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Case Number 109,2019

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,	)	C.A. No. 11189-VCG
v.	)	
BRACE INDUSTRIAL CONTRACTING, INC. and PETERSON INDUSTRIAL SCAFFOLDING, INC.,	)	
Plaintiffs below, Appellees.	)	

Court Below:
Court of Chancery of the State of Delaware

APPELLANTS' AMENDED REPLY BRIEF ON APPEAL AND CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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NATURE OF THE PROCEEDINGS ON CROSS-APPEAL

In their Cross-Appeal, Plaintiffs challenge only the Chancery Court's discretionary decision to fix its award of Plaintiffs' attorneys' fees, awardable by contract, at $241,686, less than the total amount Plaintiffs had requested.

SUMMARY OF ARGUMENT IN OPPOSITION TO CROSS-APPEAL

DENIED. Brace appears not to follow Delaware Supreme Court Rule 14(b)(iv)'s requirement that a cross-appellant state in its summary of the argument "in separate numbered paragraphs the legal propositions upon which" it relies for its cross appeal so that the statement may "be admitted or denied with specificity in appellee's summary, paragraph by paragraph." *See also* Del. Supr. Ct. R. 14(c)(ii). Therefore, PEI is unable to "admit or deny," "paragraph by paragraph," any legal propositions upon which Brace relies. Accordingly, PEI treats Brace's entire Summary of Argument on Cross-Appeal as a single paragraph and denies it and all propositions contained in it.

Brace is entitled to no attorneys' fees in this case because it is not entitled to indemnification, as PEI explained in its Opening Brief on Appeal ("Opening Br.").

If the Court affirms the indemnification award on Brace's Inventory Claim, however, the trial court's award of $241,686 in attorneys' fees that Brace incurred on that claim should stand as well, as a permissible exercise of that court's broad discretion to fix fees. Brace's argument that it is contractually entitled to *all* attorneys' fees it incurred in the case (including on claims it lost entirely or in large part) lacks merit.

Brace failed to fairly present to the Chancery Court the argument that it now makes for reversing that award—that all of Brace's fees in this case were

contractually required because they all "arose from" Brace's Inventory Claim and thus are "Losses" the SPA requires PEI to bear. Brace thus forfeited this new argument on appeal and the "interests of justice" do not compel its review. Indeed, Brace also forfeited plain-error review by not requesting it specifically in its Opening Brief on Cross-Appeal ("Br.").

Brace's new argument fails in any event. The structure of the SPA shows that the parties intended to limit the recovery of fees and expenses recoverable as indemnification Losses to those incurred litigating only on the Inventory Claim, and no others. They did not include an all-purpose fee-shifting provision to the prevailing party in Article VII, which addresses "miscellaneous" items, including dispute resolution. Instead, they provided for differing treatment of fees and expenses throughout the SPA, depending on the nature of the claim at issue. Most importantly, here, they did not provide for fee shifting in the Transition Services Agreement, the agreement under which Brace pled its Cash Claim.

In the Chancery Court below, Brace requested all of its fees, $1.3 million, along with all of its costs and expenses for all claims in the litigation, under a combination of a contractual fee-shifting claim for the indemnification claim and under the bad-faith exception to the American Rule for the rest of its claims. The Court denied awarding Brace any attorneys' fees for the Restrictive Covenant and Cash Claims under the bad-faith exception. The Court only awarded Brace fees for

its indemnification claim under the contractual construction provision for that claim in an amount the Court determined was reasonable.

Just as the Court denied awarding Brace any fees for the Restrictive Covenant and Cash Claims, the Court should not have awarded Brace any of its associated litigation expenses to those claims. Instead, the Court initially erroneously awarded Brace all of their litigation expenses for all claims, under Chancery Rule 54(d). After PEI brought this error to the Court's attention in its Motion for Reconsideration, the Court corrected its error, but committed a new one by modifying its order to state that the cost award (for all of the litigation claims, including the ones Brace lost) was also covered under § 6.2 of the SPA.

Now, Brace, rather than conceding this second error on costs and expenses, is attempting to exploit that error by claiming for the first time that all of its attorneys' fees along with all of its litigation expenses for all claims should be awarded on a contractual basis as an exception to the American Rule. However, as will be shown, the parties never agreed to a broad fee-shifting provision for the prevailing party for all claims, which is why the Court below limited Brace's fee award to the indemnification claim.

STATEMENT OF FACTS IN OPPOSITION TO CROSS-APPEAL

Brace's Cross-Appeal raises a legal issue concerning the interpretation of the SPA. Any additional facts relevant to the Cross-Appeal are included where necessary in the Argument below.

REPLY IN SUPPORT OF ARGUMENT ON APPEAL

I. The Chancery Court Erred in Sustaining Brace's Indemnification Claim; its Decision was not the Product of an Orderly and Logical Deductive Process.

