**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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<tr><td>JONATHAN URDAN, an individual and WILLIAM WOODWARD, an individual,<br><br>Plaintiffs-Below, Appellants,<br><br>v.<br><br>WR CAPITAL PARTNERS, LLC, a Delaware limited liability company, WR E3 HOLDINGS, LLC, a Delaware limited liability company, HENRI TALERMAN, an individual, and FRANK E. WALSH III, an individual,<br><br>Defendants-Below, Appellees,<br><br>and<br><br>ENERGY EFFICIENT EQUITY, INC., a Delaware corporation,<br><br>Nominal Defendant-Below</td><td>No. 423,2019<br><br>Court Below:<br>The Court of Chancery of The State of Delaware<br><br>C. A. No. 2018-0343-JTL</td></tr>
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# APPELLANTS' OPENING BRIEF

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Dated: November 21, 2019

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## NATURE OF PROCEEDINGS

This action stems from a series of self-dealing, highly-dilutive and one-sided lending transactions in 2017 and 2018, in which a controlling shareholder unfairly harmed the economic rights and voting power of two minority stockholders.

Plaintiffs-Below/Appellants Jonathan Urdan and William Woodward (together, "Plaintiffs") are former directors and minority shareholders of Energy Efficient Equity, Inc. ("E3"). Plaintiffs filed this action on May 11, 2018, asserting breach of fiduciary duty, unjust enrichment, and other tort and contract claims. Defendants-Below/Appellees WR Capital Partners, LLC, WR E3 Holdings, LLC, Henri Talerman and Frank E. Walsh III (collectively, "Defendants") moved to dismiss Plaintiffs' complaint. While the dismissal motions were pending, Plaintiffs sold their E3 shares back to the company as part of a settlement with former defendant-below Bradley Knyal.

The Court of Chancery heard oral argument on March 7, 2019. There the Court raised *sua sponte* the issue of whether Plaintiffs had lost standing to assert *direct* claims by selling their E3 shares. The Court asked the parties to submit supplemental briefing on the question.[1] Plaintiffs submitted supplemental briefing

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[1] Defendants had argued in their dismissal briefing that Plaintiffs had lost *derivative* standing by selling their shares. Plaintiffs acknowledged at the dismissal argument that standing to assert any purely derivative claims was lost under the DGCL's continuous ownership requirement.

showing that (1) under the plain language of the agreements governing the sale of their shares, Plaintiffs contracted to retain their legal claims (including direct claims) against Defendants, while selling their other interests in the shares; and (2) Plaintiffs' fiduciary duty claim is, under Delaware Supreme Court authority, a personal claim that did not travel with the shares. Defendants' supplemental briefing disagreed.

The court granted the motions to dismiss via Memorandum Opinion dated August 19, 2019. The court first ruled that Plaintiffs' direct claims had travelled with the sale of Plaintiffs' shares, and Plaintiffs had failed to retain these claims. This holding was based on the court's interpretation of the Repurchase Agreements[2] and the Settlement Agreement and General Release ("Settlement Agreement") by which Plaintiffs sold their shares and settled with Knyal. (Appellants' Appendix ("A") 489-503, 507-22, 524-38.)

The Settlement Agreement specifies that Plaintiffs' legal claims against Defendants shall not be "released" or otherwise "affected" by the sale. (A494, § 10.) This term is memorialized in section 10 of the Settlement Agreement, which is entitled "Preservation of Certain Claims, Defenses and Counterclaims." (*Id.*) It reads, in pertinent part: "Nothing in this Agreement shall affect any claims

[2] The Repurchase Agreements are substantially identical for Urdan and Woodward and are hereinafter treated in this brief as the "Repurchase Agreement." The Memorandum Opinion defines them this way as well.

[or] shall release any claims that any of the [Plaintiffs] has asserted or may assert against any of the [Defendants]." (*Id.*)

The court held this language was insufficient to retain the direct claims with Plaintiffs. The court first found the Settlement Agreement was not incorporated by reference into the Repurchase Agreement, even though the contracts were executed simultaneously by the parties, were part of the same transaction, and even though the Repurchase Agreement states: "This Agreement, *the Settlement Agreement*, the [other Repurchase] Agreement and the documents to be delivered hereunder and thereunder *constitute the sole and entire agreement of the parties* to this Agreement with respect to the subject matter contained herein." (A516 § 8.06, A534 § 8.06 (emphasis added).)

The court next held the Settlement Agreement could not preserve any claims because it did not come into effect until the "conceptual microsecond" after the sales were complete and Plaintiffs had already transferred their entire "right, title and interest" in the shares. (Ex. A ("Op.") at 15, 33.) The court reached this decision despite express language in the Repurchase Agreement and Settlement Agreement asserting the contracts would close "concurrently" and "simultaneously." (A489, § 1, A507, 524.)

Separately, the court held that Plaintiffs' fiduciary duty claim is not personal under Delaware law and therefore presumptively travels with a sale of shares. (Op.

at 24-27.) This holding runs against this Court's holding in *Schultz v. Ginsburg*, 965 A.2d 661, 668 (Del. 2009) (stating that fiduciary duty claim for economic dilution "was personal"). It also runs contrary to Court of Chancery cases that have followed *Schultz*. *See, e.g.*, *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *14 (Del. Ch. Mar. 23, 2012 ("[C]laims for breach of fiduciary duty are personal . . . ."), *aff'd in relevant part*, 59 A.3d 418 (Del. 2012).

Having concluded that Plaintiffs lost standing on the fiduciary duty and unjust enrichment claims, the Court of Chancery did not reach the issue of whether Plaintiffs had stated a dual-natured claim under the *Tri-Star* and *Gentile* line of cases, and it dismissed Plaintiffs' remaining tort and contract claims. (Op. at 37-46.) Plaintiffs moved for reargument, which was denied on September 4, 2019. Plaintiffs timely filed their Notice of Appeal on October 4, 2019.

## SUMMARY OF ARGUMENT

1. The Court of Chancery erred as a matter of law by failing to give effect to the plain meaning of the Repurchase Agreement and Settlement Agreement, disregarding language that Plaintiffs' sale of shares shall not "affect" or "release" any legal claims that Plaintiffs might assert against Defendants. The court misapplied the doctrine of incorporation by reference, holding that the Settlement Agreement was not made part of the Repurchase Agreement. The court further erred by concluding the Settlement Agreement did not come into effect until the "conceptual microsecond" after the sale of shares was completed, ignoring contrary language in the Repurchase Agreement and Settlement Agreement.

2. The Court of Chancery erred as a matter of law by holding that a breach of fiduciary duty claim is a non-personal claim that presumptively travels with a sale of shares. In so holding, the court misread Delaware Supreme Court precedent holding that a fiduciary duty claim for economic dilution "was personal." This case law is reinforced by other Delaware authority holding that "[b]ecause claims for breach of fiduciary duty are personal, they do not transfer to a later purchaser of the initial shareholder's stock."

3. The Court of Chancery erred as a matter of law by dismissing Plaintiffs' unjust enrichment claim based on the same flawed reasoning relied on to

dismiss the fiduciary duty claims, i.e., that the unjust enrichment claim (1) was not retained by Plaintiffs in the Purchase Agreement or Settlement Agreement, and (2) traveled with the shares when Plaintiffs sold them.

