No. 12–4108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOCKHEED MARTIN CORP., Plaintiff-Appellant,	)	Appeal from the U.S. District Court for the Northern District of Ohio
v.	)	
THE GOODYEAR TIRE & RUBBER CO., Defendant-Appellee.	)	No. 5:10–cv–00673
	)	Hon. David D. Dowd, Jr.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-4108 Case Name: Lockheed Martin Corp. v. Goodyear

Name of counsel: Dan Himmelfarb

Pursuant to 6th Cir. R. 26.1, Lockheed Martin Corporation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No, although State Street Bank & Trust Company, a subsidiary of State Street Corporation, holds more than 10% of the common stock of Lockheed Martin Corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 26, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Dan Himmelfarb
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Counsel for Plaintiff-Appellant

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 6th Cir. R. 34(a), plaintiff-appellant Lockheed Martin Corporation ("Lockheed Martin") hereby requests oral argument. In light of the complex history of this case and the multiple errors in the district court's interpretation of the contract at issue, oral argument will facilitate this Court's resolution of the appeal. *See* Fed. R. App. P. 34(a)(2).

JURISDICTIONAL STATEMENT

Lockheed Martin filed a complaint in the U.S. District Court for the Northern District of Ohio on March 31, 2010. (Compl., RE 1, Page ID # 1.) The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and 42 U.S.C. § 9613(b). On August 15, 2012, the district court granted summary judgment to defendant-appellee The Goodyear Tire & Rubber Company ("Goodyear") and entered final judgment. (Judgment Entry, RE 109, Page ID # 6550.)

Lockheed Martin filed a timely notice of appeal on September 12, 2012. (Notice of Appeal, RE 114, Page ID # 6565.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in granting summary judgment to Goodyear on Lockheed Martin's claims that Goodyear is responsible for costs of the cleanup of a facility known as the Airdock and a stream called Haley's Ditch, based on the court's conclusion that Goodyear transferred its liabilities to Lockheed Martin's predecessor, when the operative agreement transferred "liabilities of GAC," a Goodyear subsidiary, rather than "liabilities of Goodyear."

2. Whether, even assuming that Goodyear transferred liabilities associated with the Airdock to Lockheed Martin's predecessor, the district court erred in granting summary judgment to Goodyear on Lockheed Martin's claims that Goodyear is responsible for costs of the cleanup of Haley's Ditch, when (a) federal and Ohio law require the past owner of Haley's Ditch to pay for or contribute to the costs of its cleanup and (b) Goodyear retained ownership of portions of Haley's Ditch when the operative agreement was executed.

INTRODUCTION

In 1987, Loral Corporation ("Loral"), a predecessor of Lockheed Martin, entered into an agreement to acquire certain assets and liabilities related to Goodyear's aerospace business. Pursuant to an asset purchase agreement ("APA") among Loral, Goodyear, and Goodyear Aerospace Corporation ("GAC"), a wholly owned subsidiary of Goodyear, Loral acquired "assets * * * of GAC" and assumed "liabilities of GAC." Loral also acquired certain assets from Goodyear: those that were "not owned by GAC * * * but [were] historically used and necessary to the conduct of [its] business." The APA did not contain a parallel provision transferring liabilities of Goodyear to Loral.

Pursuant to the APA, Goodyear transferred to Loral a facility known as the Airdock. That facility was not owned by GAC but was "historically used and necessary to the conduct of [its] business." The facility was also contaminated with polychlorinated biphenyls, more commonly known as PCBs. So too was Haley's Ditch, a stream near the Airdock.

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et*

seq., and Ohio's Voluntary Action Program ("VAP"), Ohio Rev. Code §§ 3746.01 *et seq.*, a company that *owns* a facility at the time the facility is contaminated with a hazardous substance is liable for the cleanup costs, even if the company subsequently sells the facility, unless it transfers its liability for the cleanup to somebody else. Likewise, a company that *contaminates* a facility is liable for the cleanup costs, unless the company transfers that liability to somebody else.

This case is about whether Goodyear transferred its liability for environmental remediation of the Airdock and Haley's Ditch to Loral when Goodyear transferred the Airdock. The district court found, as a matter of law, that the provision of the APA obligating Loral to assume "liabilities of GAC" included liabilities related to the Airdock, even to the extent that those liabilities were Goodyear's rather than GAC's. As a matter of contract interpretation, that conclusion is manifestly wrong.

Throughout the APA, the parties referred to "GAC" when they meant GAC, "Goodyear" when they meant Goodyear, and "GAC and Goodyear" when they meant both. Accordingly, the APA provision

transferring "liabilities of *GAC*" and not "liabilities of *Goodyear*" means that Goodyear liabilities were not assumed by Loral.

Even if the district court's interpretation of the APA were correct, however, Goodyear would remain liable for the cleanup of Haley's Ditch. Goodyear's ownership of large portions of Haley's Ditch was not transferred by the APA, and therefore Goodyear's liability under CERCLA and Ohio's VAP as a past owner of Haley's Ditch could not have been transferred either.

STATEMENT OF THE CASE

On March 31, 2010, Lockheed Martin filed an action against Goodyear and its insurers. (Compl., RE 1, Page ID # 1.)[1] As twice amended, the complaint alleged that Goodyear is responsible for all or part of the environmental remediation of the Airdock and Haley's Ditch in Akron, Ohio, pursuant to CERCLA, Ohio's VAP, and the contract between Goodyear and Loral. (Second Am. Compl. ("SAC"), RE 75, Page ID # 1355.)

[1] The insurance companies—The Travelers Casualty & Surety Company and The Travelers Indemnity Company of America—were subsequently dismissed from the case and are not parties to this appeal. (Order, RE 57, Page ID # 856.)

The parties filed cross-motions for summary judgment on whether the APA transferred Goodyear's liabilities related to the Airdock and Haley's Ditch to Loral. In its motion, Goodyear argued that all of its liabilities were transferred along with the Airdock. (Goodyear's Mot. for Summ. J., RE 77, Page ID # 1419.) Lockheed Martin sought partial summary judgment on the meaning of the APA, arguing that the contract transferred to Loral only liabilities of GAC and not liabilities of Goodyear itself. (Lockheed Martin's Mot. for Summ. J., RE 78, Page ID # 2959.)

The district court denied Lockheed Martin's motion, granted Goodyear's motion, and entered judgment for Goodyear as to both the Airdock and Haley's Ditch. (Mem. Op., RE 108, Page ID # 6531; Judgment Entry, RE 109, Page ID # 6550.) This appeal followed. (Notice of Appeal, RE 114, Page ID # 6565.)

