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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JONATHAN URDAN, an individual and WILLIAM WOODWARD, an individual, Plaintiffs-Below, Appellants v. WR CAPITAL PARTNERS, LLC, a Delaware limited liability company, WR E3 HOLDINGS, LLC, a Delaware limited liability company, HENRI TALERMAN, an individual, and FRANK W. WALSH III, an individual, Defendants-Below, Appellees and ENERGY EFFICIENT EQUITY, INC., a Delaware corporation, Nominal Defendant-Below	)	No. 423, 2019 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2018-0343-JTL

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NATURE OF THE PROCEEDINGS

As the trial court's Memorandum Opinion ("Opinion") granting Defendants motion to dismiss in its entirety properly found, "plaintiffs sold their shares voluntarily. By selling their shares, the plaintiffs transferred the rights to sue that depended on ownership of their shares." Op. 23-24. After filing their Verified Complaint (the "Complaint") and in the middle of briefing on Defendants' motion to dismiss, Plaintiffs sold all their "right, title, and interest" in their stock of Energy Efficient Equity, Inc. ("E3" or the "Company"). As a result of the sale, Plaintiffs were divested of their right to bring claims that ran with the stock, including as the claims at issue here.

The Complaint arose out of a series of financings between 2016 to 2018 in which Defendants agreed to provide the Company with needed capital. First, in May 2016, WR E3 Holdings, LLC ("WR E3") agreed to loan E3 up to $5 million through a revolving credit facility in which WR E3 would receive a certain number of warrants of E3 depending on the amount of the credit facility E3 had drawn upon. This transaction was negotiated and approved by Plaintiffs. A year later in 2017, after the entire $5 million credit facility had been drawn upon, the parties amended the loan agreement to increase the credit facility by $3 million in exchange for more warrants of E3. This transaction was also negotiated and approved by Plaintiffs. By February 2018, E3 needed more funds. WR E3 led a

further loan by a group of E3 investors totaling another $2.5 million, of which WR E3 loaned $1.54 million to E3. Plaintiffs had the option of participating in the 2017 financing and in the February 2018 financing, but chose not to lend E3 any money.

On May 14, 2018, Plaintiffs filed the Complaint alleging, among many other claims, that Defendants breached their fiduciary duties and were unjustly enriched in connection with negotiating and approving the financings in 2017 and 2018. In essence, Plaintiffs believed Defendants should have paid more in the financings.

The Court of Chancery found that the fiduciary duty and unjust enrichment claims arise out of the stockholder-company relationship, as opposed to a claim that is personal to the holder. Op. 26-27, 46. Thus, the claims traveled with the shares when Plaintiffs sold them. *Id.* Absent stock ownership in the Company, Plaintiffs lacked standing to bring the claims, and thus the court dismissed them.

Plaintiffs appeal the Opinion, challenging the Court of Chancery's interpretation of the repurchase agreements through which they sold their stock and a settlement agreement the parties entered into releasing claims against non-parties. As shown here, none of Plaintiffs' claimed bases for reversal have merit.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly interpreted the Repurchase Agreement and Settlement Agreement in finding that the Repurchase Agreement did not incorporate the Settlement Agreement by reference. Further, the Court of Chancery properly held that the plain terms of the Settlement Agreement did not carveout from the releases Plaintiffs' right to bring non-personal claims. The Court of Chancery also correctly held that to the extent the two agreements were in conflict, the Repurchase Agreement controlled.

2. Denied. The Court of Chancery properly held that Plainitffs' breach of fiduciary duty claims are non-personal such that they travel with a sale of the shares. Under Delaware law, "a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer." 6 *Del. C*. § 8-302(a). Because the fiduciary duty claims relate to the relationship between the stockholder and the Company, the claims are included in the "rights in the security," as opposed to rights personal to the holder, and transfer with the shares.

3. Denied. The Court of Chancery properly held that Plaintiffs' unjust enrichment claim is duplicative of the breach of contract and breach of fiduciary duty claims and that Plaintiffs lacked standing to assert the unjust enrichment claim because they sold their shares. Further, because the parties'

relationship challenged by the unjust enrichment claim is governed by a contract, the claim was properly dismissed.

STATEMENT OF FACTS

A. The Parties.

WR Capital Partners, LLC ("WR Capital Partners") is a partnership focused on investing in small capitalization companies. A028 ¶ 49. WR E3 (together with WR Capital Partners, "WR Capital") is an affiliate of WR Capital Partners. *Id.* Henri Talerman and Frank Walsh III are principals of WR Capital. *Id.*

E3 is a Delaware corporation that provides financing for energy-saving home improvements, such as air sealing and insulation, solar panels, and water saving landscaping. A024 ¶ 40. E3 operates the property-assessed, clean-energy ("PACE") financing industry, in which homeowners pay off the financing over time through a voluntary assessment added to the existing property tax bill. A024 ¶ 41. E3 has been approved by several local municipalities in California to provide PACE financing. A024 ¶ 41.

Urdan co-founded E3 in 2014 with non-party Kevin Kurka, the former CEO of E3. A011 ¶ 2. From 2014 to May 31, 2016, E3's three-member board of directors (the "Board") was composed of Urdan, Woodward, and Kurka. A027 ¶ 47. During that time period, Urdan, Woodward, and Kurka were the sole stockholders of E3. *Id.*

B. The 2016 Financing.

In early 2016, WR E3 began discussing a potential investment in E3. A029 ¶ 51. Plaintiffs, represented by counsel, negotiated a series of agreements whereby WR E3 would invest $500,000 and commit to loan $5 million to E3 (the "2016 Financing"). A031-32 ¶¶ 57-62. As Plaintiffs admit, during negotiations, WR E3 told Plaintiffs that "it usually requests equity and a board seat in the companies in which it invests, and that it wanted both with respect to E3." A029 ¶ 51. WR Capital Partners' website states that "WRCP's objective is to apply a disciplined approach and achieve strong performance by augmenting management's efforts to enhance and realize the portfolio company's inherent value." A028 ¶ 49 (quoting website).

As part of the 2016 Financing, the parties negotiated a loan agreement under which WR E3 would provide a $5 million revolving credit facility to E3 to be drawn on in increments of at least $100,000, which accrued interest of 10% per annum (the "Loan Agreement"). A031 ¶¶ 57-58. In exchange, E3 pledged certain collateral and issued a warrant certificate authorizing WR E3 to purchase up to 2,307,033 shares of E3's common stock at $0.01 per share, exercisable in proportion to the amount of the credit facility E3 had drawn upon. A031 ¶ 58. In addition, WR E3 and E3 entered into a Series B Preferred Stock Purchase Agreement pursuant to which WR E3 received shares of Series B Preferred Stock

for $500,000. A032 ¶ 60. WR E3 also received the right to designate two of E3's five board members. *Id.* Plaintiffs approved the transaction by written consents. A034 ¶ 65.

As Plaintiffs have admitted, "[t]hese terms were heavily negotiated by the parties." A034 ¶ 65.

