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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PETERSON ENTERPRISES, INC., RONALD A. PETERSON, ERIC PETERSON, KIRK PETERSON, RONALD A. PETERSON REVOCABLE TRUST, RONALD A. PETERSON 2010 IRREVOCABLE TRUST, and VERNON L. GOEDECKE COMPANY, INC.	:	No. 109, 2019
Defendants below/Appellants,	:	Court below: Court of Chancery of the State of Delaware
v.	:	C.A. No. 11189-VCG
BRACE INDUSTRIAL CONTRACTING, INC. and PETERSON INDUSTRIAL SCAFFOLDING, INC.,	:	
Plaintiffs below/Appellees and Cross-Appellants.	:	

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

Dated: May 24, 2019

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NATURE OF PROCEEDINGS

This case presented a post-closing dispute on the sale of a going concern (the "Acquisition") via a stock purchase agreement (the "SPA"). The parties escrowed 10% of the purchase price (the "Escrow Account") to cover buy-side indemnification claims for breaches of sell-side representations and warranties. Certain seller affiliates also provided a guaranty to cover any sell-side indemnification obligation exceeding the escrow amount (the "Guaranty").[1]

After closing, the buyer, Brace, duly noticed a claim for indemnification against the Escrow Account, on the basis that the seller, PEI, failed to transfer all the industrial equipment identified in the SPA's disclosure schedules (the "SPA Disclosures"). Defendants then retaliated by usurping cash (*i.e.*, customer payments belonging to Plaintiffs) that they held as agents on a transition services agreement entered into as part of the Acquisition (the "TSA"). Defendants further retaliated by competing against the sold business, despite non-competition covenants associated with the sale. This litigation ensued.

[1] "Plaintiffs" refers to Brace Industrial Contracting, Inc. ("Brace")—the buyer in the Acquisition—and Peterson Industrial Scaffolding, Inc. ("PIS," n/k/a Platinum), the acquired business. "Defendants" refers to seller Peterson Enterprises, Inc. ("PEI"), along with Ronald A. Peterson, Eric Peterson, Kirk Peterson, Ronald A. Peterson Revocable Trust, Ronald A. Peterson 2010 Irrevocable Trust (the two trusts are referred to as the "Trust Defendants"), and Vernon L. Goedecke, Inc. ("Goedecke"). The Trust Defendants and Ronald A. Peterson are referred to together as the "Guarantors."

Plaintiffs' Amended Complaint asserted three categories of claims: (i) contractual indemnification for non-transferred equipment ("Inventory Claims"); (ii) breach of the SPA's restrictive covenants ("Covenant Claims"); and (iii) wrongful withholding of the net cash on the TSA ("Customer Payment Claims").

Defendants' retaliation against Brace's indemnification claim continued after the lawsuit began. Defendants asserted an affirmative defense of setoff against the Customer Payment Claims to justify their withholding of customer payments. Defendants also asserted three counterclaims generally seeking, on one hand, declaratory judgment that Plaintiffs were not entitled to indemnification and, on the other hand, indemnification from Plaintiffs for an alleged breach of the SPA by Plaintiffs.

The trial took place over three days in March 2016. On October 31, 2016, the Court of Chancery (or "Trial Court") issued a memorandum opinion ruling in Brace's favor on the Inventory Claims in the amount of $725,059, ruling in Defendants' favor on the Covenant Claims (not appealed), and deferring final judgment on the Customer Payment Claims, including Defendants' setoff defense.[2] On February 24, 2017, the Court of Chancery entered an order implementing post-trial opinion as applied to the Inventory Claims (the "Inventory Order").[3]

[2] OB Ex. A.
[3] *Id.*

Plaintiffs won the Customer Payment Claims and defeated the affirmative defense of setoff by a combination to two orders. First, in response to a motion for summary judgment filed by Plaintiffs, the Trial Court ordered Defendants to tender to Plaintiffs $1,650,422 million.[4] Second, more than three years later and after protracted post-trial motion practice, the Trial Court issued final judgment in Plaintiffs' favor in the amount of $1,986,354, plus post-judgment interest.[5] The total award on the Customer Payment Claims reflected $2,763,139.82 in damages and post-closing adjustments. The Trial Court rejected Defendants' counterclaims.

On January 11, 2019, the Court of Chancery entered an order granting Plaintiffs $241,686 in attorneys' fees and $440,149 in costs (the "Fee Order").[6] The Trial Court ruled that "[t]he Plaintiffs generally prevailed in the litigation,"[7] and were entitled to contractual fee-shifting per the SPA. However, the Trial Court declined to award the requested fees based on an erroneous "implied contingency fee" logic that considered only the amount Plaintiffs won on the Inventory Claims,

[4] *See* OB Ex. D.

[5] *Id.*

[6] The Trial Court initially entered an order on the respective fee applications on December 12, 2018. OB Ex. B. The December 12, 2018 order was superseded and replaced by the January 11, 2019 Fee Order. OB Ex. C.

[7] OB Ex. C at 2.

exclusive of spend to defeat the setoff defense.[8] On February 6, 2019, the Trial Court entered a final order and judgment (the "Final Order").[9]

Defendants have appealed the Court of Chancery's judgement in favor of Plaintiffs on the indemnification claim, entry of judgment against a subset of Defendants as guarantors, and certain aspects of the Trial Court's award of costs. Plaintiffs have cross-appealed a single issue: contractual fee-shifting. This is Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross Appeal.[10]

[8] *Id.* at 6.

[9] OB Ex. D.

[10] On April 25, 2015, Defendants filed an Opening Brief in support of their appeal. D.I. 13. On May 1, 2019, Defendants filed an Amended Opening Brief (the "OB"). D.I. 16.

SUMMARY OF ARGUMENT

A. Cross-Appeal

Plaintiffs appeal from the Trial Court's award of just $241,686 in attorneys' fees, a massive, clearly erroneous reduction from the $1,294,576.50 required by the SPA. Candidly, it appears the Trial Court reduced the amount owed under the SPA because it felt harsh, and thus not "reasonable," to land upon the losing party three years' worth of litigation expense for a case that could have been resolved relatively expeditiously but which suffered expensive post-trial delays.[11]

Neither the SPA nor controlling case law on Delaware Rule of Professional Conduct 1.5(a) ("DRPC 1.5") allows that result. The SPA unequivocally states that PEI owes contractual fee-shifting for any "Losses" that "arise from" breaches of sell-side representations. "Losses" is contractually defined and expressly includes reasonable attorneys' fees and litigation expenses.

The affirmative defense of setoff arose from Brace's successful indemnification claim. In lay terms, Defendants took cash from Plaintiffs to

[11] To its great credit, the Trial Court repeatedly and graciously took responsibility for certain procedural difficulties and the lapse of time. *See* B-343 ("[T]o the extent this took a lot of time to get decided, I was complicit in that[.]"); B-327 ("It has been a long road to get to this point, and the inordinate lapse of time is an evil for which I, and not the parties or their counsel, must take responsibility."); B-346 ("[T]he way this matter has gone…I don't absolve myself from responsibility for that."); B-352 ("…I did want to resolve this because it is enormously stale…and that, as I have expressed before, is, in part, my responsibility[.]").

retaliate against the indemnification claim notice, which blocked release to Defendants of $1.87 million from the Escrow Account. When litigation ensued, Defendants asserted an affirmative defense of setoff to justify that retaliation. Defendants bore the risk of fee-shifting for forcing Plaintiffs to defeat that setoff defense. There is no basis in the SPA, in law, equity, or DRPC 1.5 to reallocate that risk onto the substantially successful Plaintiffs.

The Trial Court expressly ruled that Defendant PEI breached Section 3.11(b) of the SPA, triggering the SPA's fee-shifting provision. Plaintiffs sought $1,294,576.50 in attorneys' fees incurred to litigate that breach (suing to recover the value of the missing equipment) and Defendants' retaliation (usurping the customer payments), which Defendants later disguised as an affirmative defense of setoff.

In the Fee Order, the Trial Court erred by:

a) failing to recognize that all of Plaintiffs' attorneys' fees "arose from" PEI's breach of the SPA and, thus, must be shifted per the contract;

b) divorcing the amount recovered on the Inventory Claims ($725,059) from the larger recovery based on Defendants' usurpation of Customer Payments pursuant to the pre-textual setoff defense ($3,488,199.82);[12] and then,

[12] Plaintiffs won $561,975.82 as a post-closing adjustment pursuant to a separate ADR proceeding required under the SPA (defined below as "Post-Close Adjustment Proceeding"). *See* OB Ex. D at 2. The parties agreed to include that

c) employing DRPC 1.5 – instead of the SPA – to state an "implied contingency fee" of 1/3 of that balkanized $725,059.

The SPA's fee-shifting clause was expressly negotiated to protect Brace from "all Losses" that arise from or relate to a breach of PEI's representations. PEI breached a representation, Brace noticed the breach as required by the SPA, and, *at their own peril*, Defendants took Plaintiffs' cash as a purported setoff to the breach claim. Plaintiffs then won the breach claim and defeated the setoff defense. The attorneys' fees requested both "arose from" PEI's breach the SPA and were "reasonable" per DRPC 1.5. Plaintiffs are contractually entitled to indemnification in full as a matter of law.

Alternatively, if it were legally possible to ignore the SPA in favor of an "implied contingency fee," which it is not, the starting amount would be the total amount recovered through the affirmative claims and by forcing disgorgement of the unsuccessful setoffs. Plaintiffs could not have recovered on their core Inventory Claims for $725,059 without also defeating the larger setoff demand, to the tune of $3.5 million. If Plaintiffs had lost the setoff defense, they would have

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award in the Final Order specifically because of Defendants' setoff defense. Per the SPA, Defendants were required to pay the adjustment award within five days of issuance. Defendants refused to pay on the basis of their setoff defense. Thus, even this issue "arose from" Defendants' setoff defense, and the adjustment award in properly reflected in this amount.

recovered nothing. Plaintiffs ultimately recovered $3,488,199.82, as reflected in the Final Order. One third of that sum is $1,162,733.27, not $241,686.

