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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEMPERATSURE HOLDINGS, LLC, a Delaware limited liability company,	)	
Defendant/Counterclaim Plaintiff/ Third Party Plaintiff-Below/ Appellant,	)	
v.	)	No. 180, 2020
B&C HOLDINGS, INC., a Colorado corporation,	)	CASE BELOW:
Plaintiff/ Counterclaim Defendant-Below/ Appellee,	)	Superior Court of the State of Delaware C.A. No. N19C-02-105 AML CCLD
and	)	
CHRISTOPHER SMITH,	)	
Third Party Defendant-Below/ Appellee.	)	

APPELLANT'S REPLY BRIEF

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INTRODUCTION

All parties agree that the dispositive issue in this breach of contract action turns on whether and when a statement was delivered to B&C that met the requirements of a Principal Statement as contemplated by the promissory note at issue in this case (the "Note"). The key provisions in the Note are:

- Section 2(a) of the Note, which requires the preparation and delivery of LTM Gross Profit Statements setting forth the determination of the amount of the LTM Gross Profit for the months during the Evaluation Period.
- Section 2(b) of the Note, which provides that after delivery of the LTM Gross Profit Statements pursuant to Section 2(a), "[t]he Principal will be determined, based on the greatest LTM Gross Profit set forth on any LTM Gross Profit Statement <u>delivered</u> with respect to the Evaluation Period . . .". (Emphasis added)
- Section 2(c) of the Note, which provides that "Temperatsure will deliver to [B&C] a statement setting forth [Temperatsure's] calculation of the Principal to [B&C]." JA52, Note, §2(c). Section 2(c) also includes a detailed and time sensitive process for resolution of any disputes regarding the Principal amount set forth in the delivered Principal Statement, including an arbitration provision.

- Section 3 of the Note, which provides that interest on the Note only starts to accrue "from the date on which the Principal is finally determined to be any amount greater than $0 pursuant to Section 2, at the rate of 5.00% per annum…".

This case turns on whether a single internal email sent by the CFO in response to his superior's request to pay interest that had not accrued and was not payable constitutes the Principal Statement under the terms of the Note. Temperatsure contends that the above provisions should be construed together consistent with the overall scheme of the Note. B&C and Smith convinced the lower court to interpret each provision in isolation. By its Opening Brief, Temperatsure established that the lower court misconstrued the Note, failed to interpret the Note's provisions as a whole and failed to consider whether calculation of the Note's Principal was even possible given the lack of any delivered LTM Gross Profit Statements. The lower court also improperly rejected Temperatsure's condition precedent defense based on waiver and misapplied the undisputed facts with respect to Temperatsure's breach of fiduciary duty claim.

As set forth in more detail below, B&C's and Smith's Answering Brief fails to support the court's conclusions. As does the lower court's order, B&C's and Smith's interpretation ignores key provisions of the Note, fails to interpret the Note as a whole, and disregards the Note's overall scheme and plan. The Answering Brief

also mischaracterizes many of Temperatsure's arguments and improperly relies on extrinsic evidence that has no bearing on the interpretation of the Note. Finally, B&C's and Smith's contentions that certain of Temperatsure's arguments were not preserved is belied by the record.

For these reasons, and for the reasons set forth in Temperatsure's Opening Brief, Temperatsure respectfully requests that this Court reverse the lower court's grant of B&C's Motion for Summary Judgment and denial of Temperatsure's Cross-Motion for Summary Judgment.

ARGUMENT

I. THE JULY 7 EMAIL IS NOT THE PRINCIPAL STATEMENT CONTEMPLATED BY THE NOTE.

A. B&C's interpretation ignores key provisions of the Note, fails to interpret the Note as a whole, and disregards the Note's overall scheme and plan.

In their Answering Brief, B&C and Smith ignore Sections 2(a) and 2(b) of the Note by arguing that Temperatsure did not have to deliver LTM Gross Profit Statements in order for the July 7 Email to be the Principal Statement. *See* Answering Brief at 18-21. According to Smith and B&C, "[n]either section has any bearing on the definition of Principal Statement or whether the email meets that definition." Answering Brief at 18.

