No. 12-4108

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**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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

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# REPLY BRIEF FOR PLAINTIFF-APPELLANT

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## INTRODUCTION

The district court granted summary judgment to Goodyear because it thought the Airdock was an "asset[] *** of GAC" under Section 2.1 of the APA, such that attendant liabilities were "liabilities of GAC" under Section 2.2. The core problem with this reasoning is that the Airdock was *never* an asset of GAC. It was an asset of *Goodyear* that was conveyed to Lockheed Martin's predecessor, Loral, because Section 4.4 separately transferred certain "assets *** *not* owned by GAC." And Section 4.4 has no parallel provision that transferred related liabilities.

Goodyear strives mightily to justify the district court's conclusion. In the end, however, it cannot answer this fundamental question: If Sections 2.1 and 2.2 were meant to transfer *Goodyear*'s assets and liabilities, why did the contract refer only to GAC? Goodyear seeks refuge in the parties' supposed "intent" (GB15, 18, 21, 22, 28, 30, 33),[1] but the intent of contracting parties "is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 509

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[1] We cite our opening brief as "LB__" and Goodyear's brief as "GB__."

N.E.2d 411 (Ohio 1987), syl. ¶ 1. No matter how many times Goodyear insists that the parties *intended* to include in Sections 2.1 and 2.2 all "GAC-*related* assets and liabilities," GB20 (emphasis added); *accord, e.g.,* GB19 ("GAC-related assets and corresponding liabilities"); GB22 ("assets and liabilities concerning the GAC business"), the language they chose does not say that. Nor can Goodyear find support for its countertextual interpretation in any other provision of the APA.

In tacit recognition of the shortcomings of its contractual argument, Goodyear advances an alternative theory not reached by the district court. The theory is that, even if the Airdock was a Goodyear rather than a GAC asset, Airdock-related liabilities were transferred from Goodyear to GAC through a series of leases—and then to Loral as GAC liabilities under the APA. That record-intensive theory is not suitable for determination by this Court in the first instance. In any event, Goodyear is not entitled to summary judgment on that basis.

Finally, even if Goodyear's interpretation of the APA or the leases had merit, that would not end the case. After the APA was executed, Goodyear retained ownership of parts of Haley's Ditch,

the contaminated waterway that was connected to the Airdock by an underground drainage system. Neither the APA nor the leases transferred Goodyear's liability for owning that contaminated property.

## ARGUMENT

### I. THE ASSET PURCHASE AGREEMENT DID NOT TRANSFER GOODYEAR'S LIABILITIES TO LORAL

#### A. The APA Did Not Transfer Goodyear's Liabilities Through The Transfer Of "Liabilities Of GAC"

Nothing in the APA supports the conclusion that it transferred Goodyear's Airdock-related liabilities to Loral.

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

The sole relevant provision of the APA that transferred liabilities to Loral was Section 2.2. (APA, RE77-3, PageID#1467-68.) That provision transferred only "liabilities of GAC," not liabilities of Goodyear. Because *Goodyear's* environmental liabilities could not have been included among the "liabilities of GAC," Goodyear did not transfer its environmental liabilities under the APA.

In arguing otherwise, Goodyear takes the position that the Airdock was an "asset[] *** of GAC" under Section 2.1, such that

Airdock-related liabilities were "liabilities of GAC" under Section 2.2. GB19-22. But the language of the APA does not permit this interpretation.

Section 2.1 provides that

> GAC and, to the extent necessary, Goodyear hereby agree, on the Closing Date, to convey, transfer, assign and deliver to Loral and Loral agrees, on the Closing Date, to acquire and accept as hereinafter provided, *all the assets, properties, business and good will of GAC of every kind and description, wherever located*.

(APA, RE77-3, PageID#1466 (emphasis added).) Goodyear's submission is that the Airdock—although owned by Goodyear—was an "asset[] *** of GAC" because Section 2.1 transferred "'*all*' GAC assets '*of every kind and description.*'" GB20 (quoting APA, RE77-3, PageID#1466) (emphasis added). To state that assertion is to refute it. Regardless of whether Section 2.1 transferred *all* GAC assets, it did not transfer anything that was *not* a GAC asset. And the Airdock was never owned by GAC.

Goodyear claims that we are "trying to convince the Court" that the Airdock was "not actually an 'asset' as defined in the agreement." GB2. We are trying to do no such thing. The Airdock was indisputably an "asset." But it was not an "asset[] *** of GAC."

If there were any doubt what the parties meant by "'all' GAC assets 'of every kind and description'" (GB20), it would be removed by the examples they provided. Section 2.1 states that "all the assets *** of GAC" include

> all property, tangible, or intangible, real, personal, or mixed, accounts receivable, bank accounts, cash and securities, claims and rights under contracts of GAC, rights to use the name "Goodyear Aerospace" for the period provided in, and in accordance with Sections 6.22 and 6.25 of this Agreement, and all books and records of GAC relating to its business, all as the same shall exist at the Closing Date.