Simultaneously, E3's wholly-owned subsidiary, E3 SPV, borrowed $75 million from Oaktree Capital Management ("Oaktree"). Pursuant to the loan, Oaktree obtained a board observer seat and required that E3 maintain at least $500,000 of immediately-available capital. A037 ¶ 74; A042 ¶ 86.

C. The Parties Agree to Terminate the CEO.

Over the course of the next several months, E3 continually drew on the credit facility. A035 ¶ 68. Urdan, with the approval of Talerman and Walsh, terminated Kurka's employment for cause effective April 23, 2017. A036 ¶ 72. As provided by Section 7.1(l) of the Loan Agreement, Kurka's termination constituted an "Event of Default," permitting WR E3 to, *inter alia*, terminate its obligation to make loans and declare all portions of the loan immediately due and payable. A159 § 7.1(l). However, no Event of Default was declared.

After Kurka's termination, the Board selected Knyal as a replacement CEO, and, as part of the compensation package, Knyal received a 12% equity stake in E3. A037-38 ¶ 74.

D. The 2017 Financing.

By June 2017, Plaintiffs had caused E3 to draw on nearly the entire $5 million credit facility. A039 ¶ 77. E3 was in need of short-term funding to make payroll and to keep the company in compliance with its debt covenant imposed by Oaktree Capital, so Plaintiffs negotiated an amendment to the Loan Agreement (the "Amended Loan Agreement") as part of a larger lending transaction (the "2017 Financing"). Under the Amended Loan Agreement, WR E3 lent an additional $3 million (to a total of $8 million) in exchange for the option of WR E3 to receive up to 8,524,478 warrants. A040 ¶ 79. Also in connection with the Amended Loan Agreement, WR E3 would obtain the right to designate a third board member (out of the five board seats). A041 ¶ 82. The Board, including Plaintiffs, was represented by counsel and approved the 2017 Financing. A043 ¶ 88.

Although Plaintiffs attempt to cast the Amended Loan Agreement as a "re-trade" by WR E3 (A040 ¶ 79), that is not so. Instead, Plaintiffs and WR E3 negotiated the amendment on terms that were fair under the circumstances. A040 ¶ 80. Because E3 had quickly drained the existing credit agreement, was performing poorly, and had defaulted under the 2016 loan agreement, WR E3 would not exercise the option under the 2017 Lending Transaction to extend the credit facility by $3 million for 379,034 warrants. A040 ¶ 79. Thus, the parties

negotiated an amendment on terms that WR E3 would agree to commit to provide $3 million loan. *Id.*

E. <u>The 2018 Financing.</u>

In February 2018, E3 again had drawn upon the existing credit facility and needed bridge financing (the "2018 Financing"). A046 ¶¶ 95-96. The 2018 Financing was open to all participants, including Plaintiffs who could have – but chose not to – lend their own money to E3. A046 ¶ 96. WR E3 participated by committing $1.54 million of a $2.5 million credit facility to E3 in exchange for additional shares of E3. *Id.* Knyal and Oaktree also participated in the February 2018 Bridge, and Plaintiffs were the only investors who did not participate. *Id.*

F. <u>The Complaint.</u>

On May 14, 2018, Plaintiffs filed the Complaint asserting six counts against Defendants for (1) breach of fiduciary duties in connection with 2017 Financing and the 2018 Financing;[1] (2) fraudulent inducement into the 2016 Financing; (3) fraudulent concealment in connection with the 2016 Financing; (4) breach of the Loan Agreement; (5) unjust enrichment in connection with the 2017 Financing and 2018 Financing; and (6) breach of the implied covenant of good faith and fair dealing in the Loan Agreement.

[1] The Complaint also challenged a proposed transaction in the Spring of 2018, but Plaintiffs did not raise the issue on appeal, so it is not addressed here.

G. Plaintiffs Sell All Their Shares in the Company.

On August 31, 2018, Plaintiffs sold all their shares in the Company pursuant to the Repurchase Agreement.[2] The Repurchase Agreement provides that

> Seller shall sell to the Company, and the Company shall purchase from Seller, all of Seller's right, title, and interest in and to the Repurchased Securities, free and clear of any mortgage, pledge, lien, charge, security interest, claim, or other encumbrance ("Encumbrance"), for the consideration specified in Section 1.02.

A507 § 1.01; A524,§ 1.01.

Also on August 31, 2018, the parties entered into a Settlement Agreement and Release (the "Settlement Agreement") under which Plaintiffs released their claims against Knyal and E3. Section 10 of the Settlement Agreement carves out from the release (the "Release Carveout") the following:

> Nothing in this Agreement shall affect any claims any of the Delaware Plaintiffs may have against any of the WR Parties or the defenses or counterclaims that any of the WR Parties may have to the claims of the Delaware Plaintiffs. 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; provided that, notwithstanding the foregoing, the WR Parties hereby waive and agree not to assert or otherwise raise any defense related to the Delaware Plaintiffs'

[2] Each Plaintiff separately executed substantively identical repurchase agreements, which are collectively referred to as the "Repurchase Agreement."

> agreement to sell their shares in the Company, including without limitation any defense that the Delaware Plaintiffs lack standing to assert any claim that has been brought or could have been brought in the Delaware Action.

A494 § 10.

H. The Memorandum Opinion.

In its Opinion dated August 19, 2019, the Court of Chancery granted Defendants' motion to dismiss in its entirety. Plaintiffs appeal the Court of Chancery's dismissal of only the fiduciary duty claims (Count I) and the unjust enrichment claim (Count VII).

The court held that Plaintiffs lacked standing to bring the fiduciary duty claims because, under the unambiguous terms of the Repurchase Agreement, they voluntarily transferred all of their "right, title and interest" in all of their shares; nothing was held back. Op. 32. The court reasoned that the fiduciary duty claims are non-personal in nature and, thus, travel with the shares in the event of a sale. *Id.* at 15, 27. The court interpreted the Repurchase Agreement and Settlement Agreement to find that the Plaintiffs' sale was of all of their interests in the E3 shares such that Plaintiffs did not retain their right to bring claims arising out of their stock ownership. *Id.* at 27-37. The court rejected Plaintiffs' argument that the Settlement Agreement was incorporated by reference into the Repurchase Agreement because the plain language of the Repurchase Agreement merely refers

(in a recital) to the Settlement Agreement, but never actually incorporates it (*Id.* at 28) and because the Repurchase Agreement expressly states that in the event of inconsistency between the agreements, the terms and provisions of the Repurchase Agreement shall control. *Id.* at 29. The court also rejected Plaintiffs' argument that the Release Carveout in the Settlement Agreement operated to hold back from the sale Plaintiffs' right to assert non-personal claims because the Release Carveout was limited to the releases in the Settlement Agreement; it did not extend to the Repurchase Agreement, which provided for the transfer of all of Plaintiffs' interests (with no exceptions or carveouts). *Id.* at 30-33.

