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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARLOS EDUARDO LOREFICE LYNCH, *Plaintiff Below,* *Appellant*, v. R. ANGEL GONZALEZ GONZALEZ, TELEVIDEO SERVICES, INC., a Florida Corporation, and JUAN PABLO ALVIZ, *Defendants Below,* *Appellees*.	No. 356, 2020 On Appeal from C.A. No. 2019-0356-MTZ in the Court of Chancery of the State of Delaware

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is the Opening Brief of Plaintiff Below/Appellant Mr. Carlos Eduardo Lorefice Lynch ("Lynch" or "Appellant") in support of his appeal from the Final Order and Judgment (the "Judgment"), dated October 2, 2020 (attached as Ex. A), issued by the Honorable Morgan T. Zurn, Vice Chancellor, in the Court of Chancery of the State of Delaware (the "Trial Court") in Civil Action No. 2019-0356-MTZ (this "Action"). The Trial Court's basis for entry of the Judgment is its "Memorandum Opinion" (or "Mem. Op."), dated July 31, 2020 (attached as Ex. B). Appellant timely appealed the Judgment on October 26, 2020. *See* Supr. Ct. Dkt. 1 (Notice of Appeal).

The Trial Court erred by failing to hold Appellees Remigio Angel Gonzalez Gonzalez ("Gonzalez") and Televideo Services, Inc. ("Televideo") (together with Juan Pablo Alviz, "Appellees") to representations made to government authorities and regulators. Parties are bound by representations: (1) made to secure governmental approval of transactions; and (2) made to tax authorities. Grupo Belleville Holdings, LLC ("GBH"), a Delaware limited liability company, holds subsidiaries that operate television and radio stations in Argentina. Argentina regulates foreign ownership of licensed broadcast entities, including GBH's operating subsidiaries. Appellees claim that to secure Argentine regulatory approval, they falsely represented to Argentine authorities that Lynch, an Argentine

citizen, owned 65% of GBH. In addition, for more than a decade, Gonzalez represented to the Internal Revenue Service ("IRS"), under oath, that Lynch owned 65% of GBH. Gonzalez has now reversed course, claiming that his representations to Argentine regulators, the Delaware Secretary of State, and tax authorities were a sham. Appellees are bound by Gonzalez's representations.

In 2009, Gonzalez and Televideo documented their prior oral agreement to sell 65% of GBH to Appellant Lynch (together with Gonzalez and Televideo, the "Parties") in exchange for Lynch's promise to pay $16 million. The Parties' notarized agreements memorialize Lynch's purchase. Due to unforeseen economic and political events in Argentina, the Parties revised Lynch's payment terms several times, but each revision stated that Lynch owned 65% of GBH. Every executed document reflects that fact.

At trial, however, the Parties presented drastically different views of their executed agreements. Lynch's straightforward position remains that the Parties' contracts "speak for themselves and this ownership dispute is easily resolved" (Ex. B at 9): Lynch owns 65% of GBH. Indeed, there is not a single executed document in evidence to the contrary.

In contrast, Appellees asserted that the Parties' notarized contracts must be ignored because Gonzalez purportedly believed that a "Counterdocument"—a sworn statement that the contracts were false—had been executed. Under

Appellees' explanation, Lynch executed a Counterdocument, rendering the deal documents a sham. Appellees' argument was that Gonzalez aimed to fool Argentine regulators into thinking that he—a U.S. citizen—did not own regulated Argentine assets.

Despite concluding that Lynch never executed the Counterdocument (Ex. B at 12), the Trial Court both accepted Gonzalez's claim that he only agreed to enter into a "sham" deal, and allowed him to reap the benefit of the sham. Delaware law is clear: Gonzalez cannot use laws of the State of Delaware or its Courts to advance a purported scheme to defraud Argentine regulators.

Appellant offered a different explanation. Lynch maintains that he purchased 65% of GBH. Lynch never executed the Counterdocument; no counterdocument ever existed. During the eight-years following Lynch's purchase, the Parties revised their financial arrangements several times, documenting each revision through a notarized contract. Critically, the final iteration of the Parties' agreement, dated May 4, 2016, and executed in November 2017, expressly disclaims reliance on any counterdocument (A-1801-02 (JX-67 at § 2.05))—whether executed or unexecuted. Section 2.05 of that agreement (the "May 4 Agreement") (JX-67) states:

> Televideo states and acknowledges the following:
>
> (a) Full and lawful ownership of [Lynch] of 65% of [GBH].
>
> (b) Any previous public or private documents executed between the Parties or by one of the Parties regarding the ownership of 65%

of [GBH] to any person other than [Lynch] shall be deemed null and void.

(c) Any other document signed by [Lynch], whether complete or partial, acknowledging and/or transferring ownership of 65% of [GBH] in favor of Televideo and/or [Gonzalez] shall be revoked and destroyed by Televideo and/or [Gonzalez]. Televideo and/or [Gonzalez] shall be responsible before [Lynch] and shall indemnify and hold harmless [Lynch] in case of display and/or enforcement of such documents.

Delaware courts consistently enforce anti-reliance provisions—particularly those with express disclaimers. Nonetheless, the Trial Court accepted Gonzalez's testimony that the Parties' contracts were universally a sham, and rejected the anti-reliance provision. This was error.

Gonzalez admitted that he did not read the May 4 Agreement and could not testify as to its contents. Yet, the Trial Court assumed—without evidence—that Lynch misled Gonzalez concerning the contents of the May 4 Agreement. The record contains no document or testimony to support that conclusion. Gonzalez had the opportunity to review the May 4 Agreement: he cannot avoid its terms by claiming to have been unaware of Section 2.05.

Although assent to a contract is determined exclusively based upon objective, contemporaneous evidence, observable by a third party, not subjective evidence (*i.e.*, a party's unspoken and un-manifested thoughts and beliefs), the Trial Court determined otherwise. The Trial Court mistakenly relied on its perception of the Parties' un-manifested thoughts and beliefs—subjective evidence—to determine

that there was not mutual assent. In the Trial Court's view, Gonzalez's claim that he did not agree—years after the fact—could override the objective evidence of his assent to the agreements. Indeed, the Trial Court rejected the "best evidence" of assent: the existence of the Parties' executed and notarized agreements. That was error.

Further, the Trial Court improperly relied upon *Fogel v. U.S. Energy Systems, Inc.*, 2007 WL 4438978 (Del. Ch. Dec. 13, 2007), and similar decisions for the proposition that contracts obtained through fraudulent inducement are *void*. This Court expressly overruled *Fogel* in *Klaassen v. Allegro Development Corp.*, 106 A.3d 1035, 1047 (Del. 2014). Contracts obtained through fraudulent inducement are not *void*, as the Trial Court mistakenly held, but *voidable*. Assuming, *arguendo*, that Appellees established fraudulent inducement, the Trial Court's factual findings establish the Appellees' acquiescence. Therefore, the parties' notarized agreements are to be enforced.

Appellees did not object to *any* of the Parties' notarized contracts from October 2009 until April 12, 2019. Appellees' made their first objection to the Parties' contracts in April 2019, more than 16 months after execution of the May 4 Agreement. In February 2018, Lynch told Appellees that they would have no future role in operating GBH's subsidiaries. The same month, Lynch sent Appellees an operating agreement naming himself GBH's sole manager and stating that Lynch

owned 65% of GBH. Gonzalez knew that Lynch was asserting Lynch's 65% ownership of GBH and excluding Gonzalez from GBH's management. Nonetheless, just weeks later, Gonzalez, acting as a GBH member, authorized the filing of GBH's tax returns. Under penalty of perjury, Gonzalez represented to the IRS that Lynch owned 65% of GBH. By both actively affirming that Lynch owned 65% of GBH and failing to contest the validity of the May 4 Agreement and the Operating Agreement for more than a year, Appellees acquiesced.

Finally, the Trial Court's factual findings are frequently unsupported or contradicted by the record. This Court cannot allow such findings to stand and must reject those that are "based on faulty factual predicates, unsupported by the record." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (reversing and remanding).

SUMMARY OF ARGUMENT

1. The Trial Court erred by allowing Appellees to take a litigation position contrary to (1) their representations to third parties, including Argentine regulators, in an effort to obtain approval of a transaction, and (2) Gonzalez's representations to tax authorities made under penalty of perjury. *See, e.g.*, *Derickson v. Derickson*, 281 A.2d 487, 488 (Del. 1971). A-2207-08; A-2278-82.

2. The Trial Court erred by invalidating executed and notarized contracts that contained express anti-reliance provisions. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (valid contract where both parties signed a writing and had writing notarized); *see also RAA Mgmt., LLC v. Savage Sports Hldgs., Inc.*, 45 A.3d 107, 118-19 (Del. 2012) (public policy requires "enforcing contractually binding written disclaimers of reliance on representations outside of a final agreement of sale or merger"). Despite Appellees' admissions and the Parties' testimony that Appellees had transferred 65% of GBH to Lynch, the Trial Court erred as a matter of law, and in its determination of the facts, by concluding otherwise. A-2294-95.

3. The Trial Court erred by relying on its perception of the Parties' unexpressed beliefs (*i.e.*, subjective evidence) concerning the enforceability of the May 4 Agreement rather than limiting its consideration to the objectively observable and contemporaneous actions and statements (*i.e.*, objective evidence) made at

execution to determine assent. *See, e.g.*, *Eagle Force Holdings, LLC v. Campbell*, 235 A.3d 727, 735 (Del. 2020) ("*Eagle Force II*"). A-2205-08.

4. The Trial Court, relying on overturned case law, erred by finding that a contract purportedly obtained through fraudulent inducement was void as opposed to merely voidable. *See Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014) (overruling *Fogel v. U.S. Energy Sys., Inc.*, 2007 WL 4438978, at *1 (Del. Ch. Dec. 13, 2007)). Moreover, Appellees took no action to invalidate the "fraudulent" contract for over a year, and voluntarily authorized a tax filing, under penalty of perjury, confirming the facts stated in the contract, yet the Court erroneously determined that the contract was void. A-2292-95; A-2204-05.