(APA, RE77-3, PageID#1466.) All of the enumerated items are assets of *GAC*. And none of the enumerated items suggests that the parties meant for "all the assets *** of GAC" to include assets *not* of GAC. Thus, even if it were somehow not self-evident that "assets *** of GAC" means GAC's assets, the maxim *noscitur a sociis*—according to which "a word is known by the company it keeps," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)—would require the term to be interpreted in a manner consistent with the examples provided. *See, e.g., Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 953 N.E.2d 285, 293 (Ohio 2011).

In sum, because the Airdock was not an "asset[] *** of GAC" under Section 2.1, associated liabilities could not have been "liabilities of GAC" under Section 2.2. The district court's contrary conclusion was mistaken.

### 2. The Airdock was transferred by Section 4.4

As our opening brief explains (at 30-31), the Airdock was transferred by Section 4.4, which required Goodyear to transfer to Loral all assets historically used in the operations of GAC. Goodyear suggests that we have waived reliance on Section 4.4 (GB22-23) and contends that, in any event, Section 4.4 is merely a "representation and warranty" rather than an actual "transfer of assets" (GB23-24). Neither claim is correct.

**a.** For several separate reasons, the meaning of Section 4.4 is properly presented in this appeal.

*First*, there can be no dispute that our *claim* has been preserved. Our claim is that Goodyear remains liable for the cleanup of the Airdock because its liabilities were not transferred by the APA. We rely upon Section 4.4 as one of our arguments in support of that claim. "'[O]nce a *** claim is properly presented, a party can make any argument in support of that claim; parties are

not limited to the precise arguments they made below.'" *Gallenstein v. United States*, 975 F.2d 286, 290 n.4 (6th Cir. 1992) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). It is particularly inappropriate for Goodyear to argue that, although "contracts must be read 'as a whole'" (GB18), in reading *this* contract the Court should ignore a part of it.

*Second*, the meaning of Section 4.4 was *actually decided* by the district court. The court found that

> APA § 4.4 echoes § 2.1 in that the assets of GAC transferred to Loral pursuant to the APA was not limited to assets and properties owned by GAC, but includes assets and properties 'historically used and necessary to the conduct of the business of GAC,' which included the Airdock owned by Goodyear.

(Mem. Op., RE108, PageID#6543.) Our submission is that the district court erred in interpreting Section 4.4 to provide for the transfer of GAC assets. As appellant, we obviously have the right to challenge what the district court has done. "[T]here can be no forfeiture [when] *** the district court addressed the issue." *United States v. Clariot*, 655 F.3d 550, 556 (6th Cir. 2011) (citing *United States v. Williams*, 504 U.S. 36, 41 (1992), which held that "review

of an issue not pressed" below is permitted "so long as it has been passed upon").

*Third*, consistent with *our* position on appeal, *Goodyear* acknowledged in its motion for summary judgment below that "§ 4.4 *provides for the transfer* of 'all of the assets and properties used in the conduct of the business of GAC consistent with past practice.'" (Goodyear Mot. Summ. J., RE77-1, PageID#1438 (emphasis added).) If anybody has waived anything, therefore, it is *Goodyear* that has waived the argument it is now pressing—namely, that Section 4.4 did not transfer anything at all.

*Finally*, Goodyear asserts that we "agreed with Goodyear" in the district court that "the Airdock was transferred to Loral through Section 2.1." GB22. That is not only wrong but misleading. We argued that GAC's *leases* had not been assigned to Loral, because there was no assignment in Section 2.1, which "dictates those assets that were to be conveyed and those that were not." (Lockheed Martin Draft Op., RE105-2, PageID#6370.) Unlike the Airdock, GAC's own lease interests could not have been governed by Section 4.4, so we were correct to argue that only Section 2.1 was relevant to them.

**b.** On the merits, Goodyear's effort to minimize the importance of Section 4.4 is unavailing. Its basic premise is that, because Section 4.4 appears in a section titled "Representations and Warranties," the provision only *represents* that Goodyear's assets will be transferred to Loral and Section 2.1 effects the actual *transfer*. GB23. This premise is mistaken.

To begin with, the APA specifically provides that "captions and section numbers *** are inserted only as a matter of convenience" and "do not define, limit, construe or describe the scope or intent of [its] provisions." (APA § 9.6, RE77-3, PageID#1529.) Beyond this, Goodyear's position rests on a 1996 law review article explaining the function of representations and warranties. *See* GB23. Nothing in that article is inconsistent with the common-sense proposition that, when a party to a contract represents or warrants that something will be done, the party is obligated to do it. *See, e.g., Hicks v. Mennonite Mut. Ins. Co.*, 2011 WL 345667, at *9 (Ohio Ct. App. Feb. 4, 2011) ("promissory warranty" is "absolute undertaking" that "certain things *** shall be done") (internal quotation marks omitted). More to the point, that was the view of Goodyear, GAC, and Loral here.

