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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TUTOR PERINI CORPORATION,

Defendant/Counterclaimant-Below, Appellant,

v.

GREENSTAR IH REP, LLC,

Plaintiff-Below, Appellee,

and

GARY SEGAL,

Plaintiff/Counterclaim Defendant-Below, Appellee.

No. 504, 2017

Court Below: Court of Chancery of the State of Delaware, C.A. No. 12885-VCS

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises from the Court of Chancery's legal error in interpreting a July 1, 2011 Merger Agreement (the "Merger Agreement"), pursuant to which Appellant Tutor Perini Corporation ("Tutor Perini") acquired Greenstar Services Corporation ("Greenstar" or the "Company"). Under the terms of the Merger Agreement, Appellee Greenstar IH Rep, LLC ("Greenstar Rep"), as the representative of all of the former "Interest Holders" of Greenstar, is entitled under certain circumstances to earn-out payments from Tutor Perini based on the "Pre-Tax Profit" of Greenstar's subsidiaries in the five years following the merger. The largest of the Interest Holders, and the one who stands to gain the most from the earn-out payments, is Appellee Gary Segal ("Segal," and with Greenstar Rep, "Plaintiffs" or "Appellees"). Segal is the former President and CEO of Five Star Electric Corporation ("Five Star"), one of the three subsidiaries owned by Greenstar.

Segal, who is also a defendant in an arbitration proceeding initiated by Tutor Perini related to his misconduct as President and CEO of Five Star, enlisted Greenstar Rep to initiate this action in the Court of Chancery by filing a Verified Complaint (the "Complaint" or "Compl.") on November 7, 2016. (A8-41.) The Complaint asserts, among other things, that Tutor Perini breached the Merger Agreement by failing to make earn-out payments to Greenstar Rep (the "Earn-Out Claims"). (A11 ¶ 12, A14-21 ¶¶ 23-44.) Tutor Perini had declined to make the

disputed earn-out payments because it learned that Segal caused Five Star to provide Tutor Perini with inaccurate financial information for the purpose of calculating earn-out payments. The Merger Agreement expressly provides that earn-out payments owed to former stockholders of Greenstar are based on "Pre-Tax Profit." The term "Pre-Tax Profit" is expressly defined by the Merger Agreement as "the profit of the Company and its Subsidiaries (on a consolidated basis) prior to reduction for income taxes of the Company and its Subsidiaries for such Earn-Out Term, calculated in accordance with past practices and based upon financial statements (prepared in accordance with GAAP consistently applied) of the Company…." (A54-55 § 1.01.) The Merger Agreement also separately sets forth a procedure whereby Tutor Perini is obligated to submit "Pre-Tax Profit Reports" to Greenstar Rep. Under the terms of the Merger Agreement, such Pre-Tax Profit Reports become binding if not objected to by Greenstar Rep within thirty days of receipt. Tutor Perini contends that certain Pre-Tax Profit Reports were rendered inaccurate as a result of the misconduct of Segal, and therefore do not accurately reflect Pre-Tax Profit for the particular earn-out year.

On March 9, 2017, Tutor Perini filed an Answer to the Complaint (the "Answer") and asserted Counterclaims for fraud and offset against Segal (the "Counterclaims"). (A236-85.) In its Answer, Tutor Perini denied that the Pre-Tax Profit Reports accurately reflected Greenstar's Pre-Tax Profit and denied that it

owed the disputed earn-out payments. (A251-53 ¶¶ 34–43.) Tutor Perini alleged in the Counterclaims that Segal, in his capacity as President and CEO of Five Star, knowingly and intentionally caused Five Star to provide Tutor Perini with inaccurate information for the purpose of calculating the earn-out payments so that Segal, as the largest Interest Holder, could personally benefit. (A277 ¶ 2, A280-81 ¶¶ 11–12.)

On March 29, 2017, Greenstar Rep filed a Motion for Judgment on the Pleadings (the "JOP Motion") with respect to the Earn-Out Claims, and Segal filed a Motion to Dismiss the Counterclaims (the "Motion to Dismiss" and, together with the JOP Motion, the "Motions"). Greenstar Rep argued in the JOP Motion that the disputed earn-out payments were owed based upon the Pre-Tax Profit Reports submitted by Tutor Perini, irrespective of whether such reports accurately reflected Greenstar's Pre-Tax Profit. The trial court held oral argument on the Motions on July 31, 2017, and by Memorandum Opinion dated October 31, 2017, granted the Motions (the "Opinion" or "Op.") (Exhibit A hereto).

In interpreting the Merger Agreement, the trial court determined that there was a conflict between the procedure set forth in Section 2.14 of the Merger Agreement for submitting Pre-Tax Profit Reports to Greenstar, on the one hand, and the definition of Pre-Tax Profit as provided in Section 1.01 of the Merger Agreement, on the other hand. Instead of attempting to reconcile these two provisions in a way that gave meaning to both, however, the trial court interpreted

the contract in a way that gave no effect to the Merger Agreement's definition of Pre-Tax Profit. The trial court interpreted Tutor Perini's earn-out payment obligation to be based solely on Pre-Tax Profit Reports, despite the fact that earn-out payments are expressly based on Pre-Tax Profit and Pre-Tax Profit has its own unique and distinct definition under the Merger Agreement. Under the trial court's interpretation, earn-out payments are owed even if Pre-Tax Profit Reports are inaccurate, thereby effectively excising the accuracy requirement embedded in the definition of Pre-Tax Profit.

The trial court violated a foundational tenet of Delaware contract law that requires a contract to be construed in a manner that gives meaning to all provisions. Had the trial court followed this basic principle of contract construction and given meaning to the definition of Pre-Tax Profit as set forth in the Merger Agreement, the court would have (i) determined that the earn-out payments are only due if the underlying Pre-Tax Profit calculations are accurate or, (ii) at a minimum, determined that the contract was ambiguous and permitted the breach of contract claims to go to discovery instead of granting judgment on the pleadings. Furthermore, there are material factual disputes (recognized by the trial court) that preclude entry of judgment on the pleadings. For these reasons, discussed more fully below, the court erred by granting judgment on the pleadings on the Earn-Out Claims.

On November 15, 2017, the trial court entered a Final Order and Judgment pursuant to Court of Chancery Rule 54(b) with respect to the Earn-Out Claims and the Counterclaims, enabling Tutor Perini to immediately appeal.[1] (Exhibit B hereto). Tutor Perini filed a Notice of Appeal on November 30, 2017 with respect to the Memorandum Opinion and the Final Order and Judgment. (Dkt. 1.) This is Tutor Perini's Opening Brief on appeal.

[1] In addition to the Earn-Out Claims, the Complaint alleges claims for declaratory relief and additional breach of contract claims. The declaratory relief claims were resolved by a separate memorandum opinion dated February 23, 2017. The remaining breach of contract claims relate to an Indemnity Holdback Agreement and remain pending before the trial court.