5. The Trial Court erred by making factual findings that (1) are not supported by citation to the record, (2) are contradicted by the record, or (3) fail to acknowledge or address Appellees' admissions. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (reversing and remanding where the "Court of Chancery finding … was based on faulty factual predicates, unsupported by the record."). A-2177-90.

6. Finally, the Trial Court erred by concluding that Appellant acted in bad faith, and shifting attorneys' fees. That conclusion is based on factual findings that are unsupported by the record, it ignores Appellees' admissions, and that Appellant's position is supported by executed, notarized contracts. *See Candlewood Timber*

Group, LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 1000-01 (Del. 2004). A-2177-90; A-2285-90.

STATEMENT OF FACTS

The Trial Court recognized that this case is essentially a "he said – he said dichotomy." Ex. B at 9. Yet, aside from proclaiming that he had the Counterdocument, Gonzalez did not dispute Lynch's account. Every document executed by the Parties—including every contract, representation, affidavit, tax return—supports Lynch's claim that Lynch owns 65% of GBH. Where the record does not contain evidence, or the only evidence was Lynch's uncontradicted testimony, the Trial Court made unsupported assumptions. The Trial Court also ignored admissions by Gonzalez, his family and his accountant, specifically:

- Gonzalez admitted that his daughter, Morelia Gonzalez ("Morelia")[1] truthfully certified that Lynch owned 65% of GBH. A-1624 (JX-37); A-1350:16-19.[2]

- Morelia admitted that Lynch's assumption of $16 million of Televideo's debt is an enforceable contract, and Lynch could be sued if he failed to pay. A-1149:3-11.

- Morelia admitted that in exchange for the assumption of $16 million of Televideo's debt, Lynch received "his 65 percent ownership" of GBH. A-1149:12-14.

- Morelia admitted that Gomez, Gonzalez's and Televideo's accountant, reviewed the debt assumption paperwork "because he wanted to make sure that everything was recorded correctly, because Televideo had

[1] Morelia Gonzalez's first name is used to differentiate between her and her father, Gonzalez. No disrespect is intended.

[2] References to "A-___" refer to the accompanying Appendix submitted concurrently herewith. References to transcripts include page numbers in the Appendix followed by line numbers (*i.e.*, "___:___") where applicable.

those loans. So if they were going to be taken off the books from Televideo, he wanted to make sure it was done correctly." A-1152:7-11.

- Gonzalez admitted that he had agreed to sell 5% of GBH to Lynch. A-1315:13-14.

In 2007, Lynch assisted Gonzalez with the acquisition of an Argentine media group that operates television and radio stations. Shortly thereafter, Gonzalez agreed, orally and later in writing, that Televideo would sell Lynch 5% and then 60% of GBH. The parties subsequently executed a series of documents to memorialize their agreement. Lynch initially paid for his purchase by assuming $16 million[3] of Televideo's debt through the Addenda. (A-1499 (JX-12 at §1.1)). The Parties executed the First Purchase Agreement in October 2009 (A-1443 (JX-5)), and Gonzalez executed a notification to GBH stating that Televideo had transferred "*una participación*" (a participation) of 5% in GBH including the voting and economic rights associated with that ownership (A-1461-68 (JX-6)). Both documents were notarized. *See* A-1452 (JX-5); A-1464 (JX-6). The Parties executed comparable documents to transfer 60% of GBH to Lynch. *See* A-1473 (JX-11); A-1503 (JX-13). Again, the documents were notarized. *Id.*

[3] Contrary to the Trial Court's holding that $16 million was an arbitrary amount (Ex. B at 43-44), it was the pro rata share of Gonzalez's purchase price for the Argentine assets. Gonzalez paid $27.345 million for the group. GBH held a 90 percent interest in the Argentine operations. A-2103 (JX-161). Lynch acquired 65% of GBH. $27,345,000 x 0.90 x 0.65 = **$15,996,825**. Lynch assumed a debt that was essentially his pro rata share of Gonzalez's purchase price.

After executing the four purchase documents in October 2009, Lynch and Gonzalez executed two additional documents in February 2010: the "Addenda" (A-1491 (JX-12)) and the "Complement" (A-1511 (JX-14)). Through the Addenda, Lynch assumed $16 million of Televideo's existing debt. *See* A-1499 (JX-12 at §1.1)). Appellees admitted that Lynch's assumption of debt is enforceable. A-1149:3-11; A-1152:7-11. They also conceded that in exchange for his assumption of $16 million of Televideo's debt, Lynch received "his 65 percent ownership" of GBH. A-1149:12-14.[4]

During the following years, the Parties renegotiated Lynch's payment terms on several occasions. *See, e.g.*, A-1610 (JX-35), A-1722 (JX-64), A-1750 (JX-66),

[4] The Trial Court erroneously concluded that the executed Addenda (A-1491 (JX-12)) was "substantively identical" to the draft Addenda (A-1541 (JX-30)). Ex. B at 52. The Court mistakenly cited to JX-12, the executed Addenda, when referring to the draft Addenda, establishing that the Trial Court did not consider the differences between the documents. There are material differences between the draft and the executed version of the Addenda. The Parties deleted Sections 1.4, 2.1.2, 2.2, 3, and 4 from the draft. Those provisions had permitted Lynch to satisfy his debt by delivering 1% of his shares of GBH to Televideo in exchange for forgiveness of 1% of his debt (including interest). *See* A-1545 (JX-30 at §§ 2.1.2 and 2.2). Those changes are material. Had Lynch actually executed and Gonzalez sought to enforce the Counterdocument, Sections 2.1.2, 2.2, and 3 of the draft Addenda would have protected Lynch from losing his interest in GBH and continuing to be liable for the associated debt. The revisions to the Addenda and creation of the Complement (A-1511 (JX-14)) show the change from the initial proposed transaction with the Counterdocument to a traditional purchase where a debt is secured by a pledge of the purchased securities. This structural change to the Parties' transaction is consistent with Lynch's uncontradicted testimony that he told Gonzalez that he would not execute the Counterdocument. A-877:24–A879:10; A-999:5-11; A-1011:9-11.

A-1780 (JX-67). The Parties used these agreements to address issues that included Argentina's ban on sending US dollars outside of the country and making adjustments to the payment schedule and applicable interest rate. *See, e.g.*, A-1743 (JX-65). Indeed, in preparing the May 2, 2016 Restructuring Agreement (A-1722 (JX-64)), Lynch's and Gonzalez's respective advisors exchanged emails to negotiate the applicable interest rate and method to calculate interest on Lynch's debt—demonstrating that, far from being a sham transaction, the payment terms mattered to the Parties. *See* A-1743 (JX-65).

The May 4 Agreement

In November 2017, the Parties executed two forms of their final restructuring agreement: (i) a version intended for public use, dated May 3, 2016 (the "May 3 Agreement") (A-1733 (JX-66)), and (ii) a private version containing the Parties' complete terms, dated May 4, 2016 (the "May 4 Agreement") (A-1780 (JX-67)). Ex. B at 62.[5] These agreements reaffirmed Lynch's purchase of 65% of GBH and, once again, revised his payment terms. The only material difference between the May 3 and May 4 Agreements is the Parties' inclusion of Section 2.05 in the May 4 Agreement. A-1801-02 (JX-67 at § 2.05). Section 2.05 is the Parties' anti-reliance provision—signed by Gonzalez on behalf of Televideo—it states:

[5] The Trial Court erroneously reversed Lynch's testimony on this point. *Compare* Ex. B at 56-60 *with* A-893-94, A-898. No other witness testified on this point.

> Televideo states and acknowledges the following:
>
> (a) Full and lawful ownership of [Lynch] of 65% of [GBH].
>
> (b) Any previous public or private documents executed between the Parties or by one of the Parties regarding the ownership of 65% of [GBH] to any person other than [Lynch] shall be deemed null and void.
>
> (c) Any other document signed by [Lynch], whether complete or partial, acknowledging and/or transferring ownership of 65% of [GBH] in favor of Televideo and/or [Gonzalez] shall be revoked and destroyed by Televideo and/or [Gonzalez]. Televideo and/or [Gonzalez] shall be responsible before [Lynch] and shall indemnify and hold harmless [Lynch] in case of display and/or enforcement of such documents.

A-1801-02 (JX-67 at § 2.05). The Parties had the May 4 Agreement notarized. A-1781.

The preamble to the May 4 Agreement recites the Parties' extensive negotiating history, starting with the initial purchase agreements dated September 1, 2007 and January 8, 2008. A-1794. The May 4 Agreement then notes that the Parties restructured Lynch's debt by agreements dated September 15, 2010, and May 25, 2011. A-1794-95. Lynch made the scheduled payments required by the May 4 Agreement (A-1811 (JX-69)), and additional payments (A-2078 (JX-128)).

The May 4 Agreement differs from the Parties' prior agreements: the Parties labeled it a "novation."[6] By November 2017, Lynch had paid more than $4 million towards his purchase of GBH. He used a portion of his share of the profits from GBH's subsidiaries to fund his purchase. He reported that income to Argentina and paid income tax on this. A-1106:13-17.[7] Further, the Parties executed the May 4 Agreement following a project with Greenberg Traurig and Ernst & Young to prepare the media companies for a sale, public offering, or other restructuring. During that work, Lynch became acutely aware of his personal exposure to prosecution due to Gonzalez's illegal business activities and corruption.[8] Lynch is a sophisticated businessman, who ran GBH for a decade and was Gonzalez's Chief

[6] "A novation extinguishes a prior contract and replaces it with a new agreement." *Great-W. Inv'rs LP v. Thomas H. Lee Partners, L.P.*, 2012 WL 19469, at *8 (Del. Ch. Jan. 4, 2012).

[7] Lynch largely received his share of the profits in form of director's fees. Gonzalez received his share of the profits through mechanisms designed to avoid the payment of taxes. These included cash carried into the United States in increments of $8,000 or less (to avoid reporting) totaling more than $400,000; personal charges on the corporate credit card; and fictitious purchases and acquisitions of assets, including real estate, with funds from the Argentine subsidiaries totaling over $14 million. A-1188:8–A-1192:8; A-1273:19–A-1274:13).

