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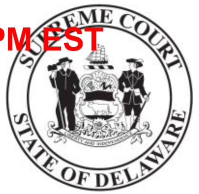

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 REPLY BRIEF

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PRELIMINARY STATEMENT[1]

Tutor Perini advances a straightforward and logical argument on appeal—former Interest Holders of Greenstar are not entitled to earn-out payments based upon inaccurate Pre-Tax Profit Reports. Here, Tutor Perini's argument is all the more compelling because the Pre-Tax Profit Reports at issue were rendered inaccurate by Appellee Gary Segal, the former Interest Holder who stands to gain the most if Yearly Earn-Out Payments are based on inaccurate Pre-Tax Profit Reports. An interpretation of the Merger Agreement which permits Segal to benefit without recourse from causing inaccurate Pre-Tax Profit Reports defies logic.

More importantly, such an interpretation is inconsistent with the language of the Merger Agreement. Former Interest Holders are entitled to Yearly Earn-Out Payments defined by the amount of Pre-Tax Profit. A69 (§ 2.14(a)). In turn, Pre-Tax Profit is expressly defined as "the profit of the Company and its Subsidiaries (on a consolidated basis) prior to reduction of income taxes of the Company and its Subsidiaries for such Earn-Out Term…." A54-55 (§ 1.01). The interpretation of the Merger Agreement advocated by Appellees excises these two provisions, and instead focuses solely on the procedure for presenting Pre-Tax Profit Reports to IH Rep for the purpose of providing it an opportunity to object thereto. A69-70 (§

[1] All capitalized terms not defined herein have the same meanings provided in Appellant's Opening Brief ("Opening Brief" or "OB"). Appellees' Answering Brief is referred to herein as "Answering Brief" or "AB".

2.14(b)). The conflict between the Definitions Provision (Section 1.01) and the Earn-Out Provision (Sections 2.14(a) and 2.14(b)) created by Appellees' contractual construction at the very least constitutes an ambiguity that prevents the granting of judgment on the pleadings.

It was also error to dismiss Tutor Perini's fraud counterclaim. Segal is the largest former Interest Holder of Greenstar and has a significant personal financial interest in the amount of Yearly Earn-Out Payments. As alleged in Tutor Perini's Counterclaims, Segal caused the anticipated profit numbers for certain projects to be inflated such that the Pre-Tax Profit Reports were rendered inaccurate. Appellees advocate for a heightened pleading threshold which essentially would require Tutor Perini to plead all facts necessary to *prove* its fraud claim. Contrary to Appellees' contention, the Counterclaims include sufficient factual allegations to satisfy Court of Chancery Rule 9(b), and therefore the trial court's decision granting Segal's motion to dismiss should be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT THE EARN-OUT PROVISION UNAMBIGUOUSLY REQUIRED TUTOR PERINI TO MAKE EARN-OUT PAYMENTS BASED ON INACCURATE PRE-TAX PROFIT CALCULATIONS

Appellees' primary argument is based on the reasoning that the Earn-Out Provision is unambiguous and requires Tutor Perini to pay former Greenstar stockholders additional merger consideration in the form of an earn-out even if the numbers set forth in the yearly Pre-Tax Profit Report do not accurately reflect Pre-Tax Profit. In advancing their argument, Appellees contend that the "shall be binding" language in Section 2.14(b) of the Earn-Out Provision supersedes the definition of Pre-Tax Profit in Section 1.01 and Section 2.14(a)'s definition of Yearly Earn-Out Payments as being "an amount equal to 25% of *Pre-Tax Profit*." AB 17-21 (emphasis added). According to Appellees, the Definitions Provision cannot have an accuracy requirement that is the trigger for Tutor Perini's earn-out obligations or else the "shall be binding" language in Section 2.14(b) would be superfluous and, thus, the Definitions Provision does nothing more than merely define how Tutor Perini is to calculate Pre-Tax Profit. Op. 17-20; AB 17-21.

Appellees' argument, however, renders both the Definitions Provision and Section 2.14(a)'s definition of "Yearly Earn-Out Payments" meaningless. At the very least, Appellees interpretation of Section 2.14(b) conflicts with the Definitions

Provision and Section 2.14(a). Accordingly, judgment on the pleadings should have been denied by the trial court.

