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ORAL ARGUMENT REQUESTED

IN THE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J.R. SIMPLOT COMPANY et al.,
Plaintiffs–Counter-Defendants–Appellees,

vs.

CHEVRON PIPELINE COMPANY et al.,
Defendants–Counter-Claimants–Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
DALE A. KIMBALL, DISTRICT JUDGE • CASE NO. 04-624

APPELLANTS' OPENING BRIEF

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CHEVRON PIPELINE COMPANY,
CHEVRON CHEMICAL COMPANY, and CHEVRON U.S.A., INC.

CORPORATE DISCLOSURE STATEMENT

Appellants Chevron Pipeline Company and Chevron U.S.A., Inc., are wholly owned by Chevron Corporation. No person or entity owns 10% or more of Chevron Corporation.

Appellant Chevron Chemical Company is an operating division of appellant Chevron U.S.A., Inc.

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Statement of related cases (10th Cir. R. 28.2(C)(1))

1. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 129 F. Supp. 2d 1299 (D. Utah 2000) (No. 89-554), *aff'd*, 315 F.3d 1245 (10th Cir. 2003) (Nos. 01-4017, 01-4031, 01-4066), *cert. denied*, 540 U.S. 820 (2003).

2. *Ashley Creek Phosphate Co. v. Chevron Corp.*, 76 F. App'x 238 (10th Cir. 2003) (No. 01-1074).

3. *Ashley Creek Phosphate Co. v. Chevron Corp.*, No. 00-1252.

4. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, No. 00-4147.

JURISDICTIONAL STATEMENT

Plaintiffs J.R. Simplot Company, Simplot Phosphates LLC, fka SF Phosphates Limited Company, and SF Pipeline Limited Company filed this action against defendants Chevron Pipeline Company, Chevron Chemical Company, and Chevron U.S.A., Inc., in the United States District Court for the District of Utah. (1 App. 26.) In this brief, we generally refer to the group of plaintiffs (and their predecessors-in-interest, including Farmland Industries, Inc.) as "Simplot." We refer to the group of defendants as "Chevron."

The district court acquired subject matter jurisdiction under 28 U.S.C. § 1332 because the parties had diverse citizenship and because Simplot's claim of damages exceeded $75,000. (1 App. 27-28, 41-43.)

This court has jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). On March 9, 2007, the district court entered a final judgment resolving all claims brought by all parties to the action. (1 App. 23; 20 App. 5561.) Chevron timely filed a notice of appeal on March 22, 2007. (20 App. 5562-64.)

STATEMENT OF ISSUES

Simplot sued Chevron for indemnification of litigation expenses that Simplot incurred while defending itself in an action filed by a third party, Ashley Creek Phosphate Company. Chevron filed several counterclaims seeing to recoup some of its Ashley Creek litigation expenses from Simplot. This appeal presents the following four issues:

1. Whether Chevron is entitled to summary judgment on Simplot's indemnification claims because the parties' written agreements provide that Simplot will bear its own litigation expenses in the Ashley Creek litigation.

2. Whether—if Chevron is *not* entitled to summary judgment—the parties' written agreements are at least ambiguous, requiring a jury to determine if Chevron must indemnify Simplot for its litigation expenses.

3. Whether Chevron can recoup some of its litigation expenses from Simplot because Simplot breached the covenant of good faith and fair dealing.

4. Apart from the foregoing questions of liability, whether Chevron is entitled to a jury trial to ascertain the amount of Simplot's damages.

STATEMENT OF THE CASE

Chevron sold Simplot a phosphate mine, a processing plant, and a pipeline in the midst of antitrust litigation concerning the use of the pipeline. The Chevron-Simplot transaction was structured through two asset sale agreements, one for the pipeline and one for the remaining assets. After the transaction closed, the antitrust plaintiff, Ashley Creek Phosphate Company, joined Simplot as a new defendant in the pending litigation. After more than a decade of litigation before regulatory agencies and federal courts, this court held that Chevron and Simplot were not liable to Ashley Creek. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245 (10th Cir. 2003).

Ashley Creek's loss marked the end of an epic antitrust struggle. It also marked the beginning of a new dispute between the victors. In this case, Chevron and Simplot have sued each other to recover litigation expenses they incurred while defending themselves separately against Ashley Creek.

Simplot's claims against Chevron arise under general indemnification clauses in the asset sale agreements. The clauses provide for indemnification

of attorney fees and costs, among other matters. The indemnification clauses also include a duty to defend, and Simplot has claimed that Chevron is liable for failing to provide Simplot a defense in the Ashley Creek litigation. Simplot moved for partial summary judgment and sought a ruling that Chevron was liable on the indemnification claims. The district court granted Simplot's motion. That ruling is wrong and it is the main focus of this appeal.

Before describing the nature and number of the district court's errors, we must interject a word about terminology. Although the district court ruled that Chevron owed a duty to *defend* Simplot in the Ashley Creek litigation, we speak in this appeal solely in terms of the duty to *indemnify* Simplot for its litigation expenses. For purposes of this case, there is no difference is substance because the scope of these duties is identical: the same events trigger both duties. Likewise, the measure of relief available to Simplot for a breach of either duty is identical—reimbursement of the litigation expenses Simplot actually incurred. For these reasons, we treat Simplot's claims as indemnification claims and we speak only of the duty to indemnify.

Simplot's indemnification claims fail as a matter of law because they are trumped by narrowly-tailored provisions in the sale agreements that demarcate the parties' specific responsibilities for the ongoing Ashley Creek litigation. These specific provisions do not obligate Chevron to pay Simplot's litigation expenses. In fact, the language of the specific Ashley Creek litigation provisions is so clear on this point that Chevron—not Simplot—is entitled to summary judgment. At minimum, the Ashley Creek litigation provisions are ambiguous—as shown by the extrinsic evidence Chevron proffered and by Simplot's conduct after the sale—requiring a jury to ascertain their meaning. In no event does the meaning of these provisions so clearly favor Simplot's position that it is entitled to judgment as a matter of law on its indemnification claims.

Chevron sought affirmative relief too, but the district court granted summary judgment to Simplot on each of Chevron's four counterclaims. This ruling was erroneous and we challenge it as to two of the counterclaims.

Chevron's first counterclaim seeks a declaration that it did not breach any duties to Simplot under the sale agreements. This counterclaim is the opposite of Simplot's claims, and it has merit for the same reason that Simplot's claims lack merit. Chevron is therefore entitled to declaratory relief.

Chevron's third counterclaim alleges that Simplot breached the covenant of good faith and fair dealing, thereby causing Chevron to incur needless, additional litigation expenses. Under the Ashley Creek litigation provisions, Simplot was obliged to comply with a pipeline tariff ruling issued by a regulatory agency. When Simplot finally complied by publishing a lower tariff—two years after the agency ruled—Chevron was able to rely on the new tariff to obtain summary judgment against Ashley Creek. In the interim, however, Chevron incurred years of additional litigation expenses that could have been prevented by Simplot's immediate compliance. Simplot should reimburse Chevron for those litigation expenses.

After deciding all issues of liability on the parties' competing summary judgment motions, the district court fixed the amount of Simplot's damages

(attorney fees, costs, and prejudgment interest) without a jury trial. This is an obvious error under the Seventh Amendment, which guarantees a defendant a jury trial as to both the liability and damages components of a breach of contract action, such as this one. Thus, even if this court does not reverse the district court's liability rulings for the reasons we have described above, this court should at minimum reverse and remand for a jury trial on damages.

STATEMENT OF FACTS

A. Chevron mines phosphate and manufactures fertilizer. A competing mining company, Ashley Creek, sues Chevron to gain access to Chevron's pipeline for shipping phosphate ore.

In the 1980s, Chevron developed a vertically integrated system for manufacturing and distributing phosphate fertilizer in the western United States. (7 App. 1767-68, 1770, 1773, 1833.) In 1981, Chevron purchased an operating phosphate mine near Vernal, Utah. (7 App. 1770.) Between 1984 and 1986, Chevron built a phosphate fertilizer processing plant in Rock Springs, Wyoming. (*Id.*) And in the late 1980s, Chevron constructed a 97-mile pipeline to transport phosphate ore from the Utah mine to the Wyoming plant. (7 App. 1770, 1772-73.)