SUMMARY OF ARGUMENT

1. The trial court erred in concluding that the Merger Agreement's earn-out provision unambiguously requires Tutor Perini to make earn-out payments even when the underlying Pre-Tax Profit calculations are inaccurate. In interpreting the contract in a way that gave full effect to the dispute resolution process set forth in Section 2.14 but no effect to the express definition of Pre-Tax Profit in Section 1.01 of the Merger Agreement, the court violated foundational principles of contract construction under Delaware law, which require that a court must interpret a contract in a way that gives meaning to all provisions. Earn-out payments under the Merger Agreement are based on Pre-Tax Profit, which the Agreement expressly requires to be calculated accurately. Hence, under the express language of the Merger Agreement, if Pre-Tax Profit calculations are inaccurate, Tutor Perini's earn-out obligations are not triggered. Tutor Perini's interpretation of the Merger Agreement is reasonable, and it was error for the trial court to determine as a matter of law that Greenstar Rep's contrary interpretation was the only reasonable interpretation of the relevant provisions of the Merger Agreement. Unlike the construction adopted by the trial court, Tutor Perini's proposed contractual construction gives meaning to all pertinent provisions and is therefore reasonable. Alternatively, even if the express language of the Merger Agreement does not require that Pre-Tax Profit be accurate, the implied contractual language imposes an accuracy requirement. Additionally,

there are factual disputes (recognized by the trial court) relating to the accuracy of the Pre-Tax Profit calculations that preclude entry of judgment on the pleadings on the Earn-Out Claims.

2. The trial court erred in concluding that the Counterclaims do not allege fraud with sufficient particularity under Rule 9(b). The Counterclaims fairly apprise Segal of the basis for the fraud claims against him and therefore satisfy Rule 9(b). Additionally, it was reasonable to infer that, as President and CEO of Five Star, Segal was in a position of superior knowledge to know whether the information that he caused Five Star to provide to Tutor Perini for purposes of calculating the earn-out payments was accurate. Furthermore, by faulting Tutor Perini for failing to plead additional facts from information to which it "presumably" had access, the trial court erroneously imposed a heightened pleading burden on Tutor Perini over and above Rule 9(b)'s particularity standard.

STATEMENT OF FACTS

A. The Merger Agreement

On July 1, 2011, Tutor Perini, Greenstar, Greenstar Rep, and a merger subsidiary executed the Merger Agreement pursuant to which Tutor Perini acquired all of the shares of Greenstar (the "Acquisition"). (A137 ¶ 3.) Greenstar consists of three specialty subcontractors, one of which is Five Star. (*Id*.) At the time of the Acquisition, Segal was the CEO of Greenstar and the President and CEO of Five Star.[2] (*Id*.)

Under Section 2.14 of the Merger Agreement (the "Earn-Out Provision"), Greenstar Rep, on behalf of the Interest Holders, is entitled to certain yearly earn-out payments from Tutor Perini during the five-year period following the Acquisition under certain circumstances. (A69-71 § 2.14.) Specifically, the Earn-Out Provision states, in pertinent part, that:

> For the period beginning on July 1, 2011, and ending on July 1, 2012, and each of the four (4) succeeding twelve-month periods beginning on July 1 thereafter (the "Earn-Out Term" and each year of the Earn-Out Term an "Earn-Out Year"), the Interest Holders shall be entitled to earn an amount equal to 25% of Pre-Tax Profit that exceeds Seventeen Million Five Hundred Thousand Dollars ($17,500,000.00) (the "Yearly Earn-Out Payment"); provided that any Yearly Earn-Out Payment shall not exceed Eight Million Dollars ($8,000,000.00) in the aggregate (the "Yearly Earn-Out Cap").

[2] Segal is also an express third-party beneficiary under the Merger Agreement, a fact to which Plaintiffs have admitted during this litigation. (A210; A339; A93-94 § 6.02(a), A115 § 10.07; A125-26.)

(A69 § 2.14(a).)

The Earn-Out Provision further provides that:

> Within ninety (90) days after each twelve-month period in the Earn-Out Term, [Tutor Perini] shall in good faith prepare (or cause to be prepared) and deliver to [Greenstar Rep] a report setting forth the Pre-Tax Profit for such period (the "Pre-Tax Profit Report") …. The Pre-Tax Profit Report and the Pre-Tax Profit for the twelve-month period reflected thereon, shall be binding upon [Greenstar Rep], Stockholders and [Tutor Perini] upon the approval of such Pre-Tax Profit Report by [Greenstar Rep] or the failure of [Greenstar Rep] to object in writing within thirty (30) days after receipt thereof by [Greenstar Rep].

(A69-70 § 2.14(b).)

Section 1.01 of the Merger Agreement defines "Pre-Tax Profit," upon which the Yearly Earn-Out Payments are based, as "the profit of the Company and its Subsidiaries (on a consolidated basis) prior to reduction for income taxes of the Company and its Subsidiaries for such Earn-Out Term, calculated in accordance with past practices and based upon financial statements (prepared in accordance with GAAP consistently applied) of the Company . . . ." (the "Definitions Provision"). (A54-55 § 1.01.)

In connection with the Acquisition, Tutor Perini, Five Star, and Segal executed an employment agreement, wherein Segal agreed to be employed as President and CEO of Five Star for an initial period of five years after the Acquisition

and to perform duties customary to such an executive position.[3] (A173-96.) As the President and CEO of Five Star, Segal would play an integral role in the ultimate compilation of Pre-Tax Profit Reports for each of the Earn-Out Years.

B. The Pleadings

On November 7, 2016, in response to the California arbitration that was filed approximately one month earlier, Plaintiffs filed the Complaint in this action. In support of the Earn-Out Claims, the Complaint alleges that Tutor Perini issued Pre-Tax Profit Reports for the periods ending June 30, 2014 and June 30, 2015, and that based on the profit numbers specified therein, Tutor Perini owed earn-out payments cumulatively totaling $16,000,000, plus interest, but failed to make those earn-out payments in breach of the Merger Agreement. (A18-20 ¶¶ 34-39; A28-30 ¶¶ 65–76.) The Complaint also alleges that Tutor Perini failed to issue a Pre-Tax Profit Report for the period ending June 30, 2016, and that Tutor Perini owes an earn-out payment for that period of at least $3,380,646, which Tutor Perini has failed to pay. (A20 ¶¶ 40-42, A30-31 ¶¶ 77-82.)

[3] Tutor Perini and Five Star initiated an arbitration against Segal in California on September 29, 2016, based on Segal's breaches of the employment agreement. Specifically, Tutor Perini and Five Star allege in the arbitration demand that, during his employment as President and CEO of Five Star, Segal engaged in serious misconduct including violating rules and regulations relating to Five Star's use of certain subcontractors and other compensation-related fraud.

On March 9, 2017, Tutor Perini filed an Answer to the Complaint and asserted Counterclaims against Segal. In its Answer, Tutor Perini denied each of Plaintiffs' allegations relating to the Earn-Out Claims, with the exception of admitting that (i) it issued Pre-Tax Profit Reports for the periods ending June 30, 2014 and June 30, 2015 showing profits of $31,564,617 and $43,946,950, respectively, and (ii) it has not issued a Pre-Tax Profit Report for the period ending June 30, 2016. (A251-52 ¶¶ 34–42, A262-63 ¶¶ 67–70, A264 ¶¶ 73–76, A265 ¶¶ 79–82.) Tutor Perini also asserted thirteen defenses to the Earn-Out Claims. (A274-76.)