[8] In addition to evading U.S. income taxes by receiving unreported cash payments (*see* n.7, *supra*), Gonzalez admitted that he had been sanctioned under the Magnitsky Act (A-1312:17-19)), is exposed to liability under the Foreign Corrupt Practices Act, and was responsible for his wife's receipt of an Interpol Red Notice related to Gonzalez's interference in Guatemalan elections. Major banks declined to do business with Gonzalez because of "know your client" regulations. A-1157:4–A-1158:6.

Operating Officer. His experience and knowledge gave him particular insight into potential risks related to working with Gonzalez. The May 4 Agreement reveals the Parties' intent to eliminate any uncertainty about ownership of GBH. *See* A-898:10-16; A-900:23–A-901:14.

Gonzalez, on behalf of Televideo, executed the May 4 Agreement. A-1750 (JX-66); A-1780 (JX-67). Gonzalez admitted the same. A-1338:20–A-1339:17. Both the public and private versions are notarized. *Id*. The record is devoid of reference to what any party did or said when executing the May 4 Agreement. Gonzalez admitted that he did not read the agreement. A-1319:19-23. He did not claim that Lynch made any representation concerning its purpose or contents at the time of its execution. *See* A-1340:14–1341:13.

The Parties' Relationship Breaks Down

Lynch and Gonzalez's relationship ultimately reached a breaking point. In February 2018, Lynch informed Gonzalez that the Argentine companies would operate independently from Albavision, a loose network of Latin American media companies in which Gonzalez held an interest. Lynch made clear that Gonzalez would have no role in selecting the programming for the Argentine operations or any managerial decision. A-1216:16-20. He told Gonzalez that he would be treated as a minority shareholder. Ex. B at 73-74.

Also in February 2018, Lynch sent a GBH operating agreement to Gonzalez and Televideo naming Lynch as GBH's sole manager based on his 65% interest in GBH. *Id.* at 75. The same month, Gonzalez sent a senior officer to meet with Lynch to gain a full understanding of Lynch's position, but he did not challenge Lynch's claim. Lynch also changed GBH's registered agent through a filing with the Delaware Secretary of State. *Id.* at 75. Thus, Lynch fully informed Gonzalez of Lynch's position in February 2018. Gonzalez did not immediately respond to Lynch's communications.

Indeed, Gonzalez accepted Lynch as the controlling majority owner of GBH. In March 2018—after Lynch had separated the Argentine operations from Albavision and removed Gonzalez from management—Gonzalez affirmed, under penalty of perjury, that GBH's 2017 tax return, which stated that Lynch owned 65% of GBH, was accurate. He did so after reviewing the return with GBH's accountant. A-1296; A-2083 (JX-135). The Schedule K-1's in that return identify Lynch as the owner of 65% of GBH. *See* A-2089 (JX-138); A-1348-49.

More than a year later, "[o]n April 11, 2019, Gonzalez responded." Ex. B at 75. "He signed a 'Certificate of Amendment' … in which he claimed that Televideo owned 95% of … Belleville and … caused [it] to be filed … on April 12, 2019." *Id.* at 75-76. Acting under the purported authority of the Certificate of Amendment, Gonzalez then attempted to remove Lynch as GBH's Manager and Legal

Representative in Argentina. *Id.* at 76. Lynch responded with a filing reversing Gonzalez's actions. *Id.* at 77.

Noticeably absent from the Trial Court's decision is any mention of a host of documents and admissions made by Gonzalez and his team that demonstrate Lynch to be the true owner of GBH. These include:

- Gonzalez's admission that he had sold 5% of GBH to Lynch. A-1315:10-14.
- Certificate of the Secretary of GBH, dated December 31, 2008, signed by Gonzalez and his daughter, Morelia, stating that Lynch owned 65% of GBH. A-1624 (JX-37).
    - This document was submitted to the Argentine media regulator. *Id*.
    - Gonzalez admitted that Morelia's certification was accurate. *See* A-1350:16-19; A-1352:23–A-1353:2.
    - Morelia testified that the document was accurate. A-1146.
- Gonzalez signed or authorized the electronic filing of GBH's tax returns for the years ended 2008-2017, all of which identify Lynch as the 65% owner of GBH. A-1296:5–A-1298:1; A-1642 (JX-47), A-1654 (JX-49), A-1666 (JX-56), A-1695 (JX-61), A-1815 (JX-89), A-2083 (JX-135), A-2084 (JX-138). In so doing, Gonzalez represented under oath that GBH's returns were accurate. A-2083 (JX-135), A-2084 (JX-138); A-1296-97.
- Gonzalez executed receipts for payments that Lynch delivered in accordance with the Parties' agreements, an unnecessary process if the payments were not real. A-1637 (JX-42), A-1813 (JX-70), A-2072 (JX-124).

Morelia admitted that the 2007 Certificate of Amendment (A-1469 (JX-7)) was filed with Delaware Secretary of State and that it accurately stated that Lynch owned 65% of GBH. She received a copy of this certificate in 2007. A-1115-16.[9] She also admitted that the "ownership of GBH changed from 95 percent Televideo and 5 percent [her] father to 65 percent Mr. Lynch, 30 percent Televideo, and 5 percent [her] father." A-1144. Morelia signed certificates for GBH confirming that ownership structure. *Id.*; A-1624 (JX-37). Morelia further testified that she signed a certificate as the Secretary of GBH, identifying Lynch as the owner of 65% of GBH, and that she was not lying when she signed that certificate. A-1146-47. Morelia, acting on behalf of Televideo, received payments from Lynch for his interest in GBH and the money came from Lynch's salary and bonuses from his employer. A-1146-48.

[9] The Trial Court erroneously found that Morelia did not receive a copy of this certificate. Ex B at 27.

ARGUMENT

I. PARTIES ARE BOUND BY THEIR REPRESENTATIONS TO GOVERNMENT AUTHORITIES AND REGULATORS.

Questions Presented

Whether a party is barred from taking a litigation position that is contrary to (1) representations it made to third parties, including government authorities and regulators, to obtain approval of a transaction, or (2) representations it made, under penalty of perjury, in its tax returns. A-2207-8; A-2278-82.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

Merits of the Argument

The Trial Court's decision departs from Delaware law because: (1) a party is bound by its representations to regulators and third parties; and (2) a party cannot testify to facts that are contrary to its tax returns.

A. Gonzalez is Bound by the Terms of the Transactions He Claims Were "Shams."

The record establishes that Lynch purchased 65% of GBH, already paid Gonzalez more than $4 million, and still owes Gonzalez more than $8 million. *See* A-1491 (JX-12); A-1623 (JX-36); A-1636 (JX-41); A-1811 (JX-69); A-1814 (JX-74); A-2077 (JX-125); A-2078 (JX-128); A-1004:7-9. The Trial Court, however,

accepted Gonzalez's position that the documents show a "sham" transaction intended to deceive Argentina's regulators.[10] Regardless of whether the initial purchase was intended to be real or a "sham," the Parties are bound by their representations to Argentina's regulators.

"When parties enter into legal relationships in an effort to mask their illicit arrangements and to deceive regulatory authorities into allowing the parties to carry out their illicit business, they will be left to lie in the bed they have made." *Patel v. Dimple, Inc.*, 2007 WL 2353155, at *12 (Del. Ch. Aug. 16, 2007). That is an accurate description of long-standing Delaware law. *See, e.g.*, *Derickson v. Derickson*, 281 A.2d 487, 488 (Del. 1971) (where purchaser of property had it titled in name of brother to protect it from creditors, he could not later obtain his interest in the property); *Ryan v. Ryan*, 1992 WL 2556, at *1 (Del. Ch. Jan. 9, 1992) (parent bound by representation to bank that transfer to child was a gift and could not later claim transfer was a loan). Because Gonzalez and Televideo held Lynch out as GBH's 65% owner, they are bound by that representation and cannot later obtain relief on their affirmative claim, *even if it rewards Lynch's supposed fraud*. *See Haggerty v. Wilmington Trust Co.*, 194 A. 134 (Del. Ch. 1937) (where son's name is placed on deed at father's direction, with intent to defeat creditors, court cannot grant relief to father even if that rewards son's fraud). Instead, Gonzalez and

[10] Argentine law did not permit Gonzalez to own and control GBH. Ex. B at 29-30.

Televideo must be "left to lie in the bed they have made," with Lynch as GBH's 65% owner—consistent with the representations they made to Argentina's government to procure and retain control of the broadcast licenses. *See Patel*, 2007 WL 2353155, at *12.

The Trial Court could not enforce a supposed promise to rescind a "sham transaction"—the relief sought by Appellees—because doing so required the Trial Court to assist in a deception of the Argentine regulatory authorities. *See Morente v. Morente*, 2000 WL 264329, at *3 (Del. Ch. Feb. 29, 2000) (court cannot "enforce specific performance of an illegal contract"). Former-Chancellor and Chief Justice Strine explained the principles behind this rule:

> Under this rule, a person thinking about entering into a fraudulent transaction knows that he will be at the mercy of his co-conspirator and unable to call upon the aid of the court. Thus, he should think twice before acting dishonestly and making himself vulnerable to other persons with a professed willingness to engage in deception. But when he does not, goes on to commit fraud, and later feels aggrieved when one of his co-conspirators does not live up to her end of the bargain, public resources should not be sullied in proceedings analogous to enforcing a code of honor among thieves.

Id. at *3. Here, Appellees claimed and the Trial Court accepted that Gonzalez used Lynch to circumvent Argentina's regulatory framework and deceive Argentina's regulators. Delaware law cannot be used in this manner.