## STATEMENT OF FACTS

### A. Plaintiffs Take E3 From Startup To Successful Energy Financing Company

Urdan, with business partner Kevin Kurka ("Kurka"), founded E3 in 2014. (A011 ¶ 2, A026 ¶ 46.) E3 is a clean energy financing company that partners with municipalities and contractors to provide affordable funding for energy-saving home improvements. (A024-25 ¶ 40.) Woodward was an early investor, board member and active participant in E3. (A011 ¶ 2, A026 ¶ 45.)

Plaintiffs contributed $790,000 in seed money to E3. (A011 ¶ 3, A027 ¶ 48.) They devoted the first several months to building out the company's technology platform and securing regulatory approvals from state and local governments. (A027 ¶ 48.) E3 is now among a small group of property assessed clean energy ("PACE") financing companies, approved in 21 counties and over 100 cities across California. (A011 ¶ 3, A027 ¶ 48.)

Urdan was installed as President, CFO and Director of E3. (A026 ¶ 46.) Woodward was named a Director. (*Id.*) Kurka was installed as CEO and Director. (*Id.*) Until May 31, 2016, Plaintiffs and Kurka collectively owned 100 percent of E3's equity and held all board seats. (A027 ¶ 47.)

### B. Defendants Engage Plaintiffs And Acquire Equity, Board Seats And Veto Authority Over Significant Corporate Transactions

Defendants engaged Plaintiffs and Kurka in early 2016. (A028 ¶ 49.) The parent entity, WR Capital Partners, LLC, is a venture capital fund that targets companies with valuations between $50 million and $500 million for private and public investment opportunities. (*Id.*) WR E3 Holdings, LLC is a fully-owned affiliate of the parent. (A023-24 ¶ 36.) Talerman and Walsh are principals of the fund. (A024 ¶¶ 37, 38.)

Defendants prepared a loan agreement for E3 that was executed on May 31, 2016 (the "Loan Agreement"). (A031-32 ¶¶ 57, 58.) The Loan Agreement called for WR E3 Holdings, LLC, to fund a $5 million credit facility for E3, in exchange for repayment at 10 percent interest, shares of Series B stock, a pledge agreement and a warrant certificate ("Warrant Certification No. 1"), authorizing Defendants to purchase up to 2,307,033 shares of E3's common stock, in proportion to the amount of credit drawn upon by E3. (A031-32 ¶¶ 57, 58, 60.)

In exchange, Defendants acquired certain rights in E3. (A032 ¶ 61, A034 ¶ 66.) Section 5 of the Loan Agreement barred E3 from raising capital or carrying out corporate transactions without Defendants' prior written consent. (A034 ¶ 66.) Section 7 of the Loan Agreement specified 12 different events that would constitute "Events of Default" and allow Defendants to declare all credit due and payable, including (i) termination of Kurka or Urdan, or (ii) a default under E3's existing financing facility with another lender, Oaktree Capital Management, L.P. ("Oaktree"). (A032 ¶ 62.) Plaintiffs also acceded to Defendants' demand for two (40%) of E3's five board seats. (A032 ¶ 60.)

The Loan Agreement further included an option for Defendants to expand the credit facility by $3 million. (A033-34 ¶ 64.) If that option were exercised, Defendants would receive 379,034 more warrants, which was the number of warrants needed to increase their equity in E3 by 3% (i.e., 1% for each $1 million of additional credit). (*Id.*) The term sheet made clear that this was the upper limit on what Defendants would accept. (A034 ¶ 64.) These terms were negotiated; and they gave Plaintiffs assurance that should E3 need more short-term capital in the future, Defendants would not exploit their position and condition an extension of credit on grossly unfair terms. (A034 ¶ 65.)

### C. Defendants Gain Control Over E3

Once the Loan Agreement was in place, Defendants took steps to gain control over E3 and squeeze out Plaintiffs and Kurka. Defendants, using their veto authority over capital raises, blocked efforts to bring in new investors. (A035-36 ¶ 70.) Defendants later terminated Kurka as CEO, unilaterally, without the required board vote. (A036-37 ¶ 72.) Over Plaintiffs' objections, Defendants hired a new CEO, Bradley Knyal, who was Walsh's golfing friend. (A037-38 ¶ 74.) Defendants did not comply with E3's bylaws in hiring Knyal; and they negotiated his compensation without any input from Plaintiffs, both of whom were still on E3's board.[3] (A037-38, ¶¶ 74, 75.)

### D. With Self-Dealing Transactions, Defendants Severely Dilute Plaintiffs' Interest In E3

Defendants controlled E3 by June 2017. (A038 ¶ 76.) As the controlling stockholder, Defendants owed fiduciary duties to Plaintiffs, who were both minority stockholders. (A039 ¶ 76.) Instead of honoring these duties, however, Defendants continued to starve E3 of new capital, shutting down potential outside investors. (A039-40 ¶¶ 77, 78.) Defendants knew that E3 would need short-term financing, and they sought to leverage this need for their own gain. (A039-40 ¶ 78.)

**<u>July 2017 Lending Transaction</u>:** When E3 became cash-pressed and had nowhere else to turn in mid-2017, Defendants re-traded on their original deal and demanded 30% more equity (and millions of new warrants) for the same $3 million in new credit – even though they had previously agreed to 3% more equity in exchange for $3 million in new credit, as memorialized in Warrant Certificate No. 1. (A040 ¶ 79.) Defendants did not hide this self-dealing. In his May 6, 2017 email to Plaintiffs, Walsh wrote that funding of the new $3 million option was "by design expensive and not priced at 'arms length.'" (A040-41 ¶ 81.)

[3] On January 31, 2018, Urdan was terminated, effective May 31, 2018. (A045 ¶ 93.) Defendants did not comply with E3's bylaws governing the termination of corporate officers when they terminated Urdan. (A045-46 ¶ 94.)

Plaintiffs objected because the new terms were unfair. (A041-42 ¶¶ 83-85.) Indeed, E3 had already had serious buyout discussions with a larger competitor and would reach agreement to be sold less than a year later for substantially more than the debt amount, making the 30% demand completely indefensible. (A035-36 ¶ 70, A047-48 ¶ 100.) But Defendants threatened to run E3 into the ground unless Plaintiffs assented to the July 2017 Lending Transaction on the (new) terms. (A042 ¶ 85.) In his May 12, 2017 email to Plaintiffs, Talerman threatened to call an "Event of Default" under the Loan Agreement (based on Defendants' own unsupported termination of Kurka) unless Plaintiffs approved the transaction, writing: "We remind you that Kevin Kurka's Termination for Cause entitles WR to cause an event of default under WR's note agreements." (*Id.*) Talerman again threatened to call a default on May 17, 2017. (A042 ¶ 86.)

These threats were made to coerce, and Plaintiffs had no real choice but to approve the July 2017 Lending Transaction. The alternative to approval was bankruptcy. (A042-43 ¶ 87.) Plaintiffs reluctantly approved the July 2017 Lending Transaction, even though it left them with a small fraction of E3. (*Id.*) Plaintiffs' loss was Defendants' gain, however, as Defendants stood to double their equity and become the majority shareholder with over 60% of E3.[4] (A043 ¶ 87.)