Tutor Perini also asserted separate Counterclaims for fraud and offset against Segal. Specifically, Tutor Perini alleges that Segal (as President and CEO of Five Star) knowingly and intentionally provided inaccurate information for the purpose of calculating earn-out payments, which caused Tutor Perini to prepare overstated Pre-Tax Profit Reports, which in turn resulted in inflated Yearly Earn-Out Payments. (A280 ¶ 11, A282 ¶¶ 22-23.) Although Tutor Perini asserted the defenses of fraud and offset in its Answer, Tutor Perini affirmatively brought Counterclaims against Segal to recover any damages exceeding the earn-out payment amount in any given year under the Merger Agreement.

C. The Motions

On March 29, 2017, Greenstar Rep filed the JOP Motion and Segal filed the Motion to Dismiss. In the JOP Motion, Greenstar Rep argued that it is entitled to

judgment on the pleadings on the Earn-Out Claims because Tutor Perini admitted in its Answer that it issued Pre-Tax Profit Reports reflecting the profit numbers alleged in the Complaint and because Greenstar Rep did not object to those numbers. In the Motion to Dismiss, Segal argued that the Counterclaims should be dismissed because Tutor Perini failed to plead fraud with the requisite particularity under Court of Chancery Rule 9(b).

In response, Tutor Perini argued that judgment on the pleadings was not appropriate on the Earn-Out Claims because, pursuant to the Merger Agreement's definition of Pre-Tax Profit, Tutor Perini's contractual earn-out obligations are only triggered when the underlying Pre-Tax Profit calculations are accurate and because there was a factual dispute relating to the accuracy of those calculations. Tutor Perini also argued that the Counterclaims satisfied Rule 9(b) because the allegations fairly apprise Segal of the basis for the claims.

D. The Opinion

The trial court issued the Opinion on October 31, 2017. In granting judgment on the pleadings on the Earn-Out Claims, the trial court held that the provisions of the Merger Agreement are unambiguous and require Tutor Perini to make earn-out payments based upon the numbers reflected in Pre-Tax Profit Reports, even if those numbers are inaccurate. (Op. at 17–20.) Specifically, the court held that if the dispute resolution procedure in the Earn-Out Provision is not invoked within the

specified time period, the numbers in the Pre-Tax Profit Report "shall be binding" and the required earn-out payments must be calculated and paid from these amounts, regardless of whether the Pre-Tax Profit calculations are accurate. (*Id.*) According to the court, Tutor Perini's proposed construction would render the Earn-Out Provision's "shall be binding" language superfluous. (*Id.* at 18.) The Court of Chancery concluded that, because Tutor Perini provided the Pre-Tax Profit Reports to Greenstar Rep, and Greenstar Rep did not object, the reports and the numbers disclosed therein were binding on the parties and Tutor Perini was obligated to make earn-out payments based on those calculations. (*Id.* at 17–20.)

In granting the Motion to Dismiss, the court stated that the Counterclaims did not plead fraud with the requisite particularity under Rule 9(b).

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY INTERPRETING THE MERGER AGREEMENT TO UNAMBIGUOUSLY REQUIRE TUTOR PERINI TO MAKE EARN-OUT PAYMENTS EVEN WHEN PRE-TAX PROFIT REPORTS ARE INACCURATE

A. Question Presented: Did the Court of Chancery err by interpreting the Merger Agreement in a manner that gave no meaning to the definition of Pre-Tax Profit?[4]

B. Scope of Review: This Court's "review of the trial court's grant of a motion for judgment on the pleadings presents a question of law, which [this Court] review[s] *de novo*." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993) (citation omitted). Furthermore, this Court likewise "review[s] questions of contract interpretation *de novo*." *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits:

1. The Merger Agreement Expressly Requires Pre-Tax Profit To Be Accurate In Order To Trigger Tutor Perini's Earn-Out Obligations

The trial court erred by not properly applying the basic rules of contract construction when interpreting the Merger Agreement. Specifically, after determining that the Definitions Provision conflicted with certain language in the Earn-Out Provision, the court did not attempt to reconcile these two provisions in a

[4] This question was presented below at A354-55, A366, A378-89.

way that gave meaning to both, but instead, interpreted the contract so as to give full effect to the Earn-Out Provision, but no effect to the Definitions Provision. For the reasons discussed below, this was legal error.

The standard rules of contract interpretation under Delaware law are well-established. Those rules "require a court to determine from the language of the contract the intent of the parties." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) (citation omitted). In ascertaining the parties' intent, "the [contract] should be read as a whole and, if possible, interpreted to reconcile all of the provisions of the document. If no ambiguity is present, the Court must give effect to the clear language of the [contract.]" *Id.* (citations omitted). If "the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings[,]" then the contract is ambiguous. *Id.* (internal quotation marks & citation omitted). "Where a contract is ambiguous, the interpreting court must look beyond the language of the contract to ascertain the parties' intentions." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (internal quotations & citation omitted). A trial court cannot grant judgment on the pleadings on breach of contract claims when the pertinent contractual provisions are ambiguous. *See VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) (reversing and remanding the trial court's grant of a motion to dismiss breach of contract claims

where the contract provisions at issue were ambiguous, noting that, at the pleadings stage in a contractual dispute, "the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions"); *Textron, Inc. v. Acument Glob. Techs., Inc.*, 2011 WL 1326842, at *6 (Del. Super. Ct. Apr. 6, 2011) (denying a motion for judgment on the pleadings on breach of contract claims because the contractual provisions at issue were ambiguous).

The Court of Chancery committed legal error in the Opinion by not following these basic principles of contract construction when interpreting the Merger Agreement. In analyzing the Merger Agreement, the court fixated on the dispute resolution process set forth in the Earn-Out Provision to the exclusion of the other provisions of the contract relating to earn-out payments. Specifically, the court noted that, under the terms of the Earn-Out Provision, if Tutor Perini submits a Pre-Tax Profit Report and the expedited dispute resolution process expires without being invoked, the numbers in the Pre-Tax Profit Report "'shall be binding upon [Greenstar Rep, the Interest Holders, and Tutor Perini]' . . . and the required Earn-Out Payments must be calculated and paid from these amounts." (Op. at 17-18.) According to the trial court, Tutor Perini's proposed construction (which gives meaning to the Definitions Provision's accuracy requirement) conflicted with the Earn-Out Provision's dispute resolution process and rendered the "shall be binding" language superfluous. This result "fails at the threshold," the court determined,

because (i) nothing in the Definitions Provision can be read to negate or qualify the "shall be binding" language; (ii) the Definitions Provision "simply defines how [Tutor Perini] must calculate Pre-Tax Profit"; and (iii) the Earn-Out Provision "makes no reference to th[e Definitions Provision]." (*Id*. at 19.) Hence, after determining that Tutor Perini's proposed construction (which gave meaning to the Definitions Provision) conflicted with the dispute resolution process, the court proceeded to interpret the contract in a manner that gave full effect to the Earn-Out Provision's dispute resolution process, but no effect to the Definitions Provision. (*Id*. at 17-19.) This was legal error. *See In re HC Cos., Inc. v. Myers Indus., Inc.*, 2017 WL 6016573, at *9 (Del. Ch. Dec. 5, 2017) ("The Court cannot rewrite . . . contracts, and it cannot ignore the plain terms of . . . contracts.").