A. Appellees Ignore Tutor Perini's Primary Argument

Appellees fail to directly address Tutor Perini's primary argument in its Opening Brief. This misdirection is not surprising because Tutor Perini's main argument on appeal begins (as any sound contractual construction should) with the plain language of the contract. OB 18-19.

The amount of any Yearly Earn-Out Payment is expressly defined as that year's Pre-Tax Profit. Specifically, Section 2.14(a) of the Merger Agreement provides that the Interest Holders are entitled to Yearly Earn-Out Payments in "an amount equal to 25% of *Pre-Tax Profit* . . . ." A69 (emphasis added). "Pre-Tax Profit" is a separate capitalized, defined term in the Merger Agreement that means "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 Definitions Provision requires that Pre-Tax Profit be calculated accurately—inaccurate profit calculations cannot qualify as Pre-Tax Profit as defined in the Merger Agreement.

Section 2.14(a) expressly uses the defined term Pre-Tax Profit to establish the amount of any Yearly Earn-Out Payment. Appellees' construction expunges the definition of Pre-Tax Profit and does not address the fact that Yearly Earn-Out Payments are expressly based on Pre-Tax Profit. Under at least one reasonable reading of the Merger Agreement, if the profit calculations contained in the Pre-Tax Profit Report are not accurate, those calculations (even if the dispute resolution procedure expires without any objections from IH Rep) do not qualify as Pre-Tax Profit and are therefore not binding and do not trigger Tutor Perini's contractual earn-out obligations.[2] Judgment on the pleadings therefore should not have been granted by the trial court.

B. The Trial Court Erred By Not Interpreting The Earn-Out Provision And Definitions Provision Together

When read in isolation, the Earn-Out Provision arguably appears unambiguous for the reasons articulated by the trial court and by Appellees.

[2] As stated in the Opening Brief, Tutor Perini believes that the profit calculations presented in the Pre-Tax Profit Reports were inaccurate as a direct result of Segal's fraud. OB 35 n.10. As a third-party beneficiary to the Merger Agreement, Segal's fraud in connection with the preparation of Pre-Tax Profit Reports is a cognizable defense warranting denial of Appellees' motion for judgment on the pleadings. However, Tutor Perini's proposed contractual construction does not depend on showing that the inaccuracies were caused by Segal's fraud. Instead, the Merger Agreement requires that Pre-Tax Profit be accurate and, if for any reason (fraud or otherwise) the Pre-Tax Profit numbers are inaccurate, those numbers do not constitute Pre-Tax Profit as defined in the Merger Agreement. Tutor Perini's position on this point has remained consistent throughout the trial court proceedings and on appeal, despite Appellees' arguments to the contrary. AB 23 n.7.

However, the basic rules of contract construction under Delaware law prohibit interpreting a contractual provision in a vacuum, divorced from the other provisions in the agreement. *See, e.g.*, *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010) ("Although isolated terms and provisions of the contract support DSPC's contractual interpretation, the contract as a whole also supports Kuhn's interpretation."); *Aetna Cas. & Sur. Co. v. Kenner*, 570 A.2d 1172, 1174 (Del. 1990) ("Moreover, we must examine all relevant portions of the [contract], rather than reading a single passage in isolation."), *overruled on other grounds by Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10 (Del. 1995).

The trial court erred by violating this basic principle of contract construction. The court analyzed the Earn-Out Provision in isolation and purported to divine the parties' intent by looking exclusively to the Earn-Out Provision. Op. 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. . . . Thus, reading Section 2.14(a) and Section 2.14(b) together, the terms unambiguously provide . . . ."). Only after the trial court settled on its (purportedly) unambiguous interpretation of the Earn-Out Provision, did it inject the Definitions Provision into the analysis. The court determined that the Definitions Provision's accuracy requirement rendered the Earn-Out Provision's "shall be binding" language superfluous and therefore excised the

accuracy requirement to negate the ambiguity between the two provisions. *Id*. at 18-20. This was error.

