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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

APPELLEES' ANSWERING BRIEF

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Kenneth J. Nachbar (#2067)
Lauren Neal Bennett (#5940)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
Attorneys for Appellees Greenstar IH Rep, LLC and Gary Segal

OF COUNSEL:

MINTZ & GOLD LLP
Ira Lee Sorkin
Amit Sondhi
600 Third Avenue, 25th Floor
New York, NY 10016
(212) 696-4848

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NATURE OF PROCEEDINGS

In the court below, Vice Chancellor Slights correctly applied Delaware law to interpret an unambiguous contract – a merger agreement – according to its plain terms. In doing so, Vice Chancellor Slights gave meaning to every provision of the contract, correctly determined that no ambiguity existed, and appropriately rejected Tutor Perini's request to imply terms that not only did not exist, but also curiously only benefited Tutor Perini. Vice Chancellor Slights adhered to the well-established rule under Delaware jurisprudence that, when a court is presented with an unambiguous contract and no material fact in dispute, judgment on the pleadings is the appropriate mechanism to enforce that agreement.

Tutor Perini nevertheless presses ahead with an appeal that is premised not only on misconstruing the underlying agreement, but also on misconstruing the trial court's opinion. Contrary to Tutor Perini's assertions, Vice Chancellor Slights *did not* find that provisions of the Agreement and Plan of Merger (the "Merger Agreement") conflicted with one another, *did not* enforce one provision at the expense of another, and did not acknowledge any relevant factual disputes.

The underlying Merger Agreement was executed in connection with the sale of Greenstar Services, Inc. ("Greenstar"), a holding company of specialty contractors, to Tutor Perini, a public company. The selling shareholders of

Greenstar appointed one shareholder representative ("IH Rep") to represent all shareholders in connection with, among other matters, collecting earn-out payments related to achieving certain profit targets post-acquisition.

The Merger Agreement requires Tutor Perini to prepare and submit Pre-Tax Profit Reports (defined below) to IH Rep on a yearly basis, from which certain earn-out consideration owed to IH Rep must be calculated and paid. The Merger Agreement provides that, absent timely objection by IH Rep, these computations "shall be binding" on all parties. In its Complaint, IH Rep alleges the Pre-Tax Profit (defined below) reported by Tutor Perini for the first four earn-out terms and, in its Answer, Tutor Perini admits to reporting the Pre-Tax Profit. The parties agree that IH Rep never objected to the Pre-Tax Profit. As such, the trial court simply enforced the unambiguous terms of the agreement by holding that Tutor Perini was required to pay IH Rep the very earn-out amounts based on the profit numbers that Tutor Perini itself reported, and which are now binding.

Each of Tutor Perini's arguments as to why the profits reported in the Pre-Tax Profit Reports are not binding is premised on misconstruing an unambiguous contract, or implying terms that contradict the agreement. *First*, Tutor Perini's central argument – that the Merger Agreement requires Pre-Tax Profit Reports to be "accurate" before Tutor Perini's earn-out obligations may be triggered – is diametrically opposed to the plain language in the agreement that

such reports "shall be binding" if IH Rep does not object within a thirty-day period. *Second*, Tutor Perini's back-up request that the Court should re-write the contract and "imply" that an "accuracy requirement" exists to trigger the earn-out payments, even though no such requirement is stated in the Merger Agreement, similarly fails because it is well-established under Delaware law that courts do not "imply" terms that contradict the plain language of the underlying contract. *Finally*, Tutor Perini's contention that a factual dispute regarding the accuracy of the Pre-Tax Profit precludes entry of judgment on the pleadings rests on the faulty presumption that Tutor Perini remains free at all times (and, in this case, years later) to challenge the accuracy of Pre-Tax Profit Reports it prepared. As the court below held, arguments concerning the accuracy of the reports are irrelevant because, pursuant to the parties' agreement, the reports are now binding.

What Tutor Perini actually seeks is a contractual re-write that gives it an unlimited remorse provision to object to its own report, at any time, on vague "accuracy" grounds, while IH Rep is bound by a thirty-day provision to accept the Pre-Tax Profit. Under Tutor Perini's interpretation, IH Rep is out of luck if the Pre-Tax Profit turns out to be understated, but Tutor Perini never has to pay if it is overstated. This is not the bargain the parties struck.

Further, the court below properly dismissed Tutor Perini's Counterclaims against Segal for failure to plead fraud with the requisite

particularity under Court of Chancery Rule 9(b). Tutor Perini's fraud claim amounts to nothing more than vague and conclusory allegations that fall far short of Rule 9(b)'s heightened pleading requirement. Likewise, Tutor Perini's assertion that Segal was aware of inaccurate information being supplied to Tutor Perini based solely on his position as CEO is unsupported by law or fact. Tutor Perini's thread-bare allegations of fraud fail to state a claim. Accordingly, the trial court's dismissal of the Counterclaims should be upheld.

SUMMARY OF ARGUMENT

1. Denied. The court below adhered to Delaware's well-established rule of contract interpretation—that an unambiguous contract should be interpreted according to its plain meaning—to find that Tutor Perini was contractually obligated to pay $19,380,646 in earn-out consideration to IH Rep. Giving full effect to the definitions in the Merger Agreement, as well as the Earn-Out Provision (defined below), the court below reasoned that the definition of Pre-Tax Profit does not negate or qualify the Merger Agreement's language that the Pre-Tax Profit Report and Pre-Tax Profit stated therein "shall be binding" on all parties if IH Rep does not object within thirty days. This interpretation effectuates the parties' intent to achieve finality. Further, although the Merger Agreement's plain language requires that the Pre-Tax Profit Report be prepared in accordance with GAAP, the accuracy of the report does not trigger the earn-out payment. Rather, the obligation to make the earn-out payment is triggered when the Pre-Tax Profit Report and the Pre-Tax Profit stated therein become binding, which occurs when either IH Rep expressly accepts the report, fails to object within thirty days, or an objection is lodged and the figure is determined by a Neutral Accountant (defined below). Thus, neither party can challenge the report's accuracy once it is binding. Moreover, the court below did not identify a conflict between any of the

provisions in the Merger Agreement, accurately concluding that the contract was unambiguous and susceptible to only one reasonable interpretation.

In addition, the court below did not err in declining to imply a term that requires the Pre-Tax Profit to be accurate in order to trigger Tutor Perini's earn-out obligations, even though the contract is clear that after a certain period of time, the Pre-Tax Profit is binding. Finally, the court below did not identify any factual disputes relating to the accuracy of the Pre-Tax Profit calculations that would preclude entry of judgment on the pleadings.

2. Denied. The court below did not err in dismissing Tutor Perini's Counterclaims against Segal for failure to plead fraud with the requisite particularity under Court of Chancery Rule 9(b). The Counterclaims do not fairly apprise Segal of the basis for the fraud claims against him in the manner that Rule 9(b) requires because they do not provide the "who, what, when, where and how" of the alleged fraud. Moreover, it is not reasonable to infer that because Segal was CEO of Five Star Electric Corporation ("Five Star"), and Five Star supplied allegedly inaccurate estimates to Tutor Perini, Segal – who is not alleged to be an accountant or an auditor – knew the information was inaccurate, or even that such estimates were knowable. Finally, the trial court's comment regarding Tutor Perini's informational advantage vis-à-vis other plaintiffs does not reflect application of a standard higher than Rule 9(b) and is not reversible error.