After identifying a conflict between the two provisions, the trial court should have attempted to resolve that conflict in a manner that gave meaning to both provisions and that did not read out the Definitions Provision. *See Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."); *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006) ("[C]ontracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'") (citations omitted). Had the court done

so, it would have determined that Tutor Perini's proposed construction was the only reasonable one (because it gives meaning to all pertinent provisions) or, at the very minimum, determined that the Merger Agreement was susceptible to multiple reasonable interpretations and was therefore ambiguous. *Duff v. Innovative Discovery LLC*, 2012 WL 6096586, at *12 (Del. Ch. Dec. 7, 2012) ("[T]his Court has held that where a contract contains two conflicting provisions, the document is rendered ambiguous.") (citation omitted); *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 836 (Del. Ch. 2007) (finding that two conflicting provisions of a merger agreement "render[ed] it decidedly ambiguous").

Tutor Perini's proposed construction is a reasonable one, if not the only reasonable one, based on the principles of contract interpretation under Delaware law. Under the terms of the Merger Agreement, Yearly Earn-Out Payments are calculated based on "25% of ***Pre-Tax Profit*** that exceeds . . . $17,500,000,00 . . . ." (A69 § 2.14(a) (emphasis added).) Hence, it is Pre-Tax Profit, and not the Pre-Tax Profit Reports or any other source, which forms the basis for the Yearly Earn-Out Payments. The parties did not leave the definition of Pre-Tax Profit open for debate. Instead, the Merger Agreement (in the Definitions Provision) defines Pre-Tax Profit as "the profit of the Company and its Subsidiaries (on a consolidated basis) . . . calculated in accordance with past practices and based upon financial statements (prepared in accordance with GAAP consistently applied) of the Company." (A54-

55 at § 1.01.) GAAP[5] requires financial statements to be free from material inaccuracies, a point that Greenstar Rep does not dispute.[6] Accordingly, through the Definitions Provision, the Merger Agreement expressly requires that Pre-Tax Profit, the sole basis for the Yearly Earn-Out Payments, be accurate. If certain numbers or calculations are not free from material inaccuracies or otherwise GAAP-compliant, they do not meet the definition of Pre-Tax Profit under the terms of the Definitions Provision and, therefore, cannot trigger Tutor Perini's contractual earn-out obligations. The trial court erred in rejecting Tutor Perini's proposed construction and instead holding as a matter of law that Appellees' construction was the only reasonable one.

[5] GAAP means "United States generally accepted accounting principles, consistently applied." A51 § 1.01. GAAP are expressly referenced throughout the Merger Agreement. *See, e.g.*, *id*., A73 § 3.06, A83-84 § 3.16, A91 § 4.07(a)(i), A96-98 § 6.07.

[6] *See, e.g.*, A402-54, AU § 316 (American Institute of Certified Public Accountants 2002) (requiring reasonable assurances that financial statements are free from material misstatements); A455-65, AU § 326.14–.15 (American Institute of Certified Public Accountants 2006) (noting that, in preparing and reporting financial statements, "management implicitly or explicitly makes assertions regarding the recognition, measurement, presentation, and disclosure of information in the financial statements," and further listing "Accuracy" as one assertion by management that "[a]mounts and other data relating to recording transactions and events have been recorded appropriately").

(a) The Earn-Out Provision Expressly Incorporates The Definition Of Pre-Tax Profit And Its Accuracy Requirement

The trial court erred by ignoring the incorporation of the definition of Pre-Tax Profit and its accuracy requirement in the Earn-Out Provision. Contrary to the court's suggestion that the Earn-Out Provision "makes no reference to th[e Definitions Provision]," (Op. at 19), the Earn-Out Provision expressly uses the capitalized term, "Pre-Tax Profit," multiple times. By using this defined term, the Earn-Out Provision imports the exact definition of Pre-Tax Profit as set forth in the Definitions Provision. *See, e.g.*, *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 2017 WL 6422337, at *4–5 (Del. Dec. 18, 2017) (reversing trial court's determination on summary judgment that earn-out payment was due under purchase agreement and, in interpreting the unambiguous earn-out provision, replacing a capitalized term used in the earn-out provision with the exact definition of that capitalized term as set forth in a separate definitions provision in the agreement); *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 928–30 (Del. 2017), *as revised* (June 28, 2017) (interpreting a purchase agreement by giving effect to the defined term "Net Working Capital," and stating that "[t]he plain terms of the definition of Net Working Capital, read in conjunction with rest of Purchase Agreement, require the use of [the company's] past accounting practices"). The definition of Pre-Tax Profit is "the profit of the Company…calculated in accordance

with past practices and based upon financial statements (prepared in accordance with GAAP consistently applied) of the Company." (A54-55 § 1.01.) GAAP requires financial statements to be free from material inaccuracies and therefore, to meet the definition of Pre-Tax Profit in the Merger Agreement, the profit numbers must be accurate. (A51, A54-55 § 1.01.) Materially inaccurate calculations that result in inaccurate profit numbers to be contained in a Pre-Tax Profit Report does not meet the definition of Pre-Tax Profit under the Merger Agreement. Accordingly, inaccurate Pre-Tax Profit Reports cannot form the basis of the Yearly Earn-Out Payments. (A54-55 § 1.01, A69-71 § 2.14.)

Contrary to the court's reasoning, the definition of Pre-Tax Profit, as set forth in the Definitions Provision, does indeed "qualify" the "shall be binding" language and necessarily informs the interpretation of the Earn-Out Provision. (Op. at 19.) Far from rendering the "shall be binding" language "superfluous," Tutor Perini's proposed construction acknowledges and gives meaning to the threshold definition of Pre-Tax Profit and clearly delineates when the "shall be binding" language is triggered. (*Id*. at 18.)

To the extent that the trial court saw a conflict between the Earn-Out Provision and the Definitions Provision, it was error for the court to ignore and give no meaning to the Definitions Provision, while giving full meaning to the Earn-Out Provision. *See In re HC Cos., Inc.*, 2017 WL 6016573, at *9 ("The Court cannot

rewrite . . . contracts, and it cannot ignore the plain terms of . . . contracts."). As stated above, the definition of Pre-Tax Profit (as contained in the Definitions Provision) is expressly embedded in the Earn-Out Provision—accordingly, the trial court should have attempted to reconcile the two provisions in a manner that afforded meaning to both or, alternatively, determined that the contract was ambiguous. *Gordon*, 801 A.2d at 7 ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."); *Duncan v. STTCPL, LLC*, 2017 WL 816477, at *5 (Del. Super. Ct. Feb. 28, 2017) ("[I]t is the province and duty of the court to find harmony between [two conflicting provisions of an agreement] and reconcile them if possible.") (internal quotation marks & citation omitted). If courts could resolve internal contractual conflicts by arbitrarily ignoring certain provisions, that would amount to an impermissible judicial rewriting of the contract. *See In re HC Cos., Inc.*, 2017 WL 6016573, at *9.