The Earn-Out Provision is one provision in the context of a broader Merger Agreement and therefore cannot be interpreted in isolation. Not only must it be interpreted in the context of the Merger Agreement's other provisions generally, but because the Earn-Out Provision expressly uses the defined term Pre-Tax Profit multiple times, the Earn-Out Provision cannot be interpreted without specifically consulting the Definitions Provision. Indeed, the Definitions Provision necessarily informs the interpretation of the Earn-Out Provision. The two provisions must be interpreted in tandem in a way that gives meaning to both. *See In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) ("Under Delaware law, . . . courts interpreting a contract will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." (citation & internal quotation marks omitted)); *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).

Appellees argue that *Exelon Generation Acquisitions, LLC v. Deere & Company*, -- A.3d --, 2017 WL 6422337 (Del. Dec. 18, 2017), and *Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Company LLC*, 166 A.3d 912 (Del. 2017), two cases cited by Tutor Perini in the Opening Brief in support of its contention that the definition of "Pre-Tax Profit" and its accuracy requirement are incorporated into the Earn-Out Provision, are consistent with the trial court's interpretation of the Merger Agreement. AB 24-25. Appellees misconstrue these opinions. In *Deere* and *Chicago Bridge*, this Court construed contractual provisions by replacing defined terms with their full definitions and by giving full effect to those definitions. *See Deere*, 2017 WL 6422337, at *4-5; *Chicago Bridge*, 166 A.3d at 922-30.

In *Deere*, an earn-out provision in a purchase agreement provided that an earn-out payment was contingent upon "the Blissfield Wind Project achiev[ing] Completion of Development and Commencement of Construction." *Deere*, 2017 WL 6422337, at *4 (alteration in original). The purchase agreement defined the "Blissfield Wind Project" as "the wind project under development in Lenawee County, Michigan . . . ." *Id.* After substituting this full definition in place of the defined term in the earn-out provision, the Court gave full effect to the definition and concluded that completion of a separate project in a county other than Lenawee County did not trigger payment of the earn-out. *Id.* at *4-5.

Similarly, in *Chicago Bridge*, the purchase agreement provided that the final purchase price would be determined by certain calculations of the defined term "Net Working Capital[.]" *Chicago Bridge*, 166 A.3d at 914-15. As defined, "Net Working Capital" had to be calculated in a manner "*consistent with GAAP, consistently applied* by [the company]" and based on "*the past practices and accounting principles, methodologies and policies* applied by [the company]." *Id.* at 922, 928-29 (emphasis in original). In interpreting the provisions, the Court gave full effect to the definition of "Net Working Capital," concluding that the purchase agreement "establish[ed] a requirement of consistency" and that any accounting approach besides the company's past practices would be "unreasonable." *Id.* at 929.

Appellees contend that even after applying *Deere* and *Chicago Bridge* by replacing "Pre-Tax Profit" with its full definition, the resulting language of the Earn-Out Provision "does not alter the Merger Agreement's plain meaning that the Pre-Tax Profit Report and the profit numbers reported therein 'shall be binding' if IH Rep does not object within thirty days of receipt." AB at 25-26. As explained above, Appellees' construction excises the accuracy requirement from the Definitions Provision. Appellees' attempt to distinguish *Deere* and *Chicago Bridge* is unavailing.

Here, the trial court (1) did not substitute the full definition of "Pre-Tax Profit" where that term is used in the Earn-Out Provision, (2) did not give full effect to the

meaning of "Pre-Tax Profit" by reading its full definition in conjunction with the Earn-Out Provision, and (3) did not discern the parties' intent by looking to all pertinent provisions. Indeed, the court erroneously stated that the Earn-Out Provision "makes no reference to th[e Definitions Provision]," overlooking the fact that the capitalized, defined term Pre-Tax Profit is used multiple times in the Earn-Out Provision. Op. 19; OB 20. As stated above, the court should have read the two provisions together and given full effect to both.