STATEMENT OF FACTS

A. Relevant Facts

1. Goodyear's contamination of the Airdock

The Airdock is a manufacturing facility for lighter-than-air ships, known as airships or dirigibles, in Akron, Ohio. It was built in 1928 and 1929 by a Goodyear subsidiary, Goodyear-Zeppelin

Corporation ("Goodyear Zeppelin"), which manufactured dirigibles using the patented technology of the German company Luftschiffbau-Zeppelin GmbH. (Mem. Op., RE 108, Page ID # 6534; Goodyear's Post-Hearing Br., RE 105–3, Page ID # 6385; Consent Agreement ¶ 8, RE 77–25, Page ID # 2921.) *See also* J. GORDON VAETH, THEY SAILED THE SKIES 62, 72 (2005). At the time the Airdock was built, it was the largest building in the world without interior supports. Nat'l Park Serv., Goodyear Airdock, http://www.nps.gov/nr/travel/aviation/goo.htm. The Airdock is nearly a quarter mile long and has the semi-cylindrical shape of a Quonset hut. (Consent Agreement ¶ 8, RE 77–25, Page ID # 2921.)

For the Airdock's shell, Goodyear Zeppelin installed siding made of coated steel sheets known as Robertson Protected Metal ("RPM"). (*Id.* ¶ 10, Page ID # 2922.) RPM was advertised as a permanent, low-cost material for covering industrial structures. *See* H.H. Robertson Co., Robertson Protected Metal for Industrial Building Construction (1925), available at http://archive.org/download/RobertsonProtectedMetalRoofingSidingAndTrimForIndustrialBuilding/CCA23776.pdf. It consists of three layers: steel, asphalt, and asphalt-saturated asbestos felt. *Id.* The asphalt

saturating the asbestos contains the fire retardant Aroclor 1268, a mixture of highly chlorinated PCBs. (*See* SAC ¶ 35, RE 75, Page ID # 1363; Consent Agreement ¶ 10, RE 77–25, Page ID # 2922.) *See also* Technical Description of Robertson Protected Metal, App. A to Letter from Richard Weissenborn, Dep't of Navy, to Judy Huang, Regional Water Control Bd., May 5, 2006, available at http://navydocs.nuqu.org/060828%20EECA_Hangar1_CD.pdf. PCBs are now "widely considered to be hazardous to human health." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997); *see* 15 U.S.C. § 2605(e)(2)(A) (banning the production and sale of PCBs, subject to certain exceptions).

By 1939, Goodyear Zeppelin was insolvent and had initiated liquidation proceedings. (Mem. re Dissolution of Goodyear-Zeppelin Corp., RE 106–3, Page ID # 6442.) Goodyear Zeppelin's real and personal property was subject to a mortgage that Goodyear had obtained to finance Goodyear Zeppelin. (*Id.*) To partially satisfy that mortgage, the Airdock and Goodyear Zeppelin's personal property were sold back to Goodyear in 1940. (*Id.*; Bill of Sale, RE 106–5, Page ID # 6447; Deed, RE 80–2, Page ID # 3312.)

Goodyear deemed it desirable, however, for Goodyear Zeppelin's intellectual property rights to be treated differently. Accordingly, on December 5, 1939, Goodyear incorporated a new wholly owned subsidiary, initially named Goodyear Aircraft Corporation and later renamed Goodyear Aerospace Corporation (collectively "GAC"), to which Goodyear Zeppelin's patent rights were licensed. (Mem. re Dissolution of Goodyear-Zeppelin Corp., RE 106–3, Page ID # 6443; Mem. Op., RE 108, Page ID # 6534.) Goodyear leased the Airdock to GAC in December 1940. (1940 Lease, RE 77–4, Page ID # 1551.) Through a series of superseding agreements, Goodyear continued to lease the Airdock to GAC until 1987, but it remained at all times under Goodyear's ownership. (*Id.*; 1945 Extension of 1940 Lease, RE 77–4, Page ID # 1557; 1946 Lease, RE 77–5, Page ID # 1559; 1980 Lease, RE 77–6, Page ID # 1564; 1984 Lease, RE 77–7, Page ID # 1574.)

2. The stock purchase agreement

On January 12, 1987, Goodyear and Loral entered into a Stock Purchase and Sale Agreement ("SPA"). (SPA, RE 77–18, Page ID # 2541, 2548.) Pursuant to the SPA, Loral was to purchase all the outstanding stock of GAC (and would thereby acquire GAC's

assets and liabilities). (*Id.* § 2.1, Page ID # 2554.) Moreover, Goodyear was required to transfer to GAC prior to closing "assets and properties not owned by [GAC] * * * but historically used and necessary to the conduct of [its] business." (*Id.* § 4.4, Page ID # 2571.) Thus, under the terms of the SPA, Goodyear would have been required to transfer the Airdock to GAC prior to closing, at which time Loral would have acquired all of GAC's stock.

There was no provision in the SPA assigning Goodyear liabilities to Loral, nor was there any provision requiring or permitting GAC to assume Goodyear liabilities prior to closing. To the contrary, GAC was permitted only to "[c]arry on its business in the ordinary course in substantially the manner as heretofore conducted." (*Id.* § 6.4.1, Page ID # 2588.)

3. The asset purchase agreement

After the execution of the SPA, Loral contacted Goodyear and asked to restate the agreement as an asset purchase agreement, which would permit Loral to use favorable purchase accounting rules regarding asset valuation. (Aff. of Michael B. Targoff ¶ 4, RE 77–8, Page ID # 1586.) Goodyear, GAC, and Loral thereafter agreed

to the three-party APA, which was retroactively effective as of January 12, 1987. (APA, RE 77–3, Page ID # 1454.)

The APA superseded the SPA and provided, through an integration clause, that prior negotiations and understandings carried no effect. (*Id.* § 9.2, Page ID # 1527.) Under the APA, Loral did not acquire the stock of GAC and GAC remained a subsidiary of Goodyear. But virtually all of GAC's assets and most of its liabilities were transferred to Loral.

Under Section 2.1 of the APA, "GAC and, to the extent necessary, Goodyear" agreed to transfer to Loral "all the assets, properties, business and good will *of GAC*," subject to certain exceptions. (*Id.* § 2.1, Page ID # 1466 (emphasis added).) Under Section 2.2, Loral agreed to assume "all debts, obligations, contracts and liabilities *of GAC* * * * whether now or hereinafter arising," subject to five exceptions:

> (i) any liabilities for which GAC and Goodyear have agreed to indemnify Loral under this agreement, (ii) any other liabilities specifically excluded under this Agreement, * * * (iii) any liabilities arising out of actions unrelated to the transactions contemplated hereby done or permitted to be done by Goodyear after the Closing Date, (iv) any obligation to provide retired employees of GAC, retired as of the

> Closing Date, with medical benefits, or (v) any refund not contemplated by this Agreement.

(*Id.* § 2.2, Page ID # 1466–67 (emphasis added).)

Like the SPA, the APA required Goodyear to transfer certain assets. Section 4.4 provided that "assets and properties not owned by GAC at December 31, 1986 but historically used and necessary to the conduct of the business of GAC will be duly and properly conveyed to Loral." (*Id.* § 4.4, Page ID # 1482.) The APA contained no provision mentioning the transfer of Goodyear liabilities.