A. Brace did not follow the SPA's requirements for direct claims, which prejudiced Defendants.

Brace cannot dispute that its Notice of Direct Claim was a one-page letter with an "Appendix A—Schedule of Estimated Losses" that was a half-page long, and that the basis for the alleged equipment shortage identified in the Schedule was a "physical inventory count conducted by Brace." (A-0354–55) Brace also cannot dispute that not a single slip of paper showing the results of that physical count—other than the total number of pieces counted—was included in the claim or supplied later on. Finally, Brace cannot dispute that it (1) told PEI for the first time in later December 2015 in a vague interrogatory response that Brace's claim was *not* in fact based on a physical count and was instead based upon "a comparison of Defendants' own accounting data against the SPA disclosures" (A-0405), but yet (2) did not disclose its method for a new inventory claim or the new amount along with documents supporting it until February 22, 2016—little more than one month before trial—when Brace produced its expert's working papers.

Instead, Brace essentially contends that it did not have to give PEI *anything* to support the Inventory Claim, because PEI already had the documents that supported Brace's claim—the Mary Sheet and the SPA's Scaffolding List—as part

of its own records. (Br. 40) Under its theory, Brace could have given PEI a Notice of Direct Claim that simply listed the dollar amount of the claim and told PEI the claim was based on PEI's "records," leaving it to PEI to piece together the basis for the claim. That ignores that the SPA compelled Brace to "describe the Direct Claim in reasonable detail" and supply the material evidence, as a condition for indemnification. Telling PEI that it should already know the basis of the claim, not then identifying the claim in any detail, and then waiting one month before trial to spring the amount of and basis for the claim on PEI does not comply with the letter or the spirit of the SPA's Direct Claim procedure.

PEI was prejudiced by Brace's sandbagging. Brace claims otherwise because "Defendants knew that Plaintiffs thought shortages existed *and* that Brace had used the Mary Sheet to evaluate the inventory received" (Br. 41), but omits that PEI learned this only one month before trial and well after Brace had filed a lawsuit, in violation of the SPA's notice procedure. It points to an October 7, 2014 email from Talley to Eric Peterson referencing the Mary Sheet. (Br. 41) But Talley did not say that review of the Mary Sheet compared to the scaffolding list showed that Brace was shorted items; he said only that "I used the Mary Sheet to determine average cost." (B-643) Moreover, to the extent that any such comparison formed the basis for a shortage claim as of October 2014 (it did not),

Brace abandoned that approach in its March 26, 2015 Notice of Direct Claim by basing it on a "physical inventory count conducted by Brace." (A-0354–55)

Brace also points to an April 14, 2015 email from Mark Talley to a number of Brace employees and Bob Hatty, a PEI employee, saying "This is a file per Mary that tied to the balance sheet as of 12 2013" and attaching a file called "Peri File Format.xlsx." (B-650) It is disingenuous that this email and attachment could have satisfied Brace's obligation to "describe the Direct Claim in reasonable detail." In the end, Brace's delay and malfeasance in supplying notice and evidence of the Inventory Claim gave Eric Peterson too little time to fully review and analyze it before trial. PEI needed these materials to analyze and try to understand (and later debunk) Brace's claim. (A-0966) Brace therefore forfeited its inventory claim and the Chancery Court erred in concluding otherwise.

B. The Chancery Court's decision on the inventory claim is clearly wrong and not the product of an orderly and logical deductive process.

Brace failed to carry its burden of proof on its Inventory Claim. It invoked a methodology that created what they styled as "overages" but did not credit any of the overages against perceived shortages, rendering the methodology unreliable. The Chancery Court should have acknowledged the flaw in this approach and rejected it. Its decision to credit the approach and find in Brace's favor was not the

product of an orderly and logical deductive process. It should be reversed and judgment entered in PEI's favor on the Inventory Claim.

In its response, Brace refuses to grapple with the reality that its methodology created but failed to count overages, and that its explanation for them—that overages were never transferred because they represent "disposals"—ignored real data on PEI's disposals that Brace had available to it. It contends that overages are "unsupported by any admissible expert testimony." (Br. 52) That is false. Mark Talley, the creator of Brace's Inventory Claim, conceded at trial that Brace *did receive* roughly 1,800 more units of a particular item of scaffolding than Brace's methodology credited PEI for transferring, *i.e.*, an "overage" of that item. (Opening Br. 18) Brace physically counted 5,800 units of a specific item in its possession, but Kops, using his theoretical methodology, only credited PEI for transferring 3,949 units. *Id.* That was not the only instance of reality showing that Brace received more than the maximum units that Kops said PEI could have transferred. *See id.* at 19 n.10. Brace ignores all of this evidence, suggesting that PEI needed an expert witness to refute Brace's claim. (Br. 52) No expert testimony was required to show the logical and evidentiary flaws in Brace's claim.