C. Appellees' Interpretation Of The Merger Agreement Is Not The Only Reasonable One And Therefore It Was Error To Grant Judgment On The Pleadings

The ambiguity in the Merger Agreement arises when both the Definitions Provision and the Earn-Out Provision are read together (as they must be). On the one hand, the Earn-Out Provision provides that the calculations contained in the Pre-Tax Profit Reports "shall be binding" if the dispute resolution period expires without IH Rep lodging an objection. A69. On the other hand, the Definitions Provision requires that profit calculations be accurate in order to qualify as Pre-Tax Profit, which is the sole basis in the Merger Agreement on which Yearly Earn-Out Payments are paid. A54-55. Reading these two provisions together raises the following question: What does the Merger Agreement require when the profit calculations contained in the Pre-Tax Profit Reports are not accurate, but the dispute resolution period closes without any objections? Are those inaccurate numbers

binding such that Tutor Perini must make Earn-Out Payments based on those calculations? If yes, that violates the Definitions Provision's accuracy requirement because Yearly Earn-Out Payments are based solely on Pre-Tax Profit, which must be accurate. If no, that arguably violates the Earn-Out Provision which states that the numbers reported in the Pre-Tax Profit Reports "shall be binding." This is the ambiguity that Appellees (and, respectfully, the trial court) failed to acknowledge.

Appellees concede that the Definitions Provision has an accuracy component. AB 23 ("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." (emphasis omitted)). But, Appellees attempt to limit its reach by arguing that it is just a one-way accuracy requirement that merely defines procedurally how Tutor Perini is to calculate Pre-Tax Profit numbers and that has no bearing on Tutor Perini's contractual earn-out obligations. This is meritless and contrary to the plain language of the Merger Agreement. Even assuming that Appellees' reading of the Definitions Provision is correct, under Appellees' own construction, if Tutor Perini fails to perform its calculations accurately, Tutor Perini would have violated the calculations procedure mandated by the Definitions Provision and the resulting numbers would not be Pre-Tax Profit. But, the Definitions Provision is more than just a procedural method of calculating profit numbers. The definition of Pre-Tax Profit is foundational and critical to the proper construction of Tutor Perini's earn-out

obligations under the Merger Agreement. As stated above, Pre-Tax Profit is the sole basis for the Yearly Earn-Out Payments and is expressly used multiple times in the Earn-Out Provision. Appellees' construction of the Definitions Provision is nothing more than an attempt to rewrite the contract in a way that supports their proposed construction of the Earn-Out Provision and that renders the accuracy requirement superfluous. *See Gordon*, 801 A.2d at 7; *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.").

To be sure, Appellees' proposed construction (and the one adopted by the trial court) has facial practical appeal. It streamlines the dispute resolution process so that the parties can have closure and avoid a scenario where any of the parties could challenge the profit calculations in the Pre-Tax Profit Reports years after the objections period expires. Op. at 17-20, 22; AB 21-22, 27. Tutor Perini respectfully submits, however, that the trial court and Appellees' construction is not reasonable based on a joint reading of the Earn-Out Provision and Definitions Provision because, as discussed above and in the Opening Brief, their construction excises the Definitions Provision's accuracy requirement. *See Gordon*, 801 A.2d at 7; *Delta & Pine Land Co.*, 2006 WL 1510417, at *4. Even assuming *arguendo*, however, that their construction is a reasonable one, the inquiry does not end because it is not the *only* reasonable one.

For the reasons stated above, Tutor Perini's construction is also a reasonable one because it gives meaning to both the Definitions Provision and the Earn-Out Provision. *See Gordon*, 801 A.2d at 7; *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). Specifically, the definition of Pre-Tax Profit, as set forth in the Definitions Provision, qualifies the "shall be binding" language. OB 21. If the numbers in the Pre-Tax Profit Reports are not accurate, then those numbers are not Pre-Tax Profit as that term is defined in the Merger Agreement and used in the Earn-Out Provision, and therefore do not trigger the "shall be binding" language or Tutor Perini's earn-out obligations.