The transaction closed on March 13, 1987. (Dep. of John M. Ross, RE 77–10, Page ID # 1619.) At that time, the Airdock was transferred from Goodyear to Loral pursuant to Section 4.4. (APA Sch. G-1, RE 77–3, Page ID # 1537; Deed, RE 78–4, Page ID # 3007, 3012; Closing Mem., RE 78–13, Page ID # 3281.) After the closing, there was "a GAC corporate shell that remained," and the parties entered into a side agreement under which GAC's stock was to be sold to Loral the following year. (Aff. of Anthony E. Miller ¶ 17, RE 77–17, Page ID # 2536; *see also* Letter, RE 77–14, Page ID # 2348.)

4. Lockheed Martin's cleanup of the Airdock and Haley's Ditch

In June 1997, Loral merged with Lockheed Martin, which succeeded to ownership of the Airdock. (Consent Agreement ¶ 9, RE 77–25, Page ID # 2922.) In 2003, PCBs from a Navy-owned dirigible hangar in Mountain View, California, were discovered in storm drains and a nearby stormwater basin. Stephen Tung, *Stripping a Relic*, SAN JOSE MERCURY NEWS, June 19, 2012, at 1A. That discovery prompted Lockheed Martin to evaluate the Airdock, which it determined to have similar problems. (Message to Employees, RE 106–10, Page ID # 6468.) Decades of deterioration and maintenance work had caused PCBs from the Airdock's siding to be released. (SAC ¶ 7, RE 75, Page ID # 1357.) The contamination had spread beyond the Airdock to Haley's Ditch, a stream 1,000 feet north of the Airdock that was connected to it through an underground storm drainage system. (*Id.* ¶ 8, Page ID # 1357.) Unlike the Airdock, substantial portions of Haley's Ditch owned by Goodyear had not been transferred pursuant to the APA and remained under Goodyear's ownership at the time the PCBs were discovered. (*Id.* ¶ 9, Page ID # 1357.)

In December 2003, Lockheed Martin advised the U.S. Environmental Protection Agency ("EPA"), pursuant to the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*, that it had discovered PCB contamination at the Airdock site. (SAC ¶ 36, RE 75, Page ID # 1363; Mem. Op., RE 108, Page ID # 6537.) Lockheed Martin thereafter submitted a series of notices and applications to EPA to effect the remediation of the Airdock and Haley's Ditch. In May 2005, EPA and Lockheed Martin entered into a consent agreement, which, together with subsequent amendments, permitted Lockheed Martin to continue its use of the Airdock on the condition that Lockheed Martin took specified steps to sample for PCBs, to remove existing PCBs, to repair the siding to reduce future releases of PCBs, and to submit plans for remediation of the exterior of the Airdock and surrounding areas. (Consent Agreement, RE 77–25, Page ID # 2920.) The actions of Lockheed Martin and EPA with respect to the Airdock and Haley's Ditch—including the notices, applications, and consent agreement—do not prejudice Lockheed Martin's rights to seek reimbursement or contribution from other parties liable under CERCLA or Ohio's VAP. *See* 42 U.S.C. §§ 9607(a), 9613(f)(3)(B); Ohio Rev. Code

§§ 3746.01(R), 3746.23; *see also United States v. Atl. Research Corp.*, 551 U.S. 128, 134–40 (2007).

Lockheed Martin has complied with the notices, applications, and consent agreement, and had already expended more than $31 million on the cleanup as of the date of the Second Amended Complaint. (SAC ¶¶ 38, 60, RE 75, Page ID # 1364, 1369.) Lockheed Martin is required to remove and dispose of the Airdock's siding when it ceases its use of the Airdock. (*Id.* ¶ 38, Page ID # 1364; Third Amend. to Consent Agreement ¶ 96, RE 106–20, Page ID # 6511.) Those obligations will require a further expenditure of many millions of dollars. (SAC ¶ 38, RE 75, Page ID # 1364.)

In 2006, ownership of the Airdock was transferred to the Summit County Port Authority, which now leases the building to Lockheed Martin. (Limited Environmental Review, RE 106–21, Page ID # 6520.)

B. Proceedings Below

On March 31, 2010, Lockheed Martin filed suit against Goodyear, seeking reimbursement for the cost of the remediation of the Airdock and Haley's Ditch, or for equitable contribution thereto. (Compl., RE 1, Page ID # 1.) Lockheed Martin's Second Amended

Complaint alleged, in Counts 1 and 2, that Goodyear is required to reimburse Lockheed Martin pursuant to CERCLA § 107(a), which specifies that four categories of persons and entities are liable to pay for the cleanup of a hazardous substance: (1) the present-day owner or operator of the facility; (2) the owner or operator of the facility at the time of the disposal of the hazardous substance; (3) the person or entity who arranged for the disposal of the hazardous substance; or (4) the person or entity that transported the hazardous substance to the facility. 42 U.S.C. § 9607(a). (SAC ¶¶ 39–40, 47, 61–62, 71, RE 75, Page ID # 1364, 1366, 1369, 1371.) Counts 1 and 2 alleged, in the alternative, that Goodyear is required to make an equitable contribution to the cleanup costs pursuant to CERCLA § 113(f)(1), which authorizes a person to file a civil action to "seek contribution from any other person who is liable" pursuant to § 107(a). 42 U.S.C. § 9613(f)(1). (SAC ¶¶ 49, 73, RE 75, Page ID # 1366, 1371–72.) The Second Amended Complaint raised related claims under Ohio's VAP, Ohio Rev. Code § 3746.23(B), in Count 3. (SAC ¶¶ 75–86, RE 75, Page ID # 1372–75.) It also asserted, in Counts 4–8, state-law claims of negligent misrepresentation, indemnification, breach of contract, and

equitable estoppel, as well as a request for declaratory relief, all of which concerned the lease agreements between GAC and Goodyear. (SAC ¶¶ 87–221, RE 75, Page ID # 1376–1404.)

The parties filed cross-motions for summary judgment. (Goodyear's Mot. for Summ. J., RE 77, Page ID # 1419; Lockheed Martin's Mot. for Summ. J., RE 78, Page ID # 2959.) Goodyear sought summary judgment on the theory that its liability as the owner of the Airdock and the party responsible for introducing the PCBs was transferred directly to Loral pursuant to the APA—and, if not, that it was transferred to GAC pursuant to GAC's lease agreements with Goodyear and then transferred to Lockheed Martin by the APA. Lockheed Martin sought partial summary judgment on Goodyear's theory that the APA transferred Goodyear liabilities to Loral, contending that the APA transferred only "liabilities of GAC," which does not include liabilities of Goodyear. Lockheed Martin asked the district court to apply the ruling of another court in the Northern District of Ohio, which had concluded in earlier litigation between Lockheed Martin and Goodyear that Section 2.2 of the APA did not transfer Goodyear liabilities. *See* Mem. Op. & Order at 7, *Lockheed Martin Corp. v. Goodyear Tire & Rubber Co.* ("*Lockheed*

Martin v. Goodyear I "), No. 5:10–cv–673, at 7 (N.D. Ohio Nov. 29, 2007) (reproduced at RE 78–10, Page ID # 3246).