STATEMENT OF FACTS

A. The Parties Enter Into A Merger Agreement With An Earn-Out Provision.

On July 1, 2011, Tutor Perini acquired Greenstar and its three subsidiaries, including Five Star (the "Acquisition"). A9, ¶ 3; A43-125. The terms of the Acquisition were memorialized in a 70+ page Merger Agreement among Tutor Perini, Greenstar, Galaxy Merger, Inc. (the merger sub) and Plaintiff IH Rep, as the Interest Holder Representative. A11, ¶ 10; A43-125. Under the Merger Agreement, "Interest Holders" include all stockholders of Greenstar immediately prior to closing – of which Gary Segal is but one[1] – who are entitled to certain payments under the Merger Agreement, such as earn-out payments. A12-13, ¶¶ 15-16; A51, § 1.01; A56, § 1.01.

Section 2.14 of the Merger Agreement (the "Earn-Out Provision") requires Tutor Perini to make a yearly earn-out payment to IH Rep if certain profit thresholds are exceeded by Greenstar for any year during a five-year period following the Acquisition. A11, ¶ 12; A69, § 2.14. The Earn-Out Provision provides, in relevant part:

> For the period beginning on July 1, 2011, and ending on July 1, 2012, and each of the four (4) succeeding twelve-

[1] Segal is not the only Interest Holder who stands to benefit from payment of the owed earn-out consideration. *See* Op. 25 n.76 (noting that there are many Interest Holders with rights to the earn-out payments).

> 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) (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 ("Yearly Earn-Out Cap").

A69, § 2.14(a).

Although the Interest Holders are subject to a maximum $8,000,000 Yearly Earn-Out Cap, the Merger Agreement further provides that if a Yearly Earn-Out Payment exceeds the Yearly Earn-Out Cap – defined as "Yearly Excess" – the Interest Holders carry that Yearly Excess amount forward to a later year. A57, § 1.01; A69, § 2.14(a); A15, ¶ 25. If the Yearly Earn-Out Payment in a later year is less than the Yearly Earn-Out Cap – defined as "Yearly Shortfall" – the Interest Holders may apply Yearly Excess from a prior year to receive earn-out payments up to the Yearly Earn-Out Cap. A57, § 1.01; A69, § 2.14(a); A16, ¶ 27. The relevant portion of Section 2.14(a) that addresses Yearly Excess and Yearly Shortfall is as follows:

> If it is finally determined that a Yearly Shortfall has occurred, Parent shall pay to the Interest Holders . . . the Yearly Excess (if any) from any or all previous Earn-Out Years . . . in an amount equal to such Yearly Shortfall. If it is finally determined that a Yearly Excess has occurred, Parent shall pay to the Interest Holders . . . such Yearly Excess in an amount equal to the aggregate Yearly

> Shortfall from any previous Earn-Out Year (to the extent not already paid to the Interest Holders).

A69, § 2.14(a).

Finally, the parties agreed on how the Pre-Tax Profit for purposes of calculating the earn-out payment would be calculated: Tutor Perini would make the calculation, and IH Rep could object within 30 days. The parties agreed that, absent timely objection, Tutor Perini's calculations "shall be binding" upon all parties:

> Within ninety (90) days after each twelve-month period in the Earn-Out Term, Parent [Tutor Perini] shall in good faith prepare . . . and deliver to the Interest Holder Representative 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 the Interest Holder Representative, Stockholders and Parent*** upon the approval of such Pre-Tax Profit Report by the Interest Holder Representative or the failure of the Interest Holder Representative to object in writing within thirty (30) days after receipt thereof by the Interest Holder Representative.

A69-70, § 2.14(b) (emphasis added).

B. Tutor Perini Fails To Honor The Earn-Out Provision, And IH Rep Brings Claims For Breach Of Contract.

On November 7, 2016, Plaintiffs filed a Complaint, alleging that the Pre-Tax Profit Reports issued by Tutor Perini pursuant to Section 2.14(b) of the Merger Agreement reported the following Pre-Tax Profit:

Year	Amount
1	$70,440,184
2	$65,570,837
3	$31,564,617
4	$43,946,950

A17-19, ¶¶ 31-32, 34, 37.

On March 9, 2017, Tutor Perini filed its Answer, admitting that it issued these Pre-Tax Profit Reports and the Pre-Tax Profit for each of the first four Earn-Out Terms, respectively. A250-51, ¶¶ 31-32, 34, 37. Tutor Perini also admitted that, pursuant to the Merger Agreement, the "Interest Holders are entitled to 25% of Pre-Tax Profit that exceeds $17.5 million." A279, ¶ 8. As detailed below, the Complaint alleges that, based upon the Pre-Tax Profit provided by Tutor Perini, and applying the Merger Agreement's terms to those numbers, Plaintiff IH Rep is owed $19,380,646 in unpaid earn-out consideration.

1. The First Earn-Out Year.

As noted, it is undisputed that the Pre-Tax Profit Report prepared by Tutor Perini for the First Earn-Out Year reported $70,440,184 in Pre-Tax Profit. *See* A17, ¶ 31; A250, ¶ 31; Op. 7. The Yearly Earn-Out Payment was

$13,235,046,[2] but the Interest Holders were subject to the Yearly Earn-Out Cap, and thus only received $8,000,000 for the First Earn-Out Year, leaving $5,235,046 in Yearly Excess. A17, ¶ 31. The parties agree that the $8,000,000 Yearly Earn-Out Cap was paid to IH Rep for the First Earn-Out Year. A17, ¶ 31; A250, ¶ 31.

2. The Second Earn-Out Year.

It is undisputed that the Pre-Tax Profit Report prepared by Tutor Perini for the Second Earn-Out Year reported $65,570,837 in Pre-Tax Profit (A18, ¶ 32; A250, ¶ 32; Op. 7), which resulted in a Yearly Earn-Out Payment of $12,017,709. A18, ¶ 32. Once again, the Interest Holders were subject to the Yearly Earn-Out Cap, leaving $4,017,709 in Yearly Excess. *Id.* The parties agree that the $8,000,000 Yearly Earn-Out Cap was paid to IH Rep for the Second Earn-Out Year. A18, ¶ 32; A250, ¶ 32. The Complaint alleges that by the end of the first two Earn-Out Terms, the Interest Holders accumulated $9,252,755 in Yearly Excess. A18, ¶ 33.

3. The Third Earn-Out Year.

It is undisputed that the Pre-Tax Profit Report prepared by Tutor Perini for the Third Earn-Out Year reported $31,564,617 in Pre-Tax Profit. A18, ¶ 34; A251, ¶ 34; Op. 8. The Yearly Earn-Out Payment for the Third Earn-Out

[2] Pre-Tax Profit of $70,440,184 - $17,500,000 x .25 = $13,235,046. *See* A69, § 2.14(a).