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[4] Defendants specifically targeted Plaintiffs. Other shareholders, like Knyal, were not diluted in the July 2017 Lending Transaction. (A044 ¶ 89.) Defendants also agreed to restore equity to Oaktree, thereby negating its dilution. (*Id.*)

**<u>February 2018 Bridge</u>:** In February 2018, Defendants pushed through a short-term lending transaction (the "February 2018 Bridge") that was designed to increase their equity, at Plaintiffs' expense, in advance of a larger capital raise. (A046 ¶ 95.) The February 2018 Bridge called for a new $2.5 million credit facility for E3, with only $500,000 funded up front. (A046 ¶ 96.) As consideration for participating, Defendants (and Knyal) were given millions of additional shares in E3. (*Id.*) This consideration was promised in full merely for committing to the bridge. (*Id.*) Unbeknownst to Plaintiffs, Defendants and Knyal were simultaneously negotiating with outside buyers to be repaid as a condition of an acquisition of E3. (*Id.*.) Plaintiffs did not learn about these negotiations until after the bridge closed and Defendants had taken millions of new warrants. (*Id.*)

### E. Plaintiffs File This Action

Plaintiffs filed this action on May 11, 2018, at which time they still owned common stock, Series A preferred stock and convertible debt in E3. (A043-44 ¶ 88.) The complaint asserts six claims against Defendants, including breach of fiduciary duty, fraudulent inducement, fraudulent concealment, breach of contract, unjust enrichment, and breach of the implied covenant of good faith and fair dealing.

### F. Plaintiffs Sell Their E3 Shares But Expressly Carve Out And Retain Their Claims Against Defendants

On August 31, 2018, Plaintiffs sold their E3 shares back to the company, which coincided with a larger capital transaction in E3 by an outside investment fund. (Op. at 11-12.) The terms of the repurchase were memorialized in (1) the Settlement Agreement, and (2) the Repurchase Agreement. Each of these agreements was negotiated and executed together (on August 31, 2018) and was intended and understood by all parties to be part of a single integrated transaction.

Specifically, the parties, including Plaintiffs, Defendants, E3, outside investors and Knyal (E3's Chief Executive Officer) agreed to a partial settlement of certain claims against certain parties. (Op. at 12.) To that end, Plaintiffs released all of their claims against Knyal, E3 and certain outside investors (A490-92, §§ 5-6), in exchange for a settlement payment of $150,000 each (A490, § 3). However, Plaintiffs did not release their claims against Defendants, and were not given any consideration for such claims.

The Settlement Agreement specifies that the claims against Defendants in this action are retained by Plaintiffs and shall not be "released" or otherwise "affected" by the sale of their shares. In full, section 10 of the Settlement Agreement reads:

> 10. **<u>Preservation of Certain Claims, Defenses and Counterclaims.</u>** Nothing in this Agreement shall affect any claims any of the [] Plaintiffs may have against any of the [Defendants] or the defenses or counterclaims that any of the [Defendants] may have to the claims of the [] Plaintiffs. Nothing in the releases contemplated by this Agreement shall

> release any claims that any of the [] Plaintiffs has asserted or may assert against any of the [Defendants], whether derivative or otherwise; provided that, notwithstanding the foregoing, the [Defendants] hereby waive and agree not to assert or otherwise raise any defense related to the [] Plaintiffs' agreement to sell their shares in the Company, including without limitation any defense that the [] Plaintiffs lack standing to assert any claim that has been brought or could have been brought in the Delaware Action.

(A494, § 10.)

Section 1.01 of the Repurchase Agreement states that Plaintiffs are to sell their "right, title and interest" in their E3 shares, "[s]ubject to the terms and conditions set forth herein." (A507, § 1.01, A524, § 1.01.) The remainder of the Repurchase Agreement sets forth the terms of this sale, as well as the interplay between the Repurchase Agreement and Settlement Agreement.

Section 8.06 of the Repurchase Agreement refers to the Settlement Agreement and makes clear that it shall be construed as part of the entire agreement of the parties. In pertinent part, this section reads: "This Agreement, *the Settlement Agreement*, the [other Repurchase] Agreement and the documents to be delivered hereunder and thereunder *constitute the sole and entire agreement of the parties* to this Agreement with respect to the subject matter contained herein."[5] (A516-17, § 8.06, A534, § 8.06 (emphasis added).)

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[5] In the recitals, the Repurchase Agreement further states: "WHEREAS, concurrently herewith, Seller is entering into a Settlement Agreement . . . pursuant

As noted above, the Repurchase Agreement refers to the "concurrent[]" closings of both the Repurchase and Settlement Agreements. (A507, 524.) In the same vein, the Settlement Agreement states that "[t]he closing under this Agreement shall occur *simultaneously* with the closings under the Urdan Repurchase Agreement and the Woodward Repurchase Agreement."[6] (A489 § 1 (emphasis added).)

### G. The Court Of Chancery Grants Defendants' Motions To Dismiss

On September 14, 2018, Defendants moved to dismiss the complaint. At oral argument, the Court of Chancery raised *sua sponte* the issue of whether Plaintiffs had transferred their direct claims against Defendants by selling their shares. (A365-68.)

Notably, counsel for Defendants took the position that Plaintiffs had *not* released their claims by the sale. (A366 at 6:13-7:12 (MR. NACHBAR: "I think the theory – so those claims were not released as part of the transaction. There was no release of claims. . . . I'd be thrilled to be wrong about that.").) Instead, Defendants' view was that Plaintiffs' breach of fiduciary duty claim was derivative (and could not be pursued under the continuous ownership rule).

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to which, among other things, the parties thereto are releasing certain claims against each other." (A507, 524.)

[6] After entering into the Settlement Agreement, Plaintiffs dismissed their claims, namely Counts II and III, against Knyal.

In its Memorandum Opinion, the Court of Chancery granted the motions to dismiss, finding that Plaintiffs had transferred all of their "right, title and interest" in the shares, including direct claims against Defendants, in the sale. (Op. at 27-33.) Ignoring the provision describing the Settlement Agreement as part of the "sole and entire agreement of the parties," the court found the Settlement Agreement was not incorporated by reference because its terms were inconsistent with the "all-encompassing transfer of rights contemplated by the Repurchase Agreement." (Op. at 30.)

Further, the court held the express language in the Settlement Agreement purporting to preserve Plaintiffs' claims against Defendants had no effect because the transfer of Plaintiffs' interests in the shares was complete "in the conceptual microsecond before the Settlement Agreement became effective"—meaning there were no legal claims left for Plaintiffs to retain. (Op. at 15.)

The court also rejected Plaintiffs' argument that their breach of fiduciary duty claim is personal. (Op. at 23-27.) The court thus dismissed the breach of fiduciary duty claim, finding that Plaintiffs lacked standing to assert a claim that had passed with the sale of the shares. (Op. at 27, 35-37.) For the same reasons, the court dismissed the unjust enrichment claim, finding that Plaintiffs had given it up when they sold their shares. (Op. at 46.)