The court dismissed the unjust enrichment claim because it was duplicative and subsumed by the breach of fiduciary duty and breach of contract claims. *Id.* at 44-46. The court also recognized that Plaintiffs lacked standing to assert the unjust enrichment claim because it is a non-personal claim, which Plaintiffs gave up when they sold their shares. *Id.* at 46.

On August 26, 2019, Plaintiffs moved for reargument on the Court of Chancery's holding as to the interpretation of the Repurchase Agreement and Settlement Agreement. A551-567; A570-584. On September 4, 2019, the Court denied Plaintiffs' motion. B1-3.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY INTERPRETED THE RELEVANT CONTRACTS TO FIND THAT PLAINTIFFS SOLD THEIR STOCK FREE OF ENCUMBRANCES.

A. Question Presented.

Whether the Court of Chancery properly held that Plaintiffs sold their stock free of any encumbrances, including the right to assert claims arising out of the stockholder-company relationship, under the Repurchase Agreement, which did not incorporate the Settlement Agreement. A544-46; A587-593.

B. Scope of Review.

The Court reviews interpretation of a written agreement and conclusions of law de novo. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

C. Merits of Argument.

Plaintiffs sold all their shares pursuant to the Repurchase Agreement. The plain language of that agreement transferred all of Plaintiffs' "right, title and interest" in the E3 shares. Thus, the Repurchase Agreement did not provide that Plaintiffs would retain any rights in the shares (and instead said the opposite). The Court of Chancery recognized that for Plaintiffs to maintain their fiduciary duty and unjust enrichment claims against Defendants despite the sale, (1) the Settlement Agreement would need to be incorporated by reference into the Repurchase Agreement ***and*** (2) the Settlement Agreement would need to carve out

from the stock sales Plaintiffs' rights to claims related to the stock (*i.e.*, non-personal claims). Op. 28. The trial court properly found that Plaintiffs met neither hurdle based on the plain language of the agreements. *Id.* at 30-33.

1. The Repurchase Agreement Does Not Incorporate the Settlement Agreement.

In Argument I, Plaintiffs do not dispute that the claims at issue were related to the E3 shares and could have been transferred; instead, they argue that, because of a carveout in the Settlement Agreement, the claims were not in fact transferred. Specifically, Plaintiffs argue that the Repurchase Agreement incorporated the Settlement Agreement through (i) the fourth recital to the Repurchase Agreement; (ii) Section 8.06 of the Repurchase Agreement; and (iii) the fact that they were executed as part of an integrated transaction. AOB 20-22. Thus, according to Plaintiffs, the carveout in the Settlement Agreement limited what was transferred by the Repurchase Agreement. None of Plaintiffs' arguments have merit.

a. The Fourth Recital of the Repurchase Agreement Is Vague and Insufficient to Incorporate the Settlement Agreement.

Plaintiffs argue that the fourth recital of the Repurchase Agreement incorporates the Settlement Agreement. The recital states:

> WHEREAS, concurrently herewith, Seller is entering into a Settlement Agreement and Release (the "Settlement Agreement") with the Company, Woodward, WRW Investment s LP, Provident Trust Group LLC, the Elliott Investors, Elliott Management Corporation, a Delaware corporation and affiliate of the Elliott Investors ("Elliott"), OPPS X E3 Holdings PT, L. P., a Delaware limited partnership, WR Capital Partners, LLC, Henri Talerman, Frank E. Walsh and Bradley D. Knyal pursuant to which, among other things, the parties thereto are releasing certain claims against each other.

A507; A524.

This recital simply refers to the Settlement Agreement. It does not come close to making the Settlement "a part of it" (AOB 20-21), particularly because recitals are not a substantive part of the agreement. The *TA Operating LLC v. Comdata, Inc.*, 2017 WL 3981138, at *23 (Del. Ch. Sept. 11, 2017) case Plaintiffs rely on (AOB 26) confirms this: "recitals 'do not ordinarily form any part of the real agreement' and 'do not have the force of contractual stipulations.'" (quoting *In re Pyramid Operating Auth., Inc.*, 144 B.R. 795, 814 (Bankr. W.D. Tenn. 1992)). In *TA Operating*, the Court of Chancery turned to extrinsic evidence to interpret an agreement because the recitals were not sufficient to rely on. *Id.*

Even more on point is the *Pyramid Operating* case Plaintiffs cite to (AOB 26), which held that "merely mentioning in the recitals that the parties have entered into a preexisting agreement is not enough to work a sufficient incorporation. The succeeding agreement must state that it incorporates a previous

agreement." *Pyramid Operating*, 144 B.R. at 829. As in *Pyramid Operating*, there is no language in the Repurchase Agreement that actually incorporates the Settlement Agreement. This is fatal to Plaintiffs' argument.

Finally, Plaintiffs' reliance on *United States v. Cmty. Health Sys., Inc.*, 666 F. App'x 410, 417 (6th Cir. 2016), is also misplaced. There, the court merely recognized that a recital "may guide interpretation of the binding obligation in Term 8, but only if that term is ambiguous in the first place." *Id.* There is no ambiguity here that would require looking to the fourth recital as an interpretation guide.

b. Section 8.06 of the Repurchase Agreement Expressly Rejects Incorporation When Provisions Conflict.

Section 8.06 of the Repurchase Agreement, which is the integration clause, also does not effect an incorporation of the Settlement Agreement. Like the fourth recital, it merely references the Settlement Agreement and contains no incorporation language. Moreover, Section 8.06 of the Repurchase Agreement expressly excludes from incorporation any term or provision in the Settlement Agreement that is inconsistent with the terms and provisions of the Repurchase Agreement. In full, Section 8.06 provides:

> 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, and supersede all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter. *In the event of any inconsistency between the terms and provisions in the body of this Agreement and those in the documents delivered in connection herewith, the terms and provisions in the body of this Agreement shall control*.

A516-17 § 8.06; A534 § 8.06 (emphasis added).

If one accepts Plaintiffs' construction of the Settlement Agreement, the agreements directly conflict on the pertinent provision – what rights were transferred through the stock sale. The Repurchase Agreement plainly directs an all-encompassing transfer of rights. Section 1.01 states:

> Subject to the terms and conditions set forth herein, at the Closing (as defined herein), Seller shall sell to the Company, and the Company shall purchase from Seller, all of Seller's right, title, and interest in and to the Repurchased Securities, free and clear of any mortgage, pledge, lien, charge, security interest, claim, or other encumbrance ("Encumbrance") . . . .