Both sides and the Trial Court were frustrated by the expensive procedural difficulties from which this case suffered. But those litigation difficulties "arose from," and would not have happened *but for*, Defendants' self-help usurpation of cash from Plaintiffs *at peril* to state their unsuccessful setoff defense. Under the SPA, Defendants bear the risk of full fee-shifting arising from that ill-advised strategy.

B. Appeal

1. Denied. The Court of Chancery did not err in resolving the Inventory Claims in Plaintiffs' favor. The Trial Court applied an orderly and logical deductive process in finding that Plaintiffs carried the burden of proof in establishing a breach of PEI's representation in Section 3.11(b) of the SPA. The Trial Court's ruling is entitled to deference on appeal.

2. Denied. The Court of Chancery did not abuse its discretion or commit legal error in awarding Plaintiffs $440,149 in litigation costs. Section 6.2 of the SPA authorizes fee-shifting for "losses,…costs or expenses of whatever kind, including reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder…" "arising out of" PEI's breach of the SPA. All of Plaintiffs' litigation costs arose from PEI's breach and, thus, must be indemnified

under the SPA. Court of Chancery Rule 54(d) provides a separate right of recovery for certain of those costs.

3. Denied. The Court of Chancery did not err in entering judgment against PEI and the Guarantors for the full amount of attorneys' fees and expenses owed to Plaintiffs pursuant to the Final Order which is not satisfied from the Escrow Account. Under the SPA and TSA, PEI is liable for all amounts awarded to Plaintiffs pursuant to the Final Order. Moreover, as explained above, all of Plaintiffs' attorneys' fees and costs are indemnifiable pursuant to Section 6.2 as "Losses" incurred as a result of PEI's breach of the SPA. Thus, the Guarantors are liable for PEI's indemnification obligations. The Final Order should not reasonably be read to state that non-guarantors who were never sued on the Guaranty are liable on a guaranty basis.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. Defendants Agree to Sell Their Scaffolding Business.

PIS "sells scaffold, rents scaffold, erects and dismantles scaffold, designs scaffold layouts, and manages the deployment and use of scaffold assets."[13] In the Acquisition, Defendants[14] sold PIS as a going concern to Brace for $18.7 million via the SPA.[15]

Pursuant to the SPA, Brace purchased all of PIS's assets, including its scaffolding equipment, except as expressly reserved.[16] The transferred scaffolding equipment was expressly identified in an SPA schedule. The parties also signed the TSA, which, among other things, charged Defendants with collecting customer payments for the sold business for one year.[17]

Brace and PEI also entered an "Escrow Agreement" under which ten percent of the $18.7 million purchase price was placed into the Escrow Account for post-closing business disputes.[18] Subject to indemnification claims by Brace, that $1.87

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[13] B-166.

[14] Defendant PEI is a holding company that owns Defendant Goedecke. B-165. Defendant Ron Peterson and his sons, Defendants Eric and Kirk Peterson, serve as Goedecke directors and officers of PEI. B-166. Ron Peterson served as Defendants' primary negotiator in the Acquisition. OB Ex. A at 17.

[15] B-167.

[16] *Id.*

[17] B-170.

[18] B-171; A-0212-0338.

million was scheduled to be released to PEI in equal halves on April 1, 2015 and February 10, 2016.[19] Finally, PEI, Ron Peterson and the Trust Defendants entered into the Guaranty, whereby the Guarantors guaranteed PEI's indemnification obligations under the SPA.[20]

B. Defendants Agree to Indemnify Brace for Inaccurate Representations and Warranties in the SPA.

In the SPA, the parties agreed that "[t]he conveyance of PIS's scaffolding equipment to Brace was an essential part of the Acquisition."[21] PEI "purported to" list all assets PIS possessed at closing, including scaffolding equipment, in Section 3.11(b) of the SPA Disclosures (the "Scaffolding List").[22] The Scaffolding List includes dozens of line items, each of which identifies a different type of scaffolding and the number of units purportedly in PIS's inventory.[23] Identifying PIS's scaffolding in this manner was important because different types of scaffolding serve different purposes and are not necessarily interchangeable (in the same way that a screw is different from a nail),[24] and Brace needed to know what would be on hand after closing.[25]

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[19] B-171; A0214-0215 at 1.3(c), 1.4(a), 1.5(a).
[20] B-168; A-0339-0352.
[21] B-168.
[22] B-167-168.
[23] *See* B-452-470.
[24] A-0594 at 9-21; A-0597 at 6-24.
[25] *See* A-0504 at 4-17; A-0505 at 7-15.

Brace could not verify the accuracy of the Scaffolding List before closing because the equipment was dispersed on customer job sites.[26] Therefore, PEI warranted the accuracy of the Scaffolding List and agreed to indemnify Brace for losses if that equipment was not transferred.[27]

In Section 3.11(b) of the SPA, PEI represented that the Scaffolding List was a "true, correct and complete list" of the equipment used by PIS to conduct its business:

> Section 3.11(b) of the Disclosure Schedules sets forth a true, correct and complete list and general description of substantially all furniture, fixtures, equipment, machinery, tools, vehicles, office equipment, supplies, computers, telephones and other tangible personal property of the Company or used solely in the Business and not by the Seller for other purposes in connection with any Affiliates (the "Tangible Personal Property"); provided, the Company also regularly uses rented equipment from PERI USA, PERI Canada, and other third-parties for which the Company has no ownership claim.[28]

In Section 6.2 of the SPA, PEI agreed to indemnify Brace for "Losses," including reasonable attorneys' fees and costs, arising out of breaches of PEI's representations and warranties:

> Subject to the other terms and conditions of this ARTICLE VI, Seller shall indemnify and defend each of Buyer and its Affiliates and hold their respective Representatives (collectively, the "Buyer Indemnitees") against, and shall hold each of them harmless from and against, and shall pay and reimburse each of them for, any and all Losses incurred or sustained by, or

[26] *See* B-662 at 91:24 to 93:2.
[27] B-168; A-0082.
[28] B-168; A-0056.

imposed upon, the Buyer Indemnitees based upon, arising out of, with respect to or by reason of:

(a) any inaccuracy in or breach of any representations or warranties of Seller contained in this Agreement . . . .[29]

In the Guaranty, the Guarantors guaranteed PEI's indemnification obligations under the SPA.[30]

C. Defendants Create the Scaffolding List Without Validating PIS's Scaffolding Assets.

The Acquisition closed in August 2014.[31] Defendants provided the first draft of the SPA Disclosures approximately two months before the Acquisition closed, but they did not include the Scaffolding List.[32] When the Scaffolding List had not materialized by early July, Brace requested an update because the "equipment schedules" were "most important."[33] Eric Peterson, PEI's COO, guaranteed a "full draft of the disclosures to you before Friday."[34]

Mr. Peterson did not follow through.[35] Defendants could not get an "accurate" scaffolding count and did not finalize the Scaffolding List until the day before the closing of the Acquisition.[36]

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[29] A-0082 at § 6.2; B-168.
[30] B-167-168.
[31] B-166.
[32] *See* B-358-399.
[33] B-401.
[34] B-400.
[35] *See* B-406 (indicating that Scaffolding List was absent from the SPA Disclosure).

Defendants track scaffolding using software known as "FACTS."[37] FACTS depends on accurate data entry.[38] In this case, PEI's satellite offices sent physical ship and receipt tickets to Houston,[39] resulting in lost paperwork and rendering FACTS inaccurate.[40]

Between November 2013 and July 4, 2014, Defendants attempted three physical counts.[41] They were never able to reconcile FACTS with the scaffolding counted.[42] This problem was not corrected before closing.[43] Eric Peterson knew that FACTS was inaccurate,[44] but he nevertheless used FACTS to create the Scaffolding List. The Scaffolding List was an export from FACTS that Eric Peterson created at the last minute as an "afterthought."[45]

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[36] *See* B-420 (the attachment to this e-mail is not appended to this brief due to size; however, Plaintiffs will be happy to provide it upon the Court's request).

[37] A-0569 at 7-11, A-0940 at 21 to A-0941 at 4.

[38] A-0569 at 7-15, A-0570 at 14-19, A-0956 at 9-15.

[39] A-0570 at 14-19, A-0572 at 4-14, A-0949 at 22 to A-0950 at 7.

[40] A-0579 at 14-19; A-0580 at 4-14.

[41] A-0579 at 6-13, A-0955 at 23 to A-0956 at 1.

[42] A-0579 at 6 to A-0580 at 24.

[43] A-0581 at 23 to A-0582 at 21, A-0583 at 12-18.

[44] A-0571 at 12-16.

[45] A-0581 at 23 to A-0582 at 4, A-0957 at 17 to A-0958 at 9. Eric Peterson testified at trial that he took two weeks and great care to prepare the Scaffolding List. A-0957 at 17 to A-0958 at 9. That story, however, contradicted Mr. Peterson's deposition testimony, where he called the Scaffolding List an "afterthought" and "approximation" that he spent "maybe an hour or two" preparing the day it was submitted to Brace after exporting it from FACTS at 2:00 a.m. that morning. B-671 at 66:11-67:18.

D. Plaintiffs Discover the Scaffolding Overstatement After Closing and Seek Indemnification in Accordance with the SPA.

After closing, Plaintiffs' expenses to rent scaffolding from the manufacturer were higher than they would have been had Defendants delivered the assets on the Scaffolding List.[46] As workflow had not substantially increased, the logical conclusion was that PIS possessed fewer assets than had been represented, and thus fewer pieces of scaffolding were returning from completed customer jobs in the ordinary course.[47]

Mark Talley, Ron Peterson's brother-in-law and former employee of Defendants, had access to the "Mary Sheet," a record kept by Defendants' lead accountant, Mary Soffner, of all scaffolding ever purchased by Defendants, which tied directly to Defendants' balance sheet.[48] A comparison of the Mary Sheet to the Scaffolding List (the "Mary Sheet Analysis") revealed multiple inventory shortages.[49] Simply, the Scaffolding List included more equipment than PIS had bought and thus could not possibly be accurate.

[46] B-662 at 93:24 to B-663 at 95:3.

[47] *See id.*

[48] A-0583 at 22 to A-0584 at 11; A-0585 at 13-18; A-1051 at 15 to A-1053 at 14. The Mary Sheet is not appended to this brief due to size; however, Plaintiffs will be happy to provide it upon the Court's request.

[49] *See* A-0589 at 4-8; A-0734 at 1 to A-0736 at 2.