The SPA proves as much. Under Section 4.4 of that agreement, Goodyear was required to transfer to GAC prior to closing those "assets and properties not owned by [GAC] at December 31, 1986 but historically used and necessary to the conduct of the business of [GAC]." (SPA, RE77-18, PageID#2571.) As in the APA, Section 4.4 of the SPA appeared under the heading "Representations and Warranties." (*Id.* § 4, PageID#2564.) In the SPA, however, there was *no* general transfer of assets, because the transaction was a stock sale. That means that Section 4.4 *necessarily* obligated Goodyear to take action. Goodyear's suggestion that parties cannot require the transfer of assets under the heading "Representations and Warranties" is therefore manifestly incorrect.

Nor does the text of the APA permit the interpretation that Section 4.4 merely clarifies what Section 2.1 does. Section 2.1 says nothing about GAC-*related* assets. It speaks only of GAC assets. And Section 4.4 hardly expands the scope of GAC assets. To the contrary, it identifies a category of "assets *** *not* owned by GAC." For that category—which includes the Airdock—Section 4.4 imposes an obligation (that those assets "be duly and properly

conveyed to Loral") and a timeline for satisfying the obligation ("on or prior to the Closing Date"). Conversely, Section 2.1 imposes an obligation for a *different* category ("assets *** of GAC"), and it imposes a *different* timeline for the transfer ("on the Closing Date"). If Section 4.4 were merely a guide for interpreting Section 2.1, the different obligations and timelines would make no sense at all. Perhaps that is why, in its motion for summary judgment, Goodyear recognized that "§ 4.4 *provides for the transfer* of 'all of the assets and properties used in the conduct of the business of GAC consistent with past practice.'" (Goodyear Mot. Summ. J., RE77-1, PageID#1438 (emphasis added).)

In sum, the only reasonable interpretation of the APA is that Section 2.1 transfers GAC assets and Section 4.4 transfers certain GAC-*related* assets. The district court erred in concluding otherwise.

### 3. Other provisions reinforce Lockheed Martin's interpretation

In our opening brief (at 27-29), we identified two contextual indications that our interpretation of Sections 2.1, 2.2, and 4.4 of the APA is correct. We explained that the APA elsewhere *defines*

"GAC" in a manner that does not include Goodyear. (APA, RE77-3, PageID#1461.) And we cited no fewer than 25 instances in which the parties specified "GAC and Goodyear" when they intended to refer to both parties, thereby demonstrating that a reference to GAC cannot mean "GAC and Goodyear." *See* GB28. Goodyear offers no response to the first point, and its response to the second point is meritless.

Section 2.3 of the APA prescribes the method for conveying the "assets and property of *GAC and Goodyear* to Loral." (APA, RE77-3, PageID#1468 (emphasis added).) This provision shows that the parties understood the "assets *** of Goodyear" subject to transfer to be something different from the "assets *** of GAC" that were to be transferred. *See* LB29. Goodyear argues that "[t]he Airdock was a *GAC* asset because it was essential to the continued operation of the GAC business." GB27. But if the parties considered Goodyear assets that are "essential to the continued operation of the GAC business" to be "assets *** of GAC," then what could the parties have intended when they *separately* referred to "assets *** of Goodyear"? The necessary—indeed inescapable—implication is that the reference to "assets *** of GAC and

Goodyear" in Section 2.3 encompassed assets of GAC and assets of Goodyear, respectively, such that the reference to "assets *** of GAC" in Section 2.1 does *not* encompass assets of Goodyear.

#### 4. Section 2.2(iii) cannot be used to avoid the clear meaning of the APA

None of the foregoing analysis is changed by Section 2.2(iii), which excludes from the general liability transfer "any liabilities arising out of actions unrelated to the transactions contemplated hereby done or permitted to be done by Goodyear after the Closing Date." (APA, RE77-3, PageID#1467-68.)

*First*, as our opening brief explains (at 37-38), Section 2.2(iii) was necessary because, after all of GAC's assets and liabilities were transferred to Loral, Goodyear would retain ownership of the corporate shell. Subject to exceptions elsewhere in the APA, the parties thus divided GAC liabilities as follows: (1) GAC liabilities arising before closing as a result of GAC's pre-closing activities were transferred to Loral; (2) GAC liabilities arising after closing as a result of GAC's pre-closing activities were transferred to Loral; and (3) GAC liabilities arising after closing as a result of Goodyear's post-closing use of GAC were *not* transferred to Loral.

In Goodyear's view, Section 2.2(iii) served a very different purpose. It claims that Section 2.2(iii) "restricts Loral's liability for *Goodyear's post-closing* actions" and thereby "confirms that the parties intended to transfer certain *pre-closing Goodyear* liabilities (*i.e.*, those related to GAC assets)." GB25 (emphasis added). That interpretation neglects a critical component of Section 2.2(iii). The provision speaks of "actions unrelated to the transactions" and thus cannot be a limitation on the transfer of liabilities "related to GAC assets." Applying Goodyear's inference—that the exclusion of "post-closing" implies the existence of "pre-closing"—would mean, instead, that Loral assumed liability for Goodyear's pre-closing actions that were *unrelated* to the transactions. But not even Goodyear asserts that its unrelated liabilities were transferred to Loral. Goodyear's reading of Section 2.2(iii) therefore renders it meaningless. Surely "liabilities of GAC" need not be reinterpreted to facilitate such nonsense.