A507 § 1.01; A524 § 1.01. Plaintiffs attempt to cut down Section 1.01 by arguing that the introductory clause, "[s]ubject to the terms and conditions set forth herein," operates to encumber the shares through the terms of the Settlement Agreement. Plaintiffs' interpretation is wrong for two reasons. First, the

Repurchase Agreement elsewhere directs an unencumbered sale with no conditions. Specifically, in Section 3.02(c), Plaintiffs represented and warranted that the "execution, delivery, and performance by Seller of this Agreement and documents to be delivered hereunder, and the consummation of the transactions contemplated hereby, do not and will not . . . result in the creation or imposition of any Encumbrance on the Repurchased Securities." A509 § 3.02(c); A526 § 3.02(c). Second, by using the term "herein," the introductory clause refers only to the Repurchase Agreement. Section 8.05 of the Repurchase Agreement defines "[h]erein" and "hereunder" to include only "this Agreement," as opposed to the integrated agreements. A516 § 8.05; A533-534 § 8.05. Indeed, Section 8.06 makes clear that "herein" does not refer to the Settlement Agreement because Section 8.06 uses the term "hereunder" to refer to the Repurchase Agreement and "thereunder" to refer to the Settlement Agreement, showing that "herein" as used in Section 1.01 does not incorporate the Settlement Agreement. *See* A516-517 § 8.06; A534 § 8.06 ("This Agreement, the Settlement Agreement, the Elliot Purchase Agreement and the documents to be delivered ***hereunder*** and ***thereunder*** constitute the sole and entire agreement….") (emphasis added).

In contrast to the complete transfer effected by the Repurchase Agreement, Section 10 of the Settlement Agreement provides "[n]othing in this Agreement [*i.e.*, the Settlement Agreement] shall affect any claims any of the

Delaware Plaintiffs may have against any of the WR Parties . . . . [and] [n]othing in the releases . . . shall release any claims that any of the Delaware Plaintiffs has asserted." A494 § 10. Section 10 is merely a limitation on the scope of the release set forth in the Settlement Agreement; by its terms, it has no effect on any loss of rights resulting from Plaintiffs' voluntary transfer of all of their interests in E3 shares.

Plaintiffs erroneously assert that "[o]n its face, the Settlement Agreement states that Plaintiffs' legal claims . . . shall not be 'released' or otherwise 'affected' by the sale of their shares back to E3." AOB 23 (citing Settlement Agreement (A494 § 10)). This is not true. Section 10 of the Settlement Agreement states only that "Nothing in this Agreement" – *i.e.*, the Settlement Agreement – "shall affect any claims . . . ." A494 § 10. The Settlement Agreement is silent as to the effect on Plaintiffs' claims of their voluntary sale of all of their E3 shares. However, if one reads Section 10 of the Settlement Agreement, as Plaintiffs do, as limiting what was transferred under the Repurchase Agreement, Section 10 would then be in direct conflict with the clear terms of the Repurchase Agreement. Under that interpretation, the Repurchase Agreement would provide for a complete transfer of all of Plaintiffs' "right, title and interest" in the E3 shares, while the Settlement Agreement would provide for a transfer of all rights except the right to assert claims related to the shares. Under that

interpretation, the two provisions would be in conflict, and under the express terms of Section 8.06 of the Repurchase Agreement, the Repurchase Agreement would control.

Plaintiffs cite to *Cerberus Int'l, Ltd v. Apollo Mgmt., L.P.*, 1999 WL 33236239, at *4 (Del. Ch. Nov. 4, 1999) to argue that the Court should construe the provisions in harmony. *Cerberus* involved a single contract and the court found that plaintiffs' interpretation to manufacture an inconsistency was "unreasonable." *Id.* Here, two separate contracts contain inconsistent language and thus do not incorporate each other as to that language. *Cerberus* is inapplicable. Indeed, the caselaw supports Section 8.06's rejection of the incorporation by reference doctrine when the two contracts conflict. *See, e.g.*, *Karish v. SI Int'l, Inc.*, 2002 WL 1402303, at *3 (Del. Ch. June 24, 2002) (finding LLC agreement and management agreement were incorporated into each other but LLC agreement controlled as to the remedies section where the two conflicted because LLC agreement expressly stated it would control in event of a conflict); *see also* 11 Williston on Contracts § 30:26 (4th ed.) ("*[A]bsent anything to indicate a contrary intention*, written instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together as one contract or instrument. . . .") (emphasis added).

Because the agreements contain conflicting provisions as to the scope of rights transferred, Section 10 of the Settlement Agreement is excluded from the Repurchase Agreement by operation of Section 8.06 of the Repurchase Agreement.

c. Incorporation by Reference Is Not Achieved by the Fact that the Agreements Were Part of an Integrated Transaction.

Plaintiffs' final argument, that the Settlement Agreement is incorporated into the Repurchase Agreement because the agreements were executed as part of an integrated transaction (AOB 21-22), also fails. Plaintiffs cite to cases holding that as a matter of contract interpretation, courts will construe together two contracts that were executed close in time as part of the same transaction. AOB 21-22. However, none of the cases involve reconciling conflicting provisions, as is the case here. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1115 (Del. 1985) (holding defendant violated license agreement by attempting to use two agreements to achieve what the license agreement prohibited it from doing in one); *Green Plains Renewable Energy Inc. v. Ethanol Holding Co., LLC*, 2015 WL 590493, at *4 (Del. Super. Ct. Feb. 9, 2015) (finding schedule to exhibit incorporated into agreement when agreement stated that "[t]his Agreement and the other Deed in Lieu Documents (including all Exhibits and Schedules hereto and thereto) contain the entire agreement . . . .");

Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1120 (Del. Ch. 2012) (finding that one agreement "provide[d] a gloss on what [the parties] meant by the words 'business combination transaction between' in an interrelated agreement), *aff'd*, 45 A.3d 148 (Del. 2012), *and aff'd*, 68 A.3d 1208 (Del. 2012); *BAYPO Ltd. P'ship v. Tech. JV, LP*, 940 A.2d 20, 27 (Del. Ch. 2007) (applying principle to bind non-signatory affiliates of agreement to arbitration provision); *Star States Dev. Co. v. CLK, Inc.*, 1994 WL 233954, at *5 (Del. Super. Ct. May 10, 1994) (finding communities agreement was incorporated into condominium agreement because the latter explicitly stated that it was subject to the communities agreement and that "[n]othing [in the condominium agreement] . . . shall be deemed to supersede or permitted to interfere with . . . the [c]ommunities [a]greement").

Accordingly, the Court of Chancery correctly held that the Repurchase Agreement did not incorporate the Settlement Agreement.

2. The Settlement Agreement Does Not Carve Out Direct Claims.

The Court of Chancery properly held that the carveouts to the releases in the Settlement Agreement "did not withhold any claims from the scope of the sale." Op. 30-33. Plaintiffs argue that the Court of Chancery erred because (i) it improperly found that the Repurchase Agreement closed before the Settlement

Agreement; (ii) its interpretation would render Section 10 of the Settlement Agreement surplusage; and (iii) it improperly found an inconsistency between the Repurchase Agreement and the Settlement Agreement. Plaintiffs' third argument fails for the reasons stated in Section I *supra*. Plaintiffs' first and second arguments also fail.