Mr. Talley was skeptical – he initially thought the shortages indicated by the comparison were too high.[50] But he agreed to investigate further.[51] Though he has a financial stake in the Escrow Account that cuts against Plaintiffs' interests,[52] Mr. Talley uncovered large inventory shortfalls via the Mary Sheet Analysis.[53] Mr. Talley would have been paid a six-figure sum if Plaintiffs had lost the Inventory Claim, but he nonetheless testified at trial that Brace was shorted more than $700,000 worth of inventory.[54]

The Mary Sheet Analysis confirmed that Defendants overstated the quantities of dozens of categories of scaffolding by crediting themselves with transferring more inventory than had ever been purchased.[55] The parties conferred,[56] and as early as October 2014, Mr. Talley sent Eric Peterson the Mary Sheet and his findings.[57]

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[50] A-0617 at 21 to A-0618 at 16.

[51] A-0621 at 10 to A-0622 at 8.

[52] Mr. Talley is entitled to a portion of the Indemnification Escrow and is liable for a portion (up to $135,000) of any indemnification owed Brace. *See* A-0577 at 22 to A-0578 at 12; B-408 §1.2

[53] A-0621 at 10 to A-0622 at 8, A-0644 at 23 to A-0646 at 19. Prior to discovery, Mr. Talley had access only to a 2013 version of the Mary Sheet. Discovery revealed an August 2014 version that was contemporaneous with the SPA. Discovery thus permitted Mr. Talley to amend his inventory calculations with more current data.

[54] A-0588 at 8-14.

[55] A-0589 at 4-8; A-0734 at 1 to A-0736 at 2.

[56] B-171.

[57] *See* A-0584 at 3 to A-0585 at 8; B-666 at 39:14-19; B-643 (the attachment to this e-mail is not appended to this brief due to size; however, Plaintiffs will be

Unable to reach resolution with Defendants, and running out of time to seek indemnification under the SPA, on March 26, 2015, Brace sent a Notice of Direct Claim (the "Claim Notice") regarding the inventory deficiency.[58] The Claim Notice prevented the scheduled April 1, 2015 release of $935,000 from the Escrow Account.[59] However, the Escrow Account exists specifically to cover breach of warranty claims such as the one Brace noticed in March 2015 and on which Plaintiffs ultimately prevailed after trial.

E. Defendants Retaliate by Usurping Customer Payments Belonging to Plaintiffs and Attempting to Undermine Plaintiffs' Business.

PEI rejected the Claim Notice in a letter dated April 13, 2015.[60] Furthermore, in spite of Brace's compliance with the procedure agreed to by the parties for resolving disputes under the SPA, Defendants retaliated against the indemnification claim and refused to account for or send any cash belonging to Plaintiffs as required by the TSA.[61] Between April 2015 and November 2015,

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happy to provide it upon the Court's request). Plaintiffs did not immediately act on the identified shortages because they were performing their own physical scaffolding count, which concluded in early 2015 and revealed over a hundred shortages worth approximately $1.2 million. A-0616 at 21 to A-0618 at 5; A-0440-0466.

[58] B-171.

[59] A-0213-0215 at §§ 1.3, 1.4.

[60] B-171.

[61] A-0659 at 1 to A-0661 at 3; A-0667 at 17 to A-0668 at 2; A-0997 at 12-13; A-0998 at 5-6; A-1064 at 21 to A-1065 at 3; A-1070 at 17 to A-1071 at 2; B-645; B-649.

Defendants withheld over $3 million obtained as "compensation for work performed by PIS" (the "Customer Payments").[62]

Defendants admitted that the Customer Payments belonged to Plaintiffs[63] and that their sole reason for withholding that money was unlawful self-help. Eric Peterson testified: "[W]e were being held hostage on our inventory claim and not getting our escrow money out. We felt the only option was money that happened to be coming through the lock box that we kept to protect ourselves. . ."[64]

In addition, Defendants apparently tried to undermine PIS's business. After sending the Claim Notice, Plaintiffs discovered that Goedecke was sending its employees to PIS customers to teach those customers how to install and dismantle scaffolding themselves.[65] Plaintiffs also discovered that Defendants had caused the creation of a new scaffolding company.[66] Plaintiffs believed this conduct breached Defendants' non-competition obligations in the SPA.

F. Defendants' Retaliation Against the Inventory Claim Continues During and Prolongs the Underlying Litigation.

The underlying litigation was long and "vigorously contested."[67] In June 2015, Plaintiffs filed their initial complaint, as well as a Motion for Preliminary Injunction in connection with the Covenant Claims. On August 20, 2015,

[62] B-170; A-0667 at 23 to A-0668 at 2.
[63] B-170.
[64] A-1064 at 21 to A-1065 at 1.
[65] B-015-016.
[66] *Id.*

Plaintiffs filed an Amended Verified Complaint (the "Complaint"), followed by a Motion for Partial Summary Judgment on the Customer Payment Claims.

To defeat Plaintiffs' summary judgment motion, Defendants filed a belated answer and three counterclaims based on Plaintiffs' alleged breach of the SPA. Specifically, Defendants asserted an affirmative defense of "setoff" based on Defendants' own claim for indemnification against Plaintiffs for an alleged breach of the SPA.[68] The Trial Court ordered Defendants to tender $1,650,422.10 of Plaintiffs' Customer Payments that were not genuinely disputed, but it reserved decision on the Motion for Partial Summary Judgment pending trial.[69]

Trial took place over March 29–31, 2016. On October 31, 2016, the Trial Court issued its post-trial memorandum opinion.[70] The Trial Court ruled in Plaintiffs' favor on the Inventory Claims, but it reserved decision on certain issues relating to the Customer Payment Claims that had to be resolved by a third-party accountant (the "Post-Close Adjustment Proceedings") and referred the Customer Payment Claims to a special master. That referral was later retracted.[71]

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[67] OB Ex. C at 2.

[68] B-095 ("Defendants were justified in withholding payments from PIS customers (to the extent that it did), because of Plaintiffs' breach of the parties' agreements.").

[69] *Brace Indus. Contracting, Inc. v. Peterson Enters., Inc.*, 2015 WL 8483170, at *1 (Del. Ch. Dec. 10, 2015).

[70] OB Ex. A.

[71] *See* B-346.

The parties spent the better part of the next two years litigating the Customer Payment Claims. The Post-Close Adjustment proceedings concluded on October 27, 2017 with a report that directed PEI to pay Plaintiffs a net sum of $561,975.82.[72] On March 29, 2018, the Trial Court issued a bench ruling awarding additional damages to Plaintiffs on their Customer Payment Claims and rejecting Defendants' setoff defense (the "March 29 Ruling"). The March 29 Ruling was revised by a April 26, 2018 ruling that resulted in a further net damages award to Plaintiffs of $550,743.00.[73]

Both parties submitted fee applications. Plaintiffs sought approximately $1.3 million in attorneys' fees and $440,149 in costs. The Trial Court awarded Plaintiffs $241,686 in attorney's fees and the full amount of their costs pursuant to Section 6.2 of the SPA and Court of Chancery Rule 54(d).[74]

On February 6, 2019, more than three years after the commencement of the case, the Court of Chancery entered the Final Order. The Final Order directed that "the amount owed to the Plaintiffs must first be paid out of the escrow account," and that "the individual Defendants are liable for the remaining amount."[75]

[72] *See* OB Ex. D at 2.
[73] *Id.* at 1.
[74] OB Ex. C.
[75] OB Ex. D at 4.

In sum, throughout the course of the litigation, the parties submitted and briefed a collective total of sixteen motions.[76] They participated in five teleconferences, two in-person conferences, two hearings, and three days of trial.[77] "Plaintiffs generally prevailed in the litigation," ultimately recovering $3,488,199.82 on their Inventory Claims and their Customer Payment Claims, combined.[78]

[76] A-0001-0031.
[77] *Id.*
[78] OB Ex. C; OB Ex. D.

ARGUMENT IN SUPPORT OF CROSS-APPEAL

I. THE TRIAL COURT ERRED BY FAILING TO AWARD PLAINTIFFS REASONABLE ATTORNEYS' INCURRED AS A RESULT OF PEI'S BREACH OF THE SPA AS REQUIRED BY THE SPA.

A. Questions Presented

Whether the Trial Court erred in failing to award Plaintiffs the full amount of their requested attorneys' fees as required by Section 6.2 of the SPA. Section 6.2 entitles Plaintiffs to indemnification for all "Losses," including reasonable attorneys' fees, "arising out of" PEI's breaches of representations in the SPA. Plaintiffs preserved this issue for review in their November 7, 2016 motion for reconsideration of the Memorandum Opinion and in their fee application.[79]

B. Scope of Review

This Court reviews interpretation of a contractual fee-shifting provision *de novo*, and otherwise reviews a decision to award attorneys' fees and costs for an abuse of discretion.[80]

C. Merits of Argument

Section 6.2 of the SPA required PEI to indemnify Plaintiffs for "any and all Losses incurred or sustained by, or imposed upon, the Buyer Indemnitees based upon, arising out of, with respect to or by reason of" the breach.[81] The SPA's

[79] B-319-320; A-1285-1280.

[80] *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

definition of "Losses" includes "reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder . . . ."[82]

Ultimately, the Trial Court found that PEI breached its representation in Section 3.11(b) of the SPA by overstating the inventory of PIS in the Scaffolding List.[83] Plaintiffs, therefore, are entitled to all reasonable attorneys' fees "arising out of" PEI's breach.

Plaintiffs delivered their Claim Notice which triggered Defendants' retaliatory behavior and usurpation of Customer Payments. When Plaintiffs refused to drop their Inventory Claims, Defendants asserted their counterclaims and setoff defense as litigation leverage. Defendants bore the risk for that tactic under the SPA. Accordingly, Plaintiffs are entitled to all of their requested attorneys' fees, which are reasonable under DRPC 1.5.

Alternatively, if it were somehow legally possible to ignore the SPA in favor of the "implied" contingency fee that implicitly drove the Trial Court's decision on this issue, the correct starting point for such an implied contingency would be the total amount recovered by Plaintiffs on the claims and defenses at issue.