Also ignored in Brace's appellate brief is evidence of PEI's actual pre-closing disposals, available to Brace and its expert and unrefuted at trial, which undermined Kops' bare speculation that disposals accounted for *all* overages that

he calculated and laid bare the unreliability of Brace's methodology. (Opening Br. 18, 21–22)

Next, Brace repeats its argument that "the distinction between different types of scaffolding" means overages are irrelevant because the equipment pieces are not interchangeable. (Br. 53) But as PEI explained, these "distinctions" never actually mattered to Brace. As Mr. Talley conceded at trial, all that mattered was the "total" amount transferred—"the total at the bottom" of the Scaffolding List—not whether certain pieces were transferred. (A-0631) And that makes sense given that Brace bought $15 to $20 million in additional scaffolding shortly after Closing and could have put any "extras" to use or declined to purchase pieces it already had too many of. (A-0625)

Finally, Brace also ignores the deep logical gap in its argument regarding interchangeability of the scaffolding equipment, specifically that this argument does not explain why PEI would have ever purchased these items in ratios that did not fit together, or, conversely, why it would have chosen to keep equipment that did not work in the ratios it kept.

II. The Chancery Court abused its discretion and committed legal errors in awarding Plaintiffs $440,149 in "costs."

Brace does not challenge PEI's argument that "Plaintiffs were entitled to, at most, $18,663.88 in taxable costs under Rule 54(d)." (Opening Br. 36) The most it says about Rule 54(d) is it "provided a separate and distinct right of recovery for some portion of those costs." (Br. 57) That is insufficient to rebut PEI's challenge to the award of Rule 54(d) costs—unless it is conceding that "some" means no more than $18,663.88.

As for costs or expenses under SPA § 6.2(a), Brace's defense of the Chancery Court's award on this basis rests on the same argument Brace makes challenging the Chancery Court's fee award—that § 6.2(a) authorized shifting all of Brace's costs to PEI because all of them "flowed from PEI's breach" of its representations and warranties with respect to scaffolding inventory. (Br. 56) As PEI explains below in its response to Brace's Cross-Appeal, all costs or expenses in the case did *not* arise out of Brace's Inventory Claim. The other two claims in the case—the Restrictive Covenant Claim and the Cash Claim—were independent from the Inventory Claim. Indeed, the Cash Claim was decided years after the Inventory Claim, relied on no evidence offered on the inventory claim, and presumably still would have been brought if the Inventory Claim had not been. PEI incorporates herein its arguments below in defense of the fee award.

III. The Chancery Court erred in entering judgment against Eric and Kirk Peterson in any amount, and against the Guarantors for judgment amounts beyond what Brace is entitled to as SPA indemnification.

Eric and Kirk Peterson were individual defendants in the action below on Brace's Restrictive Covenant claims, not on any of Brace's Cash Claims. (B-028–29) Accordingly, ¶ 5 of the February 6, 2019 Order and Final Judgment holding the "individual Defendants" liable for "the remaining amount [of the monetary judgment in favor of Plaintiffs not paid out of the escrow account]" was error. (Opening Br. Exhibit D ¶ 5) Brace should have simply conceded that the Order and Final Judgment contains this error as to Eric and Kirk Peterson. They instead assert that the judgment "should not reasonably be read to state that non-guarantors who were never sued on the Guaranty are liable on a guaranty basis." (Br. 9) But there is no other way to read the judgment except that Eric and Kirk, as "Individual Defendants," are in fact liable. Any outside reader without an appreciation for the specific claims that were litigated would conclude as much by the plain reading of the judgment. The judgment must be modified to state explicitly or otherwise make clear that Eric and Kirk Peterson are not personally liable for any damages in this case.

Next, Brace agrees, as it must, that the Guarantors are only Ron Peterson and the Trust Defendants. (Br. 60). Also, the contractual scope of the Guarantors' liability is limited to any indemnification claim liability. Accordingly, this Court

must correct the Order and Final Judgment's command (at ¶ 4) to limit the remaining liability, if any, to the Guarantors for the remaining balance due, not paid from escrow, on the indemnification award, fees and expenses.

Further, in the event this Court reverses and vacates the indemnification award, and any associated contractual liability for fees and expenses, then this Court must also reverse and vacate the provision of the Order and Final Judgment against the Guarantors of the indemnification claim entirely.

ARGUMENT IN OPPOSITION TO CROSS-APPEAL

IV. The Chancery Court correctly awarded Brace only those attorneys' fees it incurred on its Inventory Claim and did not abuse its discretion in fixing the amount of fees.

Question presented

Of the more than $1.3 million in attorneys' fees that Brace asked the Court to shift to PEI based on the SPA, the Chancery Court awarded Brace $241,686, one-third of the amount it awarded Brace on its Inventory Claim. The questions presented are: (1) whether the "interests of justice" require the Court to consider and determine Brace's unpreserved argument for reversal: that *all* of its attorneys' fees "arise out of" Brace's Inventory Claim and should be shifted by contract on that basis; and (2) whether the Court erred or abused its discretion in its fee award decided based on the arguments Brace actually made.