Appellees argue that *Ballenger v. Applied Digital Solutions, Inc.*, 2002 WL 749162 (Del. Ch. Apr. 24, 2002), on which Tutor Perini relied to support the reasonableness of its construction, is distinguishable.[3] AB 30-31. Not only do Appellees misconstrue the import of *Ballenger*, but they also avoid responding to Tutor Perini's primary argument with respect to *Ballenger*. As stated in the Opening Brief and contrary to Appellees' argument, the factual dispute in *Ballenger* centered on the accuracy of the earn-out financials. *Ballenger*, 2002 WL 749162, at *5; OB

[3] Relatedly, Appellees argue that Tutor Perini relies "exclusively" on *Ballenger* to support its construction. AB 30. This is wrong. Tutor Perini cited numerous cases in its Opening Brief in support of its interpretation.

26-29. Furthermore, by holding that a factual dispute surrounding the accuracy of the earn-out financials precluded entry of summary judgment even in the face of an ostensibly clear contractual obligation[4] that required the defendant to prepare earn-out financials, the *Ballenger* court implicitly determined that one reasonable reading of the merger agreement required that earn-out financials be accurate in order to trigger the defendant's contractual earn-out obligations. *Ballenger*, 2002 WL 749162, at *5. If the merger agreement in *Ballenger* was not susceptible to a reading that earn-out financials had to be accurate, then the factual question relating to the accuracy of the financials would not have precluded a grant of summary judgment. Appellees' attempts to distinguish *Ballenger* are unavailing and *Ballenger* supports Tutor Perini's position that one reasonable reading of the Merger Agreement requires that Pre-Tax Profit be accurate in order to trigger Tutor Perini's earn-out obligations.

Appellees also argue that Tutor Perini's construction is not reasonable because it grants Tutor Perini an unbargained-for "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." AB 27; *see also id.* at 22. This, Appellees argue, is inconsistent with the "definitive, thirty-day timeframe" contained in the Earn-Out

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[4] As explained in the Opening Brief, the language from the merger agreement in *Ballenger* is very similar to the definition of Pre-Tax Profit in the Merger Agreement in the instant case. OB 26-27 & n.7.

Provision's dispute resolution process, which, if it expires without IH Rep lodging any objection, culminates in the numbers in the Pre-Tax Profit Report becoming binding on all parties. *Id*. at 23.

Instead of showing that Tutor Perini's construction is unreasonable, Appellees highlight the ambiguity that exists in the Merger Agreement that precludes entry of judgment on the pleadings. While Appellees' arguments carry some ostensible practical appeal, the fact of the matter is that the plain language of the Merger Agreement (when both the Earn-Out Provision and Definitions Provision are read in tandem) also supports Tutor Perini's reading. The sophisticated parties to the Merger Agreement could have drafted it differently. They could have defined Pre-Tax Profit as, for example, "the number reported in a Pre-Tax Profit Report after the dispute resolution process set forth in Section 2.14(b) expires without objection or, if an objection is lodged, after the parties or the Neutral Accountant resolve the objection." Instead, they defined Pre-Tax Profit in a manner that creates an accuracy requirement and, further, expressly used that definition in the Earn-Out Provision as the basis for the Yearly Earn-Out Payments. A54-55.

This is a pleadings-based motion. The trial court was required to draw all reasonable inferences in favor of Tutor Perini, the non-moving party. *See Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2013 WL 5787958, at *3 (Del. Ch. Oct. 25, 2013). Tutor Perini need not prove that its interpretation is the

only reasonable one. Rather, Appellees bear the burden of showing that they have the only reasonable interpretation. *See id.* at *4. For the reasons stated above and in the Opening Brief, Appellees have not carried that burden. There are at least two reasonable interpretations, both of which are supported by language in the Merger Agreement. A court may not pick and choose one interpretation that it feels is more reasonable or practical than the other on a pleadings-based motion. *See Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1292 (Del. 2007) ("Even if the Superior Court considered the defendants' interpretation more reasonable than the plaintiffs', on a Rule 12(b)(6) motion it was error to select the 'more reasonable' interpretation as legally controlling.") (citation omitted); *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"); *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) ("On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents."). Instead, when there are two reasonable constructions, the motion for judgment on the pleadings is denied and the claims go to discovery so that extrinsic evidence can be elicited to flesh out

the intent of the parties. *See Appriva*, 937 A.2d at 1292 (denying motion to dismiss because there were two reasonable interpretations and directing trial court to "admit extrinsic evidence to ascertain what the parties intended"); *Fiat N. Am. LLC v. UAW Retiree Med. Benefits Tr.*, 2013 WL 3963684, at *19 (Del. Ch. July 30, 2013) (denying motion for judgment on pleadings on an issue concerning a term in an agreement that was "susceptible to at least two reasonable interpretations" to permit the parties to "develop evidence regarding the intended meaning").