Delaware law is clear that contracts must be "read as a whole" and that courts should avoid "an interpretation that renders any term mere surplusage." *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019). Courts must also avoid interpretations that conflict with a contract's "overall scheme or plan." *Riverbend Cmty., LLC v. Green Stone Eng'g LLC*, 55 A.3d 330, 334-35 (Del. 2012).

As applied here, the subparts of Section 2, as well as the defined terms referenced in those subparts, collectively bear on the overall scheme and plan of the Note.

- Section 2(a) of the Note requires the preparation of LTM Gross Profit[1] Statements setting forth the determination of the amount of the LTM Gross Profit for the months during the Evaluation Period. *See* JA51-52.
- Section 2(b) of the Note provides that after delivery of the LTM Gross Profit Statements pursuant to Section 2(a), "[t]he Principal[2] will be determined, based on the greatest LTM Gross Profit set forth on any LTM Gross Profit Statement delivered with respect to the Evaluation Period . . .". *See* JA52 (Emphasis added).
- Section 2(c) of the Note provides that "Temperatsure will deliver to [B&C] a statement setting forth [Temperatsure's] calculation of the Principal[3] to [B&C]." [JA52, Note, §2(c)]. Section 2(c) also includes a detailed and time-sensitive process for resolution of any disputes

[1] LTM Gross Profits is a defined term meaning "the gross profit performance . . . measured by the last twelve months' ("LTM") consolidated gross profit . . . determined in accordance with United States generally accepted accounting principles ("GAAP")" as of the last day of each month during the seven-month evaluation period. JA51.

[2] Principal is also a defined term. Section 1(iii) of the Note sets a specific range with a maximum ($6,000,000) and minimum ($0) amount depending on the determination of LTM Gross Profits. JA51.

[3] The same defined term that is referenced in Section 2(b).

regarding the Principal amount set forth in the delivered Principal Statement, including an arbitration provision.

The language and defined terms in each subpart of Section 2 confirm that the provisions are interrelated and interdependent. For example, Section 2(b) specifically references the determination of "Principal" based on the LTM Gross Profit Statements prepared and delivered pursuant to Section 2(a). Thereafter, Section 2(c) references the delivery of a statement setting forth the calculation of that same "Principal" amount that is to be determined pursuant to Section 2(b). Thus, the delivery of LTM Gross Profit Statements under Section 2(a) of the Note, the ultimate determination of Principal under Section 2(b) of the Note, and the delivery of the statement setting forth the calculation of Principal under Section 2(c) of the Note are fundamentally related. Under the express terms of the Note it is not possible to determine the Principal amount unless LTM Gross Profit Statements are in fact delivered under Section 2(a), and it is not possible to deliver a Principal Statement setting forth such Principal unless that Principal was actually determined in accordance with the procedures set forth in Section 2(b). Most importantly, it is inappropriate to interpret any of these provisions in isolation as B&C and Smith encourage the Court to do here.

B&C's and Smith's contention that the July 7 email is the Principal Statement is also inconsistent with Section 3 of the Note, which provides that interest on the

Note only starts to accrue "from the date on which the Principal is finally determined to be any amount greater than $0 pursuant to Section 2, at the rate of 5.00% per annum . . .". *See* JA52. On its face, the July 7 Email references interest that had supposedly *already* accrued as of July 2017. If the email were correct, B&C and Smith agree that the Principal Statement would have needed to be sent five months earlier. *See* JA1733. This is not to say, as B&C and Smith wrongly claim, that Temperatsure contends that the July 7 Email is not the Principal Statement simply because it was early. That is not Temperatsure's argument. The timing of the email is relevant not because it somehow precludes the email from being a Principal Statement, but instead because viewed in context it confirms that the email reflects a clear and obvious error that simply cannot be reconciled with the express language of the Note. Since no interest can accrue until after Principal is "finally determined," and Principal is not "finally determined" until sometime after delivery of the Principal Statement, an email describing already accrued interest cannot itself also be the Principal Statement that starts the process for the Principal amount's final determination.