Standard of Review

Generally, this Court reviews the Chancery Court's interpretation of the SPA's fee-shifting provision *de novo* and the decision to award attorneys' fees for an abuse of discretion. But because Brace did not "fairly present[]" the argument that it makes now—that *all* of its attorneys' fees "arise out of" Brace's Inventory Claim—this Court asks only whether "the interests of justice" require the Court to consider and determine the question. Del. Supr. Ct. R. 8.

Merits of Opposition

A. The interests of justice do not compel review and determination of Brace's new argument for reversal of the Chancery Court's fee award.

Brace forfeited below what it now argues regarding the Chancery Court's attorney fee award. Specifically, Brace argued below that the SPA demanded that Brace "be indemnified for fees and costs incurred *in connection with the Inventory Claims.*" (A-1285 (emphasis added)) It limited its request to fees and costs incurred on the Inventory Claim. Yet it refused to break out its fees incurred on the Inventory Claims from those incurred on its Restrictive Covenant Claim and Cash Claim. (A-1281–82) PEI argued in response that this failure to break out fees was fatal to its request for fees based on SPA § 6.2(a). (A-1301–03) Then on reply, Brace said the word "any" was "important" and that SPA § 6.2's use of the phrase "any and all Losses" "control[ed]," such that, "once triggered" by an indemnification award of any amount, SPA § 6.2(a) entitled Brace to all of its attorneys' fees incurred in the entire case. (A-1316) However, Brace invoked the bad-faith exception to the American rule primarily to recover its fees and costs incurred on its Cash Claim (A-1286–89), and somewhat in its request for all of its fees and costs incurred in the litigation. (A-1289) (Brace does not challenge on appeal the Court's denial of its request based on bad faith.)

Importantly, Brace did not fairly present to the Chancery Court its new argument 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." (Br. 24) The Chancery Court did not understand Brace to make this argument. It said Plaintiffs did not attempt "to provide a break-out of fees for the inventory claim, stating (in their response to Defendants' opposition on this ground) that they have no responsibility to do so." (Opening Br. Exhibit C ¶ 8) The court then went on to explain in its analysis of the reasonableness of the fee that it was "unable to assess the time spent on compensable matters due to the Plaintiffs' failure to segregate non-compensable hours." (*Id.* ¶ 10)[1]

Because it was not fairly presented below, Brace has forfeited its new argument on appeal. Were this a typical case, the Court would review the forfeited argument only if "interests of justice" compelled it to. But because Brace did not state (let alone explain) in its Opening Brief on Cross-Appeal why the interests of justice demand consideration, Brace has doubly forfeited the issue. It "is well established that this Court will not review a legal issue on appeal unless it is fully and fairly presented in the opening brief." *Proctor v. Bunting*, 797 A.2d 671, 672 (Del. 2002); *see* Del. Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *cf.* Del. Supr. Ct. R. 14(c)(i)

[1] Without any developed argument or supporting authority, Brace baldly asserted below that the "Inventory Claim is the core of this case; the remaining claims arose from PEI's unlawful retaliation for the lawful Inventory Claim." (A-1285). That bare assertion does not fairly resemble its current argument on appeal.

("Appellant shall not reserve material for reply brief which should have been included in a full and fair opening brief.").

Nor, in any event, is Brace entitled to relief under this demanding standard, since it cannot show a "material defect . . . apparent on the face of the record" that is also "basic, serious and fundamental" and clearly shows a "manifest injustice" or would deprive Brace of a "substantial right." *Smith v. Delaware State Univ.*, 47 A.3d 472, 479 (Del. 2012).

B. Brace is not entitled to contractual fee shifting of all of its attorneys' fees and expenses.

Even under fresh review of its new argument on appeal, the Chancery Court's decision not to award Brace the entirety of its attorneys' fees is correct and should be affirmed if the Court upholds the decision on the Inventory Claim.

Brace now argues that every penny of attorneys' fees and expenses it incurred in the case is subject to contractual fee shifting under the SPA because they all "arose out of" Brace's Inventory Claim. (Br. 24) Fees incurred on the Cash Claim and Restrictive Covenant Claim arose from the Inventory Claim, Brace claims, because Brace asserted them only because PEI "retaliated" against Brace by "usurping" customer payments using unlawful self-help and violating the SPA's Restrictive Covenants. (Br. 24–25) This new argument is specious and lacks merit.