Ashley Creek Phosphate Company leased property containing phosphate reserves that was adjacent to Chevron's mine. (2 App. 549, 560.) Ashley Creek sought access to Chevron's pipeline, claiming that Chevron was a common carrier and that its pipeline was an essential facility needed to

develop a phosphate mining operation. (2 App. 559-63.) Chevron later published a pipeline tariff in May 1989. (12 App. 3265-68.)

Ashley Creek sued Chevron in the District of Utah alleging the pipeline tariff was unreasonable and claiming multiple violations of federal and state antitrust laws. (2 App. 546-79.) Ashley Creek contended that Chevron's entire operations monopolized both the phosphate market and the phosphate fertilizer market in the western United States. (2 App. 570-75.) The parties agreed to refer to the Interstate Commerce Commission (ICC) the predicate question of whether Chevron's tariff rates were "unjust, discriminatory or unreasonable." (7 App. 1734-35.) The district court stayed Ashley Creek's action pending the ICC's decision. (*Id.*)

B. In the midst of the litigation against Ashley Creek, Chevron decides to sell its phosphate business. Chevron solicits bids for the business and circulates proposed asset sale agreements.

In February 1991, while Ashley Creek's suits were pending, Chevron circulated a confidential memorandum soliciting bids for its entire phosphate

operations—the mine, processing plant, pipeline, and related assets. (7 App. 1761-73.) Chevron sent prospective bidders two proposed asset sale agreements, one for the pipeline and one for the remaining assets (which we will call the "fertilizer business"). (7 App. 1836-1943.)

Both proposals stated that a buyer would "assume *all* liabilities and obligations relating and attributable to the ownership and operation of the Assets." (7 App. 1850, 1896 (emphasis added).) There were only two exceptions. First, Chevron would be responsible for continuing to defend itself in the pending ICC case. (7 App. 1851.) Second, Chevron would pay any judgments for Ashley Creek in the district court action. (7 App. 1898.)

C. Simplot and Farmland bid jointly. They agree to seek revisions to Chevron's proposed sale agreements because of the risk to a purchaser posed by the ongoing Ashley Creek litigation.

Simplot and Farmland Industries began working together to prepare a joint bid for Chevron's entire operations. (8 App. 1946-54.) Simplot and Farmland formed "a joint relationship to own and operate the Chevron Assets

following the acquisition." (8 App. 1946-48.) They agreed to seek "modifications, supplements and revisions" to Chevron's written proposals. (8 App. 1949.) In particular, they sought "indemnifications from [Chevron] respecting [its] obligations . . . arising on or prior to the Closing Date including . . . pending or threatened litigation." (8 App. 1950.)

Simplot and Farmland knew they would become embroiled in the Ashley Creek litigation after purchasing Chevron's assets. (6 App. 1666, 1670.) A Farmland manager testified that the joint venture expected to be sued by Ashley Creek (6 App. 1599-1601), and Farmland's pipeline consultant opined that "[t]he existing ICC and anti-trust litigation by Ashley Creek Phosphate Corporation against Chevron could follow the new owner. Indemnification against any liabilities caused by Chevron under this litigation is essential" (7 App. 1830). Before bidding, Simplot's counsel discussed the Ashley Creek litigation with Chevron (6 App. 1558), and Simplot debated internally the effect of the Ashley Creek litigation (6 App. 1557).

D. Simplot tenders a joint bid with revisions to Chevron's proposed asset sale agreements. Chevron rejects the revisions, but agrees to negotiate further with Simplot.

Simplot tendered its joint bid to Chevron on June 28, 1991. (8 App. 2037-38.) The bid included amendments to key terms in each of the separate asset sale agreements proposed by Chevron. (8 App. 1956-2036, 2042-2103; *see* 8 App. 2038.)

Simplot modified the pipeline proposal so that it would assume liability only for "events or acts occurring *after* the Closing Date." (8 App. 2052 (emphasis added).) With respect to the Ashley Creek litigation, Simplot proposed to "assume control over such cases," provided Chevron "reimburse [Simplot] for all of its reasonable costs and expenses incurred in defending such litigation including, without limitation, attorney's fees, costs and expenses . . . ." (8 App. 2053.) In addition, Chevron would "indemnify, defend and hold [Simplot] . . . harmless from and against all claims, . . . expenses, costs, . . . and deficiencies . . . [it] shall incur or suffer, which arise or result from such litigation." (*Id.*) Simplot proposed nearly identical

revisions to the fertilizer business agreement. (*See* 8 App. 1970-73.)

Simplot's June 28 bid also proposed that Chevron should indemnify and defend Simplot against *all* pre-closing liabilities and expenses, including lawsuits relating to the ownership of the business. (8 App. 2025-27, 2093-94.) In turn, Simplot would indemnify and defend Chevron against comparable *post*-closing liabilities. (8 App. 2027, 2094-95.) These indemnification clauses proposed by Simplot did not specify the pending Ashley Creek proceedings or identify the district court or ICC case numbers.

Chevron notified Simplot it was one of the top bidders and requested an amended bid. (8 App. 2105-06.) To guide Simplot, Chevron articulated several issues "of great concern," including the Ashley Creek litigation:

> We understand your concern about facing some unknown liability shortly after taking over the business which is clearly linked to pre-closing operations. Chevron has operated the facilities in a responsible manner and it is our preference to sell the business as is and reflect the risk of possible pre-closing liabilities in the closing price. If this should be unacceptable, Chevron might be willing to accept pre-closing liabilities on a cost sharing basis for a limited time.

(8 App. 2105.)

In late July 1991, Chevron selected Simplot as the winning bidder. (8 App. 2108.) Chevron and Simplot then began the process of negotiating the final terms of the sale. (8 App. 2108-09.)

E. Chevron and Simplot negotiators meet in person. Chevron rejects Simplot's proposal to pay Simplot's litigation expenses if it becomes involved in the Ashley Creek litigation.

Negotiators for Chevron and Simplot met face-to-face in San Ramon, California, between August 13 and 15, 1991. (8 App. 2111, 2114.) A written summary prepared by a Chevron negotiator sheds light on the substance of the parties' negotiations. (*See* 8 App. 2111-14; 13B App. 3537-38.)

According to the summary, Simplot's "initial position[]" was that it would "assume [the] lead" in the Ashley Creek litigation, "but Chevron [would] pay the costs." (8 App. 2112 (all caps omitted).) Simplot's initial position changed by the end of the negotiating sessions; the summary's description of the parties' "current position" makes no mention of Chevron paying defense costs in the Ashley Creek proceedings and states only that

"Chevron will retain responsibility but will consult with [Simplot] regarding any settlement." (*Id.* (all caps omitted); *cf.* 6 App. 1646 (explaining that Simplot's initial position "wasn't acceptable to Chevron").)

A Chevron negotiator explained the parties' approach to drafting: "If we knew about an issue, fluoride, for example, we separately identified in the initial contract the fluoride issue, we separately identified Ashley Creek. We wanted to deal with those. If we didn't know about an issue . . . my understanding is that's where it would fall is under the general indemnification." (6 App. 1642; *see* 6 App. 1668-69 ("[T]he Ashley Creek/ICC litigation[] was intended to be addressed exclusively by [its specific provision] and that the general indemnity in Article XI was applied to unknown, unforeseen, but possible other claims."); *see also* 6 App. 1641 ("The general indemnity clause was for issues that are essentially unknown or potential.").)

Chevron negotiators believed that Simplot eventually agreed to bear its own litigation expenses if it were sued by Ashley Creek. (6 App. 1665.) Chevron left the negotiations with an understanding that the parties had

"agreed that whatever fees [Simplot] might incur with respect to Ashley Creek litigation or the ICC litigation, if any ensued, would be [Simplot's] responsibility and no indemnification was available for that[.]" (6 App. 1659, 1665, 1667.)

F. Simplot prepares revisions to the asset sale agreements. Chevron rejects them because they repeat Simplot's initial position that Chevron pay Simplot's litigation expenses.

Following the face-to-face meetings, Simplot's counsel circulated revised draft agreements on August 21, 1991. (*See* 8 App. 2116.) The specific provision addressing the Ashley Creek litigation remained nearly unchanged, though Simplot's counsel noted it was "[o]pen for discussion." (8 App. 2123.)