First, the Settlement Agreement was dependent upon and thus occurred after the closing of the Repurchase Agreement. *See* Op. 32. Plaintiffs cite only part of Section 1 of the Settlement Agreement to argue that the closings were to occur simultaneously, but the entire provision goes on to state that the closing of the Settlement Agreement "is *dependent upon* closings under the [] Repurchase Agreement," and "the provisions set forth in Sections 3-11 of this Agreement *shall be effective upon* the closings under the Repurchase Agreement." A489-490 § 1 (emphasis added). Plaintiffs offer no response for why this language does not mandate that the transfer of shares occurred conceptually prior to the effectiveness of the Settlement Agreement – because there is none.

Plaintiffs also argue that because the integration clause in Section 14 of the Settlement Agreement states that the Settlement Agreement and the Repurchase Agreements are the "entire agreement among the Parties here," the closings must have occurred simultaneously. AOB 28. Plaintiffs offer no caselaw to support the claim that integrated agreements must close simultaneously, and

there is none. Agreements can be integrated even when they are not simultaneously effective.

But even if the Settlement Agreement and Repurchase Agreement did close simultaneously, the same result would occur. At best, the first sentence of the Release Carveout would purport to preserve claims attached to Plaintiffs' shares. But as explained above, the inconsistent language in the Repurchase Agreement – that the transfer included "all [] rights" in the shares, "free and clear of any [Encumbrance]," among other language – would trump the Settlement Agreement's attempted carveout under Section 8.06 of the Repurchase Agreement. And it makes sense that the document by which the shares are transferred sets forth the final word on the scope of rights transferred.

Second, the court's interpretation does not render Section 10 of the Settlement Agreement surplusage. Neither sentence of the Release Carveout refers to the Repurchase Agreement. Instead, the first sentence refers to the Settlement Agreement and the second sentence refers specifically to the release set forth in the Settlement Agreement. The first sentence operates to ensure that Plaintiffs did not lose their ability to assert any claim *as a result of the Settlement Agreement*. For example, the indemnification or confidentiality obligations in Sections 9 and 12 of the Settlement Agreement would not affect Plaintiffs' ability to pursue claims against Defendants or Defendants' ability to defend against Plaintiffs' claims.

The second sentence, on the other hand, applies only to the releases in the Settlement Agreement, *i.e.*, paragraphs 5 and 6. This sentence preserves any claims that otherwise could be affected *by the releases*, including the releases of Knyal and the other settling parties. For example, Defendants could not argue that by releasing a claim against Knyal, Plaintiffs lost their ability to assert that same claim against Defendants. But neither sentence of Section 10 even purports to limit any loss of Plaintiffs' rights for any reason ***other than*** the Settlement Agreement and its release. Here, Plaintiffs' voluntary transfer of all of their "right, title and interest" in the E3 shares caused them, as a matter of law, (i) to lose standing to assert derivative claims (which they admit, AOB 1 n.1, 23 n.9) and (ii) to lose standing to assert direct claims arising from their ownership of shares. Plaintiffs' loss of their ability to assert these claims arises from their transfer of their interests in E3, not from any separate release they agreed to. Thus, Section 10 of the Settlement Agreement – which limits the scope of Plaintiffs' release – has no effect on Plaintiffs' loss of standing, which resulted from their transfer of shares.[3] Indeed, that loss of standing would occur if Plaintiffs had never agreed to a release. There was no error in the court's interpretation.

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[3] Although not raised in Plaintiffs' Opening Brief and thus not the subject of this appeal, the Court of Chancery also properly found that the so-called Waiver Provision in Section 10 of the Settlement Agreement could not save

(Continued . . .)

3. The Agreements Are Not Ambiguous.

Finally, as a last-ditch effort, Plaintiffs argue that the provisions of the Repurchase Agreement and Settlement Agreement are ambiguous. AOB 30-31. Plaintiffs do not even suggest which terms or provisions are ambiguous, but instead simply say that the agreements are ambiguous "as to whether Plaintiffs effectively preserved their claims against Defendants." AOB 30. As explained above, the provisions are clear and unambiguous. But regardless, Plaintiffs first raised this argument in its Motion for Reargument and thus it is not preserved for appeal. A582; Del. Sup. Ct. Rule 8. In fact, in its Supplemental Brief on Standing, Plaintiffs argued that "the import of the foregoing language [section 10 of the Settlement Agreement] is clear." A475.

Accordingly, the Court properly held that Plaintiffs lacked standing to assert non-personal claims that travelled with their stock, including the breach of fiduciary duty claims.

(. . . continued)

Plaintiffs from their lack of standing, which is a jurisdictional matter. Op. 33-37 (citing A094 § 10) ([N]otwithstanding the foregoing, [Defendants] hereby waive and agree not to assert or otherwise raise any defense related to the Delaware Plaintiffs' agreement to sell their shares in the Company . . . ."). Indeed, "a party must have standing to sue in order to invoke the jurisdiction of a Delaware court. . . . Once standing is lost, the court lacks the power to adjudicate the matter." *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016).

II. THE COURT OF CHANCERY PROPERLY HELD THAT PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS TRAVELLED WITH THE SHARES.

A. Question Presented.

Whether the Court of Chancery properly held that Plaintiffs' breach of fiduciary duty claims were non-personal claims that travelled with the sale of shares. A546-548.

B. Scope of Review.

"Questions of law are reviewed de novo." *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993).

C. Merits of Argument.

The Court of Chancery correctly determined that Plaintiffs lost their ability to assert their fiduciary duty claims, which are non-personal claims, when Plaintiffs voluntarily transferred all of their interests in E3, fully aware of their claims. Op. 23-27. Plaintiffs assert that their fiduciary duty claims for economic dilution are both direct claims and personal claims such that they remain with Plaintiffs regardless of stock ownership. AOB 32-41. Plaintiffs misconstrue *Activision* and *PHLX II* to manufacture their argument that economic dilution claims are always personal and that the court in *Activision* got it wrong. AOB 35-37 (citing *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025 (Del. Ch. 2015)). In so arguing, Plaintiffs ignore the key fact that Plaintiffs voluntarily sold

all of their shares while this lawsuit was pending. Regardless of whether the claims are derivative or direct (they are derivative), Plaintiffs claims are not personal and instead travel with the shares.

1. Non-Personal Claims Transfer with a Sale of Stock.

A claim is non-personal when "the right to assert the claim and benefit from any recovery is a property right associated with the shares." *Activision*, 124 A.3d at 1044. This principal is codified in 6 *Del. C.* § 8-302(a), which provides that "a purchaser of a . . . security acquires ***all rights in the security*** that the transferor had or had power to transfer." (emphasis added). Rights *outside* the security, *i.e.*, personal rights of the holder, do not pass with the sale. *In re Sunstates Corp. S'holder Litig.*, 2001 WL 432447, at *3 (Del. Ch. Apr. 18, 2001).

A claim is personal only when it is "not a property right carried by the shares, nor does it arise out of the relationship between the stockholder and the corporation." *Activision*, 124 A.3d at 1056; *I.A.T.S.E. Local No. One Pension Fund v. Gen. Elec. Co.*, 2016 WL 7100493, at *5 (Del. Ch. Dec. 6, 2016) (defining personal claims as "claims arising outside the stockholder/company relationship, as when the stockholder is defrauded by the company"). Where a claim is personal, "the nature of the underlying property does not matter." *Activision*, 124 A.3d at 1056.