Goodyear also claims that Loral assumed the liabilities for Goodyear's post-closing conduct related to the GAC corporate shell. GB25-26. While Loral did assume the liabilities for the continued "operations of GAC" after GAC's assets were transferred to Loral

(APA § 6.19.2, RE77-3, PageID#1515), it is absurd to suggest that Goodyear had free rein to saddle the GAC shell with liabilities unrelated to the transaction and then make them Loral's responsibility.

*Second*, the canon against superfluousness may be used only to *resolve* an ambiguity, not to create one, and the term "liabilities of GAC" in Section 2.2 is not ambiguous. *See* LB38-41. Goodyear does not contend that "liabilities of GAC" *is* ambiguous. Instead it claims that the canon "comes first," guiding courts "in *avoiding* ambiguity at the outset." GB26 n.5. But this Court has held otherwise. *See TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 578 (6th Cir. 2010). And neither of the Ohio cases Goodyear cites (GB26 n.5) applied the canon against superfluousness to alter the meaning of an otherwise unambiguous term. Quite the contrary.

In *Wohl v. Swinney*, 888 N.E.2d 1062 (Ohio 2008), the court employed the canon in choosing between a "broad definition[]" of a term and a "more limited definition." *Id.* at 1065. Consistent with *our* position, it thus concluded that, when there are two possible interpretations of a contractual term and one results in superfluousness, a court should choose the other. That hardly

implies that a term with only one possible meaning can become ambiguous because of claimed superfluousness. Likewise, in *Alternatives Unlimited-Special, Inc. v. Ohio Department of Education,* 861 N.E.2d 163 (Ohio Ct. App. 2006), the court explained that, when there is "an ambiguity on the face of the contract," a court should "peruse the contract as a whole to ascertain whether the entirety of the contract resolves the apparent ambiguity." *Id.* at 170. Again, that is our position, not Goodyear's.

*Third*, as our opening brief explains (at 41-42), our reconciliation of Sections 2.2 and 2.2(iii) is correct for the additional reason that it does no violence to the basic provisions of the APA. The district court's (and Goodyear's) interpretation, by contrast, *does*—not least of all because it requires "liabilities of GAC" to mean something entirely different from what it says. Goodyear offers no response.

*Finally*, the APA is at a bare minimum ambiguous on this point, in which case the parties' intent becomes a question of fact for a jury. *See* LB42-43. Goodyear argues that we have "identifie[d] no question of fact that would justify a trial." GB32. But of course we have; the question of fact is the intent of the parties.

Insofar as Goodyear is suggesting that there is no evidence apart from the APA that the parties did not intend to transfer Airdock-related environmental liabilities to Loral, that is wrong too. The evidence includes (1) testimony that the APA was intended to have the same practical effect as the SPA (Ross. Aff. ¶ 21, RE77-13, PageID#2037) and (2) the SPA itself. As to the latter, a transfer of assets does not transfer attendant liabilities unless the parties express an intent to do so. *Welco Indus., Inc. v. Applied Cos.*, 617 N.E.2d 1129, 1132 (Ohio 1993); *Flaugher v. Cone Automatic Mach. Co.*, 507 N.E.2d 331, 334 (Ohio 1987). Under the SPA, Goodyear would have transferred the Airdock to GAC before Loral acquired GAC's stock. But as our opening brief explains (at 10), there was no provision in the SPA conveying Goodyear liabilities to Loral, and there was no provision requiring or permitting GAC to assume Goodyear liabilities prior to closing.

**5. No other provision supports Goodyear's interpretation**

Goodyear also contends that two other provisions of the APA support its interpretation. But neither does.

**a.** Goodyear first attempts (GB21) to modify the meaning of "assets *** of Goodyear" to include the Airdock by relying on a portion of Section 2.1 providing that "[t]he assets and properties to be conveyed *** to Loral on the Closing Date *** include all assets and property of GAC *** acquired by GAC prior to the Closing Date." (APA, RE77-3, PageID#1466-67.) There is a series of problems with this approach.

The biggest problem is that the Airdock was *not* acquired by GAC prior to closing and was *never* owned by GAC. It was transferred directly from Goodyear to Loral. (Deed, RE78-4, PageID#3007, 3012; Closing Mem., RE78-13, PageID#3281.) The next problem is that the APA did not even *contemplate* that the Airdock would be transferred to GAC. Section 2.1's reference to assets that GAC would acquire before closing could not have encompassed the Airdock, because Section 4.4 specifically provided that assets "not owned by GAC at December 31, 1986 but historically used and necessary to the conduct of the business of GAC" would be conveyed directly to *Loral*. (APA, RE77-3, PageID#1482.) The final problem is that, even if there were a provision transferring the Airdock to GAC, so that GAC could in

turn transfer it to Loral, there was no provision transferring Goodyear's Airdock-related *liabilities* to GAC.