The court below granted Goodyear's motion for summary judgment and denied Lockheed Martin's. It found that the APA is unambiguous and that "the only reasonable interpretation of 'liabilities of GAC' includes liabilities for assets conveyed by Goodyear." (Mem. Op., RE 108, Page ID # 6545–46.) Based on its conclusion that "[t]he Airdock was * * * conveyed by Goodyear to Loral as part of Loral's acquisition of the assets of GAC," the district court found that Goodyear's liabilities related to the Airdock were transferred to Loral as well, because otherwise "the meaning of 'the liabilities of GAC' [in APA § 2.2 would be] inconsistent with the interpretation of the 'assets of GAC' reflected in APA § 2.1." (*Id.*, Page ID # 6543-44.) The court also believed that interpreting "liabilities of GAC" to exclude Goodyear liabilities would render the exception in APA § 2.2(iii) superfluous. (*Id.*, Page ID # 6544–45.) The court declined to follow the contrary interpretation of APA § 2.2 in *Lockheed Martin v. Goodyear I*, reasoning that the earlier case did not "involve[] environmental conditions arising from the Airdock." (*Id.*, Page ID # 6546.)

The district court did not reach Goodyear's alternative theory that its liability was transferred to GAC through the lease agreements and then transferred to Loral through the APA as a GAC liability, because the court's finding that the APA directly transferred Goodyear liabilities obviated the need to address the alternative theory. (*Id.*, Page ID # 6545.) For similar reasons, the district court dismissed—either as moot (in the case of Counts 4-7) or for lack of pendent jurisdiction (in the case of Count 8)—Lockheed Martin's state-law claims addressed to the leases, which were based on Goodyear's failure to disclose the existence of the leases before this litigation commenced. (*Id.*, Page ID # 6547–48.)

SUMMARY OF ARGUMENT

I. The district court erred in granting summary judgment to Goodyear, because the asset purchase agreement did not transfer Goodyear's liabilities to Loral.

A. Under basic principles of contract interpretation, the plain language of an agreement controls. Section 2.1 of the APA transferred to Loral "assets * * * of GAC" and Section 2.2 transferred "liabilities of GAC." No Goodyear assets or liabilities were transferred by those provisions. Elsewhere in the agreement, when

the parties intended to describe rights or obligations of both GAC and Goodyear, they specified "GAC and Goodyear." Indeed, they did so even in a provision (APA § 2.3) addressing the transfer of "assets * * * of GAC and Goodyear." Thus, the phrase "liabilities of GAC" in Section 2.2 does not encompass liabilities of Goodyear.

This straightforward interpretation is reinforced by Section 4.4, the provision under which the Airdock was transferred from Goodyear to Loral. Section 4.4 transferred "assets and properties not owned by GAC * * * but historically used and necessary to the conduct of [its] business." There is no parallel provision that transferred Goodyear liabilities. That the Airdock was an "asset[] * * * not owned by GAC" under Section 4.4, moreover, confirms that it could not have been an "asset[] * * * of GAC" under Section 2.1—and thus that Airdock-related liabilities could not have been "liabilities of GAC" under Section 2.2.

This reading of the contractual language is consistent with that of a different district court in *Lockheed Martin v. Goodyear I*, which held that the APA transferred GAC's liabilities but not Goodyear's.

B. The contrary decision of the court below was incorrect. The district court recognized that Goodyear's Airdock-related liabilities could not be transferred under Section 2.2 unless the Airdock was transferred under Section 2.1, but it misinterpreted Section 2.1 to encompass the Airdock. Section 2.1 requires Goodyear, "to the extent necessary," to transfer "assets * * * of GAC"; it does not require Goodyear to transfer its own assets.

The district court also misinterpreted Section 2.2(iii), which excludes from the liabilities assumed by Loral those "arising out of actions unrelated to the transactions contemplated hereby done or permitted to be done by Goodyear after the Closing date." The court mistakenly believed that Section 2.2(iii) would be superfluous unless Section 2.2 transferred Goodyear liabilities. Section 2.2(iii) is both meaningful and necessary if "liabilities of GAC" in Section 2.2 includes only GAC liabilities, because it protects Loral from liability arising from Goodyear's use of the GAC shell after closing. In any event, the canon against superfluousness can be used only to resolve an ambiguity, and there is none here because Section 2.2 unambiguously transferred liabilities of GAC and not liabilities of Goodyear. Even if the district court's interpretation of Sections 2.2

and 2.2(iii) is a permissible one, however, it is not the *only* permissible one, and thus the most the court should have done was deem the provisions ambiguous and allow a jury to decide the parties' intent as a matter of fact. It should not have interpreted the APA in Goodyear's favor as a matter of law.

Finally, the district court was too quick to dismiss the decision in *Lockheed Martin v. Goodyear I*, which correctly concluded that "liabilities of GAC" in APA § 2.2 means exactly what it says. That the prior case did not involve environmental issues is a distinction without a difference.

II. Even if the court below was right to interpret the APA to transfer Goodyear's liabilities, it still should have denied Goodyear's motion for summary judgment as to Haley's Ditch. Although Goodyear transferred the Airdock to Loral, it continued to own large portions of Haley's Ditch after the transaction closed. Under CERCLA and Ohio's VAP, the owner of contaminated property at the time of the contamination is separately liable from the party responsible for the disposal of the contaminants. Accordingly, even if Goodyear transferred its liability for contaminating the Airdock and Haley's Ditch with PCBs, and for owning the Airdock at the

time it was contaminated, Goodyear did not transfer its separate liability for owning portions of Haley's Ditch at the time it was contaminated.

STANDARD OF REVIEW

Summary judgment is proper only when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, a court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *Rupert v. Daggett*, 695 F.3d 417, 423 (6th Cir. 2012). This Court reviews a grant of summary judgment *de novo*, employing the same standard as the district court. *Gecewicz v. Henry Ford Macomb Hosp. Corp.*, 683 F.3d 316, 321 (6th Cir. 2012).

ARGUMENT

When Goodyear, GAC, and Loral entered into the APA, they agreed that (1) GAC assets would be transferred to Loral; (2) GAC liabilities would be transferred to Loral; and (3) certain Goodyear assets would be transferred to Loral. No provision of the APA transferred Goodyear's environmental liability for the cleanup of the

Airdock and Haley's Ditch. Thus, the default rules of federal law (that a company's environmental liability survives its sale of the facility[2]) and Ohio law (that a sale of assets does not transfer related liabilities[3]) mean that Goodyear remains liable for the cleanup costs. The district court was wrong to conclude that the APA transferred Goodyear's liability to Loral. *See infra* Part I.