Plaintiffs moved for reargument on August 27, 2019, asking the court to reconsider its decision. (A570-84.) Specifically, Plaintiffs asked the Court to grant reargument on its holding that the parties' Settlement Agreement was not incorporated by reference into the Repurchase Agreement, and on other aspects relating to the court's interpretation of the contracts. The court summarily denied the motion in its September 4, 2019 Order (attached as Exhibit B). Plaintiffs timely filed this appeal on October 4, 2019. (A600-04.)

## ARGUMENT

### I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY NOT GIVING EFFECT TO THE PLAIN MEANING OF THE PARTIES' SALE DOCUMENTS, UNDER WHICH PLAINTIFFS RETAINED AND DID NOT RELEASE THEIR CLAIMS AGAINST DEFENDANTS

#### A. Question Presented

Did the Court of Chancery err in holding that Plaintiffs did not retain their direct claims against Defendants, where the parties contracted that nothing in the sale of Plaintiffs' shares shall "affect" or "release" any claims that Plaintiffs may assert against Defendants, and such contract language was incorporated into the Repurchase Agreement as part of "the sole and entire agreement of the parties with respect to the subject matter contained herein?" This issue was preserved for appeal[7] and results from the lower court's August 19, 2019 Memorandum Opinion and September 4, 2019 Order.

#### B. Scope Of Review

This Court reviews questions of law and interpretation of written agreements *de novo*.[8]

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[7] A465-82.

[8] *See, e.g., CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018); *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502, 509 (Del. 2019) (vacating decision that was inconsistent with written agreement).

### C. Merits Of Argument

When Plaintiffs sold their shares back to E3 on August 31, 2018, they contracted to preserve—and to not transfer or "release" or otherwise "affect"—their legal claims against Defendants. The Court of Chancery did not give effect to this term, which was set forth in section 10 of the Settlement Agreement, because it concluded the Settlement Agreement was not incorporated by reference into the Repurchase Agreement and did not come into being until after the sale of shares was complete. (Op. at 27-33.) This interpretation misapplies the plain contract language, misapprehends the intent of all parties, and misconstrues binding Delaware authority, and the resulting holding should be reversed.

#### 1. The Settlement Agreement Was Made Part of the Repurchase Agreement Under the Doctrine of Incorporation by Reference

The doctrine of incorporation by reference is firmly entrenched in Delaware law. *See State ex rel. Hirst v. Black*, 46 Del. 295, 299 (Del. Super. Ct. 1951) ("It is, of course, axiomatic that a contract may incorporate by reference provisions contained in some other instrument."). A contract incorporates another instrument (or matters contained therein) where, on the face of the contract, such instrument is identified and made part thereof:

> Other writings, *or matters contained therein*, which are referred to in a written contract may be regarded as incorporated by the reference as a part of the contract and therefore, may properly be considered in the construction of the contract. Where a

> written contract refers to another instrument and makes the terms and conditions of such other instrument a part of it, the two will be construed together as the agreement of the parties.

*Star States Dev. Co. v. CLK, Inc.*, 1994 WL 233954, at *4 (Del. Super. Ct. May 10, 1994) (citation omitted); *see also Realty Growth Inv'rs v. Council of Unit Owners*, 453 A.2d 450, 454 (1982) ("A contract can be created by reference to the terms of another instrument if a reading of all documents together gives evidence of the parties' intention and the other terms are clearly identified.").

On its face, the Repurchase Agreement "refers" to the Settlement Agreement and makes "such other instrument a part of it." *Star States*, 1994 WL 233954, at *4 (citation omitted). In section 8.06, the Repurchase Agreement identifies the Settlement Agreement and purports to incorporate its terms as part of the parties' entire agreement: "This Agreement, *the Settlement Agreement*, the [other Repurchase] Agreement and the documents to be delivered hereunder and thereunder *constitute the sole and entire agreement of the parties* to this Agreement with respect to the subject matter contained herein." (A516-17 § 8.06, A534 § 8.06 (emphasis added).)

In the recitals, furthermore, the Repurchase Agreement states that the Settlement Agreement is being entered into by the parties at the same time: "WHEREAS, *concurrently herewith*, Seller is entering into a Settlement and Release (the 'Settlement Agreement') with [the other parties to the Settlement

Agreement] pursuant to which, among other things, the parties thereto are releasing certain claims against each other." (A507, 524 (emphasis added).)

The Repurchase Agreement thus "refers" to the Settlement Agreement and makes "such other instrument a part of it." *Star States*, 1994 WL 233954, at *4 (citation omitted). This alone is sufficient for incorporation by reference. Indeed, separate contracts should be construed as a single agreement where, like here, the contracts are executed as part of an integrated transaction. *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1120 n.192 (Del. Ch. 2012), *aff'd*, 68 A.3d 1208 (Del. 2012) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."); *BAYPO Ltd. P'ship v. Tech. JV, LP*, 940 A.2d 20, 27 (Del. Ch. 2007) (holding on a motion to dismiss that "[t]he structure of the transaction evinces the definite intention of the signatories that these agreements be contemplated as one document").

One instructive decision is *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108 (Del. 1985). There, this Court held that Shell Oil Company's ("Shell's") entry into both a "Toll Conversion Agreement" and a "Purchase and Sale Agreement" with a manufacturer amounted to a single "sublicense" with that manufacturer that was prohibited by an earlier contract that Shell had entered into with a different entity. 498 A.2d at 1114-15. The Court so held despite Shell's counsel's express intent that "[t]he use of a separate toll conversion agreement and sales agreement is not merely 'cosmetic.' Each agreement should be able to stand on its own . . . ." *Id*. at 1112. This Court explained that "[t]he specific provisions of these Agreements and the interrelationship thereof make it clear that the parties intended these two Agreements to operate as two halves of the same business transaction." *Id*. at 1115. As a result, the two agreements formed a single "sublicense." *Id*.

Here, the Repurchase Agreement and Settlement Agreement were executed together, by the same parties, in connection with the sale of Plaintiffs' shares. This sale was linked to and part of one transaction in which certain claims were released and other claims were retained. The contracts are part of a single agreement and must be read together. *See Green Plains Renewable Energy Inc. v. Ethanol Holding Co., LLC*, 2015 WL 590493, at *6 (Del. Super. Ct. Feb. 9, 2015) (holding that the operative contract's express "identification of all schedules to the [contract] as being part of 'the entire agreement' is sufficient to satisfy the incorporation by reference standard").

### 2. The Parties Carved Out Plaintiffs' Claims Against Defendants Within the Otherwise Complete Transfer of "Right, Title and Interest" in the Shares

Under the plain language of the Settlement Agreement, Plaintiffs preserved their claims against Defendants and did not transfer or release them in connection with the sale.