The Opinion offers insight into why the trial court elected to ignore and write out the Definitions Provision. Specifically, the court stated that the Definitions Provision "simply defines how Tutor Perini must calculate Pre-Tax Profit," essentially treating the provision as a "mere" definitions clause that carries no real weight or meaning in the context of the broader contract. (Op. at 19.) This was error because it rendered the Definitions Provision superfluous. *See Delta & Pine Land*

Co., 2006 WL 1510417, at *4. The Merger Agreement's definition of Pre-Tax Profit was negotiated and agreed to by sophisticated parties and should be given the same weight and meaning as the other provisions in the contract. There is no canon of contractual construction under Delaware law that permits a court to devalue a contractual provision because it is a definitions clause.

(b) The Dispute Resolution Procedure Set Forth In The Earn-Out Provision Does Not Override The Merger Agreement's Requirement That Earn-Out Payments Are Based On Greenstar's Pre-Tax Profit

The trial court also erred by focusing so heavily in its analysis on the Earn-Out Provision's dispute resolution process. The dispute resolution process set forth in the Earn-Out Provision is simply the procedural mechanism by which Greenstar Rep is provided with a Pre-Tax Profit Report for the purpose of examining the profit numbers calculated by Tutor Perini and providing Greenstar Rep with an opportunity to object thereto. Neither the dispute resolution process nor the Pre-Tax Profit Reports are the basis for the Yearly Earn-Out Payments; rather, it is the Pre-Tax Profit, as that term is defined in the Definitions Provision, that is the basis for the Yearly Earn-Out Payments and that triggers Tutor Perini's earn-out obligations. (A69 § 2.14(a).) For the court to focus exclusively on the dispute resolution process in determining whether Tutor Perini's earn-out obligations were triggered elevated form over substance and ignored the central role of Pre-Tax Profit in that analysis.

Furthermore, the dispute resolution process does not cover all situations in which Pre-Tax Profit numbers (as presented in Pre-Tax Profit Reports) contain material inaccuracies. This is evidenced by the fact that the dispute resolution process can only be invoked by Greenstar Rep:

> The Pre-Tax Profit Report and the Pre-Tax Profit . . . shall be binding . . . upon the approval of such Pre-Tax Profit Report by [Greenstar Rep] ***or the failure of [Greenstar Rep] to object*** in writing within thirty (30) days after receipt thereof . . . . ***If [Greenstar Rep] does not agree with the Pre-Tax Profit Report and the calculation of Pre-Tax Profit stated thereon***, and [Tutor Perini] and [Greenstar Rep] cannot mutually agree on the same, then within forty-five (45) days following receipt by [Greenstar Rep] of the Pre-Tax Profit Report, [Tutor Perini] and [Greenstar Rep] shall engage the Neutral Accountant to resolve such dispute.

(A69-70 § 2.14(b) (emphasis added).) This suggests that the dispute resolution process is intended to operate only for the benefit of Greenstar Rep in situations where it believes that the numbers in a Pre-Tax Profit Report have been understated. The dispute resolution process cannot be invoked by Tutor Perini and does not operate for Tutor Perini's benefit. Under the interpretation adopted by the trial court, Tutor Perini would be left with no recourse in situations where, as here, the numbers in a Pre-Tax Profit Report (due to inadvertence, fraud, or any other reason) are inaccurate. The sophisticated parties to the Merger Agreement negotiated for the definition of Pre-Tax Profit in the Definitions Provision, which requires that calculations be accurate and GAAP-compliant. One reasonable interpretation of the Merger Agreement is that the parties intended for the definition of Pre-Tax Profit to

protect Tutor Perini in situations in which the Pre-Tax Profit numbers are overstated. Because the situation at issue in this case (Tutor Perini's Pre-Tax Profit calculations were overstated and inaccurate to the detriment of Tutor Perini) is not covered by the Earn-Out Provision's dispute resolution process, it was error for the trial court to focus so heavily on such provision in its analysis.

(c) The Interpretation Advanced By Greenstar Rep And Adopted By The Court Of Chancery Is Not The Only Reasonable Interpretation Of The Merger Agreement

The Court of Chancery erred in rejecting Tutor Perini's proposed construction and adopting Greenstar Rep's proposed construction as the only reasonable one. On the JOP Motion, the court was required to draw all reasonable inferences in favor of Tutor Perini. *See Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2013 WL 5787958, at *3 (Del. Ch. Oct. 25, 2013). Furthermore, for Greenstar Rep to be successful on the JOP Motion, it had the burden of showing that the Merger Agreement is unambiguous and that its interpretation is the only reasonable one. *See id.* at *4; *Fiat N. Am. LLC v. UAW Retiree Med. Benefits Tr.*, 2013 WL 3963684, at *7 (Del. Ch. July 30, 2013). Greenstar Rep did not carry this burden. As explained above, Tutor Perini demonstrated that its proposed construction was the only reasonable one because, unlike Greenstar Rep's, it gives meaning to both the Earn-Out Provision and the Definitions Provision. But, to be clear, Tutor Perini did not need to show that its construction was the only reasonable one to have prevailed on

the JOP Motion. *See Cooper Tire*, 2013 WL 5787958, at *4. Rather, Tutor Perini needed only to show that the Merger Agreement is susceptible to at least two reasonable readings and is therefore ambiguous. *See Fiat N. Am. LLC*, 2013 WL 3963684, at *19 (denying a motion for judgment on the pleadings on an issue concerning a term in an agreement that was "susceptible to at least two reasonable interpretations"); *See United Rentals, Inc.*, 937 A.2d at 834–45 (resorting to extrinsic evidence to ascertain the meaning of an ambiguous merger agreement). For the reasons stated above, Tutor Perini did so and, accordingly, the trial court erred in granting the JOP Motion.

Ballenger v. Applied Digital Solutions, Inc., 2002 WL 749162 (Del. Ch. Apr. 24, 2002), supports Tutor Perini's position that at least one reasonable reading of the Merger Agreement requires that Pre-Tax Profit numbers be accurate in order to bind the parties and trigger Tutor Perini's earn-out obligations. In *Ballenger*, defendant ("Applied Digital") merged with a company ("Compec") and was obligated under the merger agreement to (i) prepare earn-out financials, and (ii) pay Compec stockholders earn-out payments based on those financials. *Id.* at *1-2. Notably, the merger agreement required Applied Digital to calculate the earn-out financials based on certain "Agreed Upon Procedures." *Id.* at *2. According to the merger agreement, "Agreed Upon Procedures" meant that "the Earnout Financials will be prepared from the books and records of the Surviving Company in accordance with

GAAP, consistently applied and in accordance with Compec's accounting policies prior to the Merger."[7] *Id*. (internal quotation marks & citation omitted). After Applied Digital failed to produce earn-out financials and make the first earn-out payment by the due date, plaintiffs (Compec stockholder representatives and other former stockholders) filed suit. *Id.* at *1-2.