Even if the district court's interpretation of the APA was correct, it still erred in granting summary judgment to Goodyear on Lockheed Martin's claims relating to Haley's Ditch. Because Goodyear did not transfer to Loral most of the portions of Haley's Ditch that it owned, Goodyear could not have transferred all of its liability as past owner of Haley's Ditch. *See infra* Part II.

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[2] *See AM Int'l, Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 994–95 (6th Cir. 1993) (explaining that "responsible parties are held accountable for their actions and prohibited from escaping CERCLA liability" but that "private risk allocations are permitted") (internal quotation marks omitted).

[3] *See Welco Indus., Inc. v. Applied Cos.*, 617 N.E.2d 1129, 1132 (Ohio 1993) ("The well-recognized general rule of successor liability provides that the purchaser of a corporation's assets is not liable for the debts and obligations of the seller corporation.").

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO GOODYEAR, BECAUSE THE ASSET PURCHASE AGREEMENT DID NOT TRANSFER GOODYEAR'S LIABILITIES TO LORAL

Under CERCLA and Ohio's VAP, Goodyear is liable for the remediation of the Airdock and Haley's Ditch unless another company agreed to assume Goodyear's environmental liabilities. Goodyear's theory is that it transferred its environmental liabilities pursuant to the APA. But application of basic principles of contract interpretation shows otherwise, and the district court's contrary construction is incorrect.

A. Under The Terms Of The Asset Purchase Agreement, Loral Assumed Liabilities Of GAC But Not Liabilities Of Goodyear

The APA contains three general provisions that transferred assets or liabilities to Loral:

- Section 2.1 transferred from GAC to Loral "assets, properties, business and good will of GAC." (APA, RE 77–3, Page ID # 1466.)
- Section 2.2 transferred from GAC to Loral "debts, obligations, contracts and liabilities of GAC." (*Id.*, Page ID # 1467.)

- Section 4.4 transferred from Goodyear to Loral "assets and properties not owned by GAC at December 31, 1986 but historically used and necessary to the conduct of the business of GAC." (*Id.*, Page ID # 1482.)

Under Ohio law,[4] "[w]hen confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1261 (Ohio 2003). "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Id.*; *see also City of St. Marys v. Auglaize Cty. Bd. of Comm'rs*, 875 N.E.2d 561, 566 (Ohio 2007) ("Where the terms in a contract are not ambiguous, courts are constrained to apply the plain language of the contract."). Intentions that are not expressed in the writing are "deemed to have no existence." *Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 544 N.E.2d 920, 923 (Ohio 1989). And extrinsic evidence is not admissible to create ambiguity in an otherwise unambiguous

[4] The APA is to be "governed and construed * * * in accordance with the laws of the State of Ohio applicable to agreements to be performed in the State of Ohio." (APA § 9.8, RE 77–3, Page ID # 1529.)

agreement. *Blosser v. Carter*, 586 N.E.2d 253, 255–56 (Ohio Ct. App. 1990).

When these principles are applied to the APA, it is clear that Goodyear's environmental liabilities were not transferred to Loral. Nothing in Section 2.1 or 2.2 transferred Goodyear's liabilities. Section 4.4 strengthens that interpretation. And the decision in *Lockheed Martin v. Goodyear I* further reinforces the conclusion that the APA did not immunize Goodyear from its liabilities for the environmental cleanup.

1. Sections 2.1 and 2.2 transferred assets and liabilities of GAC but not assets and liabilities of Goodyear

The APA is a three-party contract among Goodyear, GAC, and Loral. The parties defined "GAC" to mean "GOODYEAR AEROSPACE CORPORATION, a Delaware corporation." (APA, RE 77–3, Page ID # 1461.) Accordingly, the reference to "GAC" alone in Sections 2.1 and 2.2 must be interpreted to mean Goodyear Aerospace Corporation—and to exclude Goodyear. *See State ex rel. Paluf v. Feneli*, 630 N.E.2d 708, 712 (Ohio 1994) (per curiam) ("if certain things are specified in a law, contract, or will, other things are impliedly excluded"); *cf. Sullivan v. Stroop*, 496 U.S. 478, 484

(1990) (presuming that "identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks omitted).

Elsewhere in the APA, when the parties intended to refer to GAC *and* Goodyear, they did just that, specifying "GAC and Goodyear." Indeed, they did so on no fewer than 25 occasions. (APA §§ 2.2(i), 2.3, 2.5, 2.6.5, 3.2.2, 3.3.7, 4, 4.1, 4.1.4, 4.5, 4.8, 4.11, 6.1, 6.2, 6.3, 6.5, 6.15.2, 6.19.1, 6.19.2, 6.28, 7.1.1, 7.1.2, 7.1.4, 7.2.3, 8, RE 77-3, Page ID # 1468–1526.) The references to both GAC and Goodyear throughout the APA reinforces the inference that the references to GAC alone in Sections 2.1 and 2.2 were intentional. *See Wohl v. Swinney*, 888 N.E.2d 1062, 1066 (Ohio 2008) (refusing to "require an internally inconsistent interpretation" of a contract); *Saunders v. Mortensen*, 801 N.E.2d 452, 455 (Ohio 2004) ("a contract is to be read as a whole and the intent of each part gathered from a consideration of the whole."); *cf. Russello v. United States,* 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another * * * , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

exclusion.") (internal quotation marks omitted); *Field v. Mans,* 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects * * * .").

One of the references to "GAC and Goodyear" is particularly telling. In Section 2.3, which prescribed the method for conveying assets, the parties referred to the "conveyance, transfer, assignment and delivery of the assets and property of *GAC and Goodyear* to Loral." (APA, RE 77–3, Page ID # 1468 (emphasis added).) This shows that the parties knew how to refer to the "assets * * * of GAC and Goodyear" when they intended to. The necessary implication is that Section 2.1 transferred only GAC's assets (and not Goodyear's) and that Section 2.2 transferred only GAC's liabilities (and not Goodyear's).

Accordingly, because the Airdock was owned by Goodyear, it was *not* an asset of GAC. That means that the Airdock was *not* transferred by Section 2.1 and that liabilities related to the Airdock were *not* transferred by Section 2.2.

2. The transfer of non-GAC assets by Section 4.4 confirms that Sections 2.1 and 2.2 cover only GAC assets and liabilities

Certain assets of Goodyear were transferred by Section 4.4. But in transferring those assets, the parties did not include a parallel provision transferring liabilities.