On its face, the Settlement Agreement states that Plaintiffs' legal claims against Defendants are retained by Plaintiffs and shall not be "released" or otherwise "affected" by the sale of their shares back to E3. (A494, § 10.) This term is memorialized in section 10 ("Preservation of Certain Claims, Defenses and Counterclaims"). (*Id.*)

The plain meaning of this section confirms that Plaintiffs preserved their direct legal claims.[9] To begin, section 10 states that "[n]othing in this Agreement shall affect any claims any of the Delaware Plaintiffs may have against any of the WR Parties," nor shall it affect any defenses or counterclaims that may be raised. (*Id.*) The following sentence is even clearer: "Nothing in the releases contemplated by this Agreement shall release any claims that any of the Delaware Plaintiffs has asserted or may assert against any of the WR Parties, whether derivative or otherwise . . . ." (*Id.*)

The import of this language is clear. Plaintiffs transferred all "right, title and interest" in their shares (A507, § 1.01, A524, § 1.01), *except for* their legal claims against Defendants. This was the parties' reasonable expectation. Plaintiffs would never have sold their shares back to E3 if that sale required them to release their claims against Defendants. That is why Plaintiffs carved out such claims from the

[9] As noted above, Plaintiffs do not challenge here that they have lost standing to pursue purely derivative claims under the continuous ownership rule.

otherwise complete transfer of their "right, title and interest" in the shares. (*Id.*) Even Defendants, moreover, do not dispute that Plaintiffs retained these claims. (*See* A366 at 6:13-7:12 (MR. NACHBAR: "I think the theory – so those claims were not released as part of the transaction. There was no release of claims. . . . I'd be thrilled to be wrong about that.").)

This decoupling of legal claims and shares is lawful and enforceable. Under Delaware's Uniform Commercial Code, a seller of securities is allowed to transfer less than a full interest to the purchaser. 6 *Del. C.* § 8-302. Hence, "[w]hile ordinarily a transfer is intended to, and has, the effect of transferring all the transferor's rights in the security, *a transfer of a limited interest will transfer only that particular interest which the parties intended to transfer*." 8 Anderson on the U.C.C. § 8-302:6 (3d ed. Dec. 2018) (emphasis added). That is precisely what happened here. The plain language and the parties' intent should be given effect.

### 3. The Court of Chancery Erred

The Court of Chancery held that Plaintiffs did not retain their claims against Defendants when they sold their E3 shares because (1) the Repurchase Agreement did not incorporate by reference the Settlement Agreement (Op. at 27-30), and (2) the Settlement Agreement did not come into effect until after the Repurchase Agreement had closed and Plaintiffs had already transferred their interests in the shares (Op. at 30-33). On each conclusion, the court erred.

### a. The holding that the Repurchase Agreement did not incorporate the Settlement Agreement was error

In two places, the Repurchase Agreement expressly refers to the Settlement Agreement. The lower court reviewed each of these provisions and found they were insufficient to give rise to incorporation by reference. The court's analysis is mistaken.

__Section 8.06__: In pertinent part, section 8.06 reads:

> **Section 8.06. Entire Agreement.** This Agreement, the Settlement Agreement, the Elliott Purchase Agreement and the documents to be delivered hereunder and thereunder constitute the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein, and supersede all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter.

(A516-17, § 8.06, A534, § 8.06.) The court found this language to be inadequate because in the event of a conflict between the Settlement Agreement and Repurchase Agreement, "the terms and provisions in the body of [the Repurchase] Agreement shall control." (Op. at 29 (quoting A517, § 8.06, A534, § 8.06).)

There is no such conflict, however. Under a plain reading of the contracts, Plaintiffs transferred their "right, title and interest" in the shares, "[s]ubject to the terms and conditions set forth herein"—i.e., the terms of the Settlement Agreement, which are incorporated into the Repurchase Agreement. (A507, § 1.01, A524, § 1.01.) This is a logical and straightforward reading of the contracts. *See Cerberus Int'l, Ltd. v. Apollo Mgmt, L.P.*, 1999 WL 33236239, at *4 (Del. Ch. Nov. 4, 1999) ("A contract must be construed, where possible, so that all of its provisions may be read together and harmonized.").

**<u>Recital</u>:** The fourth recital to the Repurchase Agreement reads, "WHEREAS, concurrently herewith, Seller is entering into a Settlement Agreement and Release (the 'Settlement Agreement') with [Defendants and other parties], pursuant to which, among other things, the parties thereto are releasing certain claims against each other." (A507, 524.)

The lower court found little significance in this term because "recitals are not substantive provisions of an agreement." (Op. at 28.) That conclusion is misplaced. A recital to a contract provides context and "may have a material influence in construing the contract and determining the intent of the parties." *TA Operating LLC v. Comdata, Inc.*, 2017 WL 3981138, at *23 (Del. Ch. Sept. 11, 2017) (citation omitted). "[I]n such respect [the recitals] should, so far as possible, be reconciled with the operative clauses and be given effect." *Id*. (citing *In re Pyramid Operating Auth., Inc.*, 144 B.R. 795, 814 (Bankr. W. D. Tenn. 1992)).

Even the authorities cited by the court hold that a recital "may guide the interpretation of the binding obligation," where a substantive provision is ambiguous. (Op. at 29 n.14 (citing *United States v. Cmty. Health Sys., Inc.*, 666 F. App'x 410, 417 (6th Cir. 2016)).) Plaintiffs acknowledge that a recital, standing alone, cannot overcome other "inconsistent" contract terms. But there is no inconsistency here. The Repurchase Agreement does not foreclose the incorporation by reference of the Settlement Agreement. To the contrary, its plain language contemplates that the Settlement Agreement will be made part of the Repurchase Agreement. Put another way, the court's analysis "presumes an inconsistency which does not in fact exist." *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184 (Del. 1992) (rejecting Chancery Court's finding of inconsistent contract terms).

#### b. The holding that Plaintiffs did not preserve their claims via the Settlement Agreement was error

The Court of Chancery further held that language in the Settlement Agreement was not effective to preserve Plaintiffs' claims against Defendants. The court reasoned that such claims therefore traveled with the sale of Plaintiffs' claims. (Op. at 30-33.) This was error.

The main thrust of the court's analysis is that the Repurchase Agreement effectuated a sale in Plaintiffs' shares before the Settlement Agreement came into being. (Op. at 33 (holding carve out of claims in Settlement Agreement "did not become effective until the conceptual microsecond after the share transfers were complete. At that point, the Company owned the shares, and the Release Carveout could not modify the completed aspect of the transaction.").)

In support, the court relies on sections 1 and 2 of the Settlement Agreement. It emphasizes the language in section 1, which holds the Settlement Agreement "is dependent upon closings under both the Urdan Repurchase Agreement and the Woodward Repurchase Agreement taking place." (A489-90, § 1.) In section 2, the court emphasizes that Urdan and Woodward are selling all of their shares and interests "[a]s conditions to this [Settlement] Agreement." (A490, § 2.)

This analysis misses the mark because neither of these terms compels the conclusion that the Repurchase Agreement must occur first. In fact, the court skips over accompanying language that undermines this very position. For example:

- Section 1 states that closings under the Repurchase Agreement and Settlement Agreement shall occur at the same time: "The closing under this [Settlement] Agreement (the 'Closing') shall occur *simultaneously* with the closings under the Urdan Repurchase Agreement and the Woodward Repurchase Agreement." (A489-90, § 1 (emphasis added).)

- Section 14, like section 8.06 of the Repurchase Agreement, purports to treat both contracts as part of the same transaction: "This Agreement, along with Exhibit A hereto and the Urdan Repurchase Agreement and the Woodward Repurchase Agreement, *constitute the entire agreement among the Parties hereto* with respect to the subject matter hereof." (A495, § 14 (emphasis added).)