B. Testimony That Contradicts Tax Returns Cannot be Accepted.

The Trial Court erred by not holding Appellees to the representations—made under oath to the tax authorities—that Lynch owns 65% of GBH. *See, e.g.*, A-1642 (JX-47), A-1654 (JX-49), A-1666 (JX-56), A-1695 (JX-61), A-1815 (JX-89), A-2083 (JX-135), A-2084 (JX-138). A party cannot disclaim its tax returns when they are inconvenient to its litigation position. As other jurisdictions have held, we "cannot … permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (N.Y. 2009); *see also S & D Envtl. Servs., Inc. v. Rosenberg Rich Baker Berman & Co., P.A.*, 334 N.J. Super. 305, 317 (Law. Div. 1999) ("S & D now wishes to cast aside those sworn statements and advance an inconsistent theory in this action. Were the court to allow this, it would be permitting S & D to pursue a cause of action that is based on a theory wholly at variance with statements made by S & D to the IRS under penalty of perjury. Judicial estoppel will be applied to preclude S & D from doing so."); *In re Robb*, 23 F.3d 895, 898-99 (4th Cir. 1994) (parties are estopped from asserting a position in a judicial proceeding that differs from their income tax returns.).

Delaware law is not different. *See T. v. T.*, 2018 WL 509340, at *3 (Del. Fam. Ct. Jan. 17, 2018) (where couple filed tax return as "married filing jointly," husband

was estopped from claiming otherwise because he made the declaration under penalty of perjury).

A litigant is bound by statements made under oath in tax filings for two reasons: (1) statements made under penalty of perjury are presumed truthful; and (2) holding taxpayers to the representations made in their returns encourages truthful tax filings. Taxpayers are estopped from contradicting their sworn representations. *See, e.g.*, *In re Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991) (quasi-estoppel precludes litigation position inconsistent with tax return to prevent "a legal affront to both the bankruptcy and tax codes"); *Nowak v. Nowak*, 183 B.R. 568, 570-71 (Bankr. D. Neb. 1995) (prohibiting plaintiff from asserting statements in bankruptcy proceeding inconsistent with representations made to the IRS); *Amtrust Inc. v. Larson*, 388 F.3d 594, 601 (8th Cir. 2004) (various courts have applied "quasi-estoppel" "to estop parties from asserting a position in judicial proceedings different than what was reported on their income tax returns").

The same rule applies where a litigant seeks to repudiate its prior representations. *See, e.g.*, *Smith v. EVB*, 2010 WL 1253986, at *3 (E.D. Va. Mar. 23, 2010) ("Quasi-estoppel prohibits Smith from receiving the benefit of the 2004 Loan and now repudiating his numerous attestations when he seeks aid under consumer protection laws."). Indeed, "it would be unconscionable to permit the offending party to maintain an inconsistent position from which it has already

derived a benefit or in which it has acquiesced." *County School Bd. v. RT*, 433 F. Supp. 2d 692, 705 (E.D. Va. 2006).

Here, the Trial Court erred in allowing Appellees to take positions contrary to (1) tax returns and (2) representations to Argentina's regulators. Appellees executed documents, submitted them to various government agencies, and obtained a desired result. They are bound by those representations. This Court must reverse.

II. THE TRIAL COURT ERRED BY FAILING TO ENFORCE THE PARTIES' WRITTEN AGREEMENT, WHICH CONTAINED AN EXPRESS ANTI-RELIANCE PROVISION.

Question Presented

Whether the Trial Court erred by invalidating an executed, notarized contract that contains an express anti-reliance provision. A-2294-5.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Airgas*, 8 A.3d at 1188. This Court reviews "mixed question of fact and law *de novo*, 'to the extent that we examine the trial judge's legal conclusions,' and for clear error, '[t]o the extent the trial judge's decision is based on factual findings.'" *Miller v. State*, 4 A.3d 371, 373 (Del. 2010).

Merits of the Argument

A. The Judgment Should be Reversed Because the Trial Court Failed to Enforce a Valid Contract.

"A valid contract exists when (1) the parties intended that the contract would bind them; (2) the terms of the contract are sufficiently definite; and (3) the parties exchange legal consideration." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (valid contract where both parties signed a writing and had writing notarized). Here, Gonzalez executed the May 4 Agreement and the Parties had it notarized. It contains all necessary terms. It also contains consideration. Thus, it is a valid and enforceable agreement. The Trial Court erred by failing to enforce it.

B. Delaware's Public Policy Enforces Anti-Reliance Provisions, and the May 4 Agreement Contained Such a Provision.

Delaware has a "public policy in favor of enforcing contractually binding written disclaimers of reliance on representations outside of a final agreement of sale or merger." *RAA Mgmt., LLC v. Savage Sports Holdings, Inc.*, 45 A.3d 107, 118-19 (Del. 2012). "Delaware law enforces clauses that identify the specific information on which a party has relied and which foreclose reliance on other information." *Prairie Capital, III, LP v. Double E Holding Corp.*, 132 A.3d 35, 50 (Del. 2015).

"To allow [Gonzalez or Televideo] to assert, under the rubric of fraud, claims that are explicitly precluded by contract, would defeat the reasonable commercial expectations of the contracting parties and eviscerate the utility of written contractual agreements." *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 556 (Del. Ch. 2001) ("Delaware law permits explicit contract disclaimers to bar … fraud claims."). Indeed, as the late-Justice Ginsburg explained:

> were we to permit plaintiffs' use of the defendants' prior representations ... to defeat the clear words and purpose of the Final Agreement's integration clause, contracts would not be worth the paper on which they are written.

One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1287 (D.C. Cir. 1988) (Ginsburg, J.)). "Justice Ginsburg's observation applies equally to this case." *Great Lakes*, 788 A.2d at 555-56. A "party cannot promise … that it will not rely on promises and representations outside of the agreement and then shirk its own bargain

in favor of a 'but we did rely on those other representations' fraudulent inducement claim." *Prairie Capital*, 132 A.3d at 50. Appellees' assertion of a fraudulent inducement claim is forbidden under those cases. *Id.*

Section 2.05 of the May 4 Agreement "constituted a clear statement by [Gonzalez and Televideo] that [they were] not relying on the very factual statements that [they were] contending to be fraudulent." *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004). Having executed the May 4 Agreement, Appellees could not rely on claims that they had a Counterdocument.

The Trial Court, however, rejected the May 4 Agreement, finding that Gonzalez's agreement to its terms had been fraudulently induced through an eight-year-old promise to execute the Counterdocument and Gonzalez's claimed reliance on it.

Section 2.05 of the May 4 Agreement expressly disclaims reliance on the Counterdocument, rendering Gonzalez's claimed reliance untenable. Gonzalez executed that agreement on behalf of Televideo (A-1339; A-1782 (JX-67)), which made the following representations in that agreement:

- "Full and lawful ownership of [Lynch] of 65% of Grupo Belleville Holdings LLC" (A-1801 at § 2.05(a));
- "any previous public or private documents executed between the Parties or one of the Parties regarding the ownership of 65% of Grupo Belleville Holdings LLC to any person other than [Lynch] shall be deemed null and void" (*id.* at § 2.05(b));

- "Any other document signed by [Lynch], whether complete or partial, acknowledging and/or transferring the ownership of 65% of Grupo Belleville Holdings LLC in favor of Televideo and/or Remigio Angel Gonzalez Gonzalez shall be revoked and destroyed by Televideo and/or Remigio Angel Gonzalez Gonzalez" (A-1801-2 at § 2.05(c)); and

- "Televideo and/or Remigio Angel Gonzalez Gonzalez shall be responsible before [Lynch] and shall indemnify and hold harmless [Lynch] in case of display and/or enforcement of such documents" (A-1802 at § 2.05(c)).

"Anti-reliance language" must "be explicit and comprehensive, meaning the parties must forthrightly affirm that they are not relying upon any representation or statement of fact not contained [in the contract]." *Anschutz Corp. v. Brown Robin Capital, LLC*, 2020 WL 3096744, at *13 (Del. Ch. June 11, 2020), *reargument granted sub nom. Re: The Anschutz Corp.,* et al. *v. Brown Robin Capital, LLC,* et al., 2020 WL 4249874 (Del. Ch. July 24, 2020); *see also Kronenberg*, 872 A.2d at 593 ("Because Delaware's public policy is intolerant of fraud, the intent to preclude reliance on extra-contractual statements must emerge clearly and unambiguously from the contract."). The anti-reliance language here meets that requirement.

Where a contract contains "language that … can be said to add up to a clear anti-reliance clause by which [a party] has contractually promised that it did not rely upon statements outside of the contract's four corners in deciding to sign the contract," the party is bound by that language. *Prairie Capital*, 132 A.3d at 51 (citing *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059 (Del.

Ch. Feb. 14, 2006) and *Kronenberg*, 872 A.2d at 593). Here, the contractual language is blunt, unambiguous, and directly contradicts Appellees' position. "It is unreasonable to rely on oral representations when they are expressly contradicted by the parties' written agreement." *Chapter 7 Tr. Constantino Flores v. Strauss Water Ltd.*, 2016 WL 5243950, at *7 (Del. Ch. Sept. 22, 2016). "Delaware courts have held that sophisticated parties may not reasonably rely upon representations that are inconsistent with a negotiated contract, when that contract contains a provision explicitly disclaiming reliance upon such outside representations." *MidCap Funding X Tr. v. Graebel Companies, Inc.*, 2020 WL 2095899, at *19 (Del. Ch. Apr. 30, 2020); *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. Jul. 9, 2002) (same; enforcing integration clause). Gonzalez owns and operates a multinational network of broadcast companies: he is sophisticated. *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007) (parties with extensive experience in their field are sophisticated), *aff'd*, 985 A.2d 391 (Del. 2009), *as corrected* (Nov. 30, 2009).

The Trial Court erred by failing to enforce the May 4 Agreement's anti-reliance clause. Accordingly, this Court must reverse and require the Trial Court to enforce the anti-reliance clause.

C. Delaware Law Makes Clear that a Failure to Read a Contract Is Not a Defense to Being Bound by Its Terms.

"It is a basic principle of contract law that a person is bound by the terms of a contract he signs, even if he has not read the agreement or is otherwise unaware of its terms." *Willow-Bay*, 2007 WL 3317551, at *9 (citing *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989)); *see also Pellaton v. Bank of N.Y.*, 592 A.2d 473 (Del. 1991) (enforcing contract terms despite the signing party's assertion that he did not read the document before signing). A "party cannot seek avoidance of a contract he never read." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 677 (Del. 2013). "[N]or can a party's failure to read a contract justify its avoidance." *Graham*, 565 A.2d at 913.