Section 4.4 provides that "on or prior to the Closing Date * * * assets and properties not owned by GAC at December 31, 1986 but historically used and necessary to the conduct of the business of GAC will be duly and properly conveyed to Loral." (APA, RE 77–3, Page ID # 1482.) Section 4.4 is thus similar to Section 2.1, in that it transferred assets from Goodyear to Loral and did not transfer any liabilities. But whereas Section 2.1 is immediately followed by a transfer-of-liabilities provision (Section 2.2), there is no parallel provision transferring the liabilities related to the assets transferred by Section 4.4. That omission confirms that the parties did not intend to transfer Goodyear liabilities.

Section 4.4 also confirms that Goodyear liabilities were not transferred in a second way. The Airdock was transferred pursuant to Section 4.4 because it was among the "assets and properties not owned by GAC" that had historically been used by GAC. That the

Airdock was an "asset[] * * * *not* owned by GAC" under Section 4.4 means that it could not simultaneously have been an "asset[] * * * of GAC" under Section 2.1. And if the Airdock was not an "asset[] * * * of GAC" under Section 2.1, then Goodyear's liabilities relating to the Airdock could not have been "liabilities of GAC" under Section 2.2.

Indeed, if the Airdock were an "asset[] * * * of GAC" under Section 2.1, there would be a conflict between Sections 2.1 and 4.4. Section 2.1 requires GAC assets to be transferred "on the Closing Date," whereas Section 4.4 permits non-GAC assets to be transferred "prior to the Closing Date." (APA, RE 77–3, Page ID # 1466, 1482.) If the parties had intended the Airdock to be an "asset[] * * * of GAC" under Section 2.1, they would not have provided a conflicting timeline for its transfer in Section 4.4.

3. A different district court determined that Section 2.2 transferred only GAC liabilities in *Lockheed Martin v. Goodyear I*

The above reasoning is consistent with the conclusion of another district court in the Northern District of Ohio in *Lockheed Martin v. Goodyear I*, which interpreted the same provision of the same contract in litigation between the same parties. That case involved former GAC employees who alleged that they had been

exposed to asbestos used by Goodyear's "Vinyl Division" while working at a nearby plant. Goodyear sought summary judgment on the theory that any of its liability related to GAC employees was transferred by APA § 2.2, but the district court denied the motion in relevant part.

The court found disputed questions of fact as to whether the torts (1) resulted from the conduct of GAC or (2) constituted "separate torts of Goodyear." Mem. Op. & Order at 9, *Lockheed Martin v. Goodyear I* (reproduced at RE 78–10, Page ID # 3248). Insofar as the liability was Goodyear's and not GAC's, the court agreed with Lockheed Martin that Goodyear would remain liable, because Section 2.2 transferred only GAC's liabilities—and not Goodyear's. As the court explained:

> There is evidence of separate Goodyear liability that would not be covered by the indemnity provisions of the Agreement. The Agreement is silent about which party is responsible for any *separate liabilities* Goodyear may have for injuries caused by its ownership and operation of the Vinyl Division, which used raw asbestos in the same building where GAC operated. Lockheed Martin argues that the Agreement does not require that it assume liability for an independent tort that Goodyear committed against GAC employees in Goodyear's operation of the Vinyl Division prior to

> shutting it down in 1974. Goodyear does not point to anything in the Agreement that can be construed as requiring Lockheed Martin to assume those liabilities and indemnify Goodyear for them. Section 2.2 of the Agreement states that "Loral shall assume and Loral hereby agrees to pay, perform and discharge when due all debts, obligations, contracts and liabilities *of GAC*."

(*Id.* at 9–10, Page ID # 3248–49 (citation omitted; emphasis added by court).)

This commonsense construction of the APA is required both by its express terms and by basic principles of contract interpretation.

B. The District Court's Contrary Construction Of The Asset Purchase Agreement Is Incorrect

Despite the language of Section 2.2, the other contextual evidence, and the decision in *Lockheed Martin v. Goodyear I*, the district court concluded that the *only* reasonable interpretation of the APA was that it transferred Goodyear's liability for the Airdock. That conclusion was erroneous in three respects. The court misinterpreted a reference to Goodyear in Section 2.1. It misinterpreted a reference to Goodyear in Section 2.2. And it distinguished the decision in *Lockheed Martin v. Goodyear I* on a meaningless ground.

1. Section 2.1 does not transfer Goodyear assets

The district court's first error was its finding that "Section 2.1 expressly includes conveyances by Goodyear in the description of the 'assets of GAC' to be acquired by Loral, and does not limit the acquired 'assets of GAC' to those assets conveyed only by GAC the corporate entity," such that the Airdock was "conveyed by Goodyear to Loral as part of Loral's acquisition of the assets of GAC." (Mem. Op., RE 108, Page ID # 6543; *see also id.*, Page ID # 6545-46.) Based on the premise that "assets of GAC" in Section 2.1 include assets of Goodyear, the court drew the conclusion that "liabilities of GAC" in Section 2.2 include liabilities of Goodyear. (*Id.*, Page ID # 6544.) But the premise is manifestly incorrect, and thus so too is the conclusion.

Nothing in Section 2.1 "expressly includes conveyances" of Goodyear *assets*. On the contrary, Section 2.1 provides that "GAC *and, to the extent necessary, Goodyear* hereby agree, on the Closing Date, to convey * * * the assets * * * of GAC" to Loral. (APA, RE 77–3, Page ID # 1466 (emphasis added).) The reference to Goodyear reflects the possibility that action by Goodyear (as GAC's parent company) might be necessary to effect the transfer of GAC's assets.

It does not require the transfer of Goodyear's own assets, either "expressly" or otherwise. If the parties had intended to transfer Goodyear's assets, Section 2.1 would have referred to the transfer of assets of Goodyear in addition to the transfer of "assets * * * of GAC."

Moreover, if the reference to Goodyear in Section 2.1 were intended to mean that GAC was required to convey GAC's assets and that Goodyear was required to convey Goodyear's assets, there would have been no reason for the parties to distinguish between GAC and Goodyear in describing their respective responsibilities. Yet Section 2.1 specifies that the responsibility to transfer assets falls on "GAC and, to the extent necessary, Goodyear." (APA, RE 77–3, Page ID # 1466.) That language is further confirmation that the reference to Goodyear requires Goodyear's assistance in transferring GAC's assets (to the extent necessary) and does not obligate Goodyear to transfer its own assets.