Year was $3,516,154, but the Interest Holders were contractually permitted to apply a portion of the $9,252,755 in accumulated Yearly Excess ($4,483,846) to entitle them to a total of $8,000,000 for the Third Earn-Out Year. A19, ¶ 35.[3] Tutor Perini denies this allegation, in conclusory fashion, without any explanation. A251, ¶ 35. The Complaint alleges that Tutor Perini has not paid the $8,000,000 for the Third Earn-Out Year, in breach of the Merger Agreement (A19, ¶ 36), which Tutor Perini denies. A251, ¶ 36.

4. The Fourth Earn-Out Year.

It is undisputed that the Pre-Tax Profit Report prepared by Tutor Perini for the Fourth Earn-Out Year reported $43,946,950 in Pre-Tax Profit. A19, ¶ 37; A251, ¶ 37; Op. 8. Although the Yearly Earn-Out Payment for the Fourth Earn-Out Year was $6,611,737, the Interest Holders were again permitted to apply a portion of the $4,768,909 in accumulated Yearly Excess to the Fourth Earn-Out Year to satisfy the difference between the $6,611,737 and the Yearly Earn-Out Cap. *See* A19, ¶ 37. As such, the Interest Holders are entitled to another $8,000,000 for the Fourth Earn-Out Year. A19, ¶ 37; A19-20, ¶ 38.[4] Tutor Perini denies this claim. A251, ¶ 37; A251-52, ¶ 38. The Complaint alleges that Tutor

[3] The accrued Yearly Excess amount was then reduced to $4,768,909. A19, ¶ 35.

[4] The accrued Yearly Excess amount was then reduced to $3,380,646. A19-20, ¶ 38.

Perini has not paid the $8,000,000 for the Fourth Earn-Out Year, in breach of the Merger Agreement (A20, ¶ 39), which Tutor Perini denies. A252, ¶ 39.

5. The Fifth Earn-Out Year.

The Complaint alleges, and Tutor Perini admits, that it never issued a Pre-Tax Profit Report for the Fifth Earn-Out Year. A20, ¶ 40; A252, ¶ 40; Op. 8. The Complaint alleges that, at a minimum, the Interest Holders are entitled to $3,380,646 for the Fifth Earn-Out Year, reflecting the aggregate Yearly Excess amount carried over from the previous Earn-Out Years. A20, ¶ 41. Tutor Perini denies this allegation. A252, ¶ 41.

C. Tutor Perini Brings Counterclaims For Fraud And Offset Against Segal.

On March 9, 2017, Tutor Perini brought Counterclaims for fraud and offset against Segal. A276-84. Through conclusory allegations, Tutor Perini alleges that Segal "knowingly submitted false information to Tutor Perini," and that this false information purportedly "formed the basis for Tutor Perini's preparation of the Pre-Tax Profit Reports." A276-77, ¶ 1. Tutor Perini alleges that this "false information" consisted of "erroneous assumptions regarding certain project disputes" (A281, ¶ 14), but Tutor Perini does not allege what specific "erroneous assumptions" Segal provided, when or to whom he provided the information, why the assumptions were erroneous, or how Segal must have known the numbers he provided were false. Based upon its fraud counterclaim, Tutor

Perini seeks reimbursement for an unidentified portion of the earn-out amounts that Tutor Perini alleges Segal "improperly caused Tutor Perini to pay," as well as an "offset" against any further earn-out amounts that Tutor Perini owes to IH Rep. A280-83, ¶¶ 12, 20-23, 24.

D. The Court of Chancery Grants Judgment On The Pleadings In IH Rep's Favor On The Earn-Out Claims And Dismisses Tutor Perini's Counterclaims Against Segal.

On March 29, 2017, IH Rep brought a motion for judgment on the pleadings with respect to the breach of contract earn-out claims in the Complaint pursuant to Court of Chancery Rule 12(c) (the "JOTP" Motion").[5] A4. Also on March 29, Segal brought a motion to dismiss the Counterclaims pursuant to Court of Chancery Rules 12(b)(6) and 9(b) and 10 *Del. C.* § 8106 (the "Motion to Dismiss"). A4.

[5] These claims consist of Counts I, II and III of the Complaint. A28-31. The trial court previously issued a Memorandum Opinion on the declaratory judgment claims in the Complaint (Counts VI, VII and VIII), which related to the arbitrability of certain claims Tutor Perini brought against Segal in California. A5; A33-36. The California arbitration (which involves claims that Segal unequivocally denies and against which he is vigorously defending), is irrelevant for purposes of this appeal. Counts IV and V of the Complaint, which relate to Tutor Perini's failure to pay an indemnity holdback to IH Rep are also not at issue in this appeal; those claims are currently proceeding through discovery in the trial court with a trial scheduled for August 2018. A31-33.

After briefing and argument, on October 31, 2017, the trial court issued a Memorandum Opinion, granting the JOTP Motion and the Motion to Dismiss.[6] A2-3. A Final Order and Judgment was entered on November 15, 2017 pursuant to Court of Chancery Rule 54(b), and Tutor Perini filed a Notice of Appeal on November 30, 2017. A2.

[6] The trial court granted the Motion to Dismiss for failure "to satisfy the requirements of Rule 9(b)" and did not reach Segal's statute of limitations argument. Op. 32.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY GRANTED JUDGMENT ON THE PLEADINGS IN IH REP'S FAVOR ON THE EARN-OUT CLAIMS.

A. Question Presented

Whether the court below correctly held that, pursuant to the unambiguous, plain language of the Merger Agreement, because IH Rep did not object to the Pre-Tax Profit Reports and the Pre-Tax Profits stated therein, both are now binding, thus obligating Tutor Perini to pay the outstanding earn-out consideration to IH Rep.

B. Scope of Review

An appeal of the trial court's grant of a motion for judgment on the pleadings presents a question of law, which this Court reviews *de novo*. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). This Court reviews questions of contract interpretation *de novo*. *GMG Capital Invest., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of Argument

1. The Court of Chancery Correctly Interpreted The Merger Agreement

a. The Merger Agreement Is Unambiguous And Should Be Enforced According To Its Plain Terms.

"A party is entitled to judgment on the pleadings when, accepting the well pleaded facts admitted in the Answer to be true, there is no material fact in dispute and the moving party is entitled to judgment under the law." *Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch.) (citation omitted), *aff'd*, 597 A.2d 419 (Del. 1989). When "an unambiguous contract is before the Court, judgment on the pleadings is the appropriate mechanism by which to enforce the agreement." *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2013 WL 5787958, at *3 (Del. Ch. Oct. 25, 2013).

The purpose of this standard is to effectuate the parties' intent. *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). In effectuating the parties' intent, courts are constrained by the plain meaning of the parties' words. *See id.* at 739. Where the plain language of a contract is unambiguous, a court must construe the contract in accordance with that plain meaning. *See id.* 739. Sophisticated parties are presumed to understand the consequences of the contractual language they have chosen. *See Huatuco v.*

Satellite Healthcare & Satellite Dialysis of Tracy, 2013 WL 6460898, at *6, (Del. Ch. Dec. 9, 2013).