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[81] *See* OB Ex. C at 1-2.
[82] A-0082; A-0101.
[83] OB Ex. A at 25; OB Ex. C at 1.

1. Section 6.2 Entitles Plaintiffs to Recovery of All Attorneys' Fees Incurred in This Litigation.

Though the Trial Court determined that Plaintiffs were entitled to "reasonable attorneys' fees incurred in prosecuting the inventory claim," it erred by failing to recognize that *all* of Plaintiffs' attorneys' fees incurred in this litigation fall within the scope of Section 6.2 because they "arose out of" that covered, successful claim.[84]

Defendants freely admitted that they usurped the over $3 million in Customer Payments (*i.e.*, "compensation for work performed by PIS")[85] identified in the setoff defense as retaliation for the Claim Notice, which prevented the scheduled escrow disbursement to PEI.[86] According to Eric Peterson: "[W]e were being held hostage on our inventory claim and not getting our escrow money out. We felt the only option was money that happened to be coming through the lock box that we kept to protect ourselves."[87]

Thus, Plaintiffs' Customer Payment Claims (*i.e.*, "disgorge our unrelated money; the Inventory Claim will be resolved through the Escrow process") and

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[84] OB Ex. C.

[85] B-170; A-0667 at 23 to A-0668 at 2.

[86] Prior to the Claim Notice, PEI had identified Customer Payments that belonged to PIS but had been misdirected to PEI accounts. PEI had remitted the balance to Brace on a weekly basis. *See* B-645; B-649.

[87] A-1064 at 21 to A-1065 at 1; *see also* B-654 at 8:8-11 ("And they were holding our escrow money hostage at that point in time, so we decided to withhold those cash payments to them weekly in order to protect ourselves."); A-0659 at 1 to A-0661 at 3; A-0667 at 17 to A-0668 at 2; A-0997 at 12-13; A-0998 at 5-6; A-1070 at 17 to A-1071 at 2; B-645; B-649.

Defendants' setoff defense (*i.e.*, "we are keeping your money because your Inventory Claim is spurious") arose *solely* because Defendants made a strategic choice to increase their litigation leverage with a setoff defense. Fees incurred to litigate the purported setoff, therefore, are covered by the contractual fee-shifting right.[88]

When interpreting a contract governed by Delaware law, "the role of a court is to effectuate the parties' intent."[89] "Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning."[90]

Delaware courts construe the phrase "arising out of" broadly.[91] This language fits within the "far-reaching terms often used by lawyers when they wish

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[88] The Covenant Claims stemmed from the Inventory Claims as well. After submitting the Claim Notice based on Defendants' inventory misrepresentations, Plaintiffs discovered that Goedecke was instructing PIS's customers how to install and dismantle scaffolding themselves. B-015-016. Plaintiffs also discovered that Defendants had caused the creation of a new scaffolding company titled "Elite Scaffolding, Inc." a Missouri corporation shortly before the effective date of the acquisition. *Id.* Plaintiffs believed this conduct constituted a violation of Defendants' non-compete obligations in the RSAs and SPA Section 5.2, thereby giving rise to the Covenant Claims.

[89] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

[90] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

[91] *See, e.g., Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc.*, 68 A.3d 197, 239 (Del. Ch. 2013) ("The Limited Guaranty's fee-shifting provision is very broad. Under the Limited Guaranty, Edgewater agreed to pay "all attorneys fees and all other costs and expenses" HIG "may" incur "in connection with the enforcement of this Guaranty or in any way arising out of, or consequential to, the protection, assertion, or enforcement of the Guarantied Obligations....")

to capture the broadest possible universe."[92] The Court of Chancery addressed a similar provision in *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, where the plaintiff brought various claims relating to an asset purchase agreement in two separate Chancery proceedings and the defendant asserted a "setoff" based on alleged breaches of the asset purchase agreement and convinced the plaintiff to assist in prosecuting another lawsuit (the "Quantum Litigation").[93]

The court concluded that the defendant had breached the asset purchase agreement, thereby triggering a provision requiring indemnification for "all … losses and expenses (including reasonable attorneys' fees) of any nature (collectively, 'Losses') arising out of or relating to ... any breach or violation of the representations, warranties, covenants or agreements of [Compex] set forth in the Agreement."[94] The plaintiff was entitled to all fees and costs incurred in the two

[92] *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *10 (Del. Ch. Jan. 23, 2006) (describing a contractual provision contemplating indemnification for "Losses arising out of, connecting with or simply relating to" certain topics); *see also Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002) (finding that an arbitration clause requiring the parties to submit "any dispute, controversy, or claim arising out of or in connection with" the agreement to arbitration was broad in scope); *Town of Smyrna v. Kent Cty. Levy Court*, 2004 WL 2671745, at *2 (Del. Ch. Nov. 9, 2004) ("there is no question that the arbitration clause found in the Agreement is broad, as it covers all claims 'arising out of' or 'related to' the Agreement").

[93] 2009 WL 1111179, at *6, 7, 14 (Del. Ch. Apr. 27, 2009).

[94] *Id.* at *13.

Chancery proceedings *and* the Quantum Litigation because "those expenditures arose from [the defendant's] breach."[95]

Here, like in *Ivize*, "[t]he crux of the litigation was [the plaintiff's] breach of contract claim."[96] Like the fees incurred in prosecuting/defending multiple claims across multiple proceedings in *Ivize*, all fees incurred by Plaintiffs in connection with all claims and defenses in this case (not just the Inventory Claims) arose from PEI's breach of the SPA, and all of those fees must be covered by Defendants.[97]

SPA Section 6.2, and especially the incorporated qualifiers "all" and "arising out of" cannot rationally be read to exclude fees incurred to defeat a setoff affirmative defense to a covered claim. The word "all" is not ambiguous. It is not reasonable to postulate that sophisticated parties intended the words "all" and "arising out of" to mean, "setoff defenses excluded."

The foregoing argument is already-plowed ground in Delaware precedent. In *Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc.*, the plaintiff Edgewater had made a $4 million guaranty to the lenders of its subsidiary (Pendum), and it sued the holder of a majority Pendum's senior debt (HIG)

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[95] *Id.* at *14.

[96] *Id*. at *14. The plaintiff withdrew its claims for fraud, negligent or innocent misrepresentation, mutual mistake, and conversion, as well as its request for recession of the asset purchase agreement, prior to trial. *Id.* at *7.

[97] *See Cohen v. Cohen*, 269 A.2d 205, 207 (Del. 1970) (upholding fee award as "entirely proper" where "three separate actions [were] in fact one continuous piece of litigation which ultimately resulted in a settlement of the differences of the parties").

claiming that HIG's acquisition of Pendum contravened the Uniform Commercial Code.[98] HIG denied Edgewater's accusations and also counterclaimed that Edgewater, by failing to respond to a demand for payment under a guaranty, had breached its contractual obligation to pay HIG about $4 million.[99] Because the guaranty at issue provided for fee-shifting arising out of any efforts made by the secured lenders to enforce the agreement, and because HIG believed that Edgewater prosecuted its claims principally to avoid paying it, HIG argued that it was contractually entitled to its attorneys' fees, costs, and expenses associated with the litigation.[100]

The *Edgewater* court agreed with HIG and found that Edgewater's motivation was "principally to avoid paying on [the] guaranty," which required Edgewater to pay "all attorneys fees . . . in connection with the enforcement of this Guaranty or in any way arising out of, or consequential to, the protection, assertion, or enforcement of the Guaranteed Obligations . . . ."[101] Even though the litigation was not about the enforcement of HIG's rights under the guaranty *per se*, the breadth of the guaranty's fee-shifting provision and Edgewater's attempt to avoid that provision through litigation led the court to award HIG all of its attorneys' fees:

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[98] 68 A.3d at 202.
[99] *Id.*
[100] *Id.* at 210.
[101] *Id.* at 203, 238.

> Because the Limited Guaranty shifts all attorneys' fees, costs and expenses HIG "may" incur "in connection with the enforcement of this Guaranty or *in any way arising out of, or consequential to, the protection, assertion, or enforcement of the Guarantied Obligations*," and because I conclude that Edgewater prosecuted its claims in an attempt to exert leverage over HIG to drop its demand for payment under the Limited Guaranty, I find that HIG is entitled to collect on all of its attorneys' fees, costs, and expenses associated with defending against all of Edgewater's affirmative claims. Successfully defending these claims was necessary for HIG to collect on the guaranty, because, as Edgewater itself admits, it has refused to make payment under the Limited Guaranty until these claims were adjudicated. Likewise, HIG is entitled to collect on all of its attorneys' fees, costs, and expenses associated with prosecuting its Counterclaim.[102]

Here, like the broad fee shifting provision in *Edgewater*, the SPA requires Defendants to indemnify Plaintiffs against "any and all Losses," including "reasonable attorneys' fees and the cost of enforcing any right to indemnification," that are "incurred or sustained by, or imposed upon" Plaintiffs "based upon, arising out of, with respect to or by reason of" breaches by PEI of its representations and warranties.[103] PEI's breach of the SPA both precipitated and was inextricably intertwined to Defendants' conduct regarding their purported "setoff."[104]

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[102] *Id.* at 241.

[103] SPA, § 6.2(a).

[104] *See* B-321 ("The Opinion might have conflated Brace's contractual right to indemnification for litigation expenses pursuant to SPA §6.2 with Brace's separate argument that Defendants' admitted unlawful self-help warrants fee-shifting pursuant to the bad faith exception to the American Rule. Brief clarification might be warranted. Brace winning the indemnification claim by itself entitles Brace to recover its litigation costs per SPA §6.2, i.e., a win equals fees."); B-356 to B-357 (Plaintiffs' counsel explaining, "the progress of the litigation starts with the inventory claim. There is a purported setoff defense to the inventory claim

Moreover, exactly as in *Edgewater*, Defendants' principal motivation for the setoff was to thwart the escrow procedure for the Indemnification Claims and thereby shift the time-value risk for a breach of sell-side warranty off of where the SPA put it – the Escrow Account where the risk was born by the sellers – and onto Plaintiffs.

For all these reasons, Plaintiffs are entitled to all of their fees, and, respectfully, the Trial Court's decision to the contrary should be reversed.