This Court repeatedly has recognized that the failure to read a contract does not provide a defense to being bound by its terms. *See, e.g.*, *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 835 (Del. 1992) ("The Kaufmans cannot reasonably claim to be blamelessly ignorant of the terms of a policy of which they had notice and constructively accepted."); *see also Graham*, 565 A.2d at 913; *Pellaton*, 592 A.2d at 476.[11] Appellees accepted the May 4 Agreement for 16 months without objection.

[11] Execution of a contract "without the advice of counsel is of little moment: there is no general requirement that contracts be executed under the guidance of counsel, especially when the signor is a sophisticated businessperson." *Willow-Bay*, 2007 WL 3317551, at *9 n.82.

Simply, "a failure to read bars a party from seeking to avoid or rescind a contract." *Scion Breckenridge*, 68 A.3d at 677. Gonzalez did not claim to know its contents. Nor did he claim that the contents of the May 4 Agreement had been falsely represented to him. Indeed, there is nothing in the record to indicate what any party said about the May 4 Agreement at the time of its execution. A-1303-61. The Trial Court's decision is contrary to this Court's holdings and must be reversed.

III. THE TRIAL COURT ERRED BY RELYING ON SUBJECTIVE EVIDENCE, NOT OBJECTIVE CONTEMPORANEOUS EVIDENCE, TO DETERMINE THE ENFORCEABILITY OF THE MAY 4 AGREEMENT.

Questions Presented

Whether the Trial Court erred by relying on its perception of the Parties' unexpressed beliefs concerning the enforceability of the May 4 Agreement during its execution, rather than limiting its consideration to the objectively observable and contemporaneous actions and statements, when determining if the Parties assented to a contract. A-2205-08.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Airgas*, 8 A.3d at 1188.

Merits of the Argument

The May 4 Agreement is a valid contract: (1) the Parties objectively manifested their intent to be bound; (2) it is sufficiently definite; and (3) there is consideration. *See Osborn*, 991 A.2d at 1158.

A. The Parties Intended the May 4 Agreement to be Binding.

The determination of whether the Parties intended to form a binding agreement is not based upon their subjective beliefs, but instead upon the Parties' observable actions and statements. As this Court recently explained:

> Under Delaware law, overt manifestation of assent—not subjective intent—controls the formation of a contract. As such, in applying this objective test for determining whether the parties intended to be bound, the court reviews the evidence that the parties communicated up until the time that the contract was signed—*i.e.*, their words and actions—including the putative contract itself.

Eagle Force II, 235 A.3d at 735. "To determine whether a contract was formed, the court must examine the parties' objective manifestation of assent, not their subjective understanding." *Trexler v. Billingsley*, 166 A.3d 101 (Table), 2017 WL 2665059, at *3 (Del. 2017). "[T]he only intent of the parties to a contract which is essential is an intent to say the words or do the acts *which constitute their manifestation of assent*; that *the intention to accept is unimportant except as manifested*." *Industrial Am., Inc. v. Fulton Industrial, Inc.*, 285 A.2d 412, 415 (Del. 1971) (emphasis added). Here, Gonzalez intended to sign the May 4 Agreement and have it notarized. He intended to do the act, which manifested mutual assent.

The Trial Court misapplied the law. It considered the Parties' "intention to accept" instead of limiting its examination to "the Parties' objective manifestation of assent." *See e.g.* Ex. B at 44-45, 59; *Trexler*, 2017 WL 2665059, at *3; *Industrial Am.*, 285 A.2d at 415.

Under the "objective theory of contract law, the unexpressed, subjective intention of a party is irrelevant." *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986); *see also Acierno v. Worthy Bros. Pipeline Corp.*, 693

A.2d 1066, 1070 (Del. 1997) ("The unexpressed subjective intention of a party is therefore not relevant."). "[M]otive in the manifestation of assent is immaterial." *Industrial Am.*, 285 A.2d at 415. Thus, the Trial Court was not permitted to consider Gonzalez's motivation for executing the May 4 Agreement, or his belief about its validity, unless Gonzalez expressed those motivations and beliefs in an objectively observable manner. He did not. The record does not contain *any* documentary or testimonial evidence indicating that Gonzalez expressed his motivations or beliefs concerning the May 4 Agreement in any manner, let alone an objectively observable manner.

Further, "courts in Delaware look for objective, *contemporaneous* evidence indicating that the parties have reached an agreement whether that be in the parties' spoken words or writings." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1230 n. 147 (Del. 2018) ("*Eagle Force I*") (emphasis added); *Sarissa Capital Domestic Fund LP v. Innoviva, Inc.*, 2017 WL 6209597, at *21, 22 (Del. Ch. Dec. 8, 2017) (court must look at objective contemporaneous evidence). The Trial Court erred in considering evidence that predated the execution of the May 4 Agreement by *eight years*. That evidence is not contemporaneous with the execution of the May 4 Agreement.[12]

[12] Contemporaneous means "existing, occurring, or originating during the same time." https://www.merriam-webster.com/dictionary/contemporaneous.

B. The Trial Court Misapplied Delaware Law.

Relying on *Voss on Delaware Contract Law*, §§ 2.05[1][c], 2.07[1][a] (Lexis 2020), the Trial Court explained: "there is no mutual assent where the parties do not intend to be bound." That mischaracterizes Delaware law and is an incomplete recitation of *Voss*. The full sentence states: "There is no enforceable contract if the parties do not intend to be bound *before a formal written agreement is drafted and signed.*" 1-2 *Voss on Delaware Contract Law* § 2.07 (emphasized portion omitted by Trial Court) (*citing Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) ("There is no enforceable contract if the parties do not intend to be bound before a formal written agreement is drafted and signed.")). Further, the Trial Court's reliance on *Innoviva*, 2017 WL 6209597, at *21, for the proposition that an oral agreement can be binding is misplaced. Here, the Parties prepared and executed notarized agreements. Neither Lynch nor his wife executed the Counterdocument. Ex. B at 50, n.230. Thus, the Counterdocument never became effective. The Trial Court erred by binding Lynch to a document that he did not sign. *See Anchor Motor Freight*, 716 A.2d at 156.

C. The Trial Court Relied on Subjective Evidence.

"Under the objective theory, 'intent' does not invite a tour through [the party's] cranium, with [the party] as the guide." *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. Jul. 9, 2002). The test

is not whether "a reasonable negotiator in Lynch's position could not have concluded that Gonzalez intended to be bound by the terms of the documents they created only to facially satisfy Argentine regulators." Ex. B at 88. Instead, the Trial Court was required to "examine the parties' objective manifestation of assent, not their subjective understanding." *Trexler*, 2017 WL 2665059, at *3. It is not what a party believed that is relevant, but what it said or did—*i.e.*, the objectively observable events. Accordingly, the Trial Court erroneously rejected the May 4 Agreement because it considered the following ***subjective*** evidence:

- "[a]t all times, Gonzalez operated under the ***belief*** that Lynch would, and did, execute the Counterdocument as promised." Ex. B at 45 (emphasis added). Gonzalez's mistaken ***belief*** is not relevant to determining assent to the May 4 Agreement.

- "[Gonzalez] was indifferent to their written terms because he always ***understood*** the 65% "purchase" to be a mutual farce to satisfy Argentine holding restrictions." *Id.* at 59 (emphasis added).

- "Gonzalez signed each document, ***believing*** that each was necessary to further the Parties' mutual scheme to facially satisfy Argentine law and that, therefore, each was a sham document with meaningless, non-binding terms." (Emphasis added). *Id.* at 35-36 (emphasis added).

The Trial Court erred: it relied on its perception of the Parties' unmanifested beliefs instead of limiting its examination to the observable manifestations of the Parties' assent.

D. The Objective Contemporaneous Evidence Establishes that the May 4 Agreement Is a Binding Contract.

The Parties agreed to the May 4 Agreement. It was signed by Gonzalez and notarized. "The face of this contract manifests the parties' intent to bind one another contractually. Both parties signed the contract and had the contract notarized." *Osborn*, 991 A.2d at 1158-59. Indeed, where "the putative contract is in the form of a signed writing, that document generally offers the most powerful and persuasive evidence of the parties' intent to be bound." *Eagle Force I*, 187 A.3d at 1230.

The record below contains the following "objective, contemporaneous evidence" of the Parties' intent to be bound:

- The May 4 Agreement is executed by Gonzalez (A-1782 (JX-67 at 3));
- Gonzalez admitted that he signed the May 4 Agreement for Televideo (A-1339);
- Lynch made, and Gonzalez accepted, the payments required under the May 4 Agreement's terms (A-1637 (JX-42), A-1813 (JX-70), A-2072 (JX-124)); and
- The May 4 Agreement is notarized (A-1781 (JX-67 at 2)).

The Parties did not introduce any other "objective contemporaneous evidence" concerning the execution or performance of the May 4 Agreement.

Here, the "most powerful and persuasive evidence of the parties' intent to be bound" (*Eagle Force I*, 187 A.3d at 1230), exists in the Parties' notarized contract. Further, the Parties performed the agreement exactly as written, including Lynch's

performance of the payment terms, and Gonzalez's acknowledgment—through tax filings—of Lynch's ownership. No party took action to the contrary until Gonzalez filed a false certificate with the Delaware Secretary of State on April 12, 2019, stating that Televideo owned 95% of GBH, prompting this litigation. A-2102 (JX-143).