The Memorandum Opinion does not address this language, which conflicts with the court's conclusion that the Settlement Agreement did not come into being until a "conceptual microsecond" after the repurchases were complete. (Op. at 15, 33.) It is particularly impossible to square the language in section 1—that the closings under each contract shall occur "*simultaneously*"—with the court's finding that the Repurchase Agreement closed first. (A489-90, § 1 (emphasis added).)

The court's analysis also fails because it would render section 10 of the Settlement Agreement (i.e., the "Release Carveout") a dead letter. Section 10 specifies that claims against Defendants are retained by Plaintiffs and shall not be "released" or otherwise "affected" by the sale. (A494, § 10.) Under the court's reading, however, this section becomes meaningless because there are not any claims left to preserve where all right, title and interest in the shares have already passed with the sale. This Court disfavors contractual interpretations, like the lower court's, that would render an entire section of the contract illusory. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage (citation omitted).").

Finally, the court reasons that even if Plaintiffs are right about the Settlement Agreement, that is of no moment because it is inconsistent with the Repurchase Agreement, which controls in all cases. (Op. at 33 ("At best for the plaintiffs, the Release Carveout is inconsistent with the transfer of all 'right, title, and interest in and to' their shares pursuant to Section 1.01 of the Repurchase Agreement, but in that event, under the integration clause, the terms of the Repurchase Agreement control.”).) That analysis misses the mark too. There is no inconsistency at all between the contracts. Plaintiffs transferred their right, title and interest in the shares, except as to the claims against Defendants, which they specifically retained. This is consistent with Delaware law, *see* 6 *Del. C.* § 8-302, and gives effect to the parties’ intent.

#### 4. At a Minimum, Ambiguity Exists With Respect to the Interplay of the Repurchase Agreement and Settlement Agreement, and Further Discovery Is Warranted

At the very least, the Repurchase Agreement and Settlement Agreement are ambiguous as to whether Plaintiffs effectively preserved their claims against Defendants. The Memorandum Opinion should be reversed so that discovery can be taken and extrinsic evidence can be reviewed.

“[A] contract is ambiguous . . . when the provision[ ] in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings.” *Dweck v. Nasser*, 2012 WL 161590, at *16 (Del. Ch. Jan. 18, 2012) (alterations in original) (citation omitted). “When a contract is ambiguous, a court may look to extrinsic evidence as an aid to interpretation.” *Meyers v. Quiz–Dia LLC*, 2017 WL 76997, at *7 (Del. Ch. Jan. 9, 2017). “In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions.” *Appriva S’holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1291 (Del. 2007) (citation omitted).

As shown above, a reasonable interpretation is that Plaintiffs preserved, and did not release, their claims against Defendants. Dismissal for lack of standing is therefore improper at this stage. The lower court's decision should be reversed.

## II. THE COURT OF CHANCERY ERRED BY HOLDING THAT PLAINTIFFS' CLAIMS WERE NON-PERSONAL AND TRAVELLED WITH THE SHARES

### A. Question Presented

Did the Court of Chancery err when it dismissed Plaintiffs' breach of fiduciary duty claims as non-personal claims that travelled with the shares? (A473, 480; Op. at 24-25 & n.10.)

### B. Scope of Review

This Court reviews questions of law *de novo*.[10]

### C. Merits of Argument

The Court of Chancery erred when it dismissed Plaintiffs' breach of fiduciary duty claims on the basis that "[o]nce the Repurchase Agreements became effective, the plaintiffs transferred all of their rights, including their ability to assert derivative and direct claims . . . ." (Op. at 24, 25.) This holding violates Delaware Supreme Court precedent and other Delaware authority holding that claims for breach of fiduciary duty are personal claims that do not travel with the shares.

#### 1. Under This Court's Decisions in *Schultz* and *Celera*, Plaintiffs' Fiduciary Duty Claims Are Personal

This Court in *Schultz v. Ginsburg*, 965 A.2d 661, 668 (Del. 2009), held that a fiduciary duty claim for economic dilution "was personal." The Supreme Court explained that, even after a stockholder sold her shares, "the claim for damage

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[10] *CompoSecure*, 206 A.3d at 816.

suffered would remain with the Seller and not transfer to the Buyer." *Id.* This language could not be clearer. And it makes perfect sense, because a claim for breach of fiduciary duty is in the nature of an equitable tort. *See Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC*, 2018 WL 3326693, at *22 (Del. Ch. July 6, 2018) ("A claim for breach of fiduciary duty is an equitable tort." (citing *Restatement (Second) Torts* § 874 cmt. b (Am. Law Inst. 1979) ("A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct.")), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 2019 WL 5399453 (Del. Oct. 22, 2019).

A tort is a breach of a duty owed *by a person, toward a person*. *Restatement (Second) of Torts* § 870 (1965) ("One who intentionally causes injury *to another* is subject to liability *to the other* for that injury, if his conduct is generally culpable and not justifiable under the circumstances.") (emphasis added). Because the duty exists between people, the claim for breach of that duty resides in the wronged person. *See Almour v. Pace*, 193 F.2d 699, 702 (D.C. Cir. 1952) (recognizing the "distinction . . . between suits based on claims personal to the plaintiff, such as actions for injury sounding in tort, and those seeking vindication of some right of property or contract"); *Grass Valley Terrace v. United States*, 69 Fed. Cl. 506, 510 (Fed. Cl. 2006) (same). Thus, in addition to being clear, *Schultz*'s holding is solidly grounded in black-letter legal principles.

The Court followed *Schultz* in *In re Celera Corp. Shareholder Litigation*, 2012 WL 1020471, at *14 (Del. Ch. Mar. 23, 2012), *aff'd in relevant part*, 59 A.3d 418 (Del. 2012).[11] In *Celera*, certain shareholders of Celera Corp. ("Celera") filed a class action claiming the directors of the company breached their fiduciary duties of due care, good faith, candor and loyalty in connection with Celera's acquisition by Quest Diagnostics Inc. ("Quest"). *Id.* at *1. The putative lead plaintiff, New Orleans Employees' Retirement System ("NOERS"), however, sold its shares on the secondary market prior to the closing of the acquisition by Quest. *Id.* When NOERS applied for approval of a plan to settle the class action, Celera's largest shareholder, BVF Partners L.P. ("BVF"), argued NOERS was no longer qualified as lead plaintiff for the class because it sold its Celera shares at a premium. *Id.*

The Court of Chancery rejected BVF's argument, holding that NOERS's status as a former shareholder did not preclude it from being an adequate class representative. *Id.* at *16. The Court noted that NOERS was "a member of a class to which fiduciary duties allegedly were breached" and that "[b]ecause claims for breach of fiduciary duty are personal, they do not transfer to a later purchaser of

[11] On appeal, the Supreme Court did not disturb the Court of Chancery's holding that the plaintiff had standing to assert its fiduciary duty claim after it sold its shares. 59 A.3d at 422 ("We decline to adopt a rule of law that a shareholder class representative in a breach of fiduciary duty action must own stock in the corporation continuously through the final class certification.").

the initial shareholder's stock." *Id.* at *14.[12] The *Celera* Court also noted that "[o]nce disloyalty has been established, [Delaware law] requires that a fiduciary not profit personally from his conduct, and that the beneficiary not be harmed by such conduct." *Id.* at *14 (quoting *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996)). Accordingly, the Court concluded that NOERS was not precluded from asserting breach of fiduciary duty claims on behalf of the class because its right to assert those claims did not transfer when it sold its shares. *Id.*

In sum, the decision in *Schultz* definitively holds (and *Celera* confirms) that a fiduciary duty claim is personal.