2. Plaintiffs' Attorneys' Fees are Reasonable.

To assess the reasonableness of a fees request, Delaware courts consider the factors set out in DRPC 1.5(a) (the "DRPC 1.5 Factors").[105] Under those factors, and particularly in light of Defendants' tactical decision to pursue a meritless setoff defense, the $1,294,576.50 fee award sought by Plaintiffs here is reasonable.

a. The Trial Court Miscalculated the Value of the Results Obtained, Which is Not Dispositive in Any Event.

In the Fee Order, the Trial Court noted that "[t]he amount of inventory for which the Plaintiffs were entitled to compensation had a value of $725,059."[106] But the Trial Court erred by failing to acknowledge that Plaintiffs could not have

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that we defeated and ended up with the cash. So it all comes out of the inventory claim. It's all covered by 6.2.").

[105] *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242 (Del. 2007).

[106] OB Ex. C at 6.

recovered on their initial claim for $725,059 of missing inventory without also defeating the larger setoff demand to the tune of $3.5 million.

It is error to read the "reasonableness" element of DRPC 1.5(a)(4) to impose an "implied contingency fee" to an amount recovered, divorced from the actual hours and work necessary to succeed on a covered claim. There are seven elements of DRPC 1.5(a) which must be considered together as a whole, and exclusive reliance on a single element is error.

Again, the *Edgewater* litigation is directly on point because the Court of Chancery expressly rejected the hidebound reliance on DRPC 1.5(a)(4) that the Trial Court imposed here. There, the court explained that "to recover any money under the [guaranty], HIG had to defend against all of Edgewater's unsuccessful claims"[107] and noted that "[b]ecause Edgewater made many claims, it was costly for HIG to defend against them."[108] Because HIG substantially prevailed in the litigation, the court found that "factor 4 [(the amount involved and the results obtained)] supports the reasonableness of awarding HIG all of its attorneys' fees, costs, and expenses."[109]

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[107] *Edgewater Growth Capital Partners L.P. v. H.I.G. Capital, Inc.*, 2013 WL 1707877, at *4 (Del. Ch. Apr. 18, 2013) ("*Edgewater II*").

[108] *Id.*

[109] *Id.*; *see also ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 446 (Del. Ch. 2012) (finding a fee award larger than the amount recovered to be reasonable because the party's attorneys had to work more hours to address the other party's claims); *Mahani*, 935 A.2d at

Here, as in *Edgewater II*, if Plaintiffs had lost the setoff defense, they would have recovered nothing. Accordingly, the total amount recovered on claims and defenses was $3,488,199.82, as reflected in the Final Order.

In any event, the "results obtained" are not determinative of "reasonableness" in a contractual fee-shifting context. This Court "has repeatedly held that the amount involved and results obtained is only one factor to consider in determining if a fee is reasonable, because a contractual fee-shifting case 'should be assessed by reference to legal services purchased by those fees, not by reference to the degree of success achieved in the litigation.'"[110]

b. The Litigation was "Vigorously Contested" and Unduly "Prolonged" as a Result of Defendants' Litigation Tactic.

Among other things, DRPC 1.5 instructs trial courts to consider "the time and labor required."[111] In this case, the litigation was "vigorously contested, factually dense and prolonged."[112] Bluntly, Defendants' self-help setoff strategy

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248 (affirming a fee award, in a contractual fee-shifting case, when the prevailing party fees ($103,454.50) were greater than the amount recovered for the breach of contract ($16,500) because the complaining party took actions that made the litigation expensive).

[110] *Edgewater II*, 2013 WL 1707877 at *4 (*citing Mahani*, 935 A.2d at 248; *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 2013 WL 772651, at *7 (Del. 2013) ("[A] litigant's success in the proceeding is but one factor to be considered in determining the amount of attorney's fees to award, and this factor may be outweighed by the other factors.")).

[111] DRPC 1.5(a).

[112] OB Ex. C at 1.

materially lengthened and enlarged the case.[113] In *Edgewater II*, the Court of Chancery acknowledged that "HIG's attorneys' fees were likely to be disproportionate to the amount HIG recovered because HIG had to spend so much time and money on countering Edgewater's meritless affirmative claims."[114]

Here, the Trial Court resolved the Inventory Claims and the Covenant Claims via the October 31, 2016 post-trial opinion, seventeen months after filing. Thus, one hundred percent of the litigation time and expense from October 31, 2016 to the issuance of the Final Order on February 6, 2019 were expended to force disgorgement by Defendants of the cash they usurped via their unsuccessful setoff strategy.[115] Defendants took that cash as a purported setoff at their peril, and like in the *Edgewater* cases, they bear the contractual risk for that failed decision.

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[113] The Trial Court also took responsibility on multiple occasions. *See supra* n. 11.

[114] *See Edgewater II*, 2013 WL 1707877 at *2 (noting that "HIG's attorneys' fees were likely to be disproportionate to the amount HIG recovered because HIG had to spend so much time and money on countering Edgewater's meritless affirmative claims").

[115] By way of example, Defendants claimed they were entitled to $677,761 for supposed Goedecke equipment in Plaintiffs' possession in addition to related rental fees. A-1227; A-1229; A-1077 at 13 to A-1078 at 11. The relevant equipment, however, was *always* possessed and owned by PIS, including on the date of the Acquisition. A-0601 at 11; A-1079 at 9 to A-1084 at 15. Plaintiffs were forced to defend against this claim, including invoices offered by Defendants in support, which Eric Peterson had created six months *after* this dispute began which purported to transfer those assets from PIS to Goedecke long after the sale had closed. A-1078 at 12 to A-1079 at 14. This took considerable time and effort.

Defendants have no basis to complain that the litigation was "unreasonably" long and expensive because they intentionally made it so.

In sum, this case was long, hotly contested and complex, and it required much attention from counsel. It is no surprise that the litigation "generated substantial costs, including expert witness expenses, as well as large legal fees."[116] As the Trial Court noted, "Plaintiffs generally prevailed in the litigation," ultimately recovering a combined total of approximately $3.5 million on their Inventory Claims and their Customer Payment Claims.[117]

c. Other Factors Support the Reasonableness of the Fees Incurred.

Other DRPC 1.5 Factors demonstrate the reasonableness of Plaintiffs' fees. First, the Trial Court found "that the hourly fee [charged by Plaintiffs' counsel] was reasonable."[118] The normal hourly rates of McCarter & English LLP,

[116] OB Ex. C at 2.

[117] OB Ex. C at 1; OB Ex. D.

[118] OB Ex. C at 2. Plaintiffs' willingness to pay (and actual payment of) these attorneys' fees "with no contingency arrangement, and despite the considerable risk that the fees would be sizeable even though [they] might lose the case, evidences [their] belief that the fees [they] incurred were reasonable." *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1998 WL 155550, at *2 (Del. Ch. Mar. 30, 1998) (finding that a plaintiff's willingness to pay fees helped "independently satisfy the Court" that the fees were reasonable). "If a party cannot be certain that it will be able to shift expenses at the time the expenses are incurred, the prospect that the party will bear its own expenses provides 'sufficient incentive to monitor its counsel's work and ensure that counsel [does] not engage in excessive or unnecessary efforts.'" *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 997

including the specific trial counsel in this case, have been found to be reasonable by the Court of Chancery.[119] Second, the Trial Court correctly ruled that this case precluded Plaintiffs' counsel from taking other work, especially during the lead-up to and three days of trial in Georgetown, Delaware, away from their offices in Wilmington.[120] Third, Plaintiffs recovered approximately $3.5 million on their Inventory and Customer Payment Claims, against which a fee of $1.3 million would cause no blushes even on a contingency basis, let alone when fully paid on an hourly rate basis by a real-world purchaser of legal services.[121]

3. At the Very Least, Plaintiffs are Entitled to One-Third of the Total Amount Recovered.

Alternatively, if it were legally possible to ignore the SPA in favor of an "implied" contingency fee based (erroneously) solely upon DRPC 1.5(a)(4), the implied contingency must be derived from the total amount recovered.

In the Fee Order, the Trial Court noted that "[t]he amount of inventory for which the Plaintiffs were entitled to compensation had a value of $725,059," and

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(Del. Ch. 2012) (*citing Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del.Ch. Aug. 13, 2010).

[119] *See Martin v. Med-Dev Corp.*, 2015 WL 6472597, at *21 (Del. Ch. Oct. 27, 2015); *Costantini, v. Swiss Farm Stores Acquisition LLC*, 2013 WL 4758228, at *1 (Del. Ch. Sept. 5, 2013), *opinion withdrawn in part on rearg.*, 2013 WL 6327510 (Del. Ch. Dec. 5, 2013); *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 653 (Del. Ch. 2012).

[120] *See* A-1290 at 11.

[121] OB Ex. C at 1.

that "a contingency fee of one-third … implies a fee of $241,686."[122] The Trial Court found that amount "to be the upper limit of a reasonable fee for the inventory claims" on the grounds that "[a]warding the Plaintiffs the amount they seek in fees, nearly $1.3 million, would be unjustified in light of the amount recovered (as the Plaintiffs themselves point out in their opposition to the Defendants' similarly-disproportionate fee claims)."[123]

But Plaintiffs could not have recovered on their initial claim for $725,059 of missing inventory without also defeating the larger setoff demand to the tune of $3.5 million. If Plaintiffs had lost the setoff defense, they would have recovered nothing. The total amount recovered on claims *and defenses* was $3,488,199.82, reflected in the Final Order. One third of that sum is $1,162,733.27, or approximately 33% of the amount recovered. To the extent an implied contingency fee is appropriate (it is not), that sum sets the lower bound. The contractual fee billed to *and actually paid* by the successful Plaintiffs is $1.3 million, or approximately 37% of the amount recovered. An implied contingency fee of 37% is nowhere near unreasonable within the meaning of DRPC 1.5(a)(4), on this record.

[122] OB Ex. C at 6.
[123] *Id.*

ARGUMENT IN OPPOSITION TO APPEAL

I. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFFS MET THEIR BURDEN OF PROOF ON THE INVENTORY CLAIMS.

A. Questions Presented

Whether the Court of Chancery correctly (1) ruled for Plaintiffs on their Inventory Claims and (2) rejected PEI's threshold challenge to Brace's indemnification claim based on PEI's incorrect argument that Brace allegedly did not follow the SPA's notice requirement, and then ruling for Plaintiffs on the Inventory Claims.