The Merger Agreement sets forth the terms of Tutor Perini's acquisition of Greenstar and its subsidiaries, including the earn-out payments due to the Interest Holders. Earn-outs are common creatures of merger agreements and asset purchase agreements, in each instance giving rise to payments to stockholders. *See, e.g.*, *Airborne Health, Inc. v. Squid Soap, LP,* 984 A.2d 126, 132 (Del. 2009) ("What an earn-out (and particularly a large one) typically reflects is disagreement over the value of the business that is bridged when the seller trades the certainty of less cash at closing for the prospect of more cash over time."). The Interests Holders appointed IH Rep to prosecute any action for Earn-Out Payments.

Vice Chancellor Slights correctly concluded that Sections 2.14(a) and 2.14(b) of the Merger Agreement were unambiguous and, he therefore interpreted those provisions in accordance with their plain meaning. Op. 17-18; *see also* B17-21, 49-64. Section 2.14(a) unambiguously delineates how the Earn-Out Payment is to be calculated for each year within the five-year period:

> 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 Interest Holders shall be entitled to earn an amount equal to 25% of the Pre-Tax Profit that exceeds Seventeen

> Million Five Hundred Thousand Dollars ($17,500,000.00) (the "Yearly Earn-Out Payment").

A69, § 2.14(a).

As Vice Chancellor Slights accurately explained, the Yearly Earn-Out Payment is expressly dependent on the calculation of Pre-Tax Profit, a term defined in the "Definitions Provision" section of the Merger Agreement. *See* Op. 17 (citing A54-55, § 1.01). Specifically, the Merger Agreement defines Pre-Tax Profit 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.

Section 2.14(b) of the Merger Agreement requires Tutor Perini to prepare a "Pre-Tax Profit Report" which sets forth the Pre-Tax Profit for each Earn-Out Term.

> Within ninety (90) days after each twelve-month period in the Earn-Out Term, Parent [Tutor Perini] shall in good faith prepare . . . and deliver to the Interest Holder Representative a report setting forth the Pre-Tax Profit for such period (the 'Pre-Tax Profit Report'), together with worksheets and data that support the determination of the Pre-Tax Profit for such period and any other information that [IH Rep] may reasonably request in order to verify the Pre-Tax Profit.

A70, § 2.14(b). Section 2.14(b) then unambiguously provides that the Pre-Tax Profit Report and Pre-Tax Profit become binding on the parties if IH Rep does not object to the Pre-Tax Profit Report within thirty days of receiving it:

> The Pre-Tax Profit Report and the Pre-Tax Profit for the twelve-month period reflected thereon, ***shall be binding upon the Interest Holder Representative,*** *Stockholders and Parent* upon the approval of such Pre-Tax Profit Report by the Interest Holder Representative ***or the failure of the Interest Holder Representative to object in writing within thirty (30) days after receipt thereof by the Interest Holder Representative.***

A70, § 2.14(b) (emphasis added).

The plain terms of the Merger Agreement mandate that if IH Rep does not object to the Pre-Tax Profit Report within thirty days of its receipt, the Pre-Tax Profit Report and Pre-Tax Profit reflected in it "shall be binding" on all parties. *Id.* The Merger Agreement's statement that the Pre-Tax Profit "shall be binding" means exactly that – the number is binding on both parties.

Tutor Perini admits that it did, in fact, issue Pre-Tax Profit Reports for each of the first four Earn-Out Terms in the amounts alleged by IH Rep. A250-251, ¶¶ 31, 32, 34, 37; *see supra* pp. 9-13. IH Rep further alleges that although Tutor Perini paid the Yearly Earn-Out Payment for the first two Earn-Out Terms, Tutor Perini has failed to make payment for the last two Earn-Out Terms. A17-20, ¶¶ 31, 32, 39, 42. IH Rep alleges that Tutor Perini owes it $19,380,646 in unpaid Yearly Earn-Out Payments, plus interest. *See* A36-37.

The parties agree that IH Rep never objected to a single Pre-Tax Profit Report. *See* Op. 14 n.45. Thus, as Vice Chancellor Slights correctly concluded, "reading Section 2.14(a) and Section 2.14(b) together, the terms unambiguously provide that the Pre-Tax Profits Tutor Perini disclosed in its Pre-Tax Profit Reports, having not been disputed, are binding upon ***both*** IH Rep and Tutor Perini and the required Earn-Out Payments must be calculated and paid from these amounts." Op. 18 (emphasis in original).

Contrary to Tutor Perini's claim that Vice Chancellor Slights "fixated" on the dispute resolution provision to the exclusion of other provisions (OB 16), Vice Chancellor Slights merely cited the extra-judicial and streamlined nature of the dispute resolution provision as evidence of the parties' intent to avoid protracted litigation. *See* Op. at 17-18 ("At Section 2.14(b), the parties evidenced their intent to streamline the Earn-Out Payments by agreeing to a process by which they would settle earn-out related disputes in an expedited and extra-judicial manner."). In furtherance of this objective, the Merger Agreement provides that, in the absence of objection, the Pre-Tax Profit Report becomes binding in 30 days, and if IH Rep objects to the Pre-Tax Profit Report, a Neutral Accountant must be engaged within 45 days of IH Rep's receipt of the report and then make a binding determination as to the correct Pre-Tax Profit within 10 days of being appointed. A70, § 2.14(b); *see also* A67, § 2.13(c) (defining "Neutral Accountant" as "an

independent accounting firm mutually satisfactory to Parent and the Interest Holder Representative").

As Vice Chancellor Slights found, Section 2.14(b) "serves both parties' interests." *See* Op. 20 n.60. Tutor Perini is protected from protracted litigation to the extent IH Rep disagrees with Tutor Perini's calculations (the streamlined arbitration process) or fails to raise a timely objection (no litigation at all). *Id.* IH Rep, as Vice Chancellor Slights found, "is meant to be protected from precisely what Tutor Perini is attempting to do here—mount a challenge to its own calculation of Pre-Tax Profits and then, on that basis, delay the payment of substantial earn-out consideration." *Id.* As such, construing the Merger Agreement in accordance with its plain meaning enforces the benefit of the parties' bargain, as mandated by Delaware law. *See Lorillard*, 903 A.2d at 739.

b. Tutor Perini's Creation Of An "Accuracy Requirement" To Trigger Payment of the Earn-Out Is Contrary To The Merger Agreement's Plain Language And Should Not Be Credited.

In its attempt to re-write the Merger Agreement, Tutor Perini spills much ink arguing that the Earn-Out Provision contains an "accuracy requirement" that acts as the sole trigger for Tutor Perini's obligation to make the earn-out payment. *See* OB 20-23. According to Tutor Perini's re-write, Tutor Perini is not required to

pay the earn-out if Tutor Perini believes the reports are inaccurate, regardless of how much time has elapsed since the Pre-Tax Profit Reports were issued.