As Delaware courts have recognized, "claims arising from the relationship among stockholder, stock and the company generally adhere to the stock, and are alienable." *I.A.T.S.E.*, 2016 WL 7100493, at *5 (citing *Sunstates*, 2001 WL 432447, at *3 and 6 *Del. C.* § 8-302(a)). In contrast, claims are personal if they are not inherently tied to the rights of the stock – including, importantly, claims that the stockholder parted with his or her shares as a result of tortious conduct. *I.A.T.S.E.*, 2016 WL 7100493, at *5 (citing *Sunstates*, 2001 WL 432447, at *3); *see also Activision*, 124 A.3d at 1056 ("Quintessential examples of personal claims would include . . . a tort claim for fraud in connection with the purchase or sale of shares."). Thus, a claim is personal and remains with the original stockholder "[w]hen [the] stockholder is squeezed out by a merger[] in a transaction representing a breach of duty," because "the transaction involved necessarily severs the relationship between stockholder and entity." *I.A.T.S.E.*, 2016 WL 7100493, at *5; *see also* Op. at 23 ("If the plaintiffs had been deprived of their shares by merger, then that distinction would matter, because the plaintiffs could challenge the transaction that deprived them involuntarily of their property rights.").

2. Plaintiffs' Fiduciary Duty Claims Are Non-Personal.

Here, the Complaint alleges that Defendants breached their fiduciary duty by undertaking the 2017 Financing, the 2018 Financing, and actions leading up to each, including the negotiation of the financings. A502 ¶ 113. Plaintiffs argue that their claims, and all fiduciary duty claims for economic dilution, are personal based on the following language in *Schultz v. Ginsburg (PHLX II)*, 965 A.2d 661, 668 (Del. 2009): "the Economic Dilution claim was personal. Thus, under an Economic Dilution claim, the claim for damage suffered would remain with the Seller and not transfer to the Buyer." AOB 32-33. Plaintiffs are attempting to improperly expand *PHLX II*, which was decided based on the specific facts of that case and is not applicable here.

In *PHLX II*, minority stockholders of the Philadelphia Stock Exchange ("PHLX") brought a class action against PHLX, its board, and certain strategic investors for violation of the company's charter and breaches of fiduciary duty related to a series of dilutive transactions in which the strategic investors acquired 45% of the company's equity with warrants to purchase an additional 44.4% equity. *PHLX II*, 965 A.2d at 663-64. The parties agreed to settle the claims, and in an earlier opinion, this Court approved the certification of the class to include stockholders who sold stock, acquired stock, and continuously held stock

throughout the period of the wrongful transactions. *In re Phila. Stock Exch., Inc. (PHLX I)*, 945 A.2d 1123, 1142 (Del. 2008). The settlement consisted of equitable relief, including the strategic investors returning 14% of the shares acquired in the dilutive transactions, and attorneys' fees. *Id.* at 1137. The Court noted that it was not clear that all members of the class would recover if the case were to proceed on the merits, but that it was within the parties' rights to agree to a broad class. *Id.* at 1141 & nn.34-35 ("It is at least arguable that only the Class A shareholders who were the original PHLX seatholders, or their successors in interest, could legitimately claim to have been diluted and thus entitled to participate in the 55,257 Class A share being returned.").

In *PHLX II*, this Court affirmed the Court of Chancery's approval of the class plaintiffs' allocation plan among the class as follows:

> 100% per share to the Continuous Holders; 80% per share to the First Period Buyers; 20% per share to the First Period Sellers; 60% per share to Second Period Buyers; 40% per share to Second Period Sellers; and 20% per share to In and Out Traders who bought in the First Period and sold in the Second Period.

PHLX II, 965 A.2d at 666. A stockholder in the seller group (*i.e.*, stockholders who sold their PHLX stock between the date the wrongful actions began and the date the parties settled) objected on the ground that the allocation improperly included buyers, who they alleged did not suffer any harm from the dilution. *Id.* at

667. The Court approved the allocation and overruled the objection on the grounds that the claim for violation of the charter was non-personal and would travel with the stock (*i.e.*, to the buyers). That holding was sufficient to justify the allocation of some of the settlement consideration to the buyer group. The Court went on to state, in what was arguably dictum, that the economic dilution claim would remain with the sellers. *Id.* at 668. The Court also noted that the economic dilution claim was likely derivative, in which case the seller class would not have recovered anything. *Id.*

Although *PHLX II* stated that the dilution claim in that case was personal, it did not create a *per se* rule that is applicable here. Unlike the case at bar, the plaintiffs in *PHLX II* sought and structured the settlement to receive equitable relief of rescission of stock sales. *Compare id.* at 665, *with* A065 at Prayer for Relief (A) (seeking damages). Rescission of the purchase of shares would put the stockholders back to where they were at the time of the transactions, unlike the after-the-fact money damages Plaintiffs seek related to the 2017 and 2018 Financings.

PHLX II is also distinguishable because it was decided in connection with approval of a class settlement and the allocation of the settlement, not a dispositive motion on the merits like here. Indeed, the Court recognized that "[i]t is at least arguable that only the Class A shareholders who were the original PHLX

seatholders, or their successors in interest, could legitimately claim to have been diluted." *PHLX I*, 945 A.2d at 1141 n.34. This language was not a holding that the buyer group (*i.e.*, transferees of the original PHLX holders) ***would not*** have a claim, but instead was a statement that the matter was unsettled and various legal arguments could be made. The Court was simply noting these potential arguments in assessing the fairness of the allocation at issue. The Court of Chancery can and does approve settlements in which "persons having weak claims [are included] in a settlement class, but [are] allocate[d] little or none of the proceeds." *Id.* at 1140 n.31; *see, e.g.*, *In re Prodigy Commc'ns Corp. S'holders Litig.*, 2002 WL 1767543, at *4 (Del. Ch. July 26, 2002) (certifying class with former stockholders, and approving settlement that benefitted only current stockholders); *In re Triarc Cos., Inc.*, 791 A.2d 872, 878-79 (Del. Ch. 2001) (same, and noting "it is commonplace for class certification orders entered by this Court in actions involving the internal affairs of Delaware corporations to define the relevant class as all persons (other than the defendants) who owned shares as of a given date, and their transferees, successors and assigns"); *In re Resorts Int'l S'holders Litig.*, 1988 WL 92749, at * 11 (Del. Ch. Sept. 7, 1988) (certifying class with former stockholders who objected to inclusion in class in attempt to preserve right to bring lawsuit based on breach of fiduciary duty because the "obstacles [*i.e.*, standing] which the [] Objectors would have to overcome to maintain a suit are formidable").

Accordingly, in approving an allocation of equitable relief in a settlement in *PHLX II*, the Court did not purport to answer the question of whether dilution claims belonged only to the original PHLX stockholders (and not to their transferees).