The Trial Court did not abuse its discretion or commit legal error in finding for Plaintiffs on the Inventory Claims. The Trial Court's findings were based on determinations of fact and witness credibility that should not be disturbed on appeal, as well as correct interpretations of the SPA.

B. Standard of Review

Findings of fact must be affirmed if they are "supported by the record and the conclusions are the product of an orderly and logical deductive process," even if this Court would not have come to the same conclusions.[124] Questions of law are

[124] *Int'l Telecharge, Inc. v. Bomarko, Inc*, 766 A.2d 437, 439 (Del. 2000); *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

reviewed *de novo.*[125] Findings of historical fact are subject to the deferential "clearly erroneous" standard of review.[126]

C. Merits of Opposition

For the reasons stated below, the Trial Court correctly decided the Inventory Claims in Plaintiffs' favor and Defendants' appeal should be rejected.

1. Brace Provided Notice as Required by Section 6.5(c) of the SPA.

Section 6.5(c) of the SPA provides that the party seeking indemnification shall give "reasonably prompt written notice" and that the notice must describe the claim "in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained."[127] Section 6.5(c) also states, however, that "[t]he failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defenses by reason of such failure."[128]

Defendants contend that Section 6.5(c) bars Brace's indemnification claim.[129] The Trial Court correctly rejected that argument.

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[125] *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

[126] *Id.*

[127] A-0086-0087.

[128] A-0086.

[129] OB at 8.

a. Brace Provided PEI With the Material Evidence Supporting the Inventory Claim.

Defendants assert that Section 6.5(c) bars Brace's indemnification claim because supposedly "PEI never received documents fully supporting the inventories that Brace conducted or showing how the claim was calculated."[130] That argument is rather aggressively false on the record.

In addition to ignoring the substantial written materials provided over many months of good faith exchanges,[131] Defendants define "material evidence" based on Eric Peterson's subjective, *post hoc* belief about what was supposedly necessary to evaluate Brace's claim.[132] Under Delaware law, however, subjective belief is irrelevant. Instead, the SPA's terms must be interpreted from the perspective of "an objective, reasonable third-party."[133]

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[130] OB at 11.

[131] On March 28, 2015, two days after delivery of the Claim Notice, Brace employee Blake Kuhlenschmidt sent Eric Peterson an email stating "[a]s discussed, please find attached a spreadsheet that details by piece the count variance and estimated replacement cost." A-0357-0388. On April 8, 2015, Mr. Kuhlenschmidt sent another email to Mr. Peterson that "attached the count sheets by branch/job." B-646 (the attachment to this e-mail is not appended to this brief due to size; however, Plaintiffs will be happy to provide it upon the Court's request). And during this litigation, the spreadsheets were sent again to Defendants' counsel, who in turn provided them to Eric Peterson. B-656 (the attachment to this e-mail is not appended to this brief due to size; however, Plaintiffs will be happy to provide it upon the Court's request).

[132] *See* OB at 9.

[133] *Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1159 (Del. 2010).

Properly viewed, the Scaffolding List and the Mary Sheet, the documents used to calculate the shortages constituted "material written evidence" supporting Brace's indemnification claim. Defendants possessed these materials before they even received the Claim Notice: the Scaffolding List is an export from FACTS,[134] and the Mary Sheet is one of Defendants' own business records. Defendants' claim that the Inventory Claim was not documented in accordance with the SPA is without merit.

b. Defendants Forfeited No Rights or Defenses.

Even if Defendants had a basis for arguing that they did not possess sufficient documentation underlying the Inventory Claim, the plain text of the SPA protects Brace from technical arguments that would result in a forfeiture of a substantively legitimate claim. Section 6.5(c) states a failure to provide "material written evidence" cannot affect an indemnification claim unless there is a resulting forfeiture of "rights or defenses."[135]

Defendants argue that Eric Peterson had "too little time to fully review and analyze them before trial, prejudicing PEI's ability to fully prepare its defense,"[136] but this argument fails. The parties discussed the inventory shortfall for months

[134] A-0581 at 23 to A-0582 at 6; A-0957 at 17 to A-0958 at 3.

[135] *See Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 555 (Del. 2013) ("An interpretation that conflicts with the plain language of a contract is not reasonable.").

[136] OB at 11-12.

following the closing of the Acquisition.[137] Defendants knew that Plaintiffs thought shortages existed *and* that Brace had used the Mary Sheet to evaluate the inventory received.

For example, on October 7, 2014 – over five months before the Claim Notice – Mr. Talley sent Eric Peterson an email attaching the Mary Sheet (which Brace relied upon at trial in support of its inventory claim) and discussing the shortfall:

> My preliminary numbers for what the inventory was at closing and the values are enclosed, I used Mary sheet to determine average cost, I took out Africa since that would have made the average cost lower. It appears at July 31 we we [*sic]* short about 40k on the inventory on Tube and Clamp, I still need to make sure that none of the Direct Purchases in July were put into the inventory which would make it worse since I am using the number [*sic]* that were on the balance sheet on June 30th that should have went with the sale, if any tickets from direct were entered in July we need to know that.
>
> On PERI we are going to be short, I have entered in all rental of material and removed that, I did not take into account any negative values which are quite of [*sic]* few, I gave them zero value. I get 239,227 short based on average cost. The total is a minimum of about 280k short. I am enclosing all my files for your review.[138]

On April 14, 2015, Mr. Talley sent the Mary Sheet to Defendants a second time.[139] Thus, even though the Mary Sheet was not attached to the Claim Notice,

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[137] B-171; A-0583 at 22 to A-0584 at 11; B-666 at 39:14-19.

[138] B-643.

[139] *See* B-650 (the attachment to this e-mail is not appended to this brief due to size; however, Plaintiffs will be happy to provide it upon the Court's request).

Defendants had the material evidence underlying the Inventory Claims well in advance of trial. Defendants' inability to prepare a defense to the Inventory Claim over the approximate year-and-a-half interval between their receipt of the Mary Sheet and the beginning of trial does not give rise to prejudice under Section 6.5(c) that erases Defendants' breach of Section 3.11(b)[140] and is a testament to the merit of Plaintiffs' Inventory Claims.

The Trial Court correctly determined, "[e]ven assuming that the Plaintiffs failed to give prompt written notice by failing to provide material written evidence, the Defendants here have not forfeited any rights or defenses by reason of that failure,"[141] and thus, Plaintiffs' Inventory Claims are not barred under Section 6.5(c) of the SPA.

2. The Trial Court Employed Logical and Orderly Reasoning in Finding that Plaintiffs Carried their Burden of Proof on the Inventory Claims.

Defendants next argue that the Trial Court's decision on the Inventory Claims "was not the product of an orderly and logical deductive process."[142] For multiple reasons, Defendants are wrong.

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[140] *See Rowe v. Everett*, 2001 WL 1019366, at *1 (Del. Ch. Aug. 22, 2001) (approving Master's report recommending summary judgment and rejecting defendant's argument "that he was somehow denied access to the discovery process" because "[t]o the extent [the defendant] failed to develop evidence through the discovery process, that failure was his own fault.").

[141] OB Ex. A at 26.

[142] *Id.*

a. Defendants Rely on Semantics While Ignoring the Substance of the Trial Court's Ruling.

Defendants fault the Trial Court for finding that Plaintiffs' method of proving the shortfalls in the Scaffolding List was the "more reasonable method to establish the amount of scaffolding conveyed at Closing."[143] According to Defendants, "[t]hat was the wrong question [for the Trial to Court] to ask" because "[p]utting the choice in those terms saddled *Defendants* with a burden to offer a 'more reasonable' method to determine scaffolding at closing."[144] While Defendants try to portray the Trial Court as somehow failing to undertake the critical step of evaluating the viability of Brace's methodology, the post-trial opinion confirms that the Trial Court did, in fact, engage in a proper analysis.

The Trial Court explicitly determined that "the Plaintiffs have shown the maximum amount of scaffolding the Defendants could have had on hand, counted that as what was transferred, and any shortage by comparison to the Scaffolding List indicates the *minimum* amount of shortage in the items conveyed."[145] Critically, the Trial Court found that "it is more likely than not that the shortage stated under Plaintiffs' analysis is less than or equal to the actual shortage."[146]

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[143] OB Ex. A at 29, 32.

[144] OB at 16 (emphasis in original). Unsurprisingly, Defendants do not take issue with similar language used by the Trial Court in finding for them on the Covenant Claims: "Considering their contract as a whole, including extrinsic evidence, Defendants' construction is the more likely." OB Ex. A at 23.

[145] OB Ex. A at 29 (emphasis in original).

[146] *Id.* at 29-30.

The Trial Court properly recognized that the preponderance of the evidence standard applies to contract claims[147] and correctly applied that standard with a "more likely than not" analysis. Additionally, the Trial Court explained it was "persuaded by the testimony of Talley," whom the Trial Court found "to be a particularly credible witness."[148] "Ultimately, Mr. Talley concluded that the Scaffolding List was not accurate because after having problems with the inventory for nine months, those problems did not 'miraculously get fixed' shortly before Closing, when the Scaffolding List was created from the inherently-inaccurate FACTS-based inventory."[149]

The Trial Court also found it compelling that Eric Peterson could not credibly defend the accuracy of PEI's Scaffolding List. The Trial Court concluded that Eric's testimony "testimony does not assuage my concerns about the reliability of Defendants' method for tracking inventory and creating the Scaffolding List."[150]

The Trial Court properly evaluated and credited Plaintiffs' presentation at trial and found that Plaintiffs had successfully carried their burden of proof. Defendants' argument to the contrary should not be credited.

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[147] *Voshell v. Attix*, 574 A.2d 264 (TABLE) (Del. 1990) ("A preponderance of evidence exists when the body of evidence supporting a conclusion is greater than the body of evidence that does not support that conclusion.").

[148] OB Ex. A at 30, 31.

[149] *Id.* at 31.

[150] *Id.* at 32.

b. Plaintiffs Proved By a Preponderance of the Evidence that Brace Did Not Receive "Substantially All" of the Scaffolding Possessed by PIS.