### 2. The Court of Chancery Misread *Schultz* and Incorrectly Refused to Follow It

Here, the Court of Chancery rejected the holdings in *Schultz* and *Celera*. It did so solely based on its earlier analysis of the issue in *In re Activision Blizzard, Inc. Shareholder Litigation*, 124 A.3d 1025, 1055 (Del. Ch. 2015). (Op. at 25 n.10.) In *Activision*, the court rejected *Schultz*'s holding because it thought *Schultz*

[12] In a footnote, the Court noted that the Supreme Court in *Schultz* relied on the Delaware Uniform Commercial Code in distinguishing personal claims from claims that transfer to later purchasers, such as claims for charter violation. *Id.* at *14 n.83. The Court noted that 6 *Del. C.* § 8–302(a) provides, "a purchaser of a . . . security acquires all rights in the security that the transferor had or had power to transfer." *Id.* In *Schultz*, the Court noted that "[t]he phrase 'all rights in the security' means rights in the security itself as opposed to personal rights." *Schultz*, 965 A.2d at 667 n.12. The *Celera* Court concluded that "[the *Schultz* Court's] reasoning is in accord with Delaware's 'strong policy against the purchase of a lawsuit.'" *Celera*, 2012 WL 1020471, at *14 n.83 (citation omitted).

deployed "inconsistent terminology" when it indicated the breach of fiduciary duty claim could be both personal and derivative. *Activision*, 124 A.3d at 1055. The court noted that in *Schultz*, after holding that the economic dilution claim was personal, the Supreme Court "predicted that the Chancellor would likely find the Economic Dilution claim to be derivative." *Id.* Based on this apparent inconsistency between the two paragraphs describing the nature of the economic dilution claim, the court in *Activision* concluded that it did not regard *Schultz* "as holding definitively that a dilution claim is personal and remains with the sellers." *Id.*

The *Schultz* decision, however, did not deploy inconsistent terminology in describing the nature of the economic dilution claim. Rather, the second paragraph in *Schultz* simply acknowledged that if the economic dilution claim hypothetically was derivative, the benefit would go to the corporation and, consequently, the sellers would not be able to recover. *Schultz*, 965 A.2d at 668 ("Thus, if a chancellor determined the Economic Dilution claim was derivative, the Objector Sellers would not be able to recover because the corporation would receive the relief and they no longer held stock in the corporation.").

*Activision*'s primary analytical error was that it viewed derivative claims and personal claims as mutually exclusive. In fact, the terms "personal" and "derivative" describe two different aspects of a claim. Whether a claim is personal depends on whether the right belongs to the person or is a property interest tied to the security. *Schultz,* 965 A.2d at 667 n.12 ("The phrase 'all rights in the security' means rights in the security itself as opposed to personal rights."). Whether a claim is derivative depends on "who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). It is perfectly consistent, therefore, for a shareholder to have a personal claim that could be derivative if the corporation is the party that would benefit from the remedy. *Celera*, 2012 WL 1020471, at *14.[13] This was the case in *Schultz,* where the Court found the economic dilution claim was personal, but noted that the claim would likely have been derivative because the remedy would have gone to the corporation had the litigation gone forward.

Accordingly, *Activision*'s, and the decision on appeal's, rejection of *Schultz* is wrong.

[13] "[I]f NOERS's fiduciary claims were derivative, it would not be able to recover because the corporation would receive the relief and NOERS no longer holds stock in the corporation. Because the claims involved in this case are both personal and direct, however, NOERS is not categorically barred from receiving monetary relief, even though it no longer owns Celera stock." *Id.*

### 3. Additional Delaware Authority Holds That Breach of Fiduciary Duty Claims Are Personal

Other Delaware decisions are in accord with *Schultz* and *Celera*. For example, the personal nature of a breach of fiduciary duty claim was discussed at length in *Noerr v. Greenwood*, 2002 WL 31720734, at *4 (Del. Ch. Nov. 22, 2002). In *Noerr*, the plaintiff, a former stockholder, alleged that the former directors breached their duty of disclosure by distributing a false proxy statement. *Id.* at *1. In seeking class certification, the plaintiff argued the class should include "all . . . stockholders who owned [their] stock on . . . [the record date for the annual meeting] . . . *and their successors in interest and transferees and assigns*." *Id.* at *3 (second alteration in original). The defendants contested the class definition, arguing that only stockholders on the date of the meeting could assert the disclosure claim—not their transferees and assigns. *Id.* at *4. The defendants argued that the transferees and assigns had "no standing to assert the disclosure claim, because by its very nature, that claim is personal to the stockholders to whom the offending disclosure is made." *Id.*

The Court of Chancery agreed with the defendants, holding that "[a] claim for breach of the fiduciary duty of disclosure can only be maintained by stockholders to whom the duty was owed, in this case, the stockholders on the record date who were entitled, and were being asked, to vote." *Id.* Consequently, the court held that "[t]he only other persons who could assert that disclosure claim would be the 'record date' stockholders' successors in interest, who by operation of law would be entitled to assert disclosure claims on behalf of those record date stockholders." *Id.* The court explained that "successors in interest" would include "a person having a power of attorney to act on behalf of a record date stockholder, a personal guardian for a record date stockholder, and an executor of a record date stockholder's estate." *Id.*

On the other hand, the court held that "transferees and assigns" of a former stockholder "would not be entitled to assert any disclosure claim on behalf of a deceived stockholder transferor, because such transferees and assigns would have no personal disclosure claim to assert." *Id.* Accordingly, the court held "transferees and assigns" should be excluded from the class. *Id.* The court's decision in *Noerr* illustrates how claims for breach of fiduciary duty are unlike transferable property claims because breach of fiduciary duty claims can only be asserted by stockholders to whom the duty is owed and their successors in interest.

#### 4. Plaintiffs' Claims for Breach of Fiduciary Duty Are Even More Clearly Personal in Nature Due to Their Direct Aspects and the Fact That the Breach Was Committed by a Controller Against a Minority

The fiduciary duty claims asserted in this case are even more clearly personal than the claims in *Schultz* because the breaches were committed by a controller against a shareholder minority. Actions involving a controller and minority are personal in nature because the controller owes a duty to the minority apart from its duty to the corporation. *See, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006) ("The harm to the minority shareholder plaintiffs resulted from a breach of a fiduciary duty owed to them by the controlling shareholder, namely, not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders."). When this duty is breached in the context of direct claims, the minority shareholders suffer a harm unique to them that is separate from the harm suffered by the corporation. *Id.* at 102-03 ("Although the corporation suffered harm (in the form of a diminution of its net worth), the minority shareholders also suffered a harm that was unique to them and independent of any injury to the corporation.").