Chevron quickly responded in writing that "[t]he draft of August 21, 1991 is not acceptable to Chevron." (8 App. 2140.) A Chevron negotiator also called Simplot's counsel to complain that the August 21 revision did not reflect the agreement the parties had reached on the Ashley Creek litigation provisions during their face-to-face meetings. (6 App. 1654.) Simplot's

counsel "recognized it wasn't and [said] he was working on that contractual language and would have it to us." (*Id.*)

G. Simplot omits the proposal for payment of litigation expenses to which Chevron had objected.

Simplot circulated its next round of revisions on September 17, 1991. (*See* 8 App. 2143-44.) These revisions *deleted* the following terms that had appeared in prior drafts: "[Chevron] shall reimburse [Simplot] for all of its reasonable costs and expenses incurred in defending [the Ashley Creek] litigation, including, but not limited to, attorneys' fees, costs and expenses . . . ." (*Compare* 8 App. 2149-50, 2163 (lacking this language), *with* 8 App. 2123 (containing this language).) Simplot's September 17 revisions also deleted terms that would have required Simplot to assume control of Chevron's defense in the district court and ICC actions. (8 App. 2149-50, 2163.)

Under the September 17 revisions, Chevron retained responsibility for defending itself in the district court and ICC actions, advising Simplot of the

status of those proceedings, obtaining Simplot's consent to settle them, and paying any damages awarded to Ashley Creek in those actions. (*Id.*)

Simplot circulated additional drafts on October 7 (8 App. 2173-99), October 22 (8 App. 2201-37), and October 31, 1991 (8 App. 2239-54; 9 App. 2256-70). None of these drafts materially altered the terms we have described above. (*See* 5 App. 1128-29.)

H. Chevron and Simplot close their transaction.

Chevron and Simplot executed the asset sale agreements on November 4, 1991. (5 App. 1262, 1336-38; 6 App. 1407, 1506-08.) The entire transaction closed on April 17, 1992. (9 App. 2292-95.) When Simplot became the owner, it adopted the most recent tariff that Chevron had published. (12 App. 3285.)

The final, pertinent terms of the pipeline agreement appear below, and in the addendum at the back of this brief:

> 2.5 Assumption of Liabilities. Effective as of the Closing Date, [Simplot] shall assume only those liabilities and obligations relating and attributable to the ownership or operation of the

Assets or the Pipeline System which arise out of events or acts occurring after the Closing Date, and the Assumed Obligations specifically assumed by [Simplot] pursuant to Section 2.6 below . . . .

2.6 Assumed Obligations. Subject to the provisions of this Section 2.6, [Simplot] shall assume the following obligations as of the Closing Date (the "Assumed Obligations"):

2.6.1 Litigation. [Chevron] or its Affiliates will retain responsibility for and control over the defense of [their] involvement in the litigation, Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., et. al., ICC Docket No. 40131 (Sub.-No.1) ("ICC Case") and Ashley Creek Phosphate Co. v. Chevron U.S.A., Inc., 89-C-554-S (D. Utah, filed June, 1989), and [Chevron] shall be responsible and liable for all penalties, damages, and costs granted in such litigation or resulting from settling such cases. [Simplot] shall assume the responsibility and cost of prospective compliance with the tariff when set in the ICC Case and any mandatory prospective compliance orders granted in either case. [Chevron] shall, in handling such litigation, keep [Simplot] fully informed on the status of the cases and, consult with [Simplot] concerning defense strategy, and allow [Simplot] to make recommendations. [Chevron] shall make decisions concerning the litigation and pursue the litigation vigorously and in due consideration of the economic viability of the mine and the fertilizer plant as if [Chevron] was still the owner of the Pipeline System, and its Affiliates were still owners of the mine and fertilizer plant. [Chevron] will not settle either case without the written permission of [Simplot], which shall not unreasonably be withheld.

> 11.2.1 Indemnification by [Chevron]. [Chevron] shall indemnify, defend and hold [Simplot] . . . harmless from and against all claims, suits, damages, losses, expenses, costs, obligations, liabilities, recoveries and deficiencies, including interest, penalties and attorneys' fees, that [it] shall incur or suffer, which arise or result from (a) any and all liabilities and obligations attributed to the operation or ownership of the Assets or the Pipeline System prior to the Closing Date, which liabilities or obligations are not assumed by [Simplot] under the terms of this Agreement; (b) the breach of, or failure of [Chevron] to perform any representation, warranty, covenant or agreement given or made by [Chevron] herein, or in any writing furnished or to be furnished by [Chevron] under this Agreement; (c) any suit, action, arbitration, or legal, administrative, governmental or other proceeding that relates to the ownership or use of the Assets or the Pipeline System prior to the Closing . . . .
>
> 12.9 Entire Agreement. This Agreement, including the Schedules and other writings referred to herein or delivered pursuant hereto, constitutes the entire agreement between [Chevron] and [Simplot] with respect to the subject matter hereof, and supersedes all prior oral or written agreements, commitments or understandings with respect thereto . . . .

(5 App. 1276-77, 1321-22, 1333.) The fertilizer business agreement contains virtually identical provisions addressing the same topics. (6 App. 1428-30, 1492-93, 1503-04.)

I. Ashley Creek sues Simplot before the ICC. Simplot does not ask Chevron to indemnify its litigation expenses under the asset sale agreements.

After the Chevron-Simplot transaction closed, Ashley Creek filed a new ICC complaint against Simplot. (9 App. 2306-39.) Simplot retained Chevron's ICC lawyer to represent it before the ICC. (9 App. 2341-42.) Simplot paid its own fees for the defense of its own ICC case. (9 App. 2345-76.)

When the ICC later consolidated Ashley Creek's cases against Chevron and Simplot, Chevron offered to share the ICC lawyer's fees with Simplot. (9 App. 2393.) Simplot rejected the offer. (*See* 9 App. 2395-97.) Simplot then "propose[d]" that "Chevron reimburse [Simplot] for all costs incurred to date in the ICC proceedings and agree to assume all costs incurred in the future." (9 App. 2396.) Simplot contended "this proposal is consistent with both the terms and spirit of the agreement." (9 App. 2397.) Simplot's proposal was authored by the same lawyer who prepared successive revised drafts of the sale agreements. (*Compare* 9 App. 2397, *with* 8 App. 2116, 2144, 2173, 2201, 2239.) Chevron later rejected Simplot's proposal because it was "not willing

to go outside of the agreement currently in effect and negotiate additional indemnification language." (9 App. 2399.)

J. Ashley Creek adds Simplot to its district court action. Simplot and Chevron agree to toll their claims against each other.

Several years later, in April 1996, while the district court's stay was still in effect, Ashley Creek submitted an amended complaint adding claims against Simplot. (3 App. 583-665.) The district court allowed the amended complaint to be filed several months later. (10 App. 2639.)

The amended complaint lumped Simplot and Chevron together for many common allegations, including events that occurred before the sale. (*E.g.*, 3 App. 632-48, 655-56 (referring broadly to "defendants" in enumerating the counts).) Ashley Creek also alleged that Simplot and Chevron had conspired to exclude Ashley Creek from bidding on Chevron's plant, mine, and pipeline assets. (*E.g.*, 3 App. 629-32, 646-48.) Ashley Creek later filed a second amended complaint largely repeating the allegations against Simplot

while adding new theories of recovery. (4 App. 871-961.)

Simplot notified Chevron of the amended complaint and requested indemnification under the asset sale agreements. (3 App. 667-68.) The companies agreed to reserve any claims until after the Ashley Creek litigation was terminated. (2 App. 480; 3 App. 672-79.)

K. The ICC's successor agency, the STB, issues a decision establishing a framework for evaluating the pipeline tariffs.

Congress terminated the ICC in 1995 and transferred jurisdiction over Ashley Creek's suits to the Surface Transportation Board. (*See* 3 App. 681.)

In October 1996, the STB issued its decision resolving the Ashley Creek complaints. (3 App. 681-733.) The STB developed a methodology for calculating a reasonable tariff by comparing the costs of building and maintaining a hypothetical pipeline from scratch with the revenues generated by the tariffs at different hypothetical shipping volumes:

> [W]e will examine whether the tariff rates would allow the [pipeline] to recover all of the costs it generates (including a

> reasonable rate of return on the actual construction costs over its life). If the tariff rates would allow the pipeline to earn greater revenues than needed to recover its costs, . . . the tariff rates are unreasonably high. For purposes of this calculation, the parties agree that the [pipeline] should be assumed to have a 20-year life.