In support of its theory that the Airdock was an asset "acquired by GAC prior to the Closing Date," Goodyear cites Schedule G-1. GB21, 24, 27. Schedule G-1 was prepared as a schedule to the SPA, pursuant to which certain Goodyear assets—but not its liabilities—would be transferred to GAC prior to closing. (SPA § 4.12, RE77-18, PageID#2576; Closing Mem., RE78-13, Page ID#3280.) When the SPA was replaced with the APA, Schedule G-1 was not revised to reflect the mechanics of the new agreement. That oversight explains why Schedule G-1 refers to the "Company"—SPA parlance that was otherwise removed from the APA. (APA Sch. G-1, RE77-3, PageID#1537.) Nevertheless, the parties' conduct demonstrates that they viewed Section 4.4, rather than Schedule G-1, as controlling. (Deed, RE78-4, PageID#3007, 3012; Closing Mem., RE78-13, PageID#3281.) Their failure to update Schedule G-1 therefore lacks legal significance. *See William C. Roney & Co. v. Fed. Ins. Co.*, 674 F.2d 587, 590 (6th Cir. 1982) ("[w]here a course of conduct removes an ambiguity in the written

terms of an agreement, the rule of practical construction should take precedence").

**b.** Goodyear also relies heavily on an indemnity provision of the APA, Section 6.19.1. GB28-30. It argues that this provision "limited Goodyear's liability for the Airdock to claims made within two years of closing." GB28 (emphasis and initial capitals omitted). The provision did no such thing.

Section 6.19.1 provides, in part, that GAC and Goodyear will indemnify Loral for CERCLA claims "attributable or relating to or arising out of the operation, use, control or ownership on or prior to the Closing Date of the plants, facilities, sites, areas or properties listed in Schedule Q." (APA, RE77-3, PageID#1512-13.) Schedule Q, in turn, lists sites with known environmental contamination. (*Id.*, PageID#1548-49.) The Airdock is not listed in Schedule Q. Section 6.19.1 therefore could not serve as a limitation on liability with respect to the Airdock.

According to Goodyear, Schedule Q lists "certain soil and groundwater matters *** at or near the Airdock." GB9 n.2. But it does not list the Airdock itself. Instead, the items listed in Schedule Q reflect known environmental problems for which *GAC* was liable.

(Sweet Aff., RE98-6, PageID#6096.) Section 6.19.1 thus limited Loral's liability (and added to Goodyear's). Even if the Airdock had been listed in Schedule Q, it would have meant only that GAC had liability at the site—not that Goodyear had no liability there.

Goodyear insists that, "[u]nless liabilities related to ownership of GAC assets like the Airdock had transferred to Loral, there would be no point in indemnifying Loral for such liabilities." GB29. That begs the question whether the Airdock is a GAC asset. Under our interpretation of the APA, the Airdock was not a GAC asset, and Goodyear's Airdock-related environmental liabilities were not transferred to Loral. But there were other GAC assets, and GAC liabilities were transferred. Under that scenario, it is entirely reasonable to indemnify Loral for certain GAC liabilities even if the Airdock is excluded from the mix.

Insofar as Goodyear is suggesting that the indemnity provision was intended to immunize it from *any* claims outside a two-year window, that theory finds no support in the APA's text.

*First*, we do not require contractual indemnity to obtain relief from Goodyear. Our claims are statutory, based on CERCLA and Ohio's VAP. Regardless of whether the indemnity provision has

anything to do with the Airdock, it could not have silently assigned Goodyear's liabilities to Loral.

*Second*, the indemnity provision can hardly be thought to occupy the field of possible claims that Loral might have raised against Goodyear in the future. The provision covers only a small subset of potential environmental claims—those at locations listed in Schedule Q. There is nothing to suggest that Goodyear would not continue to bear its *own* environmental liabilities simply because they were not identified there.

*Third*, the APA did not contemplate shutting the door even on Schedule Q claims after two years. Properties disclosed on Schedule Q are *exempted* from the two-year limitation on claims in Section 6.19.1. (APA, RE77-3, PageID#1513.)

*Finally*, the two-year limitations period in Section 6.19.1 applies only to pre-closing obligations. For any obligations arising after closing, like this one, the parties intended for standard statutes of limitations to apply. *See Loral Corp. v. Goodyear Tire & Rubber Co.*, 1996 WL 38830, at *7 (S.D.N.Y. Feb. 1, 1996) (finding a "genuine and material question of fact as to the intent of the parties" regarding whether "section 6.19.1 applies only to pre-

closing obligations"). (*See also* Miller Dep., RE78-5, PageID#3112-14.)[2]

### 6. *Lockheed Martin v. Goodyear I* is not distinguishable

As our opening brief explains (at 31-33, 43-44), our interpretation of the APA is the same as that of the district court in *Lockheed Martin Corp. v. Goodyear Tire & Robber Co.*, No. 5:04-cv-1788 (N.D. Ohio Nov. 29, 2007) (*"Lockheed Martin v. Goodyear I"*) (reproduced at RE78-10, PageID#3240-57). Goodyear dismisses that decision as "inapposite"—and, indeed, as not even "instructive on any of the points at issue in this appeal." GB30. In fact the decision is squarely on point.