Consistent with Delaware law, this Court must view the provisions of the Note together. B&C's and Smith's argument that Section 2(c) can be viewed and interpreted in isolation is untenable. In support of their argument, B&C and Smith also seek to narrow the overall scheme and plan of the Note by suggesting the Parties

only intended to determine the "Principal promptly and with finality." *See* Answering Brief at 16. The argument is a self-serving oversimplification that is unsupported by a fair interpretation of the Note as a whole. While promptness and finality were certainly goals of the Note, the underlying purpose of the Note was to compensate B&C fairly for any additional value created by Temperatsure's positive performance during the Evaluation Period. Towards that end, the steps and procedures set forth in Sections 2(a), 2(b), 2(c) and 3 of the Note protected both parties and were expressly designed to assure not only a prompt and final determination, but also that the calculations were accurate, that the process was fair, that the compensation was rightfully earned, and that each party could comfortably rely on the finally determined Principal amount. *See* JA50-60; JA1686; JA1740.

B&C's and Smith's contention the July 7 Email is the Principal Statements is dependent on a myopic reliance on a single phrase in Section 2(c) and completely disregards the interrelated procedures in Section 2(a) and 2(b) which necessarily must precede the delivery of the Principal Statement. Their interpretation of Section 2(c) does not construe the contract as a whole, renders the other provisions in Section 2 as surplusage, and therefore must be rejected by this Court.

B. B&C and Smith mischaracterize Temperatsure's arguments as to the relevance of the timing of the July 7 Email and the timing of the purported accrual and payment of interest.

In their Answering Brief, B&C and Smith falsely contend (1) that "Temperature . . . argues that the CFO's Email cannot be a Principal Statement because [the CFO] sent the email earlier than the Note contemplated," *see* Answering Brief at 21, and (2) that Temperatsure argues that "paying interest early . . . convert[s] the CFO's email into a non-Principal Statement." Answering Brief at 23. Temperature makes neither argument. Rather, Temperatsure's actual argument is that in construing the Note and determining whether the July 7 Email is the Principal Statement, both the substance and the context of the email matter.

B&C and Smith acknowledge that the July 7 Email does not expressly state that the Principal amount of the Note is $6,000,000. *See* Answering Brief at 17-18. They argue, however, that the reference to supposedly accrued interest is alone sufficient because it is possible to calculate the underlying Principal amount based on the stated interest payment, the referenced number of accrued months and the interest rate set forth in the Note. First, the Note does not provide that information from which the Principal amount could possibly be calculated is sufficient to satisfy Section 2(c). For example, the Note expressly defines Principal and Section 2(b) requires that Principal be "determined" based on the greatest LTM Gross Profit amount set forth on any LTM Gross Profit Statement delivered to B&C. JA51. This

determination is simply a mathematical calculation. If the mere ability to calculate the Principal through math were alone sufficient to satisfy 2(c), there would be no need for a separate Principal Statement because the LTM Gross Profit Statements themselves provide the information necessary to calculate Principal.

Second, because the July 7 Email does not actually set forth the Principal amount, the email's substance, context and intent are all relevant to whether the email is actually consistent with the Note's overall scheme of using a Principal Statement to trigger the dispute resolution process set forth in Section 2(c). As noted in the Opening Brief, it is undisputed that when the CFO sent the July 7 Email he was not even aware of Temperatsure's obligation to deliver a Principal Statement as the first step in the process of finally determining the amount of Principal. *See* JA1869. In fact, the July 7 Email was actually one in a string of emails between the CFO and his superior, Smith, regarding interest payments that both apparently believed (albeit incorrectly) were due under the Note. Smith actually initiated the email string when he wrote to Kahle as follows on June 28, 2017:

> **Rob**
> **Obviously I am not too worried about it but you should plan on paying my Qtrly Note Payment in July sometime unless you want to do it in June.**

See JA2312. Kahle then responded:

> **CP**
> **Thanks for the reminder. We've got it accrued. I just need to check the cash balance after the shareholder distribution. It won't be a problem.**

Id. One week later, Kahle sent Smith a further email response to his request for payment stating:

> **The interest payment is being wired today. You should receive $125,000 which is 5 months interest on the note.**

See JA2324.

Thus, the July 7 Email was sent in response to Smith's own email (not B&C's) asking his subordinate to pay him quarterly interest. Under Section 2(c) of the Note, delivery of the Principal Statement to B&C is the first step in the final determination of the Principal amount of the Note. Under Section 3 of the Note, interest does not begin to accrue until after the Principal amount is finally determined pursuant to Section 2. Therefore, based on the express provisions of the Note, an email that does nothing more than reference the anticipated payment of already accrued interest cannot, as a matter of law, be the Principal Statement.