To start with, the Chancery Court correctly rejected—several times—Brace's retaliation and self-help arguments and Brace has not appealed this ruling. Brace made these arguments when it sought to dismiss PEI's counterclaim seeking to retain Brace customer payment cash that PEI permissibly received and was due to PEI, per the Transition Services Agreement (TSA). (B-332–34) The court rejected all of Brace's legal arguments, finding in its order on Brace's motion to dismiss that the "Set-Off Counterclaim is authorized under the contractual relationship among the parties." (B-335) Before issuing that written ruling, at a hearing on Brace's motion to dismiss PEI's counterclaims the Court further explained:

> This seems to me a different situation in which these payments were remitted to Mr. Penza's client under a contract agreement, and then there were to be certain accounting measures taken and they were to be paid over. It's a breach of contract. I don't think that it results in -- unclean hands is a doctrine which is for the benefit not of either party, but for the courts. . . . I don't think this is the kind of situation that calls for a blanket unclean hands remedy. . . . But as far as the vindication of the Court's reputation, it does not seem to me that an overbearing retention [of cash received] in violation of a contract is the kind of unclean hands that should prevent a consideration of a claim.

(AR-0023–24) Brace does not challenge this ruling on appeal.

And then in the Court's order awarding attorneys' fees and expenses, the Court again found, in rejecting Brace's request for bad-faith fee shifting, that PEI had not engaged in any unlawful self-help with respect to the Customer Payments:

> In particular, I reject the Plaintiffs' argument that the Defendants' withholding of contractual payments, in the circumstances here, was improper self-help justifying fee shifting . . . . (*Id.* ¶ 6)

(Opening Br. Exhibit C ¶ 6) Brace likewise does not challenge this ruling on appeal. It simply disregards the Chancery Court's ruling in its arguments made before this Court.

Thus, as the Chancery Court made clear on multiple occasions, it was not bare and unauthorized self-help that caused PEI to withhold cash from Brace, but rather PEI's contractual right under the SPA's set-off provision in § 6.7. The court therefore let proceed—and later granted substantial relief on—PEI's claim to keep cash it received that Brace owed to PEI.

Brace's attenuated causation argument is not persuasive. PEI promised in SPA § 6.2(a) to reimburse Brace for all "Losses incurred or sustained by, or imposed upon, [Brace] *based upon, arising out of, or with respect to or by reason of* . . . any inaccuracy or breach of any of the representations or warranties of [PEI] contained in this Agreement." (A-0082 (emphasis added)) Each of the italicized phrases, reasonably understood, limits the scope of recoverable fees to those incurred prosecuting a claim for indemnification and defeating defenses intrinsic to the claim. None of the phrases reasonably encompasses Brace's Cash Claim or Restrictive Covenant Claim, which had absolutely nothing to do with the Inventory Claim. The Inventory Claim was an independent, stand-alone claim. Brace could

(and in fact did) prosecute the claim independently of its other claims, and without using evidence offered on the other claims. The fact that the Chancery Court ruled on the Cash Claims more than two years after deciding the Inventory Claim, and without a single reference to the Inventory Claim or the evidence offered on it, shows the independence of the two claims.

The structure of the SPA bolsters this understanding of the scope of attorneys' fees the court can award as indemnification "Losses." The parties chose to define costs and expenses, including attorneys' fees, as an element of "Losses," a phrase that appears in Article VI of the SPA, dealing only with indemnification claims. (A-0082, A-0101) The parties also included a "Miscellaneous" section of the SPA—Article VII—that addresses various unrelated issues, such as choice of law, where to send notices, and severability, among others. (A-0089–93) A provision that shifts to the losing party all fees and costs that the prevailing party incurred in litigation regarding the SPA, had the parties intended that, most naturally would have appeared in Article VII. Such a provision appears nowhere in Article VII; that article is silent regarding any intent to disturb the American rule for all litigation fees and expenses incurred arising from or related to the SPA.

Instead, the parties have provided for different treatment of costs and expenses (including attorneys' fees), depending on the dispute at issue. They did so in Article II, with respect to the Post-Closing Adjustment, in which the parties

agreed to a binding alternative dispute resolution mechanism in which an independent accountant determined which side's calculation of working capital in the post-Closing period was the correct one. (A-0042–44). There, the parties did not agree to shift any attorneys' fees or expenses incurred in that ADR proceeding, but they did agree (in § 2.4(c)(4)) to a sliding-scale formula under which one party, depending on who was more right on that claim, would have to pay the independent accountant's fees and expenses. (A-0044) As a result of this provision, and because the independent accountant agreed 100% with PEI's calculation of working capital, Brace had to pay the accountant's entire professional fees and expenses (but none of PEI's attorneys' fees or PEI's other expenses incurred in the ADR proceeding). (Opening Br. Exhibit D ¶ 2(c))

Article VI, for indemnification, is another example. This article allows Brace (at 6.2(a)) to recover its "costs and expenses," including attorney's fees (as "Losses"), arising out of "any inaccuracy in or breach of any of the representations or warranties of [PEI] contained in this Agreement." (A-0082) The right is subject to certain agreed limitations (A-0083) and certain procedures for making an indemnification claim under Article VI (A-0085).