Plaintiffs moved for partial summary judgment, arguing, among other things, that "Applied Digital indisputably breached its contractual duties to . . . calculate the Earnout Financials . . . and pay the [first earn-out payment]." *Id.* at *4. Applied Digital contended that the reason it did not calculate the earn-out financials or make the first earn-out payment was because it became aware of certain information that "led it to suspect that the books of Compec were not accurate" and because it was unable to "verify Compec's financial statements[.]" *Id.* at *3.

The court denied plaintiffs' motion for partial summary judgment. *Id.* at *5. Then-Vice Chancellor Strine noted that Applied Digital pointed to record evidence supporting a finding that "the conduct of Compec's former management team . . . made it impossible for Applied Digital to calculate the Earnout Financials ***accurately***." *Id*. at *5 (emphasis added). Plaintiffs "chose[] to stand mute in the face of [these] particularized allegations of accounting irregularities at Compec,"

[7] As discussed below, this language from the merger agreement in *Ballenger* is strikingly similar to the definition of Pre-Tax Profit in the Merger Agreement in the instant case.

leaving the Court "with no basis to find that Applied Digital's protestations ha[d] no triable basis in fact." *Id.* Hence, while recognizing that "Applied Digital [bore] a contractual obligation to act with diligence to produce the required Earnout Financials[,]" the court concluded that whether Applied Digital had fulfilled this contractual obligation "is a factual question that the present record does not indisputably answer." *Id.*

Ballenger is substantially similar to this case and supports Tutor Perini's interpretation that the Merger Agreement requires Pre-Tax Profit numbers to be accurate. First, defendants in both cases had a contractual obligation under their respective merger agreements to prepare financials on which the earn-out payments would be made and to provide those financials to the shareholder representatives. *See Ballenger*, 2002 WL 749162, at *1–2; (A69-70 § 2.14(b)). Second, the merger agreements in both cases required these financials to be prepared "in accordance with GAAP, consistently applied," and in accordance with the past practices and policies of the company acquired in the merger. *See Ballenger*, 2002 WL 749162, at *2; (A51 § 1.01).

Notwithstanding these express contractual requirements, and despite the *Ballenger* plaintiffs' argument that Applied Digital "indisputably breached" the merger agreement by failing to calculate earn-out financials and make the first earn-out payment in accordance with these provisions, the *Ballenger* court denied

plaintiffs' motion for partial summary judgment because there was a factual dispute surrounding the ***accuracy*** of the earn-out financials. *Ballenger*, 2002 WL 749162, at *5. In doing so, the *Ballenger* court implicitly determined that one reasonable reading of the merger agreement in that case required that earn-out financials be accurate in order to trigger Applied Digital's contractual earn-out obligations.[8] *See id.* If the merger agreement did not require earn-out financials to be accurate, then the factual question relating to the accuracy of the financials would not have precluded the grant of summary judgment and Applied Digital's failure to produce the earn-out financials and to make the earn-out payment would have been a clear breach of its contractual obligations.[9]

[8] The trial court here attempted to distinguish *Ballenger* in a footnote in the Opinion. (Op. at 22 n.70.) Specifically, the court stated that the factual question in *Ballenger* concerned "whether the defendant company should be required to produce earn out financials when it lacked access to the information required to do so." (*Id.*) Respectfully, the court misinterpreted *Ballenger*. As explained above, the factual question that precluded entry of summary judgment did not center on whether Applied Digital had access to information. Rather, the court declined to enter summary judgment because there was a factual question relating to Applied Digital's ability to "calculate the Earnout Financials accurately." *Ballenger*, 2002 WL 749162, at *5; *see also id.* ("I note that the plaintiffs have chosen to stand mute in the face of particularized allegations of accounting irregularities at Compec . . . . This silence has left me with no basis to find that Applied Digital's protestations have no triable basis in fact.").

[9] Tutor Perini notes that, although it relied heavily on *Ballenger* in its answering brief in opposition to the JOP Motion (A387-89), Greenstar Rep did not respond in its reply brief to Tutor Perini's arguments based on *Ballenger* and, in fact, did not even mention *Ballenger* in its reply.

The same reasoning applies here. Under one reasonable interpretation of the Merger Agreement, earn-out financials and Pre-Tax Profit must be calculated accurately, in accordance with GAAP. Accordingly, the trial court erred in determining that the Earn-Out Provision unambiguously requires Tutor Perini to make earn-out payments based on inaccurate Pre-Tax Profit calculations.

2. The Merger Agreement Impliedly Requires Pre-Tax Profit To Be Accurate In Order To Trigger Tutor Perini's Earn-Out Obligations

After determining that the express language of the Merger Agreement does not require that Pre-Tax Profit numbers be accurate, the Court of Chancery compounded its error by concluding that the implied language of the contract likewise does not require that Pre-Tax Profit be calculated accurately in order for Tutor Perini's contractual earn-out obligations to be triggered.

The Court of Chancery determined that the implied covenant was inapplicable because "[t]here are no gaps to fill here." (Op. at 22.) According to the court, the Earn-Out Provision expressly imposes a "definitive timeline within which the accuracy of the Pre-Tax Profit, as presented in the Pre-Tax Profit Report, could be challenged." (*Id.*) The court reasoned that, as part of that dispute resolution process, the parties could have included a provision that permitted Tutor Perini to withhold Yearly Earn-Out Payments when its Pre-Tax Profit calculations were inaccurate, but they did not. (*Id.*) Hence, the court stated that it would not imply an accuracy term

that conflicted with the intent of the parties as evidenced by the express terms of the Earn-Out Provision. (*Id*.)

The trial court erred in rejecting Tutor Perini's alternative argument for implying an accuracy term because the court again failed to account for the Definitions Provision. The Court of Chancery erroneously determined that implying an accuracy requirement would conflict with the express language of the Earn-Out Provision, but in actuality, an implied accuracy requirement is consistent with the Definitions Provision's express definition of Pre-Tax Profit, which, as explained above, is imbedded in the Earn-Out Provision. Hence, by refusing to imply a term that requires Pre-Tax Profit to be calculated accurately before Tutor Perini's earn-out obligations are triggered, the court construed the Merger Agreement in a way that wrote out the express definition of Pre-Tax Profit.

"The implied covenant inheres to every contract, and is 'best understood as a way of implying terms in the agreement.'" *See JPMorgan Chase & Co. v. Am. Century Cos., Inc.*, 2012 WL 1524981, at *7 (Del. Ch. Apr. 26, 2012) (citation omitted). "The implied covenant seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them." *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 418 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013). In determining whether the

implied covenant supplies a term to a contract, a court asks a three-pronged inquiry: (1) whether there is a gap in the contract that needs to be filled; (2) if so, whether the implied covenant should be used to supply a term to fill the gap; and (3) if so, the term that should be used to fill the gap. *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *16-17 (Del. Ch. Nov. 17, 2014).