Defendants argue that Plaintiffs failed to prove that PEI's Scaffolding List was inaccurate based on criticism of Plaintiffs' chosen methodology, the Mary Sheet Analysis.[151] As verified by Plaintiffs' expert, Steven Kops, a CPA and partner at Mazars USA whom the Trial Court repeatedly found to be credible,[152] the Mary Sheet Analysis is a viable methodology.[153]

The Mary Sheet accurately and reliably demonstrates that Defendants shorted Brace with regard to two types of inventory – PERI Items (*i.e.*, equipment manufactured by PERI) and "Board Items," (*i.e.*, wood boards used in conjunction with scaffolding). The Mary Sheet Analysis establishes the PERI shortages by comparing the disclosed amount of each PERI Item on the Scaffolding List with

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[151] OB at 15.

[152] *See, e.g.*, B-349 at 19-21 (stating in connection with Customer Payment Claims that "I found Mr. Kops more credible than the witnesses, expert and lay, on behalf of the defendants").

[153] In fact, the Mary Sheet Analysis is the ***only*** reliable methodology that could have been used in this case. A-0795 at 8-12. As proven at trial, a physical count was not viable. A perpetual inventory system could not have been used. PIS did not have a perpetual inventory system – Defendants' businesses used FACTS. *See* A-0644 at 18 to A-0665 at 14. Therefore, after closing, Plaintiffs had to build a system for PIS, which is why the physical count that initially led to the Inventory Claims was performed. *Id.* A report from this system was not usable because it was not in place at closing and because of the errors in the Scaffolding List. The only other perpetual inventory system that could have been used was FACTS, which was inaccurate.

the maximum amount of those items that Defendants could have possessed.[154] According to Mr. Kops, "[t]he logic is that you can't convey or sell an item that you don't own or possess."[155] Brace calculated the replacement cost for each shorted item by using PEI's historical purchases and multiplying the shorted amount for each item by the average cost of that respective item, yielding a total of $703,975 in damages.[156] With regard to Board Items, Defendants simply gave Brace fewer items than what the Scaffolding List disclosed,[157] causing $21,084 in damages.[158]

The Trial Court properly observed that "the Mary Sheet Analysis is inherently conservative; it might overstate the amount of inventory transferred, but logically it cannot understate it; the Plaintiffs have shown the maximum amount of scaffolding the Defendants could have had on hand, counted that as what was transferred, and any shortage by comparison to the Scaffolding List indicates the *minimum* amount of shortage in the items conveyed."[159] "The shortage could be greater, but the Defendants have failed to show that the shortages are not at least as much as the shortages found to exist by the Mary Sheet Analysis."[160]

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[154] A-0729 at 22 to A-0730 at 22.
[155] A-0734 at 23-24.
[156] A-0733 at 8 to A-0734 at 3; A-0734 at 1-3.
[157] A-0739 at 1-21; A-0740 at 1-7.
[158] A-0739 at 22-24.
[159] OB Ex. A at 29.
[160] *Id.*

For all these reasons, Plaintiffs have carried their burden by establishing damages to a reasonable degree of accounting certainty.[161]

c. Defendants Did Not Prove that Brace Received "Substantially All" of the Scaffolding Possessed by PIS.

Defendants further argue that "the evidence showed that section 3.11(b) of the SPA disclosure schedule accurately set forth the scaffolding equipment that PEI transferred at Closing."[162] As the Trial Court correctly determined, this is ludicrous.

Defendants contend that the Scaffolding List was accurate because it was a print-out from FACTS, the perpetual inventory system that tracks Defendants' scaffolding.[163] Because Eric Peterson testified that FACTS was accurate, Defendants argue that the Scaffolding List must be accurate as well. However, the Trial Court correctly determined that Eric Peterson's testimony on this point was not credible.[164]

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[161] *See* A-0734 at 18-19, A-0749 at 8-9; *Base Optics Inc. v. Liu*, 2015 WL 3491495, at *16 (Del. Ch. May 29, 2015) ("[T]he plaintiff must show both the existence of damages provable to a reasonable certainty, and that the damages flowed from the defendant's violation of the contract.") (quotations omitted).

[162] OB at 26.

[163] A-0569 at 7-11; A-0940 at 21 to A-0941 at 4.

[164] OB Ex. A at 31-32.

Defendants rely on the story Eric Peterson told at trial that he supposedly took weeks and great care to validate FACTS and prepare the Scaffolding List.[165] Eric's lengthy testimony about his supposed diligence in creating the Scaffolding List, however, was newly-invented at trial and had appeared in the record nowhere before then, including in his two depositions, where he called the Scaffolding List an "afterthought" and "approximation" that he spent "maybe an hour or two" preparing the day it was submitted to Brace after exporting it from FACTS at 2:00 a.m. that morning.[166]

Moreover, if the efforts to prepare the Scaffolding List occurred as described by Eric at trial, write-offs would have resulted on Defendants' balance sheet.[167] No write-offs occurred, however, and in fact, the balance sheet actually includes an upward adjustment of $150,000.[168] Moreover, Eric Peterson is not credible for other reasons as well.[169] Not only is Eric a named Defendant whose father is personally liable for liability incurred by PEI, but he is also PEI's COO.[170] The indemnification obligations owed to Brace imposes significant financial hardship on PEI.[171] Eric's testimony is self-serving and uncorroborated.[172]

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[165] OB at 42-44; *see also* A-0957 at 17 to A-0958 at 9.
[166] B-671 at 66:10-67:18.
[167] A-1047 at 11-24; A-1056 at 21 to A-1057 at 1.
[168] A-0113 at Line 9.
[169] *See* B-157-159; B-215 at n.17; B-254-255.
[170] A-0933 at 22-23.
[171] A-1065 at 19-24; A-1067 at 8-11.

One of Eric Peterson's key failures was the inaccurate and incredible testimony that *Brace* created Defendants' financial statements included with the SPA.[173] The Trial Court, and even Defendants' expert, rejected Eric's testimony on this point.[174] Such an obvious misstatement from the witness stand correctly threw Mr. Peterson's overall credibility into doubt.

Eric Peterson was also contradicted by Mark Talley, who testified that before closing, Defendants could not reconcile FACTS[175] and that Eric knew FACTS was inaccurate when he used it to create the Scaffolding List.[176] Mr. Talley has a financial stake in this lawsuit that cuts against Plaintiffs' interests – he is entitled to a portion of the Indemnification Escrow and is liable for a portion (up to $135,000) of any indemnification owed Brace.[177] Unlike Eric Peterson, Mr. Talley's testimony was credible and not self-serving.[178]

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[172] *See Krenowsky v. Haining*, 1988 WL 90825, at *4 (Del. Ch. Aug. 30, 1988) (rejecting argument that was based only on self-serving testimony and was not corroborated by "documentary evidence" or "disinterested witnesses").

[173] *See* A-1056 at 5 to A-1057 at 5; OB Ex. A at 31-32.

[174] A-1141 at 12-22; OB Ex. A at 31-32.

[175] A-0570 at 6 to A-0571 at 24; A-0581 at 23 to A-0582 at 21; A-0583 at 12-18.

[176] A-0571 at 12-16; A-0581 at 23 to A-0582 at 21; A-0583 at 12-18; A-1058 at 10-14.

[177] A-0557 at 22 to A-0558 at 12; B-408 § 1.2.

[178] *See In re Tax Parcel No. 09-008.00-001*, 2015 WL 230457, at *2 n.10 (Del. Ch. Jan. 16, 2015) ("Mickey's sworn testimony was against his interest, and I find it to be credible."); OB Ex. A at 30-31.

Also unlike Eric Peterson, Mr. Talley's testimony is corroborated. The Scaffolding List is a representation of FACTS at closing,[179] so it should match Defendants' balance sheet, and by extension, the Mary Sheet. Eric Peterson confirmed that the Mary Sheet is an accurate representation of Defendants' scaffolding because it ties to their balance sheet.[180] The Scaffolding List, however, does not match the Mary Sheet, proving that FACTS does not match the balance sheet and is inaccurate.

The Trial Court was "persuaded by the testimony of Talley,"[181] who explained that "there were many problems with the inventory in FACTS before the sale."[182] The Trial Court noted that Mr. Talley described inventories taken in November of 2013 and July of 2014 as "junk."[183] Mr. Talley testified to the difficulties of getting all of the ship tickets in and out correctly and that "paper would get lost," causing the resulting inventory to be unreliable.[184] With regards to field audits of job sites, Mr. Talley discussed their extreme difficulty, explaining as an example that "everyone in the room would go count [the inventory], and all

[179] A-1059 at 10-23.

[180] A-1051 at 15-17; A-1052 at 18-21.

[181] OB Ex. A at 30. The Trial Court noted that "Talley has been in the scaffolding business since 1978 and worked for the Defendants before transferring over to the Plaintiffs as a 'key man' on the sell side of the transaction," and that "Talley has been involved in a majority of scaffolding purchases by PIS." *Id.*

[182] *Id.* at 30-31.

[183] *Id.* (citing A-0570 at 6 to A-0571 at 24).

[184] *Id.* (citing A-0570 at 6 to A-0571 at 24).

come up with a different number because we'll miss this corner or we'll miss this piece."[185]

According to Mr. Talley, such physical counts were attempted three different times with no success.[186] Ultimately, Mr. Talley concluded that the Scaffolding List was not accurate because after having problems with the inventory for nine months, those problems did not "miraculously get fixed" shortly before Closing, when the Scaffolding List was created from the inherently-inaccurate FACTS-based inventory.[187] The Trial Court noted that "Talley has provided testimony favorable to both sides in this matter, and—in light of the fact that his personal monetary interests lie contrary to Plaintiffs' interests in the matter of the inventory claims—I find him to be a particularly credible witness."[188]

For all these reasons, Defendants' attempt to rehabilitate the accuracy of the Scaffolding List cannot be accepted.

3. There are No Overages, Which Would Not Benefit Defendants in Any Event.

Defendants also assert that the Mary Sheet Analysis is unreliable because of so-called "overages," *i.e.*, items other than those that were shorted that have a

[185] *Id.* (citing A-0570 at 20 to A-0571 at 16).
[186] OB Ex. A at 31 (citing A-0570 at 20 to A-0572 at 16).
[187] *Id.* (citing A-0581 at 23 to A-0582 at 21).
[188] *Id.* (citing A-0557 at 22 to A-0558 at 12); B-408 § 1.2 B; A-0558 at 1 to A-0559 at 12. The Trial Court found that "[s]uch a conclusion is further enhanced by contrasting Talley's testimony with that of Eric Peterson." *Id.*

higher unit count on the Mary Sheet than what is represented on the Scaffolding List. To the extent these overages exist, Defendants claim they should receive credit for them against the Scaffolding List. Defendants are wrong again.