One place the parties chose *not* to require one party to bear the other's costs and expenses is the Transition Services Agreement, the contract under which Brace's Cash Claim was brought. Specifically, in its Amended Verified

Complaint, Brace pled its Cash Claim (in Count V) as a breach of the TSA, and (in Count VI) as a breach of the TSA's implied covenant of good faith and fair dealing. (B-021–25) If the parties had intended to allow the party that prevailed in a dispute arising from the performance of the TSA to recover its fees and expenses incurred in the litigation, then they would have said so directly in the TSA. But they did not, even though they *did* specifically include other dispute-resolution provisions (*e.g.*, a jury waiver, forum-selection clause). (B-425–26) The careful language the parties chose in the transaction documents shows they never intended to shift to the loser of a TSA-related dispute (such as Brace's Cash Claim) the fees and expenses the winner incurred in the litigation.

In arguing otherwise, Brace invokes a capacious interpretation of § 6.2(a) that is untethered to language the parties put into the SPA with care. Under Brace's reading, Brace may recover all attorneys' fees incurred in opposing *any* counterclaim—regardless its relationship to the indemnification claims—because only by defeating these counterclaims can the claimant realize the full value of its own claims and not be limited to an offsetting judgment. (Br. 29 (citing *Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc.*, 68 A.3d 197, 241 (Del. Ch. 2013)); *id.* at 30–31 (claiming that "Plaintiffs could not have recovered on their initial claim for $725,059 of missing inventory without also defeating the larger setoff demand"); *id.* at 32 ("[I]f Plaintiffs had lost the setoff defense, they would

have recovered nothing.")) Brace did substantially lose its setoff defense, achieving an award of only $550,743 on its Cash Claim. (Opening Br. Exhibit D ¶ 2). However, Brace still recovered the full amount of its Inventory Claim. (*Id.* ¶ 3).

Other indications of the absence of any relationship between the Cash Claim and Inventory Claim are Brace's own pleadings and arguments on appeal. In its Amended Verified Complaint, as noted, Brace pled its Inventory Claim in Counts I and II, for declaratory judgment on breach of contract, respectively. (B-016–19) It pled its Cash Claim separately (in Count V) as a breach of the TSA, and (in Count VI) as a breach of the TSA's implied covenant of good faith and fair dealing. (B-021–25) Not only did Brace never plead its Cash Claim as a "Loss" arising from its Inventory Claim (and thus compensable per § 6.2(a)), but it also specifically requested its attorneys' fees incurred on the Inventory Claim as "Losses," and did not do the same when pleading its Cash Claim. (B-017, B-019, B-024–25) Brace itself thus believed it could not recover fees incurred on the Cash Claims.

Brace also makes inconsistent arguments on appeal. A logical conclusion of Brace's argument on fees is that the $550,743 award on its Cash Claim (and not just fees incurred on the claim) is a "Loss" for which PEI owes indemnification. There is no principled reason, under Brace's view, why "Losses" should cover only attorneys' fees and costs incurred on the Cash Claim and not the Cash Claim

award itself. Yet on appeal, even Brace does not go that far (correctly so). The Escrow Agreement provides that awarded indemnification "Losses" must be satisfied first from escrow funds, when available. (A-0214–15) And so, as PEI has argued in its third point on the Appeal, the Chancery Court erred by ordering, in the Order and Final Judgment, an escrow disbursement of sums to cover "the amount of this judgment," which includes the Cash Claim award, rather than just indemnification "Losses." (Opening Br. 39–40 & Exhibit D ¶¶ 2, 4–5)

In its Answering Brief on Appeal, however, Brace defends *only* the Order and Final Judgment's command for escrow to cover Brace's attorneys' fees and expenses in the case. (Br. 59) Notably, it does not defend the Judgment's command to instruct the escrow agent to release funds to cover any pre- or post-judgment interest of the Cash Claim. In other words, even Brace acknowledges that its argument on fees proves too much.

None of the cases Brace cites supports it. The parties to the SPA did not select the broader language chosen by the parties in those cases. Referencing *Edgewater Growth Capital Partners* as a purported example, Brace asserts that "Delaware courts construe the phrase 'arising out of' broadly." (Br. 25 & n.91) The language involved in *Edgewater*, however, was broader in multiple respects than the words in the SPA § 6.2. The limited guaranty there said the guarantor would pay all counsel fees the guarantor "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." 68 A.3d 197, 241 (Del. Ch. 2013) (emphasis added).[2] Section 6.2, by contrast, covers less—it does not cover fees that: (1) Brace "may" incur; (2) are incurred merely "in connection with" a breach of warranty; (3) are "consequential to" the enforcement of a representation or warranty; or (4) "*in any way*" arise out of a breach of warranty. The phrases the SPA does use—"based upon, arising out of, with respect to, or by reason of"—show an intent to require a closer relationship between fees and loss, one that is absent here.