Plaintiffs' reliance on *Celera* fails for the same reasons. *Celera* applied the reasoning in *PHLX II* to hold that a stockholder who voluntarily sold shares four days before a cash-out merger that was the second step of a challenged two-step transaction could act as class representative for purposes of a settlement with no monetary recovery. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 430 (Del. 2012). However, like the settlement in *PHLX II*, the settlement in *Celera* provided only therapeutic benefits, thus removing any possibility of double recovery by the named plaintiff and its transferee – and most of the therapeutic benefits were already realized at the time the named plaintiff sold its shares. *Id.* at 426. Although the Court of Chancery certified the class, the court was troubled by the fact that the named plaintiff sold its shares and "chastised" plaintiff and "barely" found it was an adequate class representative. *See id.* at 427. *Celera*'s limited holding regarding class certification does not support Plaintiffs' broad interpretation.

The Court of Chancery addressed the distinction between personal and non-personal fiduciary duty claims in *Activision*. *Activision* arose out of a

restructuring transaction in which minority stockholders retained their stock but claimed they were improperly diluted. *Activision*, 124 A.3d at 1041. Minority stockholders filed a derivative and class action alleging claims for breach of fiduciary duty related to the dilution, and eventually agreed to settle the claims for $275 million and certain therapeutic changes. *Id.* at 1042. An objector argued that former stockholders who sold their shares should be allocated part of the settlement fund. *Id.* at 1043.

The court held that "[b]y selling their shares, the members of the Seller Class defeased to their purchasers any right they had to bring or benefit from" those claims. *Id.* at 1044. Based on 8 *Del. C.* § 8-302(a) and caselaw thereunder, the court declined to interpret *PHLX II* to mean all dilution claims are *per se* personal and thus do not transfer with the shares. *Activision*, 124 A.3d at 1055-56. Instead, the court considered the nature of the claims and their interplay with the stock. *Id.* The court stated that "the dilutive issuance affects the holders in proportion to their ownership stake in the corporation," and because non-holders have no ownership in the corporation, allocation to them would be inappropriate. *Id.* The court recognized the holding in *PHLX II*, but pointed out that the Court there used inconsistent terminology when referring to the dilution claim and decided it in connection with certifying a class for a settlement, which "can release claims of negligible value to achieve a settlement that provides reasonable

consideration for meaningful claims." *Id.* at 1044 (quoting *PHLX I*, 945 A.2d 1140).

Plaintiffs argue that *Activision* was wrongly decided because the court improperly "viewed derivative claims and personal claims as mutually exclusive." AOB 36-37. According to Plaintiffs, the Court of Chancery should have recognized that "[w]hether a claim is personal depends on whether the right belongs to the person or is a property interest tied to the security." *Id.* However, the Court of Chancery did just that. It identified a personal claim as being a claim that "is not a property right that is carried by the shares, nor does it arise out of the relationship between the stockholder and the corporation." *Activision*, 124 A.3d at 1056. The court distinguished between derivative, direct, and personal claims only to analyze who was entitled to receive the relief – the company, current stockholders, or former stockholders.

The Court of Chancery has since acknowledged that *Activision* did not hold that all fiduciary duty claims were non-personal. *I.A.T.S.E.*, 2016 WL 7100493, at *5. The court explained that fiduciary duty claims are personal when, for example, "the stockholder is defrauded by the company." *Id.* at *5. This reasoning also explains why Plaintiffs' reliance on *Noerr v. Greenwood*, 2002 WL 31720734 (Del. Ch. Nov. 22, 2002) is improper. AOB 38-39. In *Noerr*, the Court of Chancery refused to certify a class that included subsequent transferees with

respect to a disclosure claim. 2002 WL 31720734, at *4. The court held that "[a] claim for breach of the fiduciary duty of disclosure can only be maintained by stockholders to whom the duty was owed." *Id.* A disclosure claim, unlike Plaintiffs' dilution claim, arises outside of the relationship between the stockholder and the company, such as when a stockholder is defrauded. *See I.A.T.S.E.*, 2016 WL 7100493, at *5; *Sunstates*, 2001 WL 432447, at *3 ("One induced to sell shares as a consequence of a breach of fiduciary duty plainly has a claim separate from the ownership of the shares themselves.").

A critical factor that *Tooley* and its progeny look at in determining who may assert a claim is who would benefit from the remedy. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). Plaintiffs' principal claim here is that in the 2017 Financing transaction, WR E3 received more than 22x the number of shares allegedly agreed to for the $3 million additional loan. *See* Op. at 8; AOB 9-11. The most likely available remedy for that claim would be cancelling any excess shares. *See, e.g.*, *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 132 A.3d 67, 111-12 (Del. Ch. 2015), *rev'd on other grounds sub nom. El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016). The alternative – requiring WR E3 to lend an additional $66 million to E3, seems unlikely. However, because Plaintiffs voluntarily sold all of their interest in E3, they would not benefit from either of those forms of relief.

Here, as in *Activision*, Plaintiffs "chose to dissociate their economic interests from the corporation and, by doing so, to forego the opportunity to benefit from ... the class claims [and] the potential benefit to the corporation from the derivative claims." *Activision*, 124 A.3d at 1058 (quoting *Sunstates*, 2001 WL 432447, at *3. As courts have consistently reasoned, when Plaintiffs make a "conscious business decision to sell their shares into a market that implicitly reflect[s] the value of the pending and any prospective lawsuits," they are not then entitled to participate in the lawsuits or their settlements. *Activision*, 124 A.3d at 1044 (quoting *Resorts Int'l*, 1988 WL 92749, at *10); *accord Prodigy Commc'ns*, 2002 WL 1767543, at *4. In such circumstances, the plaintiffs' fiduciary duty claims are associated with the Company stock, and thus travel with the stock. *See In re Dole Food Co., Inc.*, 2017 WL 624843, at *5 (Del. Ch. Feb. 15, 2017) (approving allocation of class action settlement to record holders because such allocation "recognizes that the Delaware law claims that provided the principal basis for the settlement [*i.e.*, fiduciary duty claims] were property rights associated with the shares. As shares changed hands, these property rights traveled with the shares."). The fiduciary duty claims of the Plaintiffs here likewise relate to the value of the stock on a *pro rata* basis, thus such claims are tied to the shares and not to the individuals that held the shares at the time of the 2017 and 2018 Financings.

3. Plaintiffs' Fiduciary Duty Claims Are Derivative, Not Direct.

Plaintiffs lastly argue that their fiduciary duty claims "are even more clearly personal" than in *PHLX II* because their claims involve a controller's actions towards minority stockholders. AOB 39-41. Plaintiffs' argument rests on the false premise that direct claims are more likely personal than derivative claims. *Id.* As Plaintiffs themselves argued, whether a claim is derivative or direct is distinct from whether it is personal or non-personal. *Id.* at 36-37.