First, the so-called "overages" do not exist; they represent a facile and incorrect mathematical analysis unsupported by any admissible expert testimony and to which no competent expert could testify.[189] Directly, "overages" math backs into the conclusion Defendants want: Defendants "must have" transferred the inventory listed in the SPA and, therefore, there "must be" tens of thousands of unlisted pieces of scaffolding that Defendants "really" transferred to Brace even though they were not listed as assets owned by PIS on the SPA.

Nothing prevented Defendants from engaging a credible expert to validate their inventory position, if such validation were possible. Defendants possessed the Mary Sheet Analysis as early as October 2014,[190] and it has been discussed extensively by the parties throughout the litigation. Defendants' choice to not hire an expert to testify about inventory is their own fault. Defendants did not present any competent fact evidence that excess inventory was given to Brace and cannot undermine the damages proven by Plaintiffs with a speculative hypothetical.[191]

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[189] *See* B-668 at 126:8-16.

[190] B-643.

[191] *See M&T Bank v. Kowinsky Farm, LLC*, 2013 WL 123716, at *3 (Del. Super. Ct. Jan. 8, 2013) (granting summary judgment where "[d]espite ample opportunity during discovery to obtain testimonial or documentary evidence

And in any event, excess inventory was ***not*** transferred.[192] No phantom inventory was discovered. In fact, the record shows that Defendants kept *more* PERI scaffolding than was reserved by the SPA.[193]

Even if Defendants transferred other types of inventory, or "overages," this would not remedy PEI's breach. Brace was shorted on eighty-eight distinct items on the Scaffolding List. The distinction between different types of scaffolding cannot be overlooked. The items on the Scaffolding List were not interchangeable,[194] and if Plaintiffs do not have enough of one type of equipment they cannot simply substitute another. They have to either purchase or rent more of the shorted item.[195] The damages caused by the shortages are separate from and not impacted by any overages – they exist regardless.

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regarding what happened during the negotiations and build-up to the deal of May 22, 2006, the defendants do not advance a mistake defense that amounts to more than mere speculation.").

[192] *See* B-668 at 126:8-16.

[193] A-0589 at 23 to A-0591 at 7. Without any expert testimony, Defendants also assail the Mary Sheet Analysis because of the treatment of scaffolding sent to Africa, Defendants' supposed practice of "collapsing" item codes in FACTS, and the calculation of re-rent. These arguments are based exclusively on the conclusory, uncorroborated, self-interested testimony of Eric Peterson. Because they are contradicted by credible and corroborated testimony of *Messrs.* Kops and Talley, they should be rejected. *See* OB Ex. A at 27, n. 132.

[194] *See* A-0594 at 9-21; A-0597 at 6-24.

[195] *See* B-667 at 54:15-17.

The Trial Court properly determined that "Defendants have not shown that these items were actually transferred,"[196] and the ruling deciding the Inventory Claim in Brace's favor should be affirmed.

4. There is Nothing Unjust about Plaintiffs' Damage s Award on the Inventory Claims.

In a final (and telling) appeal to equity, Defendants contend that "the total amount of scaffolding overages that Brace calculated (less the amount of the true disposals, not including Africa scaffolding) roughly equaled the value of its inventory claim."[197] They assert that the Trial Court gave Brace a "windfall" in awarding it $725,000 without discounts for overages.

For the reasons already discussed, this argument falls flat. Even if Defendants could have proven that they transferred more inventory than what appeared on the Scaffolding List, SPA Section 3.11(b) does not say "PEI shall provide substantially all of the scaffold assets it possesses at time of sale." Instead, that provision warrants, on penalty of indemnification, the *specific* accuracy and completeness of the Scaffolding List.

The SPA is a heavily-negotiated contract drafted by sophisticated counsel over a period of months. Had Defendants wanted Section 3.11(b) to say "substantially similar net value," they could have tried to negotiate that language

[196] OB Ex. A at 33.
[197] OB at 26.

into the written contract. Defendants have offered no legal justification that would permit the Trial Court to discard the SPA's plain text in favor of a new, non-contractual standard.[198] Simply put, because they have proven that the Scaffolding List is inaccurate, Plaintiffs are entitled to the full amount of their damages.

[198] *Cf. Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("We will only imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected. When conducting this analysis, we must assess the parties' reasonable expectations at the time of contracting and ***not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contracts, the law enforces both***.") (emphasis added).

II. THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFFS THEIR COSTS PURSUANT TO COURT OF CHANCERY RULE 54(D) AND SPA SECTION 6.2.

A. Questions Presented

Whether the Court of Chancery correctly awarded Brace $400,149 in costs pursuant to Chancery Rule 54(d) and SPA § 6.2(a).

The Trial Court's ruling on this point was correct. Though Rule 54(d) provides a separate right to recovery for certain costs incurred, Section 6.2 of the SPA entitles Plaintiffs to recover all costs incurred in the litigation for the same reasons described in the Merits of Argument on Cross-Appeal, *supra* 22-30.

B. Standard of Review

This Court reviews interpretation of a contractual fee-shifting provision *de novo*, but it reviews a decision to award attorneys' fees and costs for an abuse of discretion.[199]

C. Merits of Opposition

Plaintiffs sought and were awarded $400,149 in costs. The Trial Court determined that Plaintiffs established a breach of PEI's representations in the SPA, thereby triggering the indemnification provision in Section 6.2 of the SPA.[200] All of Plaintiffs' costs in the underlying litigation flowed from PEI's breach. Accordingly, the Trial Court properly concluded that Plaintiffs were contractually

[199] *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).
[200] OB Ex. C at 1-2.

entitled to the full amount of their costs incurred pursuant to Section 6.2. Court of Chancery Rule 54(d) provided a separate and distinct right of recovery for some portion of those costs.

1. PEI's Breach of the SPA Triggered Plaintiffs' Right to Indemnification Pursuant to Section 6.2(a).

The Trial Court found that PEI breached its representation in Section 3.11(b) of the SPA by failing to transfer all of the inventory listed on the Scaffolding List.[201] Thus, Section 6.2 required PEI to indemnify Plaintiffs for "any and all Losses incurred or sustained by, or imposed upon, the Buyer Indemnitees based upon, arising out of, with respect to or by reason of" the breach.

2. The Parties' Claims All Flowed From PEI's Breach of Section 3.11 of the SPA.

Plaintiffs incorporate by reference the argument set forth in the Merits of Argument on Cross-Appeal, *supra* 22-30. As explained in detail above, all of Plaintiffs' claims, as well as Defendants' setoff defense and counterclaims, flowed from PEI's initial breach of Section 3.11(b) of the SPA. Had PEI not breached that representation, Plaintiffs would not have needed to submit the Claim Notice, which triggered the retaliatory conduct giving rise to the Customer Payment Claims, Covenant Claims, and setoff defense.

[201] OB Ex. A at 25; OB Ex. C at 1.

3. Section 6.2 Entitles Plaintiffs to Recovery of All Costs Incurred in this Litigation.

The Trial Court properly recognized that *all* of Plaintiffs' costs incurred in this litigation fell within the scope of Section 6.2. All of Plaintiffs' costs constitute "Losses incurred or sustained by, or imposed upon, the Buyer Indemnitees based upon, arising out of, with respect to or by reason of" PEI's breach under Section 6.2.[202] Plaintiffs are contractually entitled to the full amount of their costs incurred.

[202] *See* Merits of Argument on Cross-Appeal, *supra* 25-30 (explaining that Delaware courts construe the phrase "arising out of" broadly); B-355 (Trial Court noting that the SPA contemplated indemnification for "actual costs, *including* reasonable attorneys' fees") (emphasis added).

III. THE COURT OF CHANCERY DID NOT ERR IN ORDERING THAT ALL AMOUNTS OWED PURSUANT TO THE FINAL ORDER BE PAID FROM ESCROW AND THAT THE GUARANTORS ARE LIABLE FOR ANY SHORTFALL.

A. Questions Presented

Whether the Final Order imposes liability in accordance with the SPA.

The Trial Court correctly held the Guarantors liable for the full amount of Plaintiffs' fee and expense award, as Plaintiffs are contractually entitled to indemnification of those amounts pursuant to Section 6.2 of the SPA and the Guarantors have guaranteed PEI's indemnification obligations.

B. Standard of Review

This Court reviews *de novo* a lower court's interpretation and application of unambiguous contract language.[203]

C. Merits of Opposition

1. Plaintiffs' Attorneys' Fees and Expenses are Properly Payable from the Escrow Account.

Defendants contend that the Final Order violates the Escrow Agreement because "[e]scrow funds may not be used to satisfy non-indemnification claims."[204] Plaintiffs are entitled to their fees and costs because PEI and the Guarantors agreed to pay those amounts as indemnification in connection with PEI's breach of the

[203] *See BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

[204] OB 39.

SPA.[205] Further, as set forth above, all of Plaintiffs' attorneys fees and expenses arose from PEI's breach of Section 3.11(b) of the SPA. Thus, all attorneys' fees and expenses awarded to Plaintiffs are properly payable out of the Escrow Account.

2. The Guarantors are Liable for Plaintiffs' Attorneys' Fees and Expenses.

In the Guaranty, Ron Peterson and the Trust Defendants guaranteed PEI's obligations under Section 6.2 of the SPA. Because Plaintiffs are contractually entitled to indemnification of their attorneys' fees and expenses incurred in this litigation, to the extent the award of attorneys' fees and expenses is not satisfied, Ron Peterson and the Trust Defendants are contractually liable for the shortfall.

[205] B-168; A-0082.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fee Order to the extent that it fails to award Plaintiffs the full amount of their attorneys' fees incurred in this litigation, as contractually mandated under Section 6.2 of the SPA. This Court should otherwise affirm the rulings of the Trial Court in the Inventory Order, Fee Order and Final Order.

Dated: May 24, 2019

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