(3 App. 693.)

"[I]n evaluating the reasonableness of the tariff rates [the STB] constructed two possible scenarios." (3 App. 720.) One scenario assumed that the amounts of phosphate ore shipped on the pipeline would meet "the actual demand for phosphate in the market." (*Id.*) The second scenario assumed that shipments would exceed market demand, in line with projections made by Ashley Creek and Chevron/Simplot. (3 App. 721.) Under both scenarios, the tariff revenues exceeded the owner's costs by millions of dollars. (3 App. 720-21.)

"This analysis of the defendants[']tariff rates indicates that the rates are unreasonable for shipments at many volume levels." (3 App. 720.) Although the STB acknowledged "there may be certain shipping patterns where the tariff rate structure would be reasonable" (*id.*), the STB ultimately found that

the "subject tariffs covering the transportation of phosphate slurry . . . are unreasonable to the extent discussed in this decision" (3 App. 722).

The STB was unable to determine how much, if any, phosphate ore Ashley Creek would ultimately ship on the pipeline. (3 App. 721.) The STB therefore left the ultimate determination of whether the tariffs were reasonable, as well as the underlying antitrust questions, to the district court. (*Id.*) The STB provided tables demonstrating its framework for assessing the reasonableness of the pipeline tariffs. (3 App. 724-33.)

L. Simplot does not lower its tariff in response to the STB ruling. Litigation resumes in the district court.

In early November 1996, Simplot's ICC lawyer obtained computer disks containing the data and formulas used by the STB. (10 App. 2602.) Using those disks, an expert witness retained by Chevron and Simplot (*see* 12 App. 3331) determined that Simplot could immediately adopt a lower tariff causing a net *under*collection of revenue for the full 20-year period. (6 App. 1616.)

Simplot's ICC lawyer suggested that Simplot should promptly reduce the tariff. (10 App. 2600.) Simplot did not promptly lower the pipeline tariff.

In December 1996, the district court lifted the stay in the Ashley Creek action and adopted the STB decision as the law of the case. (10 App. 2639-40.)

Simplot moved to dismiss the action. (3 App. 735.) Simplot argued its tariff was reasonable because it would not accumulate "overpayment[s]" during the 14-year period it would own the pipeline. (*E.g.*, 3 App. 760.) The district court denied the motion because a proper analysis of the reasonableness of the tariff turned on examining the full 20-year lifespan of the pipeline identified by the STB, not the period of Simplot's ownership alone. (4 App. 851-55.)

M. Simplot eventually publishes a lower tariff. Both Simplot and Chevron then obtain summary judgment against Ashley Creek.

Simplot published a new (fourth) tariff in January 1999. (11 App. 2893-96.) Simplot set its new tariff at an extremely low rate—well below any

arguable market rate—so that the aggregate tariff collections over the 20-year life of the pipeline would not exceed the reasonable rate of return identified in the STB's methodology. (11 App. 2889-92.)

Simplot then moved for summary judgment. (*See* 4 App. 1029.) Simplot asserted that Ashley Creek lacked standing to bring its antitrust claims because it had neither manifested an intention to enter the market for selling phosphate nor demonstrated any preparations to do so. (*E.g.*, 4 App. 1036-38.) In addition, Simplot contended the tariffs were reasonable because, relying on the STB's framework, the aggregation of three previous tariffs and the new fourth tariff would collect less revenue than the return on capital allowed by the STB formula over the 20-year life of the pipeline. (4 App. 1038-39.) The district court accepted both arguments and granted summary judgment to Simplot. (12 App. 3120-31.) The district court also granted summary judgment to Chevron on the same grounds. (12 App. 3134.)

Ashley Creek appealed and this court affirmed based on a lack of antitrust standing. (12 App. 3211-33.) Ashley Creek later filed a petition for

writ of certiorari, which the Supreme Court denied. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 540 U.S. 820 (2003).

N. Simplot files this indemnification action against Chevron. Chevron files counterclaims seeking damages for Simplot's breach of the sale agreements.

Simplot and its business partners had previously agreed with Chevron to toll their respective claims against each other until after the Ashley Creek litigation was completed. (2 App. 480; 3 App. 672-79.) Farmland later assigned its claims against Chevron to Simplot. (*See* 1 App. 40; 2 App. 485.)

On July 6, 2004, Simplot filed this action against Chevron. (1 App. 26.) Simplot claimed that, under the asset sale agreements, Chevron owed duties to defend and indemnify Simplot in the Ashley Creek litigation. (1 App. 41-42.) Simplot sought to recover the attorney fees and costs it incurred in the Ashley Creek litigation, along with prejudgment interest. (1 App. 41-43.)

Chevron pursued affirmative relief as well. Its first counterclaim sought a declaratory judgment that it did not owe Simplot the duties to defend and

indemnify described in Simplot's complaint. (1 App. 152-208.) Chevron's third counterclaim alleged that Simplot breached obligations under the Ashley Creek litigation provisions by failing to publish a reduced tariff soon after the STB issued its October 1996 decision. (1 App. 152-53, 202-05.)

O. The district court grants partial summary judgment to Simplot.

The parties filed competing motions addressing liability issues. Simplot moved for partial summary judgment to determine whether Chevron owed the duties to defend and indemnify asserted in the complaint. (1 App. 242-85.) Simplot also sought summary judgment on Chevron's counterclaims. (13A App. 3404-07.) Chevron opposed Simplot's motions (5 App. 1092-1222) and also moved for partial summary judgment on Simplot's claims and its own counterclaims (13A App. 3409-3414; 13B App. 3418-3517).

The district court granted Simplot's motion for partial summary judgment—based on a breach of the duty to defend, but not on a breach of the duty to indemnify—and denied Chevron's motion. (13A App. 3815-50.) The

court analogized the sale agreements to third-party insurance contracts (13A App. 3833-42) and ruled that Chevron had breached a duty to defend Simplot (13A App. 3828-29). The court also granted summary judgment to Simplot on the counterclaims. (13A App. 3846-50.)

P. The district court fixes Simplot's damages and enters judgment.

After the district court decided the liability issues on the cross-motions for summary judgment, the parties filed competing motions on the remaining issue of damages. Simplot submitted copies of its litigation expenses in the Ashley Creek action (15 App. 4013 to 19 App. 5162; 20 App. 5545-57; 21 App. 5441-94) and moved to recover them, along with prejudgment interest, from the district court (13A App. 3961-63; 14 App. 3965-4010). In contrast, Chevron moved for a jury trial to ascertain Simplot's damages. (13A App. 3851-3960.) (We discuss additional, specific facts underlying these motions in Part IV of the argument section that follows.)

The district court denied Chevron's motion for a jury trial, reasoning that "[i]t is for the court, not the jury, to determine whether the fee award is reasonable." (20 App. 5543.) The district court then awarded Simplot damages of $2,912,464.17 in attorney fees and costs, and $2,195,988.98 in prejudgment interest, a total award of $5,108,453.15. (20 App. 5559.)

The district court later entered a judgment for Simplot in the amount of the total award. (20 App. 5561.) This appeal followed. (20 App. 5562-63.)

STANDARDS OF REVIEW

1. The terms of the asset sale agreements are governed by Utah law. (5 App. 1332-33; 6 App. 1503.) Because this case involves state law claims and arises under the district court's diversity jurisdiction, Utah law supplies the substantive rules of decision. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). This court reviews de novo the district court's assessment of state law: "deference to the district court's determination of state law is inconsistent with the principles underlying th[e] Court's decision in *Erie*." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 234 (1991).

2. "Summary judgment orders are reviewed de novo, using the same standards as applied by the district court." *Pitman v. Blue Cross & Blue Shield of Okla.*, 217 F.3d 1291, 1295 (10th Cir. 2000). Summary judgment is appropriate only if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The movant has the burden of showing that there is no genuine issue of fact . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 256 (1986). The non-moving party "need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Id.* at 256-57. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

3. This court reviews de novo an order denying a party's right to a jury trial under the Seventh Amendment. *Fischer Imaging Corp. v. Gen. Elec. Co.,* 187 F.3d 1165, 1168 (10th Cir. 1999).