As a threshold matter, IH Rep does not dispute that the Merger Agreement requires the Pre-Tax Profit to be prepared accurately *by Tutor Perini*. *See* A54, § 1.01. The Merger Agreement then provides, however, for a *definitive*, thirty-day timeframe during which IH Rep may contest the accuracy of the Pre-Tax Profit Report. *See* A69-70, § 2.14 (b). If the thirty-day period expires without objection from IH Rep, Section 2.14(b) unequivocally states that the Pre-Tax Profit Report and the Pre-Tax Profit "*shall be binding*" upon the parties, and not subject to further challenge. A70, § 2.14(b) (emphasis added). Thus, Tutor Perini's contention that it can invoke its proposed "accuracy requirement" to challenge the reports at any time is contrary to the Merger Agreement's plain language.[7]

[7] Tellingly, on appeal, Tutor Perini has completely shifted its argument. Tutor Perini's central argument to the Court of Chancery was that it was excused from performing under the Merger Agreement due to Segal's fraud. A367-77. Tutor Perini has now completely abandoned this argument. As Vice Chancellor Slights held, the conduct of a non-party to the Merger Agreement (such as Segal) would not alter Tutor Perini's contractual obligation to pay IH Rep. Op. 25 n.76, n.80. If anything, Tutor Perini could pursue a separate claim against that third party (if they could plead it).

(i) There Is No "Accuracy Requirement" To Trigger Tutor Perini's Contractual Obligation To Pay The Binding Earn-Out.

Tutor Perini essentially argues that the "shall be binding" language of the Merger Agreement does not actually mean "shall be binding" if Tutor Perini alleges that the Pre-Tax Profit is inaccurate. Although the Definitions Provision requires that the Pre-Tax Profit be calculated in accordance with GAAP, as Vice Chancellor Slights stated, "[n]othing in the Definitions Section reasonably can be read to negate or qualify Section 2.14's mandate that if IH Rep does not object within thirty days of receiving the Pre-Tax Profit Report, the report and the Pre-Tax Profit stated therein *are binding* on all parties." Op. 19 (emphasis added). Although the Definitions Provision defines *how* Tutor Perini must calculate Pre-Tax Profit, it *does not* affect the parties' agreement to be bound by the Pre-Tax Profit if IH Rep does not object in thirty days. To conclude otherwise would nullify the entire timing mechanism and the "shall be binding" language—a result that this Court must avoid. *See Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007) ("When interpreting contracts, this Court gives meaning to every word in the agreement and avoids interpretations that would result in 'superfluous verbiage.'").

Further, the cases cited by Tutor Perini to support its contention that "the definition of Pre-Tax Profit and its accuracy requirement" are incorporated

into the Earn-Out Provision are actually consistent with the trial court's interpretation of the Merger Agreement. *See* OB 20. In both *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 2017 WL 6422337 (Del. Dec 18, 2017) and *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912 (Del. 2017), the Court replaced defined terms in various contractual provisions with their full definition. *See Exelon*, 2017 WL 6422337 at *4-5; *Chicago*, 166 A.3d at 928-30. Applying this principle here, Tutor Perini argues that replacing the defined term "Pre-Tax Profit" as it appears in the Earn-Out Provision with its full definition demonstrates that inaccurate Pre-Tax Profit Reports cannot form the basis of the Yearly Earn-Out Payments. *See* OB 20-21. Tutor Perini is wrong. By replacing "Pre-Tax Profit" with its full definition, as shown in brackets below, the Earn-Out Provision would read, in pertinent part, as follows:

> The Pre-Tax Profit Report and [the profit 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 . . .] for the twelve-month period reflected thereon, *shall be binding* upon the Interest Holder Representative, Stockholders, and Parent upon the approval of such Pre-Tax Profit Report by the Interest Holder Representative or the failure of the Interest Holder Representative to object in writing within thirty (30) days after receipt thereof by the Interest Holder Representative.

See A69-70, § 2.14(b) (emphasis added); A54, § 1.01.

As the above quote demonstrates, incorporating the definition of Pre-Tax Profit into the Earn-Out provision does not alter the Merger Agreement's plain meaning that the Pre-Tax Profit Report and the Pre-Tax Profit reported therein "shall be binding" if IH Rep does not object within thirty days of receipt.

(ii) The "Dispute Resolution Process" May Only Be Triggered By IH Rep Because It Is Nonsensical That Tutor Perini Would Object To Its Own Report.

Tutor Perini's complaint that the "dispute resolution process" permits only IH Rep to object to the Pre-Tax Profit Report, leaving Tutor Perini with no recourse to challenge the report's accuracy, is meritless. OB 24. Tutor Perini's grievance is of its own making.

The parties struck a simple bargain—Tutor Perini would prepare the Pre-Tax Profit Report, and if IH Rep did not approve, it could object and commence an extra-judicial process to quickly resolve the dispute. The detailed process for compiling and submitting the Pre-Tax Profit Report and the Pre-Tax Profit demonstrates that this report was not haphazardly prepared. Indeed, Section 2.14(b) requires Tutor Perini to include with the Pre-Tax Profit Report "worksheets and data that support the determination of the Pre-Tax Profit." A69-70, § 2.14(b). The "dispute resolution process" identifies a definitive, thirty-day timeline within which the accuracy of the Pre-Tax Profit can be challenged. *Id.* Because Tutor Perini had the opportunity to prepare the Pre-Tax Profit Report and calculate the

Pre-Tax Profit, it is not unfair or inequitable that only IH Rep possesses the right to object to the Pre-Tax Profit Report or the Pre-Tax Profit.

What Tutor Perini actually seeks is to re-write the Merger Agreement to give it an unlimited "remorse" provision to object to its own Pre-Tax Profit Report at any time if it later wishes to challenge the Pre-Tax Profit as inaccurate. Meanwhile, IH Rep would remain bound by the thirty-day provision in the Merger Agreement. In other words, IH Rep is out of luck if the Pre-Tax Profit is understated, but Tutor Perini purportedly *always* has recourse if the figure is overstated. This is not the bargain the parties struck, and not what the Merger Agreement provides.

(iii) Tutor Perini Misrepresents The Court Of Chancery's Decision In Order To Create Ambiguity Or Conflict When None Exists.

Tutor Perini contends that the lower court identified a conflict between the Definitions Provision and the Earn-Out Provision. *See* OB 14-17. Faced with this conflict, Tutor Perini argues, the trial court should have reconciled these "conflicting" provisions, but instead erred by giving effect only to the Earn-Out Provision and disregarding the Definitions Provision. *Id.* at 15-17. Alternatively, according to Tutor Perini, once the trial court identified this "conflict," it could have determined that the Merger Agreement was susceptible to

more than one reasonable interpretation and was therefore ambiguous. *Id*. at 18. Tutor Perini's argument is a mischaracterization of the trial court's opinion.

The court below never determined that there was a conflict between the Definitions Provision and the Earn-Out Provision. As discussed in Sections I(C)(1)(a)-(b) *supra*, the court below gave full effect to both the Definitions Provision in Section 1.01 and the Earn-Out Provision in Section 2.14 as required by Delaware law. *See Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002). Based on the unambiguous, plain language of the Merger Agreement, the court below determined that the Definitions Provision defines *how* Tutor Perini must calculate "Pre-Tax Profit" (*see* Op. 17 n.53, & 19), while Section 2.14 mandates that if IH Rep does not object to the Pre-Tax Profit within thirty days of receiving a Pre-Tax Profit Report, the report and the Pre-Tax Profit become binding on all parties. *See* Op. 17 n.53 & 18-19. Thus, the court below did not find a conflict between the provisions, but rather gave effect to both provisions, ultimately finding that based on the Merger Agreement's plain meaning, Tutor Perini was bound by the Pre-Tax Profit Report and the Pre-Tax Profit stated therein.