D. Tutor Perini Did Not Mischaracterize The Opinion, Which Determined That There Was A Conflict Between The Two Pertinent Provisions And That A Factual Dispute Existed

Appellees argue that Tutor Perini misrepresented the Opinion by (1) arguing that the Opinion determined that there was a conflict between the Earn-Out Provision and the Definitions Provision (AB 27-28), and (2) arguing that the Opinion stated that, if Tutor Perini's construction was reasonable, judgment on the pleadings was inappropriate because there was a factual dispute regarding the accuracy of the Pre-Tax Profit calculations (*id*. at 36-37). Appellees are wrong.

First, the trial court plainly stated that "[t]o accept Tutor Perini's construction of Section 2.14 would be to render the language 'shall be binding' superfluous." Op. 18. In other words, the trial court determined that interpreting the Merger Agreement to require Pre-Tax Profit to be accurate (as required by the Definitions Provision) in

order for Tutor Perini's earn-out obligations to be triggered was inconsistent with the Earn-Out Provision's "shall be binding" language. *Id.*

Indeed, Appellees themselves affirmatively acknowledge this conflict. Specifically, Appellees argue that Tutor Perini's construction that its earn-out obligations cannot be triggered unless Pre-Tax Profit is accurate "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." AB at 2-3. The conflict identified by the trial court and by Appellees highlights, as explained above, that the Merger Agreement is susceptible to at least two reasonable constructions.

Second, the trial court indisputably determined that factual disputes relating to the accuracy of the Pre-Tax Profit calculations precluded judgment on the pleadings in the event that Tutor Perini's construction was reasonable. The court stated:

> The motion for judgment on the pleadings turns on whether Section 2.14 of the Merger Agreement imposes a condition that the amounts calculated as Pre-Tax Profits and disclosed to IH Rep in the Pre-Tax Profit Reports will be based on accurate financials before they will be binding upon Tutor Perini when calculating Earn-Out Payments. ***If the answer to this query is yes, then IH 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. 10 (emphasis added.) Appellees cannot credibly dispute otherwise. Because Tutor Perini's construction is reasonable, the trial court erred by granting judgment on the pleadings in the face of factual disputes relating to the accuracy of the Pre-Tax Profit numbers.

II. THE TRIAL COURT ERRED BY FAILING TO IMPLY AN ACCURACY TERM IN THE MERGER AGREEMENT

Appellees argue that the trial court did not err in refusing to imply an accuracy term because such an implied term would have conflicted with the Earn-Out Provision's "shall be binding" language. AB 32-35. As stated above, the conflict that Appellees note only highlights the ambiguity in the Merger Agreement. Furthermore, in the event that the Merger Agreement does not expressly contain an accuracy requirement, the trial court erred when it declined to imply an accuracy term because, in so doing, it rendered the Definitions Provision superfluous and thereby violated basic principles of contract construction. OB 22; *see In re Viking Pump, Inc.*, 148 A.3d at 648.

It is appropriate to imply terms that the parties did not consider at the time of drafting but "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), or that were based on "understandings or expectations that were so fundamental that [the parties] did not need to negotiate about those expectations," *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *16 (Del. Ch. Nov. 17, 2014) (citation & internal quotation marks omitted). Had the parties considered at the time of contracting whether Pre-Tax Profit calculations had to be accurate, it cannot seriously be disputed that they would have agreed in the

affirmative. Furthermore, the parties could not have anticipated at the time of contracting that the inaccuracies would have been caused by an Interest Holder. Hence, Appellees' suggestion that the parties agreed (through the "shall be binding" language) that Yearly Earn-Out Payments could be based on inaccurate Pre-Tax Profit calculations (AB 34-35) defies logic and is contrary to the Definitions Provision. If the tables were turned and the Pre-Tax Profit numbers were understated, Appellees would surely argue that they could challenge those calculations even if the dispute resolution timeframe had expired. And, as stated above, the Merger Agreement supports such a reading.