SUMMARY OF THE ARGUMENT

1. The district court erred in granting summary judgment to Simplot on its claims for indemnification of litigation expenses. Chevron, not Simplot, is entitled to judgment as a matter of law because the plain terms of the sale agreements demonstrate that Simplot is responsible for paying its own litigation expenses in the underlying Ashley Creek litigation.

Under the asset sale agreements, Simplot generally assumed all liabilities and obligations relating to the Ashley Creek litigation, save those carved out as Chevron's responsibility. The specific Ashley Creek litigation provisions enumerate several carve-outs, or obligations that remain with Chevron. But none pertains to the payment of Simplot's litigation expenses. Thus, the language and structure of the Ashley Creek provisions establishes that Simplot assumed responsibility for bearing its own litigation expenses.

Although there are broad, general indemnification clauses that can be read to require Chevron to pay Simplot's litigation expenses, those clauses are inconsistent with the specific Ashley Creek litigation provisions. Because they

are inconsistent, the more specific Ashley Creek litigation provisions prevail. It follows that Chevron has no obligation to indemnify Simplot under the general indemnification clauses.

2. In the alternative, if Chevron is not entitled to judgment as a matter of law, Chevron is at least entitled to a trial where a jury can weigh extrinsic evidence and resolve the meaning of ambiguous terms in the sale agreements. The ambiguity of the Ashley Creek litigation provisions is shown by the parties' competing interpretations of their text, by their drafting history, and by Simplot's conduct after the sale. A reasonable jury could conclude from this evidence that the parties intended Simplot would shoulder its own litigation expenses. Summary judgment was therefore inappropriate.

3. The district court also erred in granting summary judgment to Simplot on Chevron's third counterclaim alleging a breach of the covenant of good faith and fair dealing. Simplot did nothing in response to the STB's October 1996 decision establishing a methodology for calculating a reasonable tariff. Simplot did not publish a lower tariff using the STB methodology until

January 1999, more than two years later. Although Simplot's delay did not technically violate the terms of the Ashley Creek litigation provisions, its delay harmed Chevron in a manner Simplot knew was avoidable. During the delay, Chevron was unable to advance arguments that entitled it to summary judgment against Ashley Creek. Simplot's delay therefore violated the covenant and cost Chevron substantial litigation expenses in the interim.

4. Finally, the district court violated Chevron's Seventh Amendment rights by fixing the amount of Simplot's damages without a jury trial. Simplot's claims seek money damages for breaches of written contracts. It is well-settled that both the liability and damages aspects of such an action present questions for a jury. The district court could not avoid the Seventh Amendment problem by granting summary judgment as to the amount of damages because Chevron identified disputed facts on that point. Nor has Simplot sought equitable relief outside the scope of the Seventh Amendment. Thus, even if this court were to affirm the liability rulings of the district court, this court must at least reverse and remand for a jury trial on damages.

ARGUMENT

I.
THE DISTRICT COURT SHOULD HAVE ENTERED A SUMMARY JUDGMENT FOR CHEVRON, NOT SIMPLOT, ON THE LIABILITY COMPONENTS OF SIMPLOT'S CLAIMS.

A. As a matter of law, Chevron is not liable to Simplot. Simplot must bear its own litigation expenses under the plain terms of the specific Ashley Creek litigation provisions.

"In interpreting a contract, the intentions of the parties are controlling. If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement." *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (citations omitted). Here, the language of the sale agreements is plain and it establishes that Simplot agreed to bear its own expenses in the Ashley Creek litigation.

Section 2.6 of the pipeline agreement states that, "[s]ubject to the provisions of this Section 2.6, [Simplot] shall assume the following obligations as of the Closing Date . . . ." (5 App. 1276.) Two subsections follow beneath

Section 2.6. (*See* 5 App. 1277.) The first subsection addresses the Ashley Creek litigation (2.6.1). (*Id.*) The second subsection addresses material contracts (2.6.2). (5 App. 1277-78.) The structure of Section 2.6 establishes that Simplot generally assumed responsibility for both topics, subject to any specific limitations expressed within the particular subsections.

Section 2.6.1 expresses five limitations on Simplot's assumption of liability as to the Ashley Creek litigation. These limitations are carve-outs from Section 2.6 for which Chevron alone bears responsibility:

- Chevron "retain[ed] responsibility for and control over the defense of [its own] involvement in the litigation." (5 App. 1277.)
- Chevron would be "responsible and liable for all penalties, damages, and costs granted in such litigation or resulting from settling such cases." (*Id.*)
- Chevron agreed to "keep [Simplot] fully informed on the status of the cases and consult with [Simplot] concerning defense strategy, and allow [Simplot] to make recommendations." (*Id.*)
- Chevron agreed to "pursue the litigation vigorously . . . as if [it] was still the owner . . . ." (*Id.*)
- Chevron agreed not to settle without Simplot's permission. (*Id.*)

These carve-outs neither mention nor allocate responsibility for paying Simplot's litigation expenses. That silence is meaningful because of the structure of Section 2.6 and its subsections. Section 2.6.1 carves out *only* the responsibilities that remain with Chevron, thus any *unmentioned* obligations are assumed by Simplot under the umbrella of the assumed obligations included in Section 2.6.

B. Chevron is not liable under the general indemnification clauses because the specific Ashley Creek provisions trump them.

Simplot argued in the district court that the general indemnification clauses of the pipeline and fertilizer business agreements required Chevron to indemnify Simplot for litigation expenses. (1 App. 268-84.) Chevron challenged Simplot's argument in the district court (5 App. 1182-1221), but we will not do so here. It is enough to explain that Chevron cannot be liable for Simplot's litigation expenses *even accepting* Simplot's position that the general indemnification clauses apply to the Ashley Creek litigation.

If the general indemnification clauses bear the meaning Simplot advocates—that Chevron must pay Simplot's expenses—then they cannot be reconciled with the meaning of the specific Ashley Creek provisions. As we explained above, the specific Ashley Creek litigation provisions require Simplot to bear its own litigation expenses. (*See supra*, at 36-38.) When general and specific provisions of a contract cannot be reconciled, the specific provisions prevail. *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 78 F.3d 474, 480 (10th Cir. 1996); *see Big Cottonwood Tanner Ditch Co. v. Salt Lake City*, 740 P.2d 1357, 1361 n.5 (Utah Ct. App. 1987); *accord* Restatement (Second) of Contracts § 203(c) (1981). Thus, here, the general indemnification clauses bow to the specific Ashley Creek litigation provisions. Simplot's position fails because it depends on the general indemnification clauses.

Based upon the plain language of the asset sale agreements, Chevron is entitled to judgment as a matter of law on Simplot's indemnification claims. For the same reasons, Chevron is entitled to judgment as a matter of law on its first counterclaim for declaratory relief. (*See* 1 App. 195-98.)

II.
IN THE ALTERNATIVE, SIMPLOT WAS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIMS BECAUSE THE ASHLEY CREEK PROVISIONS ARE AMBIGUOUS.

A. A jury must decide the meaning of ambiguous contract terms.

Where "an ambiguity exists" and "resort to extrinsic evidence is required to determine the intent of the parties," the "ambiguity may be resolved only by the trier of fact after consideration of parol or extrinsic evidence as to the parties' intentions, that is, a review and evaluation of all the facts and circumstances surrounding the substance of the transaction." *WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139, 1147 (Utah 2002).

In this situation, it is error to grant summary judgment. An appellate court must "reverse and remand for trial in order that extrinsic evidence may be presented as to [the parties'] intentions regarding the nature and character of the transaction." *Id.* Here, the district court erred in granting summary judgment because it ignored ambiguities identified by Chevron that require a jury to ascertain the precise meaning of contractual language.

B. The Ashley Creek litigation provisions are ambiguous.

"A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms or other facial deficiencies." *Peterson v. Sunrider Corp.*, 48 P.3d 918, 925 (Utah 2002) (quotation marks omitted).

Simplot and Chevron have articulated different interpretations of the Ashley Creek litigation provisions based solely on their text. Simplot argues that Chevron must pay its litigation expenses under the general indemnification clauses because the Ashley Creek litigation provision in Section 2.6.1 is silent and does not direct a different result. (13B App. 3532-33.) In contrast, Chevron contends the silence in Section 2.6.1 is meaningful because Simplot assumed any *un*mentioned obligations within the overarching sweep of Section 2.6. At the heart of these different readings of the Ashley Creek litigation provisions are "'uncertain meanings'" and, arguably, "'missing terms.'" *Peterson*, 48 P.3d at 925. It follows that these provisions are ambiguous.