E. The Trial Court Erred by Considering Non-Contemporaneous Evidence.

The Trial Court does not identify *any* objectively observable action or statement, made contemporaneously with the execution of the May 4 Agreement, indicating that the Parties did not intend the Agreement to be binding. None was offered at trial. Instead, the Trial Court assumed that Lynch lied or Gonzalez misapprehended the significance of the May 4 Agreement. Ex. B at 59. The Trial Court cannot assume facts; its decision must be based on evidence. *See* Section V, *below*. Not knowing or understanding the significance of an agreement is not a defense, particularly for a sophisticated party, such as Gonzalez. *See* Section II.C., *above*. To the extent that the Trial Court's findings turn on a 2009 email, it improperly relied on *non*-contemporaneous evidence: an email sent eight years earlier. *See, e.g.*, *Eagle Force I*, 187 A.3d at 1230 n.147 (*citing Black Horse Capital, LP v. Xstelos Holdings, Inc.*, 2014 WL 5025926, at *12 (Del. Ch. Sept. 30, 2014) and *Debbs v. Berman*, 1986 WL 1243, at *7 (Del. Ch. Jan. 29, 1986)) ("[C]ourts in Delaware look for objective, contemporaneous evidence indicating that the parties

have reached an agreement"); *Innoviva, Inc.*, 2017 WL 6209597, at *21, 22 (court must look at objective contemporaneous evidence).

1. The Terms of the May 4 Agreement Are Definite.

The Trial Court did not address whether the contract terms are definite. However, the May 4 Agreement states that Lynch owns 65% of GBH, specifies the amount he is to pay, the payment schedule and applicable interest rate. *See* A-1780 (JX-67). In *Eagle Force I*, this Court found a contract to be sufficiently definite despite having multiple blanks for key terms and missing schedules. *Eagle Force I*, 187 A.3d at 1231. The May 4 Agreement exceeds the *Eagle Force I* standard.

2. There Is Consideration for the May 4 Agreement.

The Trial Court did not determine whether there was consideration for the May 4 Agreement. Ex. B at 88 n.405. The May 4 Agreement, however, contains Lynch's promise to pay more than $8.4 million plus interest on December 31, 2021. *See* A-1780 (JX-67). An agreement to make future payments is consideration. *See, e.g.*, *First Mortg. Co. of Penn. v. Fed. Leasing Corp.*, 456 A.2d 794, 795-96 (Del. 1982) ("consideration for a contract can consist of either a benefit to the promiser or a detriment to the promisee"); 3 *Williston on Contracts* § 7:21 (4th ed.) ("so long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant."). As Morelia admitted, Lynch's promise to pay is enforceable. A-1149:3-8. It meets the

requirement that consideration exist. *Osborn*, 991 A.2d at 1159 ("we limit our inquiry into consideration to its existence and not whether it is fair or adequate").

IV. THE TRIAL COURT ERRED BY RELYING ON OVERTURNED CASE LAW CONCERNING WHETHER CONTRACTS THAT ALLEGEDLY RESULT FROM FRAUDULENT INDUCEMENT ARE VOID OR VOIDABLE.

Question Presented

Whether the Trial Court erred by finding that a contract obtained through fraudulent inducement was *void* as opposed to merely being *voidable*, particularly where a party (1) took no action to invalidate that contract for more than a year; and (2) confirms the facts stated in the contract under penalty of perjury. A-2292-5; A-2204-5.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Airgas*, 8 A.3d at 1188.

Merits of the Argument

A. Assuming, Arguendo, That The May 4 Agreement Was Induced Through Fraud, It Was Merely Voidable, Not Void.

The Trial Court erred by relying on *Fogel v. U.S. Energy Systems, Inc.*, 2007 WL 4438978, at *3 (Del. Ch. Dec. 13, 2007), and similar decisions to conclude that the May 4 Agreement was void. This Court expressly overruled *Fogel* in *Klaassen v. Allegro Development Corp.*, 106 A.3d 1035, 1047 (Del. 2014). The Trial Court's reliance on *Martin v. Med-Dev Corp.*, 2015 WL 6472597 (Del. Ch. Oct. 27, 2015) (director's resignation void where obtained under false pretenses), *Hockessin*

Community Center., Inc. v. Swift, 59 A.3d 437 (Del. Ch. Oct. 5, 2012) (directors' resignations void because obtained under false pretenses), *Naughty Monkey LLC v. Marine Max Northeast LLC*, 2011 WL 4091851, at *3 (Del. Ch. Aug. 31, 2011) (party *may* escape contract induced under false pretenses) (emphasis added), and *Schroder v. Scotten Dillon Co.*, 299 A.2d 431, 436 (Del. Ch. 1972) (quorum obtained through trickery is not valid), for the proposition that a contract obtained through misrepresentation is void, was error. In *Klaassen*, this Court held that to "the extent that those decisions can fairly be read to hold that board action taken in violation of an equitable rule is void … we overrule them." *Klaassen*, 106 A.3d at 1047.

The "disconnect between the use of the term 'void' and acknowledgement that the deceptive action was curable (and, thus, voidable), renders these cases infirm as precedent on this specific issue." *Id*. Thus, setting aside the binding nature of the anti-reliance clause in Section 2.05 (*see* Section II.B., *above*), the Trial Court's holding that the May 4 Agreement was void because of Gonzalez's claimed reliance on the Counterdocument and related representations, was error. Such reliance would merely render the May 4 Agreement *voidable*.[13] *See Klaassen*, 106 A.3d at 1045-47.

[13] This finding is also erroneous because it improperly relies on subjective evidence. *See* Section III, *above*.

Thus, the Trial Court committed error by concluding that the May 4 Agreement was void. To the extent that Gonzalez's assent to the May 4 Agreement was procured through fraud, the May 4 Agreement was merely voidable. This Court must instruct the Trial Court to follow *Klaassen*.

B. Appellees Acquiesced to the May 4 Agreement.

Assuming *arguendo* that Lynch induced Gonzalez into executing the May 4 Agreement through false promises (and that the anti-reliance provision is not binding), under *Klaassen*, the Trial Court was required to determine whether Appellees acquiesced to the May 4 Agreement. Because of its improper reliance on *Fogel*, the Trial Court failed to consider that issue. The Trial Court's findings compel the legal conclusion that Gonzalez and Televideo acquiesced to the May 4 Agreement.

In *Klaassen*, this Court explained:

> A claimant is deemed to have acquiesced in a complained-of act where he: has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; ***or*** (2) freely does what amounts to recognition of the complained of act; ***or*** (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved.

106 A.3d at 1047 (emphasis added). "For the defense of acquiescence to apply, conscious intent to approve the act is not required, nor is a change of position or resulting prejudice." *Id.*

Gonzalez had full knowledge of the material facts and his rights:

- "In February 2018 Lynch … convey[ed] the following message to Gonzalez: '[A]s of this date, Argentina will no longer answer to Miami. It's going to be handled as an independent operation, and he [Gonzalez] will be treated as any of the other shareholders.'" Ex. B at 73-74.

- "In February 2018, Lynch drafted a new limited liability company agreement for [GBH], naming himself as [GBH]'s sole manager." *Id.* at 75. Lynch sent Gonzalez that document. *Id.* at 126.

- On March 2, 2018, Lynch changed [GBH]'s registered agent in Delaware through an amendment to [GBH]'s Certificate of Formation." *Id.* at 75.

After receipt of this information, Gonzalez authorized the filing of GBH's 2017 tax return on March 10, 2018, which identifies Lynch as the 65% owner of GBH. A-2083 (JX-135). In so doing, Gonzalez represented under penalty of perjury that the return was accurate. A-2083 (JX-135), A-2084 (JX-138). He made that representation after reviewing the return with his accountant. A-1293:17-19, A-1297:16-18.

More than thirteen months later, on "April 11, 2019, Gonzalez responded." Ex. B at 75. He signed a certificate of amendment. A-2102 (JX-143). He filed it with the Delaware Secretary of State on April 12, 2019. *Id.*

1. Gonzalez and Televideo Remained Inactive for a Considerable Time.

Between February 2018 and April 11, 2019—more than 13 months—Gonzalez and Televideo did nothing to dispute Lynch's assertion of ownership. A 13-month period is a "considerable time." *See, e.g.*, *Nevins v. Bryan*, 885 A.2d 233, 247 (Del. Ch. May 4, 2005), *aff'd*, 884 A.2d 512 (Del. 2005) (more than one-year delay in objecting was considerable time). Gonzalez's and Televideo's 13-month delay meets the *Klaassen* standard of "remain[ing] inactive for a considerable time." 106 A.3d at 1047. Appellees acquiesced.

2. Gonzalez and Televideo Freely Recognized the May 4 Agreement.

Gonzalez admitted that, after learning Lynch had asserted his 65% ownership and majority control over GBH, he executed IRS Form 8879 authorizing his accountant to file GBH's tax return electronically. A-1348:18–A-1349:5. Form 8879 states:

> *Under penalties of perjury*, I declare that I am a partner or member of the above partnership and that *I have examined a copy of the partnership's 2017 electronic return of partnership income and accompanying schedules* and statements and *to the best of my knowledge and belief, it is true, correct, and complete*.

A-2083 (JX-135) (2017 IRS Form 8879-PE) (emphasis added). Gonzalez's accountant reviewed GBH's return with Gonzalez. A-1293:17-19. Gonzalez executed Form 8879-PE on March 10, 2018, ***after*** gaining full knowledge of Lynch's

position. A-2083 (JX-135); A-2084 (JX-138). GBH's 2017 tax return states that Lynch owns 65% of GBH's capital, profits and losses. A-2093 (JX-138 at 10). Gonzalez thus freely recognized the substance of the May 4 Agreement. *Klaassen*, 106 A.3d at 1047 (party acquiesces when it "freely does what amounts to recognition of the complained of act").

3. Gonzalez and Televideo Affirmatively Acted Inconsistently With Any Purported Repudiation of the May 4 Agreement.

The third approach to demonstrating acquiescence under *Klaassen* is to establish that the party "act[ed] in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." 106 A.3d at 1047. Gonzalez's affirmation, under penalty of perjury, that GBH's tax return was, "to the best of [his] knowledge and belief … true, correct and complete" (A-2083 (JX-135)) is inconsistent with his subsequent position that Lynch does not own any part of GBH. Appellees acquiesced to the May 4 Agreement.

* * *

This Court must reverse, remand, and instruct the Trial Court to enter judgment in accordance with *Klaassen*.