In the prior case Lockheed Martin claimed that Goodyear was liable for a tort committed against GAC employees. Goodyear

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[2] Goodyear also claims that our consent agreement with EPA "imposed liability on Lockheed for operations of the Airdock from 1997 forward," such that our claim arises out of conduct postdating Goodyear's ownership of the Airdock. GB26; *see also* GB11, 15. To the contrary, the consent agreement specified that we had used the PCB-contaminated Airdock "continuously from approximately June 30, 1997 to the present" because "Loral Corporation merged with Lockheed Martin on or about June 30, 1997." (Consent Agr. ¶¶ 9, 23, RE77-25, PageID#2922, 2924.) Nothing in the consent agreement suggests that the Airdock's siding—which was installed in the 1920s—suddenly began contaminating the property on the day our merger with Loral became effective.

sought summary judgment on the ground that any liability related to GAC was transferred to Loral pursuant to Section 2.2 of the APA. The district court denied summary judgment, finding that *Goodyear's* liabilities were *not* transferred to Loral under Section 2.2 and that a trial was necessary to determine whether the liabilities at issue were Goodyear's rather than GAC's.

That analysis is the same as ours here. Our claim is that Goodyear has a liability related to the GAC business. Goodyear claims that any such liability was transferred by Section 2.2. Just as the court found in *Lockheed Martin v. Goodyear I*, our position is that Goodyear's liabilities were *not* transferred by Section 2.2.

Like the court below, Goodyear seeks to distinguish *Lockheed Martin v. Goodyear I* on the ground that the particular type of liability at issue there was different. GB31. Like the court below, however, it fails to explain why the type of liability makes any difference to the interpretation of the contract. Goodyear also suggests that *Lockheed Martin v. Goodyear I* is distinguishable because it was GAC that operated the Airdock, whereas in the prior case Goodyear's liabilities arose from activities at a plant that Goodyear both owned and operated. *Id.* That is also a distinction

without a difference, because one of our theories is that Goodyear's liability arises from its *ownership* of the Airdock.

Finally, Goodyear maintains that, whether or not *Lockheed Martin v. Goodyear I* is distinguishable, the district court in that case "did not reach *** [the] conclusion that Section 2.2 only involved GAC liabilities" and "never issued such a holding." GB31. But that is exactly the conclusion the court reached, and precisely the holding it issued. The court stated that "Goodyear does not point to anything in the [APA] that can be construed as requiring Lockheed Martin to assume [Goodyear] liabilities" and then noted that Section 2.2 provides that "'Loral shall assume *** liabilities *of GAC*.'" *Lockheed Martin v. Goodyear I*, at 9-10, RE78-10, PageID#3248-49 (emphasis added by court). The same is true here.

### B. The APA Did Not Transfer Goodyear's Liabilities Through An Assignment Of Leases

Goodyear spends much of its brief addressing an issue not decided by the district court—whether Goodyear assigned its environmental liabilities to GAC through a series of parent-subsidiary lease agreements (and whether those liabilities were then conveyed from GAC to Loral under the APA). If this Court agrees

with our interpretation of Section 2.2 of the APA, then the parties' arguments about the leases—which the district court did not reach—will be back in the case. But those issues are factually complex and should be addressed in the first instance by the district court on remand. If this Court decides the issues, however, it should rule that Goodyear is not entitled to summary judgment based on the leases.

### 1. The parties' disputes regarding the leases should be resolved by the district court in the first instance

This is "a court of review, not of first view." *Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) (internal quotation marks omitted). For that reason, "[w]here a district court fails to rule on a claim," this court "generally remand[s] for consideration below." *Dualite Sales & Serv., Inc. v. Moran Foods, Inc.*, 194 F. App'x 284, 291 (6th Cir. 2006). Remand is particularly appropriate when, as here, the claim is "factually intensive," since an appellate court is "ill-equipped to consider" such a claim "in the first instance." *First City Bank v. Nat'l Credit Union Admin. Bd.*, 111 F.3d 433, 439 (6th Cir. 1997); *see also White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 808 (6th Cir. 2004) (remanding where consideration of remaining

issue required "a careful examination of the entire record"), *aff'd,* 548 U.S. 53 (2006). Guided by these considerations, this Court routinely remands when it reverses summary judgment on the only ground relied upon by the district court. *See, e.g.*, *Rosebrough v. Buckeye Valley High Sch.*, 690 F.3d 427, 433-34 (6th Cir. 2012); *Yeschick v. Mineta*, 521 F.3d 498, 506 (6th Cir. 2008); *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 261-62 (6th Cir. 2002).