C. Chevron's extrinsic evidence supplies a plausible reading of the Ashley Creek provisions that a reasonable jury could accept.

"When determining whether a contract term is ambiguous, the court is not limited to the contract itself. Relevant, extrinsic evidence of the facts known to the parties at the time they entered the contract is admissible to assist the court in determining whether the contract is ambiguous." *Nielsen v. Gold's Gym*, 78 P.3d 600, 601 (Utah 2003) (citations, quotation marks, and brackets omitted). "Although the terms of an instrument may seem clear to a particular reader—including a judge—this does not rule out the possibility that the parties chose the language of the agreement to express a different meaning. A judge should therefore consider any credible evidence offered to show the parties' intention." *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995).

A reasonable jury could adopt Chevron's reading of the sale agreements based upon the history of their drafting. In the early stages of the parties' negotiations, when Chevron accepted Simplot's bid, Chevron expressly stated

that Simplot must assume all liabilities pertaining to the phosphate operations: "Chevron has operated the facilities in a responsible manner and it is our preference to sell the business as is and reflect the risk of possible pre-closing liabilities in the closing price." (8 App. 2105.)

Simplot later tendered a counter-proposal in which *it* would take control of the Ashley Creek litigation at *Chevron's* expense. (8 App. 1972, 2052-53.) But Chevron rejected this counter-proposal during the August 1991 negotiating sessions: a written negotiating summary reveals that the parties reverted to Chevron's initial position that it would retain control of its own defense. (8 App. 2112.)

Simplot's first draft after the negotiating sessions did not conform to the agreement Chevron thought the parties had reached on the Ashley Creek litigation. (6 App. 1654.) Chevron therefore rejected Simplot's draft. (8 App. 2140.) A Chevron negotiator also called Simplot's drafting counsel and complained that the new draft did not reflect the parties' agreement. (6 App. 1654.) Simplot's drafting counsel "recognized" the problem and said "he was

working on that contract language and would have it to [Chevron]." (*Id.*) Simplot's next draft *deleted* from the Ashley Creek provisions the very language that would have made Chevron responsible for paying the cost of Simplot's defense of the Ashley Creek litigation. (*Compare* 8 App. 2149-50, 2163 (lacking this language), *with* 8 App. 2123 (containing this language).)

Thus, at virtually every stage of the negotiations, Chevron rebuffed Simplot's efforts to include language in the Ashley Creek provisions making Chevron responsible for paying Simplot's litigation expenses. "It seems unlikely that once this first draft was rejected, [the indemnitor] would later have agreed to the same condition worded in more convoluted language." *In re El Paso Refinery, LP*, 302 F.3d 343, 353 (5th Cir. 2002).

Chevron's extrinsic evidence also undermines Simplot's reliance on the general indemnification clauses. Chevron's extrinsic evidence tends to show those clauses were intended to apply only to *unknown* claims and liabilities. Chevron's negotiators testified repeatedly that "if we had a known issue, we were going to deal with that issue in the contract, not in the general indemnity

section." (6 App. 1648-49.) "If we didn't know about an issue . . . my understanding is that's where it would fall is under the general indemnification." (6 App. 1642.) For that reason, "the Ashley Creek/ICC litigation[] was intended to be addressed exclusively by [section] 2.6.1 and . . . the general indemnity in Article XI was applied to unknown, unforeseen, but possible other claims." (6 App. 1668-69.) In sum, Chevron understood that the parties had reached an agreement in which "[t]he general indemnity clause was for issues that are essentially unknown or potential." (6 App. 1641-43.) This understanding would defeat indemnification here because both sides knew Ashley Creek would sue Simplot after the closing, causing it to incur expenses. (*See* 6 App. 1557-58, 1599-1601, 1666, 1670; 7 App. 1830.)

In sum, Chevron introduced substantial extrinsic evidence in opposition to Simplot's summary judgment motion. A reasonable jury could accept this evidence and conclude that the parties had agreed Simplot would bear its own expenses in the Ashley Creek litigation. Summary judgment was therefore inappropriate.

D. A reasonable jury could accept Chevron's reading of the Ashley Creek provisions based upon Simplot's post-sale conduct.

"[T]he course of dealing of the parties gives some indication of their intentions. . . . Though arguably clear on its face, where the parties demonstrate by their actions that to them the contract meant something quite different, the intent of the parties will be enforced." *Eie v. St. Benedict's Hosp.*, 638 P.2d 1190, 1195 (Utah 1981). "This rule of practical construction is predicated on the common sense concept that actions speak louder than words." *Bullough v. Sims*, 400 P.2d 20, 23 (Utah 1965) (quotations omitted).

Simplot's post-transaction behavior suggests that it knew it had to pay its own litigation expenses in the Ashley Creek cases. The Chevron-Simplot transaction closed in April 1992. (9 App. 2292-95.) Ashley Creek filed an ICC complaint against Simplot two months later. (9 App. 2306-39.) Simplot did not tender the ICC claim to Chevron, nor did Simplot request indemnification for litigation expenses. Simplot paid its own fees for the defense of its own ICC case. (9 App. 2345-76.)

Furthermore, in rejecting Chevron's offer to share common ICC legal expenses with Simplot (9 App. 2393), Simplot tendered a new and different "propos[al]" that "Chevron reimburse [Simplot] for all costs incurred to date in the ICC proceedings and agree to assume all costs incurred in the future." (9 App. 2396.) Simplot observed that its "proposal *is consistent with* both the terms and spirit of the agreement" (9 App. 2397 (emphasis added)), but Simplot did not contend that it was entitled to indemnification under the sale agreements. It is telling that Simplot's new proposal was authored by the same lawyer who prepared its successive drafts of the sale agreements. (*Compare* 9 App. 2397, *with* 8 App. 2116, 2144, 2173, 2201, 2239.)

Why did Simplot pay for its own defense in its ICC case, and why did Simplot prepare a new proposal for handling litigation expenses? The obvious explanation is that Simplot did not believe Chevron was required to indemnify its Ashley Creek litigation expenses under the sale agreements. There may be other explanations for Simplot's conduct, but that is a matter for a jury to decide. Summary judgment for Simplot was inappropriate.

Although Chevron believes that the language of the asset sale agreements is plain and that it is entitled to judgment as a matter of law on Simplot's claims (as we argued in Part I), in no event does the contractual language plainly entitle Simplot to summary judgment. At minimum, this court should reverse and remand for a trial because the extrinsic evidence proffered by Chevron reveals a meaning that a reasonable jury could accept.

III.
THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR SIMPLOT ON CHEVRON'S THIRD COUNTERCLAIM.

A. A party whose performance literally complies with the terms of a contract may still be liable for breaching the covenant of good faith and fair dealing if his performance prevents another party from receiving benefits under the contract.

"An implied covenant of good faith and fair dealing inheres in every contract. Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the

other party's right to receive the benefits of the contract. A violation of the covenant is a breach of the contract." *Eggett v. Wasatch Energy Corp.*, 94 P.3d 193, 197 (Utah 2004) (citations omitted).

Under the covenant, "a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party." *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 200 (Utah 1991) (citations omitted). As the Utah Supreme Court explained in *Eggett v. Wasatch Energy*, a party who has several options for performing under a contract may not choose an option to harm another party. The case involved a shareholder agreement that obligated Wasatch to pay Eggett, a departing shareholder, the "book value" of his shares calculated "in accordance with GAAP." 94 P.3d at 198. Wasatch "had the opportunity to employ some discretion in its use of GAAP" because GAAP "is not an exact science and allows a range of possible values in its application." *Id.* "There was thus an implied covenant to act in good faith and deal fairly with Eggett in its choices." *Id.* Eggett offered evidence showing "that after he left Wasatch, management changed its policy

regarding the length of time uncertain receivables would be held in a 'suspense' account . . . thereby depressing the value of Eggett's shares." *Id.* at 196. The Court held that a "jury was entitled to conclude that the voluntary change from a one- to a two-year suspense account holding period, subsequent to Eggett's departure, was a breach of the covenant of good faith and fair dealing, even if such a change did not violate GAAP." *Id.* at 198.