Further, Tutor Perini's attempt to create ambiguity in the Merger Agreement where none exists appropriately fails. It is well-settled that a contract is not rendered ambiguous simply because the parties do not agree on its proper

construction. *See Lorillard*, 903 A.2d at 739. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more meanings. *See id.* at 739. "Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty." *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

Tutor Perini's claim that one could "interpret" a pre-requisite "accuracy requirement" that must be met to trigger the earn-out obligation is simply wrong. The Merger Agreement is clear that Tutor Perini's obligation to pay the earn-out is triggered when it provides the Pre-Tax Profit Report and Pre-Tax Profit to IH Rep, and IH Rep either expressly approves the report, or fails to object to it within thirty days. A69-70, § 2.14(b). Tutor Perini's interpretation renders Section 2.14(b)'s "shall be binding" language superfluous. *See Seidensticker*, 2007 WL 4054473, at *3. As Vice Chancellor Slights stated,

> Tutor Perini's construction of Section 2.14 would allow it to avoid the detailed process set forth in that provision, and deprive IH Rep of its right to Earn-Out Payments, even in circumstances where Tutor Perini's own auditors or in-house accountants received accurate inputs but still failed to prepare GAAP compliant financials, and then relied upon those financials to create Pre-Tax Profits. That construction is not reasonable, as it finds no support in the unambiguous language and earn-out scheme set forth in the Merger Agreement.

Op. 19 n.59.

Tutor Perini relies exclusively on *Ballenger v. Applied Digital Solutions, Inc.*, 2002 WL 749162 (Del. Ch. Apr. 24, 2002), to support its interpretation of the Merger Agreement. As the court below found, *Ballenger* is distinguishable. *See* Op. 22-23 n.70. In *Ballenger*, Applied Digital acquired Compec. *See* 2002 WL 749162 at *1. Pursuant to the parties' merger agreement, Applied Digital was required to calculate earn-out financials and pay an earn-out, if applicable, by the date provided in the agreement. *Id*. at *2. Applied Digital did not make the required calculation or pay the earn-out by the deadline, claiming that it learned of accounting irregularities in Compec's books and that Compec's management prevented it from accessing information necessary to verify the financial statements by the contract's due date. *Id.* at *3. Stockholder representatives who sued for the earn-out payment moved for partial summary judgment, arguing that there was no factual dispute that Applied Digital breached its contractual obligation to calculate and pay the earn-out. *Id.* at *1, 4. The court below determined that a question of fact remained as to whether, given Applied Digital's inability to access the necessary financial information, Applied Digital had fulfilled its "contractual obligation to act with diligence to produce the required Earnout Financials." *See id.* at *5. As such, the court denied the motion for summary judgment. *Id.* at *5, 13.

As Vice Chancellor Slights found, *Ballenger* is inapplicable here. First, there is no factual dispute that Tutor Perini was required to produce the Pre-Tax Profit Reports and, for all but the final year, actually produced those reports containing the Pre-Tax Profits alleged in the Complaint. Simply put, there was no factual issue for the court below to determine, and none for this Court to review on appeal.

Second, Vice Chancellor Slights reasoned that because Tutor Perini's reports were prepared with information that Tutor Perini or its affiliates controlled, unlike *Ballenger*, there is no issue regarding access to information. Op. 22-23 n.70. Tellingly, Tutor Perini does not allege that it was hindered from accessing the information it needed to calculate the earn-out. Finally, although in *Ballenger*, Applied Digital learned of accounting irregularities prior to the earn-out financials being due, here, Tutor Perini did not even dispute the reports' accuracy until nearly two and a half years after it issued its final report (and, curiously, only after it was sued by IH Rep for payment). A276-83.

2. The Court of Chancery Correctly Refused to Interpret The Merger Agreement As Implicitly Imposing An Accuracy Requirement After the Pre-Tax Profit Reports Are Binding.

a. The Court of Chancery Correctly Refused To Engage In Gap-Filling As There Is No Gap To Fill Given The Merger Agreement's Unambiguous Language.

Tutor Perini asserts that the Merger Agreement contains a gap to the extent that it does not expressly require the Pre-Tax Profit to be free from material inaccuracies prior to Tutor Perini actually paying the earn-out. OB 32. In support of its proposition that a gap be found, Tutor Perini contends that because Pre-Tax Profit is explicitly defined in the Merger Agreement as being "calculated . . . based upon financial statements prepared in accordance with GAAP consistently applied" (A54, parentheticals omitted), and because GAAP requires that statements be free of material inaccuracies, therefore, a Pre-Tax Profit Report containing "material inaccuracies" in its Pre-Tax Profit "does not trigger Tutor Perini's earn-out obligations." OB 33. Tutor Perini's argument is premised on either ignoring or excising Section 2.14(b)'s requirement that the Pre-Tax Profit Reports and the Pre-Tax Profit stated therein "shall be binding" on the parties if IH Rep does not object within the thirty-day window. A69-70, § 2.14(b). The "shall be binding" language is not qualified by anything in the Merger Agreement, reflecting the parties' clear

intent to quickly determine and settle the Earn-Out Payments. This unequivocal language – not Tutor Perini's "gap filling" exercise as to what should have been – controls. *See Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005).

After concluding that the Merger Agreement was unambiguous, the court below correctly ruled that the contract contained "no gaps to fill here." Op. 22. "Had the parties intended to allow Tutor Perini to withhold Earn-Out Payments whenever it believed it had calculated Pre-Tax Profits based on inaccurate information, they easily could (and surely would) have provided such language as part of the bespoke process they agreed to in Section 2.14." *Id.* The parties did not.

b. Implying the Accuracy Term In The Manner That Tutor Perini Advocates Would Render Section 2.14(b)'s Contractual Language Meaningless, A Consequence This Court Must Avoid.

Unsurprisingly, Delaware courts are generally loathe to invoke the implied covenant in circumstances, such as this, where sophisticated parties engaged in arms-length bargaining and negotiated a detailed document whose plain language clearly bars the very issue one of the parties now seeks to litigate. "The implied covenant only applies where a contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not

contradict, the purposes reflected in the express language of the contract." *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 770 (Del. Ch.), *aff'd*, 976 A.2d 170 (Del. 2009). "[B]ecause the implied covenant is, by definition, implied, and because it protects the spirit of the agreement rather than the form, it cannot be invoked where the contract itself expressly covers the subject at issue." *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *16 (Del. Ch. Nov. 17, 2014) (citing *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *10 (Del. Ch. May 7, 2008)).

In declining Tutor Perini's invitation to rewrite the Merger Agreement, Vice Chancellor Slights correctly concluded that the parties' intent to "impose a definitive timeline within which the accuracy of the Pre-Tax Profit, as presented in the Pre-Tax Profit Report, could be challenged" was plainly evident from the language of Section 2.14's "bespoke" process. Op. 22. Implying the accuracy term in the manner Tutor Perini advocates would contradict the text of the agreement. Not only does Tutor Perini's approach strip Section 2.14(b)'s procedure of all meaning by reducing the "shall be binding" language to a nullity, but it also ignores the parties' intent in crafting Section 2.14(b) to avoid protracted litigation of exactly the kind pending before this Court. *See* Op. 20 n.60.