C. Temperatsure does not contend that the July 7 Email is not a Principal Statement simply because it is incorrect, nor is Temperatsure seeking to benefit from its own purported breaches of contract.

B&C and Smith wrongly suggest in their Answering Brief that Temperatsure is contending that the July 7 Email cannot be the Principal Statement because the principal amount that can be deduced from the amount of interest referenced in the

email is incorrect. *See* Answering Brief at 28. Again, Temperatsure makes no such argument. As discussed above, the procedures set forth in the Note for determining and disclosing the amount of Principal are reflected in multiple provisions in the agreement (not only in Section 2(c)), and those provisions must be read together and in harmony. It is not a matter of the purported $6,000,000 Principal amount being incorrect (although it is), it is a matter of the Principal amount being determinable only from the LTM Gross Profit Statements delivered to B&C. Because those LTM Gross Profit Statements were not delivered until August of 2018, it is simply not possible for an email in July 2017 to constitute the Principal Statement.

As part of the same argument, B&C and Smith also attempt to incorporate the holding in *Greenstar IH Rep, LLC v. Tutor Perini Corp.*, 2017 WL 5035567 (Del. Ch. Oct. 31, 2017) (Del. 2018), which was referenced in the lower court's Memorandum Opinion. Temperatsure's Opening Brief explained why any reliance on *Greenstar* is misplaced, and it will not re-argue that legal issue here. However, in arguing that *Greenstar* applies, B&C and Smith also contend (as they do throughout their brief) that by denying that the July 7 Email is the Principal Statement and seeking to have an arbitrator resolve any disputes as to the accuracy of the August 6 Principal Statement that somehow Tempersatsure is benefiting from its own breaches. This is simply not true.

As noted above, the July 7 email is not the Principal Statement because the email does not meet the definition of a Principal Statement as contemplated by the Note. While it is true that the Note requires Principal to be determined based on the delivered LTM Gross Profit Statements, and failing to timely deliver such LTM Gross Profit Statements may very well constitute a breach, the delay itself does not mean that Temperatsure "stands to benefit" from its purported breach or justify treating the July 7 Email as something that it is not. Regardless of the timing of the delivery of the LTM Gross Profit Statements or the Principal Statement, the Principal amount is dependent on the Company's LTM Gross Profits as defined by the Note. That amount is what it is. It is not dependent upon when the statements were delivered. Temperatsure does not "benefit" from the statements not being delivered until August of 2018.

In fact, it is B&C and Smith, not Temperatsure, that are seeking to take advantage of the Company's delayed delivery of a Principal Statement by improperly seeking an increase in Principal to which B&C is not entitled. There is no language in the Note that suggests that that the parties agreed that the Company's failure to timely deliver LTM Gross Profit Statements or failure to timely deliver a Principal Statement automatically results in a penalty where the Principal of the Note is deemed to be the maximum amount. There is also no language in the Note to suggest that the mistaken accrual or payment of interest, or communications

regarding the mistaken accrual or payment of interest, can substitute for the requirement that the Principal amount be determined based on delivered LTM Gross Profit Statements or that a Principal Statement be delivered *before* Principal can be finally determined and interest can accrue. To conclude otherwise amounts to a judicial modification of the express terms of the Note.

Ultimately, Temperatsure delivered LTM Gross Profit Statements, determined the Principal amount based on those delivered LTM Gross Profit Statements, and delivered the Principal Statement setting forth that calculation. Temperatsure is getting exactly what it is entitled to under the Note. To the extent B&C was damaged by Temperatsure's delay, it is entitled to seek interest as damages for the delay. However, it is not entitled to disregard the express language of the Note and convert an internal email that does not state a Principal figure, but instead references interest that was not due or payable, into a Principal Statement.

II. THE COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT TEMPERATSURE WAIVED ITS CONDITION PRECEDENT DEFENSE.

A. The issue of whether delivery of LTM Gross Profit Statements was a condition precedent to calculation of Principal was preserved in the lower court.