The Court should follow the same course here. Although the parties litigated the leases extensively below, the district court did not resolve any of the interrelated issues. Because it found—erroneously—that Section 2.2 transferred Goodyear's liabilities, the court deemed it "not necessary *** to consider *** the Leases" and so "did not consider" them. (Mem. Op., RE108, PageID#6545, 6547.) As Goodyear's own brief demonstrates (at 33-46), the issues presented by the leases are complex and fact-intensive, and certainly not so straightforward that they should be resolved by this Court in the first instance. Instead, if this Court disagrees with the district court's summary judgment ruling, the appropriate course is to remand for further proceedings before the first-level decisionmaker.

### 2. The leases do not entitle Goodyear to summary judgment

If this Court decides to address Goodyear's lease-related arguments, it should reject them. For the multiple independent reasons described below, as well as others advanced by Lockheed Martin in the district court, Goodyear's arguments do not establish that the leases transferred its environmental liabilities as a matter of law.

*First*, the leases were not valid and binding as between Goodyear and GAC. Despite Goodyear's assertion that these agreements specified the rights and obligations of GAC, the parties did not treat them that way. In particular, although the leases nominally provided that Goodyear would grant access to the Airdock in exchange for periodic lease payments, Goodyear did not adduce any evidence that it ever collected payments from GAC. (Lockheed Martin Supp. Material, RE91-1, PageID#4512; Goodyear Supp. Mot. Summ. J., RE97, PageID#5645-46.) An agreement must be interpreted in a manner consistent with the long-term conduct of the parties. *See* Restatement (Second) of Contracts § 202 cmt. g (1981). The conduct of Goodyear and GAC

demonstrates that there was no binding agreement at all—much less one that saddled GAC with four decades of liabilities. That GAC may have overseen "Airdock maintenance and repair" (GB45) is beside the point; the absence of lease payments shows that the relationship between Goodyear and GAC was not governed by the terms of the leases.

*Second*, even if the leases had been effective, they would not have transferred liability for environmental claims to GAC. The indemnity provisions cited by Goodyear made GAC liable for "claims and demands" by "persons and/or parties" for "loss, damage, damages, and/or injuries suffered or sustained by any person, persons, party or parties in, about or around the demised premises." (1940 Lease, RE77-4, PageID#1554.) To the extent this case involves liability for a "claim[]," it is a claim under CERCLA (or Ohio's VAP), which is not based on "injuries suffered or sustained by any person, persons, party or parties in, about or around the demised premises." Tellingly, Goodyear has not identified who or what that injured party might be. *See* GB37. And contrary to Goodyear's contention that we have "never disputed" that the leases "shifted CERCLA and other environmental liabilities to GAC"

(GB35), we took the position below that "the indemnification provisions of the leases do not apply to the current suit." (Lockheed Martin Draft Op., RE105-2, PageID#6373.)

*Third*, even if the lease provisions encompassed environmental liabilities, those liabilities were not transferred to Loral by the APA. Leases were subject to a series of special provisions in the APA. As relevant here, Section 4.11 required GAC and Goodyear to identify in Schedule G "all leases of real or personal property to which GAC is a party," and Section 3.4.1 required them to execute an assignment of all such leases to Loral. (APA, RE77-3, PageID#1475, 1485.) The leases now relied upon by Goodyear were not disclosed in Schedule G and were not assigned to Loral by GAC. (APA § 4.11 & Sch. G-1, RE77-3, PageID#1485, 1537; Assignment and Assumption of Leases, RE93-32, PageID#5485). Any liabilities covered by the leases, therefore, were not transferred to Loral. Goodyear claims (GB41-42) that it was not required to disclose leases concerning property to be conveyed to GAC before closing. But the Airdock was not conveyed to GAC before closing; and any such exclusion would in any event support *our* position, because the only reason Goodyear would be required to identify and assign

all lease obligations *except* those related to Goodyear-GAC leases would be that those obligations were not being transferred to Loral.

*Finally*, even if the leases had somehow been assigned to Loral by the APA, Goodyear would be estopped from relying upon that assignment because of its failure to disclose the obligations. Equitable estoppel binds a defendant to its past representations when "(1) the defendant made a factual misrepresentation, (2) that is misleading, (3) that induces actual reliance that is reasonable and in good faith, and (4) that causes detriment to the relying party." *Walworth v. BP Oil Co.*, 678 N.E.2d 959, 963 (Ohio Ct. App. 1996). With respect to the APA, Goodyear (1) omitted GAC's supposed obligations on Schedule G; (2) represented in Section 4.11 that it was identifying all leases; (3) induced Loral to believe that it would not assume Goodyear's environmental liabilities under the APA; and (4) caused Loral to accept unfavorable terms that it would have negotiated differently. (APA § 4.11 & Sch. G-1, RE77-3, PageID#1485, 1537; Sweet Aff., RE98-6, PageID#6096-97.) Accordingly, Goodyear cannot now rely upon a supposed transfer of liabilities that it previously failed to disclose. Goodyear argues that "Loral never asked to review any Airdock leases" and that our

remedy, if any, is for "breach of warranty or representation." GB43. But our position is that Goodyear was required to disclose the leases without being asked; and we have satisfied the elements of estoppel.[3]