Despite Tutor Perini's meritless contention that the accuracy of the Pre-Tax Profit Report "was so fundamental that they did not need to negotiate

about those expectations" (OB 32-33), the plain text of the agreement militates against that argument. The parties addressed this very issue when they contracted to have "binding" Pre-Tax Profit Reports, such that both sides waive any claim to challenge the Reports' accuracy if IH Rep raises no objection. "The fact that the Court of Chancery's strict reading of an unambiguous agreement is undesirable to [Tutor Perini] does not make that reading unreasonable or arbitrary." *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 994 (Del. 1998). Simply put, the phrase "shall be binding" means exactly that, without needing to divine what one party "must have" been thinking.

3. Because The Pre-Tax Profit Figures Contained Within the Pre-Tax Profit Reports Are Binding, The Purported Factual Dispute Tutor Perini Seeks To Create Does Not Alter The Analysis.

Tutor Perini's contention that "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" (*see* OB 35) is incorrect, as the record below demonstrates. Op. 10. Rather, the trial court simply noted that *if* the Merger Agreement imposed a condition that the Pre-Tax Profit Reports were only binding upon the parties *if* accurate, then a factual dispute as to their accuracy could prevent entry of judgment on the pleadings. *Id*. Conversely, however, the Court noted in the same

breath that it found no such requirement in the Merger Agreement, "meaning the parties did not bargain for an accuracy condition." *Id*.

A review of the undisputed facts in the record should lead this Court to the same conclusion. Per Tutor Perini's own admission, the Merger Agreement is a valid contract between IH Rep and Tutor Perini. A262; *see also* Op. 26, n.80. Tutor Perini admits that it prepared Pre-Tax Profit Reports for the first four Earn-Out Terms and that those reports contained the Pre-Tax Profit alleged in the Complaint. A250-51. IH Rep never objected to the Pre-Tax Profit Reports or the Pre-Tax Profit contained therein. Accordingly, the Pre-Tax Profits are binding on IH Rep and Tutor Perini. A69-70. These are the only facts that matter.

Moreover, Tutor Perini's attempt to create a factual dispute is hardly credible given that its earliest objection to the accuracy of the Pre-Tax Profit occurred nearly two-and-a-half years after its final Pre-Tax Profit Report was issued to IH Rep:

Earn-Out Term	**Binding Date**	**First Objection Date**
July 1, 2013 – June 30, 2014	November 6, 2014	March 9, 2017
July 1, 2014 – June 30, 2015	December 2, 2015	March 9, 2017
July 1, 2015 – June 30, 2016	November 4, 2016	March 9, 2017

See A250-52; *see also* A276-77, ¶¶ 1-2, A279-83, ¶¶ 9-24. This is not the only sign that Tutor Perini is manufacturing a factual dispute. For example, Tutor Perini's 10-K filings for the years 2012 to 2017 make no mention of any

restatement of profit related to a fraud at Five Star. In fact, the issue of accuracy was only raised *after* Tutor Perini was sued for failing to make the Earn-Out Payments. Tutor Perini still has not identified what the purported "accurate" Pre-Tax Profit may be, only telling the lower court in passing that it still "continues to investigate." *See* OB 41 n.12; A399.

Despite Tutor Perini's claim that it is "undisputed by the parties" that there is a dispute regarding the accuracy of the Pre-Tax Profit (*see* OB 35), IH Rep never conceded that position. Rather, IH Rep understands that the window for disputing the Pre-Tax Profit has long since elapsed, and IH Rep will abide by the bargain it struck. *See* A70, § 2.14(b). The only matter before this Court concerns Tutor Perini's failure to comply with the terms of the Merger Agreement in fulfilling its Earn-Out obligations, as to which there is no dispute of material fact.

II. THE COURT OF CHANCERY PROPERLY DISMISSED TUTOR PERINI'S COUNTERCLAIMS AGAINST SEGAL FOR FAILURE TO PLEAD FRAUD WITH THE REQUISITE PARTICULARITY UNDER COURT OF CHANCERY RULE 9(b).

A. Question Presented

Whether the trial court properly dismissed Tutor Perini's Counterclaims against Segal for failure to plead fraud with the requisite particularity under Court of Chancery Rule 9(b).

B. Scope of Review

The trial court's decision to grant a motion to dismiss is reviewed by this Court *de novo*. *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013).

C. Merits of Argument

To state a claim for fraud, "a plaintiff needs to allege: (1) that defendant made a false representation, usually one of fact; (2) with the knowledge or belief that the representation was false, or with reckless indifference to the truth; (3) with an intent to induce the plaintiff to act or refrain from action; (4) that plaintiff's action or inaction was taken in justifiable reliance on the representation; and (5) damage to the plaintiff as a result of her reliance on the representation." *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *6 (Del. Ch. Jan. 30, 2015) (citation and quotation marks omitted). Under Rule 9(b), the elements of a fraud claim must be pled with particularity, although "malice, intent,

knowledge and other condition of mind of a person may be averred generally." Ct. Ch. R. 9(b). Thus, "[t]o satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations." *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006). As detailed extensively in Segal's briefing in the court below (B21-30, 64-72), and as the court below correctly held, Tutor Perini's Counterclaims fail to meet this well-established standard.

In support of this portion of its appeal, Tutor Perini makes three arguments. First, Tutor Perini argues generally that it "was not required to allege the granular details of Segal's misconduct" but only "sufficient facts to fairly apprise Segal of the basis for its claims." OB 38. Tutor Perini then spends nearly two pages (OB 38-39) summarizing *Kahn Brothers & Co. Profit Sharing Plan & Trust v. Fischbach Corp.*, 1989 WL 109406 (Del. Ch. Sept. 19, 1989),[8] concluding that "[in] the instance case, as in *Fischbach*, Tutor Perini sufficiently alleged the circumstances surrounding the alleged fraud so as to put Segal on notice of the

[8] In the other case that Tutor Perini cites in passing, *Airborne Health, Inc. v. Squid Soap LP*, 984 A.2d 126, 142 (Del. Ch. 2009), the Court of Chancery found that the fraud claims at issue failed to meet the Rule 9(b) standard because – as here – they were supported only by "generalized allegations" (*id.* at 142) and failed to provide a "level of detail, which a plaintiff who actually was defrauded should be able to provide." *Id.* at 143.

misconduct underlying the Counterclaims." OB 39 (citing *Fischbach*, 1989 WL 109406, at *4-5).

But that is not the standard that *Fischbach* articulated, and to accept it would conflate the general notice pleading standard with the heightened pleading standard of Rule 9(b), rendering the latter meaningless. In fact, *Fischbach* stated that allegations are sufficient under Rule 9(b) only if they "'place defendants on notice of the ***precise*** misconduct with which they are charged.'" *Id.* at *4 (citation omitted and emphasis added). As Chancellor Allen explained:

> Rule 9 constitutes an exception to this general approach [of notice pleading]. It requires, with respect to the subjects it treats, some greater degree of specificity in pleading. The rule gives to defendants a right to insist that the circumstances constituting the alleged fraud be specified. Defendants are not required to be satisfied with mere notice and are not relegated to discovery mechanisms to understand the circumstances constituting the wrong when fraud is charged. Why this should be so has been commented upon by many courts. . . . In general, those commentators seem to concur that, with respect to "fraud," the seriousness of the allegations with respect to personal reputation and the risk of strike suits account for this requirement to plead the "circumstances" constituting fraud.