Moreover, the Chancery Court in *Edgewater* had concluded that the defendant "prosecuted its claim in an attempt to exert leverage over [the plaintiff] to drop its demand of payment under the Limited Guaranty," which, along with the extremely broad language involved, were the reasons the court awarded the plaintiff its fees incurred defending against the claims. *Id.* at *241. Here, the Chancery Court made no similar ruling, and no basis for one existed. It instead determined that PEI had an express contractual right to reimburse itself from received customer payments certain amounts PEI paid for Brace under the TSA and SPA. Again, Brace does not challenge this ruling on appeal.

[2] The other cases Brace cites are likewise distinguishable based on the broader language the contracts in those decisions used. (Br. 26 n.92)

The language in *Ivize of Milwaukee, LLC v. Compex Litigation Support, LLC*, 2009 WL 1111179 (Del. Ch. Apr. 27, 2009), also was far more broad than § 6.2. The parties there agreed to indemnify one another for all "losses and expenses (including reasonable attorneys' fees) of any nature . . . arising out of *or relating to* . . . any breach or violation of the representations, warranties, covenants or agreements . . . set forth in the Agreement." *Id.* at *13 (emphasis added). What is more, the contract also said that each "Prevailing Party" was "entitled to reasonable attorneys' fees and costs *associated with such litigation* from its opposing party," and a litigant was deemed a "Prevailing Party" if it had "generally prevailed in the causes of action and defenses asserted by it." *Id.* Again, the SPA is more modest. It refuses to shift fees that are "related to" an indemnifiable loss. *Cf. Zohar CDO 2003–1, LLC v. Patriarch Partners, LLC*, 2016 WL 6248461, at *12 n.109 (Del. Ch. Oct. 26, 2016) ("To arise out of . . . generally indicates a causal connection, whereas the phrase 'relating to' is defined more broadly to simply mean 'connected by reason of an established or discoverable relation.'" (quotation marks omitted)). The SPA also does not award the party that has "generally prevailed" all fees "associated with such litigation."

Finally, even if Brace could tie its Cash Claim to its Inventory Claim, it still has failed to tether its Restrictive Covenant claim (not itself subject to fee shifting) to any claim allowing for fee shifting by contract. As the trial court correctly

predicted at a hearing, "it seems passing unlikely that all of the plaintiffs' fees are going to be shifted, given the fact that the plaintiffs initially advanced an equitable ground for relief that turned out to be unavailing." (A-1301) The problem the Chancery Court acknowledged thus persists: Brace never identified those fees and expenses it incurred on the Cash Claim and Inventory Claim alone, making it impossible for the Chancery Court to honor the SPA and award only those fees and expenses.

Brace's attempt in note 88 of its brief to tie its Restrictive Covenant Claim to the Inventory Claim not only violates Delaware Supreme Court Rule 14(d)(iv)'s instruction regarding footnotes, but also is unavailing. Brace points to no record evidence that Defendants undertook the conduct that Brace challenged as violating the SPA's Restrictive Covenants (conduct the Chancery Court said was allowed and refused to enjoin) *because* Brace noticed its Inventory Claim. The allegation it cites from its Verified Amended Complaint assert no such connection between the Inventory Claim and the Restrictive Covenant Claim.

C. The Chancery Court did not abuse its discretion in fixing $241,686 as a reasonable fee for the Inventory Claim.

"The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded. Absent a clear abuse of discretion, we will not reverse the Court of Chancery's award." *Swann Keys Civic Ass'n v. Shamp*, 971 A.2d 163, 170 (Del. 2009).

The Chancery Court's choice to limit fees to $241,686 was reasonable and not an abuse of discretion. It applied the correct legal standard for assessing reasonableness by expressly considering all of the factors set forth in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct and giving them appropriate weight. (Opening Br. Exhibit C ¶¶ 9–11) *See Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245–46 (Del. 2007). The weight the court gave to each factor, as well as the court's overall balancing of those factors to arrive at its determination of a reasonable fee, was well within the permissible range of outcomes available given the circumstances. Whether or not this Court would have weighed the factors differently and arrived at a different award as an exercise of its own discretion is irrelevant to the disposition of Brace's challenge on appeal.

Brace should not be heard to complain about the Chancery Court's decision that one-third of the Inventory Claim was a reasonable fee. Brace's refusal to segregate its compensable fees (on the Inventory Claim) from the non-compensable fees (on the other claims) left the Court with few options if it did not agree that the SPA authorized shifting fees incurred on the Cash Claim and Restrictive Covenant Claim. PEI's preferred option was for the Chancery Court to award Brace zero fees for its failure to segregate, an approach that the cases supported. (A-1301–03) The court was not compelled to choose that option, however. With little else from Brace to work with, the court was justified in

grounding its award of fees on the theory that Brace would have paid counsel one-third of its recovery on the Inventory Claim under a contingency arrangement. A party cannot refuse to give a court information required to rule in its favor and then complain when the court makes a decision the party does not like.