The fiduciary duty claims here are derivative. Plaintiffs' reliance on *Gentile* is misplaced. AOB 39-40. The Delaware Supreme Court has made clear that a direct claim under *Gentile*, as "a species of corporate overpayment claim," only arises in the "unique circumstances" presented in that case – namely, where the challenged transaction involves an exchange of shares for assets of a controlling stockholder that results in the expropriation of both economic and voting power from the minority to the controller. *El Paso Pipeline*, 152 A.3d at 1263-64.[4]

[4] If the Court agrees that the claims are derivative, it must affirm the dismissal, as Plaintiffs concede that by transferring their shares, they lost standing to assert those claims. AOB 1 n.1.

But even if the claims were direct, they are nevertheless non-personal because they involve the relationship between the stock, stockholder, and the corporation. This is not a case where there is an allegation that the Plaintiffs were fraudulently induced to sell their stock. In fact, the Court dismissed Plaintiffs' fraudulent inducement claim related to the Loan Agreement (Op. 39-43), and Plaintiffs do not challenge the dismissal. Accordingly, the Court should affirm the Court of Chancery's dismissal of the fiduciary duty claims.

III. THE COURT OF CHANCERY PROPERLY HELD THAT PLAINTIFFS LACKED STANDING TO BRING THEIR UNJUST ENRICHMENT CLAIM BECAUSE THE CONTRACT CLAIM SUBSUMED IT AND PLAINTIFFS VOLUNTARILY SOLD THEIR SHARES.

A. Question Presented.

Whether the Court of Chancery properly held that Plaintiffs' unjust enrichment claim was duplicative of the breach of contract and breach of fiduciary duty claims and was not a personal claim. A546-548.

B. Scope of Review.

This Court reviews *de novo* the grant of a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6). *See Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010).

C. Merits of Argument.

The Court of Chancery dismissed Plaintiffs' unjust enrichment claim because it is duplicative of the claims for breach of contract and breach of fiduciary duty. Op. 44-46. The court also recognized that Plaintiffs lack standing to assert the unjust enrichment claim whether it is derivative or direct for the same reasons they lack standing to assert the fiduciary duty claims. *Id.* at 46. Plaintiffs dispute both grounds. AOB 42-45.

First, Plaintiffs argue that because the fiduciary duty claim should have survived, so to should the unjust enrichment claim. AOB 43-44. But the

Court of Chancery committed no error. It treated the duplicative unjust enrichment claim "in the same manner [as the fiduciary duty claim] when resolving [the] motion to dismiss." *Calma on Behalf of Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 591 (Del. Ch. 2015). Plaintiffs do not argue that the claims were not duplicative, but merely take issue with the treatment of the fiduciary duty claims. For the reasons stated above, Plaintiffs' arguments fail. *See supra* Section II.

Second, Plaintiffs argue that the court erred in failing to permit Plaintiffs to plead their unjust enrichment claim in the alternative to the breach of contract and breach of fiduciary duty claims. AOB 44-45. This argument also fails. An unjust enrichment claim will be dismissed if "a contract already governs the relevant relationship between the parties." *Pharmathene, Inc. v. Siga Techs., Inc.*, 2011 WL 4390726, at *27 (Del. Ch. Sept. 22, 2011), *aff'd in part, rev'd in part on other grounds*, 67 A.3d 330 (Del. 2013).

Plaintiffs argue that a viable unjust enrichment claim can be pled even if a contract governs the relationship between the parties if "the 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." AOB 45 & n.18 (quoting *RCS Creditor Tr. v. Schorsch*, 2018 WL 1640169, at *7 (Del. Ch. Apr. 5, 2018)).

Here, that test is not met. Plaintiffs' alleged unjust enrichment claim is not based on Defendants' purported wrongful conduct in entering into the Loan Agreement (which Plaintiffs themselves negotiated) – it is instead based upon Defendants breaching the Loan Agreement and term sheet thereto. A063 ¶ 152. Accordingly, the Loan Agreement governs the parties' relationship as it relates to this claim. Specifically, the Loan Agreement governs the precise rights and obligations at issue in the unjust enrichment claim: WR E3's ability to decline to exercise its option to lend additional money in exchange for additional warrants and to agree to lend more money on different terms. A063 ¶¶ 151-52. However, the agreements that Plaintiffs claim unjustly enriched Defendants are the agreements that memorialized the 2017 Financing and the 2018 Financing. AOB 45 & n.18 ("The dilutive transactions in 2017 and 2018 arose from Defendants' wrongful and coercive conduct [], and Defendants have been unjustly enriched by the benefits of majority ownership flowing therefrom."). Thus, the exception Plaintiffs seek to apply is inapposite here.

The cases Plaintiffs cite confirm this. For example, in *RCS Creditor*, 2018 WL 1640169, at *7, the court held that plaintiffs' unjust enrichment claim, which was based on defendants' receipt of advisory fees, survived a motion to dismiss despite the defendants having received fees pursuant to advisory agreements. The court reasoned that defendants had fiduciary obligations to

allocate a portion of the fees to plaintiffs and had entered into the fee arrangements to avoid those obligations; thus, the contractual relationship was part of the unjust enrichment. *Id.* at *7-8; *see also McPadden v. Sidhu*, 964 A.2d 1262, 1276 (Del. Ch. 2008) (refusing to dismiss unjust enrichment claim despite argument that letter of intent governed parties relationship because "Plaintiff alleges that it is the letter of intent, itself, that is the unjust enrichment"). Unlike those cases, the Loan Agreement, which governs the parties' relationship, is not the source of the alleged unjust enrichment.

Nor is *Breakaway Sols., Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, at *14 (Del. Ch. Aug. 27, 2004) persuasive. AOB 45. In *Breakaway*, the court applied New York law to deny a motion to dismiss an unjust enrichment claim based on allocation of IPO shares. The court reasoned that there was "doubt as to the enforceability or meaning of the terms of the contract in question," and thus denied the motion to dismiss. *Breakaway*, 2004 WL 1949300, at *14-15. Here, there is no doubt as to the enforceability or meaning of the Loan Agreement, and therefore the unjust enrichment claim is not viable.

Because Plaintiffs do not challenge the contract that governs the parties' relevant relationship and instead seek to recover benefits Defendants received pursuant to those contracts, the unjust enrichment claim fails.

Even if the unjust enrichment claim could be pled in the alternative to the breach of contract claim, the unjust enrichment claim asserted here must be dismissed because it is a derivative claim that Plaintiffs lack standing to bring. Indeed, at oral argument, Plaintiffs conceded that the breach of contract claim is derivative. A399-340 ("MR. MILLER: . . . . I think on breach of contract, that claim seems like it would be derivative, because that's for the company." THE COURT: . . . . So to the extent you're pleading Count VI, it's effectively . . . a derivative claim." MR. MILLER: Yes."). For the same reasons, the unjust enrichment claim would be derivative – the claim relates to a contract the Company entered into for the benefit of the Company. A063 ¶ 152.

As Plaintiffs admit, they have no standing to bring derivative claims. AOB 1 n.1.

CONCLUSION

For the reasons stated herein, the rulings and orders of the trial court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, a copy of Appellees' Answering Brief was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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