Applying this analytical framework, the Court of Chancery should have determined that the Merger Agreement impliedly requires that Pre-Tax Profit numbers be accurate in order for Tutor Perini's earn-out obligations to be triggered. First, to the extent that the court determined that the Merger Agreement does not expressly require Pre-Tax Profit to be accurate, there is a gap in the contractual language with respect to whether or not Pre-Tax Profit numbers must be free from material inaccuracies. *See, e.g.*, *id.* at *18. Although the court stated that the parties' purported decision not to include an accuracy requirement in the Earn-Out Provision's dispute resolution process left no room for a gap in the contractual language, (Op. at 22), the court again (as explained in detail above) failed to account for the definition of Pre-Tax Profit expressly embedded in the Earn-Out Provision. Second, the implied covenant should be used to fill this gap because, as discussed below, the parties' "understandings or expectations [regarding whether the Pre-Tax Profit numbers were required to be accurate] were so fundamental that they did not

need to negotiate about those expectations." *NAMA Holdings, LLC*, 2014 WL 6436647, at *16 (internal quotation marks & citation omitted).

Third, in determining how to fill this gap, the court should have looked to "what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting" and "whether it is clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to the matter." *Id.* at *17 (internal quotation marks & citations omitted). Surely, had the parties discussed during contract negotiations whether the Pre-Tax Profit numbers on which Yearly Earn-Out Payments would be calculated needed to be accurate and free from material misstatements, the parties would have unanimously agreed in the affirmative. It would be unreasonable and absurd to suggest otherwise. This conclusion is evident from the express language of the Merger Agreement. As stated above, the Yearly Earn-Out Payments are based on Pre-Tax Profit, which must be calculated in accordance with GAAP. (A51 § 1.01, A54-55 § 1.01, A69-71 § 2.14.) Accordingly, the Merger Agreement contains an implied term that Pre-Tax Profit Reports must accurately report Pre-Tax Profit and that a Pre-Tax Profit Report that contains material inaccuracies does not trigger Tutor Perini's earn-out obligations.

For these reasons, the Court of Chancery erred in rejecting Tutor Perini's alternative argument that an implied term of the contract requires Pre-Tax Profit to be accurate.

3. There Are Factual Questions Related To The Accuracy Of The Calculations In The Pre-Tax Profit Reports

The Court of Chancery expressly stated in the Opinion that, if Tutor Perini's proposed contractual construction is reasonable, "[Greenstar Rep] is not entitled to judgment on the pleadings because, at the very least, there is a factual dispute regarding the accuracy of the information Tutor Perini relied upon in preparing its Pre-Tax Profit Reports." (Op. at 10.) As stated above, Tutor Perini's proposed interpretation is reasonable under either the express or the implied language of the Merger Agreement and, accordingly, under the Opinion, the JOP Motion should have been denied due to the existence of factual disputes regarding the accuracy of the Pre-Tax Profit numbers.

In its Answer, Tutor Perini made no admissions regarding the accuracy of the numbers in the Pre-Tax Profit Reports, and indeed, asserted that the Pre-Tax Profit Reports were inaccurate, inflated, and unreliable because Segal caused Five Star to provide false information to Tutor Perini. (A251-53 ¶¶ 34–43; A277 ¶ 2, A280-81 ¶¶ 11–12.) As such, Tutor Perini denied all of the allegations that Tutor Perini owes

Yearly Earn-Out Payments.[10] (*Id.*) On the JOP Motion, Greenstar Rep did not dispute Tutor Perini's assertions that the numbers contained in the Pre-Tax Profit Reports were inaccurate and did not argue that there were no factual disputes relating to accuracy.

Because, as explained above, Tutor Perini's proposed contractual construction is reasonable, it is undisputed by the parties and recognized by the trial court that there are factual disputes relating to the accuracy of the Pre-Tax Profit calculations that preclude entry of judgment on the pleadings. *See Ballenger*, 2002 WL 749162, at *5. For this reason, the trial court erred in granting the JOP Motion.

[10] To be clear, although Tutor Perini firmly believes, as alleged in its Counterclaims, that Segal intentionally caused Five Star to submit false information to Tutor Perini for the self-interested purpose of inflating the Yearly Earn-Out Payments, Tutor Perini need not show fraud for purposes of its contractual interpretation argument. Specifically, as explained above, the Merger Agreement requires that Pre-Tax Profit be accurate and, if for any reason (*e.g.*, fraud, inattention to detail, etc.) the Pre-Tax Profit numbers are inaccurate, those numbers do not constitute Pre-Tax Profit for purposes of establishing the amount of any earn-out payment.

II. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT THE COUNTERCLAIMS FAILED TO PLEAD FRAUD WITH THE REQUISITE PARTICULARITY UNDER COURT OF CHANCERY RULE 9(B)

A. Question Presented: Did the Court of Chancery err in determining that the Counterclaims failed to plead fraud with the requisite particularity under Court of Chancery Rule 9(b)?[11]

B. Scope of Review: "The standard and scope of review by this Court of a decision granting motion to dismiss … is *de novo*." *Bagwell v. Prince*, 683 A.2d 58 (TABLE), 1996 WL 470723, at *2 (Del. Aug. 9, 1996) (ORDER).

C. Merits: The trial court incorrectly held that Tutor Perini did not adequately plead fraud under Court of Chancery Rule 9(b). Tutor Perini's fraud allegations fairly apprise Segal of the basis for the Counterclaims and therefore satisfy Rule 9(b)'s particularity standard.

Tutor Perini alleged in its Counterclaims that: (1) Segal is an Interest Holder entitled to Yearly Earn-Out Payments under the Merger Agreement (A280-81 ¶ 12, A281 ¶ 15, A282 ¶ 23); (2) Yearly Earn-Out Payments are based on the Pre-Tax Profit of Greenstar and its subsidiaries, including Five Star (A279-80 ¶ 10); (3) Segal was the President and CEO of Five Star (A277-78 ¶ 4); (4) as President and CEO of Five Star, Segal misused his position by knowingly and intentionally causing Five

[11] This question was presented below at A355, A389-97.

Star to provide Tutor Perini with inaccurate and erroneous assumptions regarding numerous projects (including Hudson Yards C-Core & Shell, Baccarat Hotel, and Carnegie 57) for purposes of calculating Pre-Tax Profit and Yearly Earn-Out Payments for each yearly earn-out term (A277 ¶ 2, A279 ¶ 9, A280 ¶ 11, A281 ¶ 15); and (5) Segal caused Five Star to submit this false information for self-interested reasons—specifically, for the purpose of inducing Tutor Perini to overpay Yearly Earn-Out Payments to former Interest Holders, including Segal himself. (A277 ¶ 2, A281 ¶ 15.) These allegations fairly apprise Segal of the basis of Tutor Perini's fraud claims against him and therefore satisfy the Rule 9(b) pleading requirements. *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 145 (Del. Ch. 2003) (noting that fraud allegations are sufficient so long as they "fairly apprise the defendant of the basis for the claim.").