Temperatsure argued in its Opening Brief that the Court committed reversible error when it concluded that both parties waived the condition precedent to calculate Principal based on GAAP-compliant LTM Gross Profit Statements delivered to B&C. *See* Opening Brief at 30-31. In their Answering Brief, B&C and Smith contend that the waiver argument is irrelevant because Temperatsure supposedly did not preserve the condition precedent defense in the court below. *See* Answering Brief at pp. 33-34. The record reflects that the defense was preserved.

The Answering Brief mischaracterizes Temperatsure's condition precedent defense which is expressly raised as an affirmative defense. JA642. Temperatsure has never contended that calculating LTM Gross Profit according to GAAP is the condition precedent at issue. While it is true that Section 1(ii)'s definition of LTM Gross Profit does contemplate GAAP compliance, *see* JA51, the condition precedent upon which Temperatsure bases its affirmative defense was the <u>delivery</u> of LTM Gross Profit Statements to B&C, which did not happen until August of 2018. Whether LTM Gross Profit Statements must be delivered to B&C before a Principal amount can be determined or calculated, and whether such a requirement benefitted

one versus both parties to the Note, was repeatedly raised in the lower court. *See* JA2243 (noting that Note's procedures designed to benefit both Parties); JA2257 (identifying Section 2(b)'s requirement that Principal be determined based on delivered LTM Gross Profit Statements); JA2260 (Smith knew that B&C had not received LTM Gross Profit Statements); JA2852 (addressing materiality of requiring that Principal be calculated from the GAAP-compliant LTM Gross Profit Statement delivered to B&C).

Further, at oral argument counsel for Temperatsure specifically addressed the affirmative defense (without any objection from B&C), and B&C's apparent confusion regarding exactly what Temperatsure contended constituted a condition precedent. Counsel stated, in relevant part:

> The second affirmative defense is the failure of condition preceeding (sic). Plaintiff misunderstood and I think mischaracterize what our argument is on that . . . we're saying that the failure of the condition preceeding (sic) relates to the failure to provide a principal statement until after August of 2018.
>
> We are not contending that it was . . . a failure of the company to calculate principal in accordance with GAAP.

JA2896 (Emphasis added).

Finally, each of the cases cited by B&C in support of its contention that the condition precedent defense was not preserved for appeal involved lower court decisions where the court ruled that an argument was abandoned because a party

either failed to sufficiently brief it or failed to present sufficient evidence in support. *See Williams Natural Gas Co. v. Amoco Prod. Co.*, 1991 WL 101369, at *2 (Del. Ch. June 10, 1991) (lower court finding that defendant failed to present material facts in support of defense); *Jenkins v. Delaware State Univ.*, 2014 WL 4179958, at *6 n. 69 (Del. Ch. Aug. 22, 2014) (lower court finding that unbriefed defenses "abandoned"); *Naughty Monkey LLC v. MarineMax Ne. LLC*, 2010 WL 5545409, at *3 n. 35 (Del. Ch. Dec. 23, 2010) (same); *Oakwood Acceptance Corp. v. Penn*, 1994 WL 150864, at *6 (Del. Super. Mar. 4, 1994) (same). Here, the lower court made no such finding. To the contrary, the lower court implicitly rejected Smith's and B&C's contention that Temperatsure abandoned its condition precedent defense when it specifically addressed the substance of the defense in its Memorandum Opinion. *See* Memorandum Opinion at 24-27.

B. Determining Principal based on GAAP-compliant LTM Gross Profit Statements delivered to B&C was one of many procedures designed to benefit both parties.

As noted above, Temperatsure does not contend that a Principal Statement must be correct or that compliance with GAAP was a condition precedent to enforcement of the "final and binding" language found in Section 2(c) of the Note. However, because Section 2(b) of the Note expressly requires that the Principal amount be determined based on the LTM Gross Profit Statements <u>delivered</u> to B&C, Temperatsure does contend that calculation of Principal (and as a result the delivery

of a Principal Statement) was not possible unless and until LTM Gross Profit Statements were in fact delivered to B&C.