V. THE TRIAL COURT'S FACTUAL FINDINGS ARE ERRONEOUS BECAUSE THEY ARE NOT SUPPORTED BY EVIDENCE.

Questions Presented

Whether the Trial Court erred by making factual findings that: (1) are not supported by citation to the record; (2) are contradicted by the record; or (3) fail to acknowledge or address admissions made by the Parties. A-2177-90.

Standard and Scope of Review

The standard and scope of review is clear error where this Court is asked to review a Trial Court's factual findings. "The Court of Chancery's factual findings will be accepted if 'they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'" *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (quoting *Levitt v. Bouvier*, 287 A.23 671, 673 (Del. 1972) and reversing and remanding where the "Court of Chancery finding … was based on faulty factual predicates, unsupported by the record.").

Merits of the Argument

This Court cannot accept the Trial Court's unsupported findings. Simply, "[w]hen the evidence does not support the findings of the court below, however, this court sitting in review of an equity cause may make its own factual findings and direct the court below to give effect to them by the entry of a judgment. We have this authority and are restrained in its exercise only by our sense of judicial

propriety." *Consolidated Fisheries Co. v. Consolidated Solubles Co.*, 35 Del. Ch. 125, 135 (Del. 1955) (reversing findings not supported by evidence).

Although this Court "will not upset a trial court's factual findings if they are supported by the record and are the product of an orderly and logical deductive process," where, as here, "the Court of Chancery's critical findings were not adequately supported by the record," those findings "*were erroneous*." *Candlewood*, 859 A.2d at 1000-1 (emphasis added). Thus, where the Trial Court's findings "lack proper record support" or "there is no identified record support," they are erroneous. *Id*. at 1001-2.

A. The Court Exceeded Its Jurisdiction With Respect to Certain Factual Conclusions.

The Trial Court exceeded its jurisdiction by resolving issues outside of its jurisdiction and issues that were not raised the Parties' pleadings. The Trial Court's finding that, "Gonzalez permitted Lynch to hold 5% of IMC in name only, that Lynch never paid valuable consideration for that interest, and that the Parties never intended for Lynch to be the true owner of that interest. I find that Lynch held 5% of IMC for Gonzalez's benefit and pursuant to a similar agreement under which he held 65% of Belleville" (Ex. B at 18-19), was beyond the Trial Court's jurisdiction and was not put at issue in the parties' pleadings. IMC, a GBH subsidiary, is an Argentine entity and disputes concerning its ownership cannot be resolved within the limited scope of a proceeding brought pursuant to 6 *Del. C.* § 18-110. Moreover,

the Trial Court cites only to JX-117 at 161 (A-2015) in support of that finding, but that document is insufficient to support such a finding.

B. The Trial Court's Fact Findings Were Erroneous Because They Cannot Be Squared With Appellees' Admissions.

The Trial Court's fact findings are erroneous because "they ignore admissions by" Appellees. *Candlewood*, 859 A.2d at 1001. Indeed, the "Court of Chancery's opinion does not come to grips with, or acknowledge, those admitted facts." *Id.* The Trial Court did not address the following admissions by Appellees:

- Gonzalez's daughter, Morelia, as GBH's secretary, signed a certificate submitted to the Argentine Regulators identifying Lynch as the 65% owner of GBH.
    - Gonzalez testified that his daughter's certification was truthful. A-1352-53.
    - Gonzalez's daughter testified that she was truthful in making that certification. A-1146-47.
- Gonzalez admitted that he sold 5% of GBH to Lynch. A-1315:10-14.
- GBH's Schedule K-1's stating that Lynch owned 65% of GBH. *See, e.g.*, A-1526 (JX-17 at 2), A-1646 (JX-47 at 5), A-1658 (JX-49 at 5), A-1684 (JX-56 at 19), A-1706 (JX-61 at 12), A-1829 (JX-89 at 15)A-2093 (JX-138 at 10).

Appellees' admissions contradict the Trial Court's overarching conclusion that Televideo's sale of 65% of GBH to Lynch was a "sham." Accordingly, this Court must reverse.

C. Erroneous Findings Related to Section 2.05 of the May 4 Agreement.

The Trial Court made numerous erroneous findings concerning the execution and intent of the May 4 Agreement and, in particular, Section 2.05. The most egregious examples include:

- "But in the event regulators began to inquire about the Counterdocument, Lynch suggested they rely on the May 4th Restructuring Agreement and Section 2.05 'in order to avoid any inconvenience or uncomfortable questioning, on behalf of the regulators' and so that 'there [would not] be any doubts about' the sham transfer." Ex. B at 62.

- "This elaborate explanation was a ruse. Lynch included Section 2.05 to justify the Counterdocument's eventual destruction and absence, and to protect himself in the event it resurfaced." *Id.* at 63

- "To the extent Lynch discussed Section 2.05 with Gonzales, the evidence shows that he more than likely implied it was a mere formality in furtherance of their joint scheme." *Id.* at 100-1.[14]

The record does not support these findings. Other than Gonzalez's admission that he executed the May 4 Agreement (A-1339), Lynch was the only witness to testify concerning the substance of, and reasons for execution of, the May 4 Agreement. Lynch explained that the May 4 Agreement was prepared to protect Lynch from Gonzalez making a false claim that he had a Counterdocument or that

[14] The Trial Court did not provide any citation to the record for this conclusion. The record does not contain any evidence of what Lynch said to Gonzalez or Gonzalez said to Lynch concerning the May 4 Agreement.

Lynch did not own 65% of GBH. A-1108-9.[15] Appellees offered no testimony to the contrary. Although not specific to the May 4 Agreement, Gonzalez testified that, generally, Lynch "very briefly" described documents before he signed them. A-1307:4-6. Gonzalez did not specify what, if anything, Lynch said about the May 4 Agreement (or any of the Parties' other agreements).

D. Erroneous Findings Concerning JX-7—the Gonzalez Family's Certification that Lynch Owned 65% of GBH.

The Trial Court found that "Morelia testified that she did not receive JX-7 (A-1469) or any other paperwork indicating that there had been a 65% transfer in 2007. She did not see a copy of JX-7 until 2008 or 2009, when Lynch informed her and Gonzalez that they needed to alter Belleville's ownership structure to comply with Argentine law." Ex. B at 27. The Trial Court misstated Morelia's testimony: Morelia testified that she *did* receive JX-7 in 2007. *See* A-1116 ("Q: Did you ever receive a copy of Exhibit 7? A: Yes. Q: Was there anything forwarded to you through your father with regards to an email, *other than this document*, with regards to the 65 percent share back in 2007? A. No." (emphasis added)). Similarly, the Trial Court held that "Gonzalez credibly testified that, aside from signing JX-7 at Lynch's direction, he had no involvement with its preparation or filing." Ex. B at

[15] The May 3 Agreement was the version of the Agreement that was intended for presentation to the regulators and did not contain Section 2.05. *See* A-898:10-16.

27. That testimony is not in the record. Equally unsupported is the Trial Court's finding that the "preponderance of credible evidence demonstrates that Lynch drafted and filed JX-7 in the context of the final Hadad acquisition, and presented it to Gonzalez under the guise that it was needed to carry out the final steps of that transaction." Ex. B at 27. The only testimony, however, is that Marco Cuono, Gonzalez's son-in-law, prepared the document. *See* A-960:19-22, A-1213:17-24.

E. Erroneous Findings Concerning the Signing of the Counterdocument.

The Counterdocument was a draft affidavit. It was never executed. It was prepared in a form to be executed by Lynch and Lynch's wife. *See* A-1536 (JX-25). It does not have a place for Gonzalez to sign. *See* A-1537. Despite these facts, the Trial Court erroneously concluded that "*Gonzalez signed* the Counterdocument shortly after receiving the October 22 Email." Ex. B at 46; A-1531 (JX-24). Further, there is no support for the Trial Court's holdings that, "Lynch then retrieved the Counterdocument from Gonzalez and took it with him to Argentina under the guise that he needed his wife's signature" (*id.* at 46-47) and "[s]till, sometime after taking the Counterdocument to Argentina, Lynch returned the Counterdocument, *signed only by Gonzalez*, to Belleville's offices in Miami" (*id.* at 49) (emphasis added).

The Trial Court also incorrectly found that "Lynch insisted in the October 2009 email that the counterdocument should be signed tomorrow." *Id.* at 46. It relied on an email where Lynch said he "urgently need[ed]" the two purchase

agreements and transfer notifications. A-1532 (JX-24 at 2) (identifying documents 2, 3, 4, and 5 and being urgently needed; the Counterdocument was document 1). That email provided options for Lynch and his wife to sign the Counterdocument, but does not suggest any need for Gonzalez to sign. *Id*. Moreover, contrary to the Trial Court's findings, no witness testified that Gonzalez signed the Counterdocument. Simply, the Counterdocument was not a contract, but rather an affidavit to be executed only by Lynch and his wife. *See* A-1537 (JX-25 at 2). As the Trial Court properly found, Lynch and his wife never executed the document. Ex. B at 50 n.230. No witness asserted that Lynch brought the Counterdocument to Argentina. Two of Appellees' witnesses claimed that a counterdocument had arrived by mail. *See* A-1406:22–A-1407:24 (delivered by FedEx)); A-1370, A-1374 (delivered by mail).[16]

F. The Trial Court Erroneously Concluded that Documents were Created to Bolster a Sham Transaction.

The Trial Court held that "[i]n February 2010, Lynch sent Gonzalez a revised addenda, JX-12, noting that when they executed the original they 'did not know what credits were going to be assigned,' that the chosen January 2008 date on the

[16] The conclusion here does not make sense. There was no use for the Counterdocument in Argentina. Further, Morelia, testified that she placed the document in a safe deposit box, that the only time it was moved was to another safe deposit box, and that it was never copied or scanned because Appellees did not want anyone else to read it. A-1132-3.

documents 'could be modified,' and that a number of loose ends remained in the sham." Ex. B at 52. There is no support for this conclusion. The email cited by the Trial Court (A- 1554 (JX33 at 48)) did not state that the date of the addenda could be modified, nor did it reference any loose ends or any sham. The original (draft) Addenda was never executed. Moreover, the Trial Court's citation to Lynch's testimony only supports Lynch's uncontradicted testimony explaining the reasons for the revisions to the Addenda: (1) it reflected a change in the structure of the deal from relying on a Counterdocument to a traditional security instrument; and (2) it identifies the proper lenders. *Compare* A-1541 (JX-30) *with* A-1491 (JX-12). Moreover, the revised Addenda was executed contemporaneously with the Complement (the security interest). *See* n.4, *above*.