B. Simplot breached the covenant when it refused to lower the tariff immediately after the STB issued its decision.

The Ashley Creek litigation provisions required Simplot to "assume the responsibility and cost of prospective compliance with the tariff when set in the ICC Case and any mandatory prospective compliance orders granted in either case." (5 App. 1276-77.) We focus here on the latter requirement—that Simplot must comply with "any mandatory prospective compliance orders."

In October 1996, the STB issued its decision announcing the framework and methodology for calculating a reasonable tariff. (*See* 3 App. 719-21, 724-

33.) Under the STB approach, a tariff is reasonable if it allows the pipeline owner to recover no more than the cost of constructing and operating the pipeline, plus a reasonable return, during its 20-year life. (*Id.*) This methodology focuses solely upon the *aggregate* collection of tariff revenue for 20 years—not whether collections were reasonable during Chevron's or Simplot's respective periods of ownership. (4 App. 852-55.)

The STB's decision was a "mandatory prospective compliance order," as that phrase appears in the Ashley Creek provisions. The order was plainly mandatory; it was even adopted as the law of the case in the district court action. (10 App. 2639-40.) The order also applied prospectively; it required Simplot to analyze its tariff for reasonableness into the future. Thus, the Ashley Creek provisions obligated Simplot to comply with the STB order.

To be clear, the STB's order did *not* require Simplot to lower its tariff immediately. The STB's methodology required only that *aggregate* collections not exceed costs over the 20-year life of the pipeline. The 20-year period began in 1986 (3 App. 694), so there were 10 years remaining in this period

when the STB issued its decision in 1996. Simplot had discretion to choose when—within those 10 remaining years—to amend its tariff to ensure compliance with the STB order.

But Simplot's discretion was cabined by the covenant of good faith and fair dealing. As the Utah Supreme Court explained in *Eggett*, a party violates the covenant by frustrating others' rights—even if the party's performance technically complies with the literal terms of the contract. *See* 94 P.3d at 198. Here, even though the STB order did not literally require Simplot to reduce its tariff immediately, the covenant obligated Simplot to move quickly. Any delay in lowering the tariff harmed Chevron. To obtain summary judgment against Ashley Creek in the underlying action, Chevron needed to rely on a reduced tariff to establish that the aggregate tariff revenues were reasonable. Chevron could not advance that argument until the tariff was reduced.

Simplot did *not* publish a new, lower tariff for more than two years and the delay harmed Chevron. There is no reason to excuse Simplot's delay. Using the STB methodology, Simplot could have calculated (within weeks of

the STB decision) that the existing tariff was too high. In early November 1996, Simplot's ICC lawyer obtained computer disks containing the data and formulas used by the STB. (10 App. 2602.) Using those disks, Simplot's own expert witness (*see* 12 App. 3331) determined that Simplot could immediately have adopted a lower tariff causing a net *under*collection of revenue for the full 20-year period (6 App. 1616)—the very fact Chevron needed to prove the tariff was reasonable. Simplot owned the pipeline and had unilateral authority to lower the existing tariff. Simplot's ICC lawyer even suggested that Simplot should promptly reduce the tariff. (10 App. 2600.) But Simplot failed to do so for more than two years. Simplot's failure is unjustifiable because its own interests were aligned with Chevron: when Simplot finally lowered its tariff, *both Chevron and Simplot* obtained summary judgment against Ashley Creek. (12 App. 3129-30, 3134.)

In sum, Chevron produced ample evidence from which a reasonable jury could conclude that Simplot breached the covenant of good faith and fair dealing. Accordingly, it was error for the district court to grant summary

judgment to Simplot on this counterclaim; indeed, the district court's order fails even to acknowledge Chevron's argument based upon the covenant of good faith and fair dealing. (*See* 13A App. 3848-49.)

IV.
THE DISTRICT COURT VIOLATED CHEVRON'S SEVENTH AMENDMENT RIGHTS BY FIXING THE AMOUNT OF SIMPLOT'S DAMAGES WITHOUT A JURY TRIAL.

A. The Seventh Amendment requires a jury to resolve every factual dispute presented in a breach of contract claim.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. Const. amend. VII. The Seventh Amendment unquestionably applies to claims for breach of contract. In *Dairy Queen, Inc. v. Wood*, the Supreme Court held "it would be difficult to conceive of an action of a more traditionally legal character." 369 U.S. 469, 477 (1962); *accord Scott v. Neely*, 140 U.S. 106, 110 (1891) ("[T]he debt due the complainants was in no respect different from any

other debt upon contract. It was the subject of a legal action only, in which the defendants were entitled to a jury trial in the federal courts.").

Simler v. Conner was a diversity action by a client "to determine and adjudicate the amount of fees owing to a lawyer . . . under a contingent fee retainer contract." 372 U.S. 221, 223 (1963) (per curiam). The Tenth Circuit had determined that the Seventh Amendment right to a jury trial did not apply. *Id.* at 221. But the Supreme Court reversed the Tenth Circuit's decision because the contractual disputes "involved are traditional common-law issues which can be and should have been submitted to a jury . . . ." *Id.* at 223.

Thus, the scope of the right to a jury trial on a breach of contract claim includes every aspect of the dispute: a defendant "has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is." *Dairy Queen*, 369 U.S. at 479; *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (holding that the Seventh Amendment confers a right "to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages").

B. Chevron was entitled to a jury trial to assess Simplot's damages.

Simplot's complaint pleaded two claims against Chevron. (1 App. 41-43.) Both claims alleged that Chevron had breached the asset sale agreements. (*Id.*) Simplot specified its measure of damages as "the attorneys' fees and costs [it] incurred in defending against the Ashley Creek claims." (1 App. 42.) Simplot "demand[ed] trial by jury," (1 App. 43), a demand that also entitled Chevron to a jury trial, *see* Fed. R. Civ. P. 38(d) (any party's demand requires a jury trial unless the demand is withdrawn by "the consent of the parties"). Although these facts triggered Chevron's Seventh Amendment rights, the district court ruled Chevron was not entitled to a jury trial. (20 App. 5543-44.) The district court then tabulated Simplot's damages itself. (20 App. 5539-42.)

The district court's ruling was erroneous because Chevron was entitled to a jury trial on damages. "A suit for money damages is unmistakably an action at law triable to a jury." *Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380, 1386 (10th Cir. 1981) (citing *Ross v. Bernhard*, 396 U.S. 531, 533 (1970)); *see Simler*, 372 U.S. at 223. The district court had resolved questions

of contractual *liability* on summary judgment, but questions of *damages* remained undecided. Because it is the province of a jury to determine both "whether the contract has been breached *and the extent of the damages* if any," *Dairy Queen,* 369 U.S. at 479 (emphasis added), the district court erred in depriving Chevron of a jury trial to ascertain Simplot's damages.

C. Simplot's counter-arguments are without merit.

1. The district court could not employ a summary judgment-style procedure to fix Simplot's damages because there were numerous disputes of fact about the reasonableness of the attorney fees Simplot sought to recover.

"When there is a material dispute of fact to be resolved or discretion to be exercised in selecting a financial award, then either side is entitled to a jury; if there is no material dispute and a rule of law eliminates discretion in selecting the remedy, then summary judgment is permissible." *BMG Music v. Gonzalez*, 430 F.3d 888, 892-93 (7th Cir. 2005). In other words, a district court is authorized to fix an award of damages for breach of contract only in

rare cases "whe[re] calculation of damages is mechanical," *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005) (Posner, J.)—usually in cases involving liquidated damages or damages prescribed by statute.

In the district court, Simplot argued that no jury trial was necessary because there were no disputed facts and the district court could decide the amount of its damages as a matter of law. (*E.g.*, 21 App. 5500.) This argument fails because Simplot was required to establish that its damages (measure by its attorney fees) were reasonable and "[q]uestions of reasonableness are typically questions of fact." *EDSA/Cloward, L.L.C. v. Klibanoff*, 122 P.3d 646, 651 (Utah Ct. App. 2005); *accord Bryan v. Jones*, 530 F.2d 1210, 1218 (5th Cir. 1976) (en banc) (Wisdom, J., concurring and dissenting) ("[R]easonableness is basically a jury question; it is a concept that loses meaning when courts try to pin it down.").