B&C and Smith do not address Temperatsure's concerns about the lower court's waiver ruling directly. Instead, B&C and Smith argue that because the court correctly ruled that GAAP compliance and delivery of LTM Gross Profit Statements are not conditions precedent, the lower court's waiver determination is "mere dictum" and therefore irrelevant. *See* Answering Brief at 34-35. As discussed above, Temperatsure agrees that GAAP compliance is not a condition precedent. However, because the express language of the Note requires that Principal be determined based on the delivered LTM Gross Profit Statements, the delivery of those statements is necessarily a condition precedent to determining Principal and delivering a Principal Statement. Accordingly, the lower court' improper rejection of the defense based on waiver should be reviewed and reversed for the reasons set forth in the Temperatsure's Opening Brief.

III. THE COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT SMITH DID NOT BREACH HIS FIDUCIARY DUTIES OF LOYALTY AND CANDOR.

A. Temperatsure preserved the issue of whether Smith concealed from the Board of Managers that he knew that the CFO failed to calculate Principal based on the LTM Gross Profit Statements delivered to B&C.

Temperatsure's Opening Brief contends that the lower court erred when it concluded that Smith did not breach his duty of loyalty and candor when he concealed that Temperatsure's CFO had not complied with the Note's procedures to (1) deliver GAAP-compliant LTM Gross Profit Statements to the noteholder; and (2) calculate the Principal of the Note based on the greatest LTM Gross Profit amount reflected in those delivered LTM Gross Profit Statements. *See* Opening Brief at 30. B&C and Smith contend that item (2) was not preserved for appeal because "the only 'procedure' whose non-performance by the company Temperatsure contended that Smith concealed concerned the (non) delivery to B&C of LTM Gross Profit Statements, not the calculation of Principal." Answering Brief at 36. Smith's and B&C's argument reflects a fundamental misunderstanding of the integrated nature of the Note's procedures and mischaracterizes Temperatsure's arguments below.

Section 2(b) of the Note provides "[t]he Principal will be determined, based on the greatest LTM Gross Profit set forth on any LTM Gross Profit Statement <u>delivered</u> with respect to the Evaluation Period . . .". JA52 Note, 2(b). (Emphasis

added). Thus, Smith's concealment of the (non)delivery to B&C of LTM Gross Profit Statements necessarily includes concealment of Temperatsure's failure to determine Principal based on delivered LTM Gross Profit Statements. It is simply not possible to determine Principal based on delivered LTM Gross Profit Statements unless and until such statements are delivered.

Contrary to Smith's and B&C's "lack of preservation" argument, Temperatsure's made this exact argument to the lower court in both briefing and oral argument. In its Answering and Opening Brief below, Temperatsure repeatedly pointed out that under Section 2(b) of the Note, Principal could not be calculated unless and until LTM Gross Profit Statements were actually delivered to B&C. *See e.g.*, JA2243-44 (describing procedures that must be followed before final calculation of Principal, including determining Principal based on delivered LTM Gross Profit Statements); JA2251 (noting that Smith knew that the CFO "failed to calculate Principal based on the delivered GAAP-compliant LTM Gross Profit Statements."). Similarly, in its Reply Brief in Support of Cross-Motion for Summary Judgment, Temperatsure argued to the lower court that the CFO's failure to follow procedures, and Smith's concealment of that failure from the Board of Managers, was material because "it was from such delivered LTM Gross Profit Statements that the Note required that the Principal amount be calculated and determined." JA2831. Temperatsure made the argument again during oral

argument. JA2894 (contending procedures not followed includes calculation of Principal because Principal is supposed to be calculated "based on those [LTM Gross Profit Statements] delivered to B&C."). The issue was preserved below.

B. Smith breached his duty of loyalty and candor because his knowing concealment of the CFO's failure to follow the Note's procedures created actual harm to the Company.

B&C and Smith argue that Smith's concealment did not reflect malfeasance because the concealment relates to a "harmless breach" of Section 2(a) of the Note. B&C and Smith contend that, "*Mills* and other cases show that an officer violates his duty of candor if he or she fails to disclose known information and, by doing so, exposes the company to serious harm." Answering Brief at 39-41 (*citing Mills Acq. Co. v. Macmillan, Inc*., 559 A.2d 1261, 1283 (Del. 1989)).