The Chancery Court did not give "dispositive" weight to the fourth factor—the amount involved and the results obtained. (Br. 31–32) It considered that factor among the other seven and permissibly weighed them. (Opening Br. Exhibit C ¶ 11) Brace's complaint that the court imposed an "implied contingency fee" rather than considering "the actual hours and work necessary to succeed on a covered claim" is bold, since Brace chose not to segregate its fees, giving the Court no information about the actual hours and work necessary to succeed on the Inventory Claim. Assuming any error occurred, Brace invited it and may not be heard to complain on appeal. *See Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 361 (Del. 1961).

Next, Brace challenges the Chancery Court's analysis and weighing of the Rule 1.5(a) factor that considers the time and labor required, but leaves out the court's finding that "the matter ha[d] been unduly protracted due to vigorous litigation *on both sides*," (Opening Br. Exhibit C ¶ 10 (emphasis added)), not simply on the part of PEI, as Brace suggests (Br. 32–33).

PEI's Cash Claims and set-offs were caused not by naked and unjustified "retaliation," as Brace claims, but by Brace's unreasonable position regarding amounts that were plainly due to PEI after closing. Specifically, since the beginning of this case, Brace has claimed entitlement to $3.457 million in customer payments that PEI received following closing. (B-178, A-1281) It even moved to dismiss PEI's counterclaims that sought to keep any of this amount per the parties' agreement. (B-187, B-333–35) The Chancery Court sided with PEI on a substantial portion of its counterclaim for offsets of the total amount. Of the $3.457 million that Brace sought, PEI retained $1,255,835 of it. Brace first received $1,650,422 of the $3.457 million it sought early on, in December 2015, by agreement of the parties. (Opening Br. Exhibit D ¶ 2(e); AR-0002–03) Over the course of the litigation, the parties fought over the remaining balance of $1,806,578 in their Cash Claims. The court ultimately ordered release of just $550,743 to Brace in its Order and Final Judgment, leaving PEI with the rest—$1,255,835. (Opening Br. Exhibit D ¶ 2(a)) In other words, of the remaining amounts Brace sought after PEI had voluntarily parted with roughly $1.65 million early in the case, Brace recovered less than one-third of it. Had Brace not taken such an unreasonable position (which the Court rejected) with their legal arguments on PEI's setoffs, the case would have ended much sooner and neither side would have incurred as much in litigation fees and expenses.

The Chancery Court permissibly weighed and balanced the remaining reasonableness factors. (Br. 34–35) Brace touts that courts in the past have found its lawyers' hourly rates reasonable. But as the court below noted, that is irrelevant because Brace never told the Court how many hours it spent on the Inventory Claim. (Opening Br. Exhibit C ¶ 10) Although the Chancery Court found that this litigation prevented Brace's counsel from spending time on others, that factor was mitigated by the fact that counsel did not handle the matter on a contingency basis. (*Id.*) Finally, Brace obtained on its Inventory Claim only a portion of the $1.2 million it sought (just $725,059 in total). As the Chancery Court noted, "awarding 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 the opposition to the Defendants' similarly disproportionate fee claims)." (*Id.* ¶ 11) All of this was a permissible exercise of the Chancery Court's broad discretion in fixing attorneys' fees.

Finally, Brace is not entitled to fees equal to one-third of the total amount it claims it recovered across all claims. (Br. 35–36) First of all, Brace never asked the Chancery Court for this relief, even as an alternative to its unsupported request for all of its fees and expenses, and so this request is forfeited on appeal. Relatedly, having failed to present the request to the Chancery Court, that court had no occasion to exercise its discretion in response, leaving this Court with no

way to judge whether there was an abuse of discretion. This Court is one of review, not first view. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In any event, the request is meritless, as it depends on the same flawed argument that Brace may recover fees it incurred on claims it lost and that were entirely unrelated to its Inventory Claim (the only claim that allowed the court to shift fees by contract).

CONCLUSION

For these reasons, the Court should reverse the judgment for Brace on its inventory indemnification claim, vacate the associated attorneys' fees and costs award on the inventory indemnification claim, vacate the associated Order and Final Judgment against the individual defendants, Eric and Kirk Peterson, vacate the Order and Final Judgment against the guarantors to the extent it exceeds the scope of the indemnification claim amount, if any, and remand for entry of judgment on the Inventory Claim in PEI's favor.

Alternatively, if the Court affirms the judgment on that inventory indemnification claim, it should (1) affirm the award of $241,686 in attorneys' fees, but (2) reduce the award of costs to $18,663.88, and (3) modify the Order and Final Judgment to state that only the Guarantors—Ron Peterson and the Trust Defendants—are responsible for any remaining amount due on the indemnification claim, including awarded fees and costs, if not first satisfied with escrow funds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,353 words, which were counted using Microsoft Word 2016's word-count function.

CERTIFICATE OF SERVICE

I hereby certify that, on June 28, 2019, true and correct copies of the foregoing document were served via **File&ServeXpress** upon the following counsel of record:

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