Under Utah law, a party seeking attorney fees as the measure of damages for breach of an indemnification agreement must prove those fees were reasonable—even when the agreement is silent about whether the

indemnitee must show reasonableness. *See Pavoni v. Nielsen*, 999 P.2d 595, 599 (Utah Ct. App. 2000) ("'[A]n indemnitee may recover only those attorney fees reasonably incurred in defending the claim indemnified against[.]'"). The Utah Court of Appeals settled this point in *Ringwood v. Foreign Auto Works, Inc.*, where two parties requested attorney fees as damages under an indemnification agreement. 786 P.2d 1350, 1360 (1990). The agreement stated the indemnitor would pay "'all claims and loss . . . including attorney's fees'"; the agreement said nothing about recovering only "reasonable" fees. *Id.* The trial court denied recovery because the parties did not introduce evidence showing their fees were reasonable. *See id.* The parties appealed, arguing they had no burden to prove reasonableness "because the request is made pursuant to an indemnity agreement and not an attorney fees clause." *Id.* The Court of Appeals disagreed: "We see no basis for distinguishing a request for attorney fees under an indemnity provision from a request under an attorney fee provision. Attorney fees awarded pursuant to contract or statute are usually those found by the court to be reasonable, unless the statute or

contract provides otherwise." *Id.* at 1361 (quotation marks omitted).

Here, Chevron contested the reasonableness of Simplot's claim of attorney fees as damages. Chevron identified numerous instances of unreasonable billing practices, thereby generating genuine disputes of fact that only a jury could resolve. In particular, Chevron claimed that Simplot was seeking to recover charges that were duplicative, unnecessary, or vague. (*See* 20 App. 5216-27, 5228.) We list several examples of those charges here:

- Although Simplot, Farmland, and their related ventures pursued a joint defense against Ashley Creek, their separate law firms billed 4,935 hours for inter-firm conferences. (20 App. 5228, 5351.)

- A cast of eight attorneys representing Simplot, Farmland, and the joint venture entities billed more than 1,490 hours to prepare the moving and reply papers seeking summary judgment against Ashley Creek. (20 App. 5226, 5354-55.)

- Several attorneys billed dozens of hours preparing for depositions at which they asked no questions. (20 App. 5222-24, 5351-53.)

- Multiple attorneys billed time for attending hearings at which they did not present argument. (20 App. 5224-25, 5357-58, 5382.)

- "[T]here are hundreds of time entries in the SF Billing Statements that merely state 'Conference,' or 'Research,' or 'Teleconference.'" (20 App. 5229.)

- Simplot sought to recover fees not attributable to the defense of the Ashley Creek action. Included in Simplot's charges were billing entries for preparing audit letters and litigation budgets, and for work on an IRS audit issue. (20 App. 5232, 5356.)

Whether any of these disputed expenditures were reasonable—and whether Chevron should indemnify Simplot for them—are jury questions.

2. Simplot is not seeking equitable relief by requesting attorney fees as the measure of its damages.

Simplot argued in the district court "that a right to jury does not attach to the issue of the amount of fees to be awarded under a contract." (20 App. 5183.) Simplot contended that the amount of fees to be awarded presented an equitable issue for a judge to decide. (20 App. 5183-85.) Simplot is wrong.

As we explained above, a defendant is entitled to a jury trial to determine the amount of damages caused by its breach of contract. (*See supra*, at 54-57.) This rule applies here because Simplot is seeking damages for Chevron's purported breach of written agreements. Simplot's measure of damages happens to include attorney fees, but the root question is still the

amount of damages owed for breach of contract. That is a jury question. Accepting Simplot's argument would violate the Supreme Court's decision in *Simler* that the Seventh Amendment required a jury trial in an action "to determine and adjudicate *the amount of fees* owing to a lawyer" under a written contract. 372 U.S. at 223 (emphasis added).

Simplot has identified three circuit decisions holding that there is no right to a jury trial because claims for attorney fees are different. (20 App. 5183-84, citing *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 150 (D.C. Cir. 1997); *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2d Cir. 1993); *Resolution Trust Corp. v. Marshall*, 939 F.2d 274 (5th Cir. 1991) (per curiam).)

These decisions cannot bear the meaning Simplot attributes to them. If these decisions actually hold that a judge may decide the amount of damages for breach of contract when the measure of those damages is attorney fees, then these decisions are flatly inconsistent with the Supreme Court's decision in *Simler*. In fact, this may be the case; there are several glaring errors in these circuit decisions. For example, the D.C. Circuit denied a jury trial because

state courts had developed a rule that "the determination of a reasonable fee award is for the trial court in light of the relevant circumstances." *Ideal*, 129 F.3d at 150 (relying on District of Columbia law). That approach is obviously wrong: *Simler* held "that the right to a jury trial in the federal courts is to be determined as a matter of *federal law* in diversity as well as other actions." 372 U.S. at 222 (emphasis added).

There is a better way to read these circuit decisions—a way to harmonize them with *Simler* and other Supreme Court cases interpreting the Seventh Amendment. Each of these circuit decisions is factually different from Simplot's case in one critical respect. Unlike Simplot's case—where fees incurred in one action form the measure of damages in a second action—the plaintiffs in the circuit decisions sought to recover fees *in the same case* in which the defendants raised a Seventh Amendment argument. *See Ideal*, 129 F.3d at 150; *McGuire*, 1 F.3d at 1312; *Marshall*, 939 F.2d at 279. In this very different procedural footing, "it would have been impossible for [plaintiffs] to prove the amount of attorneys' fees at trial, because that amount was still

accruing." *McGuire*, 1 F.3d at 1312. "[T]he jury would have to keep a running total of fees as they accrued through summations and then predict future fees from post-trial proceedings and motions. The prospect of such a trial evokes images of an attorney struggling to prove the amount of fees to which he is entitled, but never being able to do so because he must prove the value of his last words even as he speaks them, and also the value of words yet unuttered and unwritten." *Id.* at 1316.

The concurring judge in *McGuire* appreciated this factual distinction and observed that "[t]his appeal does not require us to decide the availability of a jury trial for fees where . . . a claimant seeks contractual indemnification for fees incurred in a separate litigation against a third party." *McGuire*, 1 F.3d at 1317 (Jacobs, J., concurring). The situation Judge Jacobs distinguished from *McGuire* is the very situation presented by Simplot's action. The difference between seeking fees in the same action (like a prevailing party) and seeking fees in a second action (as the measure of contract damages) explains why the Seventh Amendment applies here, but did not apply in these circuit decisions.

CONCLUSION

This court should reverse the judgment and hold that Chevron is not liable to Simplot on its indemnification claims. In the alternative, this court should reverse and remand for a jury trial to establish whether Chevron is liable on those claims. At the very least, this court should reverse and remand for a jury trial to ascertain the amount of Simplot's damages.

This court should also reverse and remand for a jury trial on Chevron's third counterclaim for breach of the duty of good faith and fair dealing.

Dated: September 4, 2007

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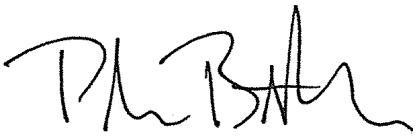
By: 

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REASONS WHY ARGUMENT IS NECESSARY

We respectfully request oral argument in this appeal. The appeal raises issues of indemnity and an uncommon application of the Seventh Amendment to a claim of attorney fees as the measure of damages. We believe the court's decision-making process would be aided by oral argument. Both sides are represented by able counsel who can assist the court in resolving issues that will likely have an impact beyond the parties to this controversy.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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By: _____
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Dated: September 4, 2007

Addendum

(Fed. R. App. P. 28(f) and 10th Cir. R. 28.2(A))

1. Excerpts from the pipeline agreement (5 App. 1276-77, 1321-23)
2. District court's September 27, 2006, order (13A App. 3815-50)
3. District court's February 23, 2007, order (20 App. 5538-44)
4. District court's March 6, 2007, order (20 App. 5558-60)

PROOF OF SERVICE

I, **Kathy Turner**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. On **September 4, 2007**, I served the within document entitled:

APPELLANTS' OPENING BRIEF

on the parties in the action by placing a true copy thereof addressed as follows and delivering in the below-stated manner:

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[✓] (Federal) I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that this declaration was executed on at Encino, California.

Kathy Turner

Kathy Turner

MAILING LIST FOR PROOF OF SERVICE
(J.R. Simplot Company, et al. v. Chevron Pipeline, et al.)
(Tenth Circuit Case No: 07-4074)

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