Accordingly, claims for breach of fiduciary duty that arise from a controller's breach of duty against a minority are more personal in nature because the harm suffered by the minority is different than the harm suffered by the corporation. *See Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175, at *7 (Del. Ch. Oct. 28, 2011) ("[W]hen a fiduciary duty claim has that dual character, the minority shareholders suffer 'an injury that [i]s unique to them individually and that [may] be remedied in a direct claim against the controlling stockholder and any other fiduciary responsible for the harm.'" (alterations in original) (quoting *Gentile*, 906 A.2d at 101)). Accordingly, the claims in this case are even more clearly personal than those in *Schultz* because the Defendants breached a duty owed directly to Plaintiffs as minority stockholders, and Plaintiffs suffered unique harm that was separate from the harm to the corporation.

## III. THE COURT OF CHANCERY ERRED BY HOLDING THAT PLAINTIFFS LACKED STANDING TO BRING THEIR UNJUST ENRICHMENT CLAIM AND HOLDING THAT OTHER LEGAL FRAMEWORKS SUPERSEDE THE UNJUST ENRICHMENT CLAIM

### A. Question Presented

Whether the Court of Chancery erred in dismissing Plaintiffs' unjust enrichment claim (1) for the same reasons it erred in dismissing Plaintiffs' fiduciary duty claim, and (2) because well-established Delaware law permits plaintiffs to plead unjust enrichment claims alternatively with breach of fiduciary duty claims and breach of contract claims. This issue was raised below. (A250-51, 286-88.)

### B. Scope Of Review

This Court reviews questions of law *de novo*.[14]

### C. Merits Of Argument

For the reasons discussed in Argument Part I above, the Court of Chancery erred when it dismissed Plaintiffs' unjust enrichment claim on the basis that, "when they sold their shares," Plaintiffs "gave up [their] parallel claim for unjust enrichment based on harm to their shares." (Op. at 46.) Because Delaware courts "frequently treat[] duplicative fiduciary duty and unjust enrichment claims in the same manner when resolving a motion to dismiss," dismissal of the unjust

[14] *See, e.g.*, *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016); *Nemec v. Schrader*, 991 A.2d 1120, 1125 (Del. 2010).

enrichment claim was error for the same reasons that dismissal of Plaintiffs' breach of fiduciary claims was error. *Frank v. Elgamal*, 2014 WL 957550, at *31 (Del. Ch. Mar. 10, 2014).

To the extent the Court of Chancery dismissed the unjust enrichment claim for the additional reason that the "more settled doctrine[s]" of fiduciary duty and contract law govern the unjust enrichment claim, the court also erred. (Op. at 45-46.) This holding[15] violates other well-established Delaware authority holding that plaintiffs may plead unjust enrichment claims alternatively with breach of fiduciary duty claims and breach of contract claims.

#### 1. Delaware Courts Treat Duplicative Fiduciary Duty and Unjust Enrichment Claims in the Same Manner at the Pleading Stage

"The Court frequently treats duplicative fiduciary duty and unjust enrichment claims in the same manner when resolving a motion to dismiss." *Frank*, 2014 WL 957550, at *31. "[W]here the Court does not dismiss a breach of fiduciary duty claim, it likely does not dismiss a duplicative unjust enrichment claim." *Id.*[16]

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[15] It is unclear whether the court's statements about "more settled doctrine[s]" constituted a holding or were *dicta*. In an abundance of caution, Plaintiffs treat the statements as an alternative holding.

[16] *See also Calma ex rel. Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 591-92 (Del. Ch. 2015) (denying motion to dismiss of unjust enrichment claim because plaintiff stated a claim for breach of fiduciary duty); *Monroe Cty. Emps.' Ret. Sys. v.*

Because the lower court erred in holding that Plaintiffs did not retain their direct fiduciary duty claims against Defendants, it similarly erred in dismissing Plaintiffs' unjust enrichment claim.[17]

### 2. Delaware Courts Permit Plaintiffs to Plead Unjust Enrichment Claims Alternatively with Breach of Fiduciary Duty Claims and Breach of Contract Claims

The Court of Chancery's reasoning that "permitting the theory [of unjust enrichment] to proceed would upset the settled outcomes generated by the established legal frameworks [of fiduciary duty and contract law]" is inapplicable. (Op. at 46.) First, well-established Delaware authority permits plaintiffs to plead unjust enrichment alternatively to breach of fiduciary duty claims, based on the understanding that at a later stage in the case, the plaintiff may "have to elect his remedies." *McPadden v. Sidhu*, 964 A.2d 1262, 1276 (Del. Ch. 2008) ("If plaintiff has pleaded and then prevails in demonstrating that the same conduct results in both liability for breach of [defendant]'s fiduciary duties and disgorgement via

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*Carlson*, 2010 WL 2376890, at *1-2 (Del. Ch. June 7, 2010) (stating that the success of the unjust enrichment claims depends on the success of the breach of fiduciary duty claim).

[17] It is also unclear whether the Court of Chancery held that Plaintiffs' unjust enrichment claim was derivative. In the first full paragraph of page 46 of the Opinion, the Court seems to indicate the unjust enrichment claim is derivative. In the very next paragraph, the Court acknowledges that the claim "can be reframed as direct . . . ." For the same reasons Plaintiffs' breach of fiduciary duty claims are dual-natured, Plaintiffs' unjust enrichment claims are dual-natured. (A249, 260-67.)

unjust enrichment, plaintiff then will have to elect his remedies.").

Similarly, the legal framework of contract law does not govern the unjust enrichment claim here. Because the court dismissed Plaintiffs' breach of contract claim (and Plaintiffs are not appealing that dismissal) (Op. at 46), contract law is inapplicable here and plaintiffs may plead a claim for unjust enrichment. *Breakaway Sols., Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, at *14 (Del. Ch. Aug. 27, 2004) ("[A]n unjust enrichment claim is not to be dismissed because it is pled in the alternative to the breach of contract claim."). Applying the equitable principles of unjust enrichment will not "upset the settled outcomes generated by the established legal frameworks [of contract law]."[18] (Op. at 46.)

[18] While it is true that, generally, "a party cannot recover under a theory of unjust enrichment if a contract governs the relationship between the contesting parties that gives rise to the unjust enrichment claim," *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 58 (Del. Ch. 2012), this rule does not apply here because "[t]he contract itself is not necessarily the measure of [the] plaintiff's right where the [unjust enrichment] claim is premised on an allegation that the contract arose from wrongdoing . . . and the [defendant] has been unjustly enriched by the benefits flowing from the contract," *RCS Creditor Tr. v. Schorsch*, 2018 WL 1640169, at *7 (Del. Ch. Apr. 5, 2018) (first, second and third alterations in original). That is exactly the case here. The dilutive transactions in 2017 and 2018 arose from Defendants' wrongful and coercive conduct (A255-57), and Defendants have been unjustly enriched by the benefits of majority ownership flowing therefrom.

## CONCLUSION

Plaintiffs respectfully request the Court to reverse the August 19, 2019 Memorandum Opinion and September 4, 2019 Order, and to remand this matter to the Court of Chancery for proceedings on the merits.


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Dated: November 21, 2019

**CERTIFICATE OF SERVICE**

I, Benjamin M. Potts, Esquire, hereby certify that on November 21, 2019, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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