First, *Mills* does not support B&C's contention that fiduciary duties only apply when there is risk of "serious" harm. *Mills* makes clear that duties imposed on officers and directors include an affirmative duty to "protect and defend those interests entrusted to them." *Mills*, 559 A.2d at 1280. Thus, "[o]fficers and directors must exert all reasonable and lawful efforts to ensure that the corporation is not deprived of *any advantage to which it is entitled*." *Id*. (emphasis added). Other cases have similarly held that where a fiduciary benefits from his breach of duty, it is unnecessary to show injury to the company to establish liability for breach of the

duty of candor. *See Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 503-504 (Del. 1981); *Brophy v. Cities Service Co.*, 70 A.2d 5, 8 (Del. 1949).

Second, B&C's and Smith's argument disregards the fundamental relationship between the delivery of LTM Gross Profit Statements under Section 2(a) of the Note and the ultimate determination of Principal under Section 2(b) of the Note. As argued above, under the express terms of the Note it is not possible to determine Principal unless and until LTM Gross Profit Statements are actually delivered. Sections 2(a), 2(b) and 2(c) of the Note are undeniably integrated and interdependent. Section 2(a) requires that GAAP-compliant LTM Gross Profit Statements be delivered to B&C. Section 2(b) requires that Principal (a defined term) be determined based on the delivered LTM Gross Profit Statements. Finally, Section 2(c) requires delivery of a statement setting forth the calculation of Principal (the same defined term referenced in Section 2(b)). It makes no sense to conclude, as B&C and Smith argue, that the statement setting forth the "calculation of Principal" described in Section 2(c) is somehow unrelated to the "determination of Principal" contemplated by Section 2(b). The only fair reading of the Note confirms that the "determination" and "calculation" of Principal (a defined term) are one and the same. Thus, Smith's decision to conceal from the rest of the Board of Managers that LTM Gross Profit Statements had not been delivered to B&C also necessarily

deprived the Board from knowing that the CFO had never made a "determination of Principal" as contemplated by Section 2(b).

Third, while it may have been true ***that B&C*** was not harmed by the CFO's failure to follow the Note's procedures, it was not harmless to the Company. Given the current state of this litigation and the material value of the claims at issue, Smith's contention now that the Company's failure to comply with the procedures of the Note was trivial or immaterial is not credible. On their face, the procedures set forth in the Note – and specifically the procedure for calculating Principal from LTM Gross Profit Statements *delivered* to B&C – protect both the Company and B&C. As with any contract, the Company's Board expected that Smith, as CEO, would ensure that the CFO who reported to him would follow the procedures required by the Note, or at a minimum, inform the Board if such procedures were not being followed. Their argument that the concealment was harmless relies on extrinsic evidence of alleged "reaffirmations" of the $6,000,000 Principal amount by other Company employees and members of the Board. *See* Answering at 42-43. In each case, however, the Board and the referenced employees made the alleged "reaffirmations" without knowing what Smith alone knew, *i.e.*, that LTM Gross Profit Statements had never been delivered to B&C. The other employees and the Board were in the dark. Smith was the only Temperatsure officer and manager in a position to know this critical information and it is undisputed that he concealed it

from the other members of the Board. JA2576; JA258; JA2597; JA2600. Smith knew that the Note required Temperatsure to determine Principal based on the GAAP-compliant LTM Gross Profit Statements delivered to B&C. Smith's failure to direct the CFO to follow the Note's procedures or to inform the Board that the CFO was ignoring those procedures caused actual harm. Temperatsure's determination of Principal based on the LTM Gross Profit Statements actually delivered to B&C confirms that B&C is now seeking more than $5,000,000 in Principal beyond the amount supported by Temperatsure's *actual* GAAP-compliant LTM Gross Profit Statements. *See* JA2327-2426. Under any measure, an unsupported and erroneous debt of that amount constitutes serious harm.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Temperatsure's Opening Brief, this Court should reverse the lower court's grant of B&C's Motion for Summary Judgment and denial of Temperatsure's Cross-Motion for Summary Judgment.

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Dated: October 26, 2020

CERTIFICATE OF SERVICE

I, Elizabeth M. McGeever, do hereby certify on this 26th day of October, 2020, that I caused a copy of Appellant's Reply Brief to be served by efiling via File and Serve*Xpress* upon counsel for the parties as follows:

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