2. A countertextual interpretation of Section 2.2 is not required to avoid superfluousness

The district court also found that the term "liabilities of GAC" in Section 2.2 necessarily includes Goodyear's liabilities related to

the Airdock because, if Loral did not assume Goodyear's liabilities, "the language of APA § 2.2(iii) specifically excluding certain liabilities related to Goodyear would be entirely unnecessary and [would] render APA § 2.2(iii) superfluous." (Mem. Op., RE 108, Page ID # 6545.) It is true that superfluousness ordinarily should be avoided "if this can be done by any reasonable interpretation" of a contract's language. *Mapletown Foods, Inc. v. Motorists Mut. Ins. Co.*, 662 N.E.2d 48, 49 (Ohio Ct. App. 1995) (internal quotation marks omitted). For multiple independent reasons, however, the district court's approach here is profoundly misguided. First, interpreting Section 2.2 to transfer only GAC's liabilities does not in fact render Section 2.2(iii) superfluous. Second, there is no ambiguity in Section 2.2 that permits resort to the canon against superfluousness in the first place. Third, the district court's reconciliation of Sections 2.2 and 2.2(iii) does substantial violence to basic contractual terms, whereas Lockheed Martin's interpretation does not. Fourth, if the APA did not leave Goodyear's liabilities where they were, it is at most ambiguous on that question, in which case the district court still had no justification

for ruling that Goodyear's liabilities were transferred as a matter of law.

a. A prerequisite to application of the interpretive canon on which the district court relied is the existence of a contractual provision that would be superfluous if another provision were construed in a particular way. That threshold requirement is not satisfied here, because Section 2.2(iii) continues to have meaning if "liabilities of GAC" in Section 2.2 is interpreted to mean what it says.

The main provision in Section 2.2 transferred to Loral "liabilities of GAC of any kind, character or description whether accrued, absolute, contingent or otherwise, *whether now or hereinafter arising*." (APA, RE 77–3, Page ID # 1467 (emphasis added).) Thus, without any limitation on the transfer, Loral would have assumed all liabilities of GAC arising in the future. But any such obligation would have been unreasonable. GAC remained a subsidiary of Goodyear after the APA closed. Although GAC became an empty shell that could not assume new liabilities itself, Goodyear was free to use its authority as parent and owner of GAC to repurpose the entity and to cause GAC to assume new liabilities.

Section 2.2(iii) protects Loral from liability arising from Goodyear's use of the GAC shell after the closing of the purchase and sale of assets. It excludes the transfer of "any liabilities arising out of actions unrelated to the transactions contemplated hereby done or permitted to be done by Goodyear after the Closing Date." (*Id.* § 2.2(iii), Page ID # 1467–68.) Thus, whereas Loral assumed pre-existing liabilities of GAC and liabilities of GAC that arose after closing but were related to the pre-closing GAC business, Loral did *not* assume any future liabilities that resulted from Goodyear's post-closing use of the GAC shell. Under this interpretation, Section 2.2(iii) was not only non-superfluous, it was essential.

b. Another prerequisite to application of the canon against superfluousness is that the contractual provision to which the canon would apply is ambiguous. That threshold requirement is not satisfied here either, because "liabilities of GAC" in Section 2.2 has one and only one possible meaning. Thus, even if the district court were correct in its view that reading Section 2.2 to include only GAC liabilities would render Section 2.2(iii) superfluous, that still would not warrant reinterpreting "liabilities of GAC" to include liabilities of Goodyear.

As this Court has recognized, "the interpretive canon * * * that courts must avoid interpreting contracts to contain superfluous words" is "one among many tools for dealing with ambiguity, not a tool for *creating* ambiguity in the first place." *TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 578 (6th Cir. 2010). Stated differently, a court should prefer an interpretation of a contract that "give[s] effect to each provision of the contract" only "*[i]f it is reasonable to do so*." *Saunders*, 801 N.E.2d at 455 (emphasis added). A court cannot adopt an *unreasonable* interpretation of one part of a contract merely to avoid superfluousness in another. Indeed, in the context of statutory construction, the Supreme Court has emphasized the strong preference that must be given to plain language, even if superfluousness results: "Where there are two ways to read the text"—one that is plain but entails surplusage, and another that avoids surplusage but is not plain—"applying the rule against surplusage is, absent other indications, inappropriate." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004); *see also Gutierrez v. Ada*, 528 U.S. 250, 258 (2000) (declining to interpret a statute to avoid redundancy because other textual canons and common sense cut the other way).

Here, absent the supposed superfluousness of Section 2.2(iii), there could be no serious doubt as to the meaning of "liabilities of GAC" in Section 2.2. On its face, that provision does not transfer Goodyear liabilities, and an interpretation of "liabilities of GAC" that includes Goodyear liabilities is simply unreasonable.

As explained above, the parties understood how to refer to Goodyear when they intended to do so and specifically defined "GAC" elsewhere in the APA. Interpreting "liabilities of GAC" to include Goodyear's Airdock liabilities would require the Airdock simultaneously to have been an "asset[] * * * of GAC" and an "asset[] * * * not owned by GAC." And interpreting "liabilities of GAC" in Section 2.2 to encompass Goodyear liabilities would mean that the reference to "assets * * * of GAC *and Goodyear*" in Section 2.3 contained a gratuitous reference to Goodyear—and thus a redundancy of its own. All of these considerations underscore why it is inappropriate to disregard the perfectly clear language in Section 2.2 in order to avoid perceived superfluousness elsewhere.

This Court has been "skeptical of an interpretation that invokes the anti-redundancy canon with one breath, then closes its lips to the redundancy problems that arise with [a competing]

interpretation." *TMW Enters.*, 619 F.3d at 579 (citation omitted). In light of the redundancy problems—and others—that arise with the district court's interpretation of the APA, this Court should be skeptical here as well.

c. In the view of the district court, Sections 2.2 and 2.2(iii) of the APA can be harmonized by interpreting the former to transfer Goodyear liabilities and giving meaning to the latter by reading it to limit the transfer of Goodyear liabilities. In Lockheed Martin's view, Sections 2.2 and 2.2(iii) can be harmonized by interpreting the former *not* to transfer Goodyear liabilities and giving meaning to the latter by reading it to protect Loral from assuming liabilities from Goodyear's use of GAC. Lockheed Martin's view is the better one for the reasons we have just described, but also for another reason: unlike the district court's view, it does no violence to the basic provisions of the APA.

The district court's approach is convoluted and requires a wholesale reinvention of a basic contractual term—"GAC." Lockheed Martin's approach is simple and straightforward, and merely adopts a particular interpretation of a minor dependent clause. If it is necessary to stray from the plain import of a

contract's text, that deviation should be as small as possible, for "[t]he intent of the parties is presumed to reside in the language they chose to use in their agreement." *Graham v. Drydock Coal Co.*, 667 N.E.2d 949, 952 (Ohio 1996). Overzealously applying a canon of construction, to the detriment of the language of the contract, will rarely effectuate the parties' intent. Yet that is what the district court did here.

d. Even if the district court's interpretation of Section 2.2 is as plausible as Lockheed Martin's, it certainly is no *more* plausible. At the very least, therefore, the APA is ambiguous with respect to whether Goodyear's liabilities were transferred, in which case the district court still erred in entering judgment for Goodyear as a matter of law.