The Court of Chancery, however, concluded that the Counterclaims did not satisfy Rule 9(b) because Tutor Perini failed to allege specifically how the information was inaccurate, what role Segal played in preparing and providing the false information, and when and where the false statements were made and to whom they were made. (Op. at 29–30.) Furthermore, the court determined that Tutor Perini's allegations were insufficient to sustain a reasonable inference that Segal was aware that the information he provided to Five Star was false. (*Id.* at 30–31.) The court also faulted Tutor Perini for not alleging more detailed facts relating to Segal's

fraud because, "as parent of Five Star and employer of Segal, Tutor Perini presumably had access to financial and other information that would allow it to point specifically to the manner in which the amounts were inflated and to the nature of the inaccuracy." (*Id.* at 31.)

The trial court erred by concluding that Tutor Perini failed to satisfy Rule 9(b)'s particularity standard. Tutor Perini was not required to allege the granular details of Segal's misconduct—rather, it need only allege sufficient facts to fairly apprise Segal of the basis for its claims. *See Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 142 (Del. Ch. 2009); *Kahn Bros. & Co. Profit Sharing Plan & Tr. v. Fischbach Corp.*, 1989 WL 109406, at *1 (Del. Ch. Sept. 19, 1989). For example, in *Fischbach*, the defendant ("Posner"), a director and stockholder of the company ("Fischbach"), entered into a standstill agreement with Fischbach that limited Posner's interest in Fischbach to 24.9%. *Id.* This limitation would be lifted, however, if a third party acquired more than 10% of Fischbach's stock. *Id.* at *2. After an individual ("Boesky") acquired 13.4% of Fischbach's stock, Posner increased his interest to over 50% and thereby gained control of the board. *Id.* Plaintiffs, stockholders of Fischbach, claimed that Posner fraudulently induced the incumbent board to waive the standstill limitation, thereby permitting Posner to gain control of the board. *Id.* at *1. In support of their fraud claim, plaintiffs alleged that Boesky and a Posner-related entity entered into a "Secret Agreement" by which

Boesky acquired Fischbach stock for the purpose of cancelling the standstill limitation on behalf of Posner. *Id.* at *3. Defendants, Posner and other Posner-related parties, argued that plaintiffs' fraud claim failed to satisfy Rule 9(b) because plaintiffs failed "to state with particularity the circumstances constituting the fraud," and their "allegation that Posner was aware of the Secret Agreement is wholly conclusory." *Id.* at *3, *5.

The *Fischbach* court rejected defendants' argument and found that plaintiffs satisfied Rule 9(b) because they pled the circumstances surrounding the alleged fraud and put defendants on notice of the misconduct underlying the fraud claim. *Id.* at *4-5. The court further rejected defendants' argument that plaintiffs failed to plead sufficient facts showing that the Secret Agreement existed, noting that "it cannot be true that each allegation of plaintiffs must be substantiated by a further allegation to support it." *Id.* at *5. "All that is required is that the circumstances constituting the fraud be alleged. The substantiation or specificity necessary is that facts be pleaded that specifically identify the act of deception charged and which, if true, would establish each of the elements of the tort." *Id.*

In the instant case, as in *Fischbach*, Tutor Perini sufficiently alleged the circumstances surrounding the alleged fraud so as to put Segal on notice of the misconduct underlying the Counterclaims. *Id.* at *4-5. Tutor Perini need not substantiate the facts already pled with additional allegations. *Id.* at *5.

Moreover, Tutor Perini's fraud allegations allow a reasonable inference that Segal was aware that the information he provided to Five Star was false. Although the trial court correctly noted that "representations regarding future conduct, predictions and expressions of opinion generally do not give rise to actionable fraud," (Op. at *31 n.93) (quoting *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 209 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007)), "even an opinion may rise to the level of misstatement of fact [on which a fraud claim may be based] when made by one with special or superior knowledge." *Aviation W. Charters, LLC v. Freer*, 2015 WL 5138285, at *6 (Del. Super. Ct. July 2, 2015) (distinguishing *Trenwick*) (internal quotation marks & citation omitted); *id.* at *7 ("[C]ompared to Plaintiff, Freer[,] [founder, owner, and President of the company] was in a position of superior knowledge to know whether the [company's] 2013 EBITDA was accurate."); *see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 116 (Del. 2006) (noting that an "estimate" or "opinion" can form the basis for a fraud claim where "it is the type of opinion that suggests the reasonable belief that it was based on facts known to the maker"). Furthermore, "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally." *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006) (quoting Ct. Ch. R. 9(b)). This means that "the circumstances that give rise to an inference of knowledge on the part of the pleader need not be pleaded with

particularity." *Fischbach*, 1989 WL 109406, at *5-6 (finding "conclusory allegations of knowledge [to be] sufficient" and noting that even under the stringent particularity requirement, plaintiffs' allegations raised the inference that defendant was aware of the alleged fraud).

In the Counterclaims, Tutor Perini alleged that, as President and CEO of Five Star, Segal caused Five Star to submit false assumptions regarding numerous projects for the purpose of overstating the Pre-Tax Profit calculations so that he would benefit from the inflated Earn-Out Payments. (A277 ¶ 2, A280 ¶ 11, A281 ¶¶ 14–15.) Tutor Perini need not allege knowledge with any more particularity. *See Abry Partners*, 891 A.2d at 1050; *Fischbach*, 1989 WL 109406, at *5-6. Based on these allegations, the Court of Chancery should have reasonably inferred on this pleadings-based Motion to Dismiss that, as President and CEO of Five Star, Segal was in a position of superior knowledge to know whether the information that he caused Five Star to provide to Tutor Perini was accurate. *See EMSI Acquisition, Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *6 (Del. Ch. May 3, 2017) (noting that in considering a motion to dismiss, "the Court must draw all reasonable inferences in favor of the non-moving party") (citation omitted).[12]

[12] In faulting Tutor Perini for failing to plead additional facts from information to which it "presumably" had access as the parent of Five Star, (Op. at 31), the trial court imposed a heightened pleading burden on Tutor Perini over and above Rule 9(b)'s particularity standard. This was error. Although the Counterclaims, as currently pled, satisfy Rule 9(b), Tutor Perini is also continuing to investigate the

CONCLUSION

For all of the foregoing reasons, the Court should reverse the judgment below.

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complete extent of Segal's fraud, which he hid from Tutor Perini, and the court's focus on the "particularity" requirement of Rule 9(b) and on Tutor Perini's access to information obscures the intent of the Rule. *See Gregg v. Rowles*, 1992 WL 364759, at *2 (Del. Ch. Dec. 2, 1992) ("[F]ocusing exclusively on the 'particularity' language of Rule 9(b) 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'") (alteration in original) (citation omitted); *see also Seiden v. Kaneko*, 2015 WL 7289338, at *12 (Del. Ch. Nov. 3, 2015) ("[W]hile particularized facts are generally required for fraud claims, [c]ourts must be sensitive to the fact that application of Rule 9(b) prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud.") (second alteration in original) (internal quotation marks & citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2018, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

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