Id. at *4 (citation omitted).

The fraud claim here does not meet this standard, unlike the fraud claim in *Fischbach*, which "***clearly*** place[d] defendants on notice ***not vaguely or generally*** but of the ***precise*** misconduct with which they [we]re charged. *Id.* at *5

(emphasis added).[9] Here, Tutor Perini alleges that "Segal caused Five Star to make erroneous assumptions regarding certain project disputes that resulted in the misstatement of the Pre-Tax Profit Reports prepared by Tutor Perini for the purpose of calculating Yearly Earn-Out Payments." A281, ¶ 14. But Tutor Perini fails to allege which assumptions were erroneous, how the assumptions were erroneous, when, where and to whom Segal provided the assumptions, what Segal's role was in preparing the assumptions or how Segal knew the assumptions were erroneous – far from the precision required by Rule 9(b). *See* Op. 29-30.

Second, Tutor Perini argues that its "fraud allegations allow a reasonable inference that Segal was aware that the information he provided to Five Star was false" (OB 40) because Segal was "President and CEO of Five Star" and thus "in a position of superior knowledge to know whether the information that he caused Five Star to provide Tutor Perini was accurate." *Id.* at 41. The trial court "reject[ed] Tutor Perini's *res ipsa loquitor*-like argument that because Segal was CEO of Five Star, and Five Star supplied 'inaccurate' information to Tutor Perini, Segal must have known that the information was inaccurate" (Op. at 31 n.93), and this Court should too.

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[9] Moreover, *Fischbach*, which primarily concerned a motion for leave to file a second amended complaint in an action brought pursuant to 8 *Del. C.* § 225, is not factually analogous.

In its Counterclaims, Tutor Perini does not allege how a projection about what is inherently an estimate – the ability to collect on a project dispute – is "knowable," and even if it is, how Segal knew or should have known that the assumptions were false. To start, the premise of Tutor Perini's fraud claim – that Segal made "erroneous assumptions regarding certain project disputes" (A281, ¶ 14) – does not even state a fraud claim because estimations or projections regarding future potential revenue are generally not actionable under Delaware law (even if they turn out to be wrong). *See, e.g.*, *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 209 (Del. Ch. Aug. 10, 2006) *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007) (Table); *see also* Op. 31 n.93. Moreover, Tutor Perini never alleges facts that Segal – who has no alleged accounting background and is not alleged to have acted as Five Star's accountant or auditor – had special or superior knowledge regarding the reporting of Five Star's ability to collect on project disputes.[10]

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[10] The cases that Tutor Perini cites on this point are inapposite. In *Aviation West Charters, LLC v. Freer*, the Superior Court found that the representation at issue – the inflation of 2013 A/R – was "a statement of past fact—not one of opinion or future conduct." 2015 WL 5138285, *7 (Del. Ch. July 2, 2015). In addition, unlike here, the plaintiff in *Aviation West* "detail[ed] [the plaintiff's] involvement in preparing the 2013 Financial Statements" in 24 paragraphs of its complaint and "identifie[d] specific improper accounting practices in the 2013 Financial Statements." *Id.* Moreover, in *Wal-Mart Stores, Inc. v. AIG Life Insurance Co.*, this Court considered a claim for equitable fraud, which, as the Court noted, "differs (Continued . . .)

Further, although "knowledge . . . may be averred generally" (Ct. Ch. R. 9(b)), "[t]o say Defendant knew or should have known is not adequate." *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Tech. Inc.*, 854 A.2d 121, 146–47 (Del. Ch. 2004) (citation and quotation marks omitted); *see also Trenwick*, 906 A.2d at 208 ("[W]here pleading a claim of fraud has at its core the charge that the defendant knew something, there must, at least, be sufficient well-pled facts from which it can reasonably be inferred that this 'something' was knowable and that the defendant was in a position to know it."). Here, Tutor Perini does just that by wholly failing to allege the level of Segal's involvement in preparing the assumptions regarding project disputes or the financial statements upon which the Pre-Tax Profit is based (*e.g.*, how Segal prepared the assumptions, whether he consulted with internal or external accountants, who was ultimately responsible for signing off on the assumptions, whether the assumptions deviated from GAAP, etc.). In sum, Tutor Perini proffers no case where an allegation that merely because a defendant was the company's CEO – standing alone – was sufficient under Rule 9(b) to support an inference of knowledge regarding financial

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(. . . continued)

from common law fraud in one respect—***the defendant need not know that the representation is false.***" 901 A.2d 106, 115 (Del. 2006) (emphasis added). Tutor Perini does not plead a claim for equitable fraud in its Counterclaims.

assumptions.[11] As the trial court held, such an "inferential leap" would be "unreasonable." Op. 31 n.93.

Finally, Tutor Perini agues in a footnote that "the trial court imposed a heightened pleading burden on Tutor Perini over and above Rule 9(b)'s particularity standard" by "faulting Tutor Perini for failing to plead additional facts from information to which it 'presumably' had access as the parent of Five Star." OB 41 n.12 (quoting Op. 31). The trial court did not apply an improper standard, and in fact concluded that Tutor Perini's Counterclaims failed to satisfy Rule 9(b) prior to commenting on Tutor Perini's informational advantage. Moreover, to so comment is neither unreasonable nor uncommon, and more fundamentally, it is not reversible error. *See, e.g.*, *Trenwick*, 906 A.2d at 211 (concluding that the plaintiff failed to satisfy Rule 9(b) and commenting that the plaintiff "had far more access to information than the typical plaintiff" and was therefore "better positioned than most fraud plaintiffs to meet the standards of Rule 9(b)").

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[11] This was not the case in *Fischbach*, where the Court of Chancery also noted that there was a split in authority regarding whether conclusory allegations concerning knowledge could satisfy Rule 9(b), and where the court concluded that, in any event, the allegations before it were not conclusory. 1989 WL 109406, at *1064. In fact, conclusory allegations do not even withstand dismissal outside of the Rule 9(b) context. *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 102 (Del. 2013) ("We do not . . . credit conclusory allegations that are unsupported by specific facts . . . .").

CONCLUSION

For the foregoing reasons, IH Rep and Segal respectfully request that the Court affirm the trial court's Memorandum Opinion and Final Order and Judgment granting IH Rep's JOTP Motion and Segal's Motion to Dismiss.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Kenneth J. Nachbar

Kenneth J. Nachbar (#2067)
Lauren Neal Bennett (#5940)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
Attorneys for Appellees Greenstar IH Rep, LLC and Gary Segal

OF COUNSEL:

MINTZ & GOLD LLP
Ira Lee Sorkin
Amit Sondhi
600 Third Avenue, 25th Floor
New York, NY 10016
(212) 696-4848

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