Concerning the Purchase Agreements, the Trial Court held—without evidence—that "Lynch intended those documents to bolster his story that he had purchased the 65% interest in September 2007 and January 2008." Ex. B at 41. "[T]hose documents gave Lynch … a majority 65% position in Belleville." *Id.* at 10.[17] The Trial Court erred in concluding that the various restructuring agreements were to maintain a façade. There is nothing in the record to show that "Lynch

[17] The Trial Court held that Lynch obtained "Gonzalez's ignorance" in procuring Gonzalez's execution of the Purchase Agreements. That is not correct. Gonzalez knew he was executing agreements that transferred 65 percent of GBH to Lynch. Even considering Gonzalez's theory of this case—that Lynch was to be a nominee—Gonzalez had to transfer title to Lynch. He was not "ignorant" of that fact.

suggested that he and Gonzalez restructure his 'debt' *to keep up with appearances*" (Ex. B at 54 (emphasis added)) or that "[i]n 2017, Lynch and Gonzalez agreed that they again needed to address Lynch's default to *maintain the transfer's apparent legitimacy*" (*id.* at 56 (emphasis added)). To the contrary, the record shows that the Parties restructured debt for three reasons: (1) Lynch was in default and needed to cure that default; (2) Gonzalez compensated Lynch for services rendered through a debt reduction; and (3) the Parties adjusted the financial terms. *See, e.g.*, A-1722 (JX-64); A-892:24–A-893:4. There is no support in the record for any alternative explanation.

G. The Trial Court Had No Basis for Its Holdings about Lynch's Statements to Gonzalez.

No witness testified as to what was said when Gonzalez executed the Restructuring Agreements, the Addenda or the Complement. Indeed, Gonzalez testified that "[n]ormally, the way [Lynch] did it was that he had already taken care of everything and not to worry about it." A-1306:22–A-1307:3. Despite this testimony, the Trial Court concluded:

- "When Lynch brought Gonzalez legal documents to sign, Lynch would summarize them briefly and offer legal and business explanations as to why Gonzalez's signature was required." Ex. B at 22-23.
- "Gonzalez and Morelia executed JX 37 because Lynch informed them that it was needed to comply with Argentine law and assured Gonzalez that there would be a counterdocument." *Id.* at 34-35.

- "Lynch[] represent[ed] that the documents were necessary to further a Belleville business objective and were complete" *Id.* at 23

The Trial Court, however, provides no citation to the record that support these holdings. There is none. No witness provided testimony as to what Lynch said in connection with the execution of any document.

- "Lynch presented the May 4th Restructuring Agreement to Gonzalez as another fake document he needed to sign to paper the transfer. In particular, he presented it as protecting Belleville in the event regulators found the Counterdocument." Ex. B at 100.

- "Lynch presented the May 4th restructuring Agreement to Gonzalez for his signature under false pretenses." *Id.* at 100.

- "Gonzalez viewed [the May 4 Agreement] as another sham document to further their mutual scheme, and signed." *Id.*

Gonzalez did not testify that Lynch said anything to him about the content or purpose of the May 4 Agreement. The Trial Court failed to identify support for these conclusions. Moreover, to the extent that the Trial Court made a finding as to what Gonzalez "believed" that finding is not relevant to the determination of whether he assented to the May 4 Agreement. *See* Section III, *above*. Unless Gonzalez objectively manifested his belief at the time of execution, his subjective belief cannot be considered. *Id.* The record contains no evidence that he did anything to manifest that purported belief.

H. Lynch's Purchase Price was Based on Gonzalez's Purchase Price.

The Trial Court held, without any basis in the record, that Lynch's "Purchase price [was] based not on the actual value of the 65 percent interest, but instead on the readily calculable amount of debt." Ex. B at 40, n.181. It also determined that the Parties set the purchase price by "tethering purchase price to arbitrary debt amounts." *Id.* at 43 n.193. The record does not support this conclusion.

Lynch's purchase price was a pro rata share of Gonzalez's purchase price for the Argentine operation. *See* n.3, *above*. It was fair value. *See DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 369 (Del. 2017) ("the fair market value of a company is what it would sell for when there is a willing buyer and willing seller without any compulsion to buy").

I. The Parties Did Not Manifest an Intent to Form a "Sham" Transaction.

The Trial Court found: "Lynch never told Gonzalez, and Gonzalez never agreed, that Lynch would not sign or perform under the Counterdocument as he initially represented" (Ex. B. at 99) and that the "preponderance of the objective evidence demonstrates that both Lynch and Gonzalez mutually assented to the terms of the sham transfer, which included their agreement to execute sham documents to create the appearance of a transfer, together with a Counterdocument precluding transfer of any actual beneficial interest" (Ex. B. at 87). Yet, Lynch did not execute the Counterdocument—refusing to sign the Counterdocument was an objective

manifestation of Lynch's refusal to agree. *See Anchor Motor Freight*, 716 A.2d at 156. Moreover, Gonzalez did not contradict Lynch's testimony. A-1303-61. The Trial Court cannot enter findings that are contrary to the only evidence in the record.

J. The Purported "Sham" Transaction Was Not Lawful and Lynch Never Advised Gonzalez It Was Permissible.

The Trial Court found: "Lynch assured Gonzalez that the solution would ensure compliance and protect Gonzalez and Televideo's collective 100% interest in Belleville, just as it had protected Gonzalez's interest in other companies in the past" (Ex. B at 32) "by drafting additional sham language that he told Gonzalez would address the Counterdocument" (Ex. B at 86). There is no support for this in the record. Appellees' witnesses admitted that the use of the Counterdocument with regulators would not have satisfied regulatory requirements. A-1404:18-23.

K. There Is No Evidence That Lynch Sought to "Paper The Record" in a Grand Scheme.

With respect to the Parties' various restructuring agreements, the Trial Court—without citation to the record—found that Lynch created them "to identify credible creditors, legitimize the transfer, and erode the significance of the counterdocument." Ex. B at 51. The Trial Court also found that the "May 2016 Restructuring Agreements were simply the latest documents that Lynch prepared, or directed to be prepared, and advised Gonzalez to sign in furtherance of their agreed-upon 'solution' to satisfy Argentine laws." Ex. B at 56. The Trial Court, however,

does not identify any evidence in support of these conclusions. Indeed, the only evidence concerning the purpose of the restructuring agreements, including the May 2016 Restructuring Agreements, is that they were created to address Lynch's defaults, adjust payment terms, interest rates, or other wholly legitimate purposes. The purpose of these agreements is apparent on the face of each agreement and required only that the Trial Court give effect to their plain terms.

L. Other Miscellaneous Factual Errors by the Trial Court.

The Trial Court concluded that as "of late February 2018, other advisors and employees of Belleville and its subsidiaries—including Lynch's subordinates—understood the same: Gonzalez, as Belleville's owner, controlled, directed, and financed the Belleville family's operations." Ex. B at 20. The Trial Court's citations to the record, however, do not support that conclusion. The Trial Court cited the testimony of Gomez, Gonzalez's personal accountant, to support that finding. Gomez, however, testified that Lynch held 65% of GBH's capital, losses, and profits. A-1292. The Trial Court also relied on Appellant's witness Marcos Landaburu, Esq., but he testified that GBH was not part of Albavision and "I wasn't in charge of the operation in Argentina, I don't know exactly." A-1279-80. The Trial Court did not identify any other support for this conclusion. There is none.

VI. THE TRIAL COURT ERRED WHEN IT FOUND THAT LYNCH ACTED IN BAD FAITH AND SHIFTED ATTORNEYS' FEES.

Questions Presented

Whether the Trial Court erred by concluding that Lynch acted in bad faith, and shifting attorneys' fees, when that legal conclusion is based on factual findings that are unsupported by the record and ignores admissions made by Appellees, and where Lynch's position is supported by executed, notarized, contracts. A-2177-90; A-2285-90.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Airgas*, 8 A.3d at 1188. Additionally, this Court "will review mixed question of fact and law *de novo*, to the extent that we examine the trial judge's legal conclusions, and for clear error, to the extent the trial judge's decision is based on factual findings." *Miller*, 4 A.3d at 373.

Merits of the Argument

Lynch commenced this litigation in good faith and consistent with his belief that he had purchased 65% of GBH from Televideo. Lynch's claim is based on notarized agreements that his contractual counterparty executed. Moreover, Lynch already has paid more than $4 million towards that purchase price and has more than $8 million plus interest that will come due on December 31, 2021. Further, although there is no question that the Parties *discussed* a possible transaction where Lynch

would execute a counterdocument, they ultimately agreed on a different transaction. Indeed, as the Trial Court properly found, Lynch never executed the Counterdocument. Further, of the original eight documents attached to the 2009 email (A-1531 (JX-24)), only four—the two purchase agreements and the corresponding notices to GBH—were executed. Of the remaining four documents, three were never executed and the fourth, after heavy, substantive, revisions was executed in February of 2010 in a conjunction with the Complement—a document that had not been drafted in October of 2009.

The revisions to the Addendum and the creation of the Complement establish that the deal encapsulated by the attachments to the October 22 email was not the Parties' actual transaction. The changes to that original transaction—unrecognized by the Trial Court—establish Lynch's good faith.

Separately, in 2017, Gonzalez and Televideo agreed in an anti-reliance provision, that they would not rely on a counterdocument. Lynch is, and was, entitled to rely on the validity of that written, notarized agreement.

Accordingly, the finding that Lynch acted in bad faith was erroneous. Moreover, the Trial Court lacked both a factual and legal basis for awarding fees. The Court must reverse.

CONCLUSION

For all the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the Judgment in accordance with the arguments outlined in this appeal.

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