For these reasons, the trial court compounded its error by refusing to imply an accuracy term requiring Pre-Tax Profit to be accurate before Tutor Perini's contractual earn-out obligations are triggered.

III. THE TRIAL COURT ERRED BY HOLDING THAT THE COUNTERCLAIMS DO NOT SATISFY RULE 9(B)

Appellees advance two primary arguments in support of their position that the Counterclaims do not satisfy Rule 9(b)'s particularity pleading standard. Both arguments fail to support dismissal of the fraud Counterclaims.

First, Appellees argue that the Counterclaims do not meet the standard articulated in *Kahn Brothers & Co. Profit Sharing Plan and Trust v. Fischbach Corp.*, 1989 WL 109406 (Del. Ch. Sept. 19, 1989), because the Counterclaims do not apprise Segal of the "precise" misconduct alleged against him. AB 40-41. In *Fischbach*, the stockholder plaintiffs' fraudulent inducement claim was premised on an allegation that a certain individual and an entity entered into a "Secret Agreement" on behalf of the defendant that ultimately worked to the detriment of the company. *Fischbach*, 1989 WL 109406, at *3. Notably, the "plaintiffs [did] not allege[] additional specific facts to support the existence of the Secret Agreement[.]" *Id.* at *5. The court concluded that the plaintiffs satisfied Rule 9(b)'s pleading requirements because all that is 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.*

Here, the Counterclaims specifically allege that Segal knowingly provided false information pertaining to at least three projects: Hudson Yards C-Core & Shell, Baccarat Hotel, and Carnegie 57. A280 ¶ 11. Furthermore, Tutor Perini alleged that Segal intentionally provided this false information for the purpose of inducing Tutor

Perini to overpay Yearly Earn-Out Payments to former Interest Holders, of which Segal is the largest. A278 ¶ 6, A281 ¶ 15. The Counterclaims meet the standard set forth in *Fischbach* and "it cannot be true that each [allegation in the Counterclaims] must be substantiated by a further allegation to support it." *Fischbach*, 1989 WL 109406, at *5.

Second, Appellees argue that Segal's position as President and CEO of Five Star does not permit a reasonable inference that Segal was aware of the falsity of the information he caused Five Star to provide to Tutor Perini and, in any event, that estimates cannot form the basis of a fraud claim. AB 41-44. As a preliminary matter, and as explained in the Opening Brief, estimates and opinions "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." OB 40 (citing *Aviation W. Charters, LLC v. Freer*, 2015 WL 5138285, at *6 (Del. Super. Ct. July 2, 2015)) (alteration in original). The Counterclaims allege not only that Segal was President and CEO of Five Star, but also that Segal, who had "significant history" with Five Star, was "intimately involved" in the business operations of the companies Tutor Perini acquired following the Acquisition. A276-77 ¶ 1, A279 ¶ 9, A280 ¶ 11. Contrary to Appellees' argument, Segal need not have acted as Five Star's accountant or auditor to know that the information he provided regarding certain projects of the company with which he has significant history were indeed false. On this pleadings-based

motion, the trial court should have reasonably inferred that given Segal's position as President and CEO of Five Star, along with his significant history and intimate involvement with Five Star, Segal was in a position of superior knowledge to be aware of the falsity of the information he caused Five Star to provide to Tutor Perini. *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).[5]

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[5] Finally, contrary to Appellees' argument (AB 44), the trial court applied an improper pleading standard by faulting Tutor Perini for failing to plead additional facts from information to which Tutor Perini "presumably" had access. Op. 31. This "presum[ed]" informational advantage led the trial court, in part, to determine that Tutor Perini's "allegations are simply inadequate" under Rule 9(b). This was error.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

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