Under Ohio law, "[c]ontractual language is ambiguous * * * where the language is susceptible of two or more reasonable interpretations." *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 763 (6th Cir. 2008) (internal quotation marks omitted). If Section 2.2 does not unambiguously mean what Lockheed Martin says it means, it is at a bare minimum ambiguous. In that event, the parties' intent becomes "a question of fact for the jury," *GenCorp,*

Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 818 (6th Cir. 1999), which may consider extrinsic evidence, *Beverly v. Parilla*, 848 N.E.2d 881, 886 (Ohio Ct. App. 2006). That is the most to which Goodyear could be entitled here.

3. The decision in *Lockheed Martin v. Goodyear I* is not distinguishable

The district court also erred in its treatment of *Lockheed Martin v. Goodyear I*, which held that Loral had assumed only GAC's liabilities under the APA, such that Goodyear's independent obligations to GAC employees had not been transferred. The court below dismissed the earlier decision on the sole basis that "none of the prior litigation involved environmental conditions arising from the Airdock." (Mem. Op., RE 108, Page ID # 6546.) But that factual difference is entirely beside the point. In interpreting Section 2.2 to transfer only GAC liabilities, the district court in *Lockheed Martin v. Goodyear I* made a conclusion of law that applies regardless of the factual circumstances. Under that court's construction of Section 2.2, in particular, there is no doubt that Loral did not assume Goodyear's liabilities for "environmental conditions arising from the Airdock."

Thus, the decision in *Lockheed Martin v. Goodyear I* should not have been so casually dismissed. To the contrary, that decision demonstrates—as we have established above—that Section 2.2 transferred only GAC's liabilities to Loral, and not Goodyear's.

* * *

For all these reasons, this Court should reverse the district court's grant of summary judgment to Goodyear (which covered Counts 1–3 of the Second Amended Complaint). This Court should also direct the district court to reinstate Lockheed Martin's claims of negligent misrepresentation, indemnification, breach of contract, and equitable estoppel, as well as its request for declaratory relief, based on Goodyear's failure to disclose its lease agreements with GAC (which cover Counts 4–8 of the Second Amended Complaint). (SAC ¶¶ 87–221, RE 75, Page ID # 1376–1404.) The latter claims were dismissed because the district court found that the APA transferred Goodyear's liabilities to Loral and thus saw no need to address any issues related to the leases. (Mem. Op., RE 108, Page ID # 6547–48.) If the district court's grant of summary judgment is reversed, those issues will have to be resolved on remand.

II. EVEN IF THE ASSET PURCHASE AGREEMENT TRANSFERRED GOODYEAR'S LIABILITIES TO LORAL, THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO GOODYEAR ON ITS LIABILITY FOR THE CLEANUP OF HALEY'S DITCH

As explained above, the APA did not transfer Goodyear's liabilities to Loral, and the district court therefore erred in holding that Lockheed Martin assumed Goodyear's responsibility for contaminating the Airdock site. But even if Loral assumed Goodyear's liability for the Airdock, the APA still did not transfer Goodyear's liability for the remediation of Haley's Ditch, because large portions of Haley's Ditch were not transferred to Loral by the APA and remained under Goodyear's ownership.

Haley's Ditch was contaminated with the same PCBs that contaminated the Airdock. (SAC ¶ 8, RE 75, Page ID # 1357.) And the root cause of the contamination of Haley's Ditch is traceable to the Airdock. (Goodyear's Resp. to Lockheed Martin's Supp. Material, RE 92–2, Page ID # 4564.) But liability for the cleanup of Haley's Ditch is *not* necessarily the same as liability for the cleanup of the Airdock. The difference between them is a function of CERCLA and Ohio's VAP.

Under CERCLA, there are four categories of entities that are liable for a cleanup of hazardous materials: (1) the present-day owner or operator of the facility; (2) the owner or operator of the facility at the time of the disposal of the hazardous substance; (3) the entity that arranged for the disposal of the hazardous substance; and (4) the entity that transported the hazardous substance to the facility. *See* 42 U.S.C. § 9607(a). Lockheed Martin claims that Goodyear is liable for the cleanup of the Airdock and Haley's Ditch under categories (2) and (3), because Goodyear owned and operated both and disposed of the PCBs. (SAC ¶¶ 29-74, RE 75, Page ID # 1361-72.) Under Goodyear's interpretation of the APA, it transferred to Loral any liability for (2) owning the Airdock and (3) disposing of PCBs at the Airdock. As to Haley's Ditch, that argument—if successful—might cover (3) disposing of PCBs at the Airdock, which then made their way to Haley's Ditch. But under Goodyear's interpretation—even if it is correct—the APA could not have transferred Goodyear's liability (2) as owner of Haley's Ditch at the time it was contaminated.

During the relevant period, Goodyear owned large portions of Haley's Ditch that were *not* transferred to Loral pursuant to the

APA. (SAC ¶ 9, RE 75, Page ID # 1357–58.) Indeed, Goodyear owned portions of Haley's Ditch until 2007, 20 years after the APA was executed. (*Id.* ¶ 55, Page ID # 1368.) Accordingly, Goodyear has no defense to a claim for the cleanup of Haley's Ditch as past owner under CERCLA § 107(a), 42 U.S.C. § 9607(a).

Likewise, under Ohio's VAP, two categories of parties are liable: anyone who "at the time when any of the hazardous substances * * * were released at or upon the property * * * was the owner or operator of the property" and anyone who "caused or contributed to a release of hazardous substances at or upon the property." Ohio Rev. Code § 3746.23(B). Thus, at most, the APA could have conveyed Goodyear's liability under Ohio's VAP for "caus[ing] or contribut[ing] to" the contamination of Haley's Ditch. It could not have conveyed Goodyear's liability for "own[ing] or operat[ing]" Haley's Ditch, because Goodyear did not transfer to Loral all of the portions of Haley's Ditch that it owned.

This is why, in opposing Goodyear's motion for summary judgment, Lockheed Martin identified as a disputed issue of material fact whether responsibility for Haley's Ditch was transferred as part of the liabilities of GAC. (Lockheed Martin's

Supp. Material, RE 91–1, Page ID # 4507–08; *see also* Tr. of Hearing, RE 104, Page ID # 6276–78.) Goodyear responded that "[a]ll of Lockheed's claims relating to Haley's Ditch arise from PCBs originating from the roof of the Airdock." (Goodyear's Resp. to Lockheed Martin's Supp. Material, RE 92–2, Page ID # 4564.) But that response neglects Goodyear's separate and distinct liability for "own[ing] or operat[ing] any facility at which * * * hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2).

For these reasons, even if the district court was correct in interpreting the APA to transfer Goodyear's liabilities with its assets, the court still erred by granting summary judgment to Goodyear on Lockheed Martin's claims concerning Haley's Ditch, large portions of which were owned by Goodyear but not transferred to Loral.

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to reinstate all counts of the Second Amended Complaint.

Dated: December 26, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Dan Himmelfarb, hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 9,350 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007.

s/ Dan Himmelfarb

CERTIFICATE OF SERVICE

I hereby certify that, on December 26, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Dan Himmelfarb

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