## II. EVEN IF THE ASSET PURCHASE AGREEMENT TRANSFERRED GOODYEAR'S LIABILITIES TO LORAL, IT DID NOT TRANSFER GOODYEAR'S LIABILITY FOR THE CLEANUP OF HALEY'S DITCH

Even if the APA transferred the Airdock and liability for its cleanup to Loral, the APA did not transfer all of Haley's Ditch and therefore could not have transferred liability for *its* cleanup. As our opening brief explains (at 45-48), this claim is straightforward. Both CERCLA and Ohio's VAP extend liability to the *owner* of property at the time of disposal (in the case of CERCLA) or release (under Ohio's VAP) of hazardous substances. Because Goodyear

[3] Goodyear also argues that this Court should not reinstate Counts 4-8 of the Second Amended Complaint—which relate to the leases—because we did not "develop[] argument" on why those counts should be reinstated. GB46. Ironically, however, Goodyear's own argument on that point consists of a single sentence. In any event, the reason for reinstating the dismissed counts is self-evident. Goodyear does not dispute that the lease issues must be resolved if the APA alone does not dispose of the case—which presumably is why Goodyear devotes nearly 14 pages of its brief to them (GB33-46)—and the issues encompass the claims raised in Counts 4-8.

never transferred its liabilities for having *owned* parts of Haley's Ditch, it remains liable.

Goodyear offers four responses. Each is baseless.

*First*, Goodyear contends that we never presented evidence "to show that Goodyear is independently liable for any environmental harm at Haley's Ditch." GB47. That is not true. We identified the applicable statutes, which assign liability to past owners. And Goodyear has never disputed that it owned large portions of Haley's Ditch during the relevant period. If Goodyear's claim is that it *transferred* its liability, that is an affirmative defense for which Goodyear, not Lockheed Martin, has the burdens of production and persuasion. *See, e.g.*, *AM Int'l, Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 993 (6th Cir. 1993). In any event, the APA and the leases themselves are evidence that Goodyear did not transfer its liability for Haley's Ditch.

Goodyear also makes the related claim that we never argued below that Goodyear was liable as an "owner" of Haley's Ditch. GB48. That is not true either. In our submission identifying factual disputes, we listed "Whether 'GAC Business' covered Haley's Ditch," and argued that, if Haley's Ditch-specific liabilities were not

transferred pursuant to Section 2.2, then "Loral would not have assumed Goodyear Tire liability related to Haley's Ditch." (Lockheed Martin Supp. Material, RE93, PageID#4587-88.)

*Second*, Goodyear maintains that there is no basis under the APA or the leases "for drawing a distinction between Haley's Ditch and the Airdock." GB48. But Goodyear offers no real response to our basic submission, which is that Haley's Ditch differs from the Airdock because there is separate liability for ownership and Goodyear never transferred ownership of Haley's Ditch. That is as true for the leases as for the APA, both of which addressed ownership of the Airdock, not of Haley's Ditch. Goodyear does say that we "never sued any other 'owner' of Haley's Ditch" (GB49), but it does not explain what relevance that could possibly have to any issue in this case.

*Third*, Goodyear argues that "there has been no 'disposal' at Haley's Ditch" and that there is therefore "no potential liability under CERCLA." GB49. That is not correct. In the cases on which Goodyear relies, this Court held that a "disposal" occurs under CERCLA when "active human conduct *** precedes the entry of a substance into the environment," *Bob's Beverage, Inc. v. Acme, Inc.*,

264 F.3d 692, 697 (6th Cir. 2001) (internal quotation marks omitted), and that *no* disposal occurs when there is "passive movement of substances *** with no human activity," *United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000). Because PCBs made their way from the Airdock to Haley's Ditch through an underground storm drainage system connecting the two locations (LB13), a jury could find that the contamination of Haley's Ditch was the result of "active human conduct" rather than "passive movement of substances." *Cf. United States v. Wash. State Dep't of Transp.*, 716 F. Supp. 2d 1009, 1015 (W.D. Wash. 2010) (finding that defendant "arranged for disposal by designing, constructing, and operating drainage systems whose sole function was to collect highway runoff and dispose of it into nearby water-bodies"). Even if Goodyear were correct that there was no "disposal" under CERCLA, however, that would not immunize Goodyear under Ohio's VAP, which extends liability to the owner "at the time when any of the hazardous substances *** were *released* at or upon the property." Ohio Rev. Code § 3746.23(B) (emphasis added).

*Finally*, Goodyear criticizes us for failing to "explain[] what exactly [we] seek[] based on this argument." GB49. But we have

done just that, explaining that the district court "erred by granting summary judgment to Goodyear on Lockheed Martin's claims concerning Haley's Ditch." LB48. Like any party appealing a grant of summary judgment, what we seek is to litigate our claims further on remand—and, in particular, to hold Goodyear liable for the cleanup of Haley's Ditch. Goodyear has not sustained its burden to deny us that opportunity.

## 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.

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Respectfully submitted,

s/ Dan Himmelfarb

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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)(ii) because it contains 6,987 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 March 14, 2013, 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