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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AB STABLE VIII LLC, Plaintiff Below, Appellant, v. MAPS HOTELS AND RESORTS ONE LLC, MIRAE ASSET CAPITAL CO., LTD., MIRAE ASSET SECURITIES CO., LTD., MIRAE ASSET GLOBAL INVESTMENTS, CO., LTD., and MIRAE ASSET LIFE INSURANCE CO., LTD., Defendants Below, Appellees.	)	No. 71, 2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0310-JTL

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NATURE OF PROCEEDINGS

This appeal arises from a final judgment by the Court of Chancery (Laster, V.C.) after a five-day trial in a contract dispute involving a $5.8 billion sale of a business that owns fifteen luxury hotels. The court considered the live testimony of six fact witnesses and eight experts, the deposition testimony of twenty-nine fact witnesses and seventeen experts, and 5,277 exhibits. Based on that voluminous record, the court granted judgment to Defendant-Appellee MAPS Hotels and Resorts One LLC ("Buyer") and the other defendants. As set forth in its careful and thorough 242-page opinion, the court found that Plaintiff-Appellant AB Stable VIII LLC ("Seller"), a subsidiary of Chinese company Anbang Insurance Group, Ltd., failed to satisfy two key conditions to closing the Sale and Purchase Agreement between Buyer and Seller ("Sale Agreement"). Accordingly, the court ruled that Buyer had properly terminated the Sale Agreement. The decision is well grounded in Delaware law and amply supported by the trial record. Seller's arguments seeking to overturn the judgment would rewrite the terms of the Sale Agreement and disregard the court's well-reasoned findings of fact and credibility determinations. The judgment should be affirmed.

First, the court correctly ruled that Seller failed to satisfy the condition that it "shall have ... complied in all material respects with all covenants and conditions required by this Agreement." A2950 (§ 7.3(a)). Those covenants include the

ordinary course covenant, which provides that, absent Buyer's "prior written consent," "the business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects." A2932-33 (§ 5.1). The court found that Seller had breached the ordinary course covenant by making extraordinary and unprecedented changes to its business in response to the COVID-19 pandemic—all without seeking or obtaining Buyer's prior consent. Seller does not contest the court's factual findings or its own witnesses' concessions that the changes departed dramatically from past practice, including shutting down two hotels, operating the remaining hotels in a "quasi-catatonic" or "closed but open" state, and laying off or furloughing over 5,200 full-time employees. Op. 90, 172, 180, 181. Nor does Seller deny that it made those changes without Buyer's prior consent. Seller argues only that it should have been allowed to make these changes because "the ordinary course of business consistent with past practice in all material respects" should not be construed in accordance with its plain meaning and prior Delaware authorities.

The trial court rightly rejected that argument. The court correctly interpreted the ordinary course covenant in accord with its plain language and well-settled Delaware law holding that such covenants exist to ensure that sellers do not unilaterally make material departures from normal and routine business operations in the period between signing and closing. This is a textbook case of such unilateral

departure. The court correctly rejected Seller's efforts to rewrite the ordinary course covenant to include the qualifier that reasonable efforts to run the business in a materially changed state are good enough. The court likewise correctly declined Seller's suggestion that the court read the ordinary course covenant out of the contract by incorporating into it the contract's separate material adverse effects clause. Under settled Delaware law, Seller may not rewrite the plain language of the Sale Agreement or insert qualifiers into a covenant where none exists.

Nor does Seller have any plausible argument that its breach was immaterial because Buyer could not have reasonably withheld consent. As the court correctly observed, "[c]ompliance with a notice requirement is not an empty formality." Op. 187. Notice and consent provisions like those in the Sale Agreement enable a buyer to engage in dialogue with a seller and participate in decisions that will materially change the business from the one it agreed to buy. Seller's attempt to trivialize (OB 42) its disregard for its notice obligation and Buyer's consent rights as a mere "foot fault" is an affront to the terms of the ordinary course covenant and the important policy it protects.

Second, and independently, the trial court correctly ruled that Buyer was entitled to terminate the Sale Agreement based on the failure of a title insurance condition that the parties specifically negotiated on the unusual facts of this case. The background to this ruling was a jaw-dropping saga in which the court found that,

"[p]ut simply," Seller and its counsel "committed fraud about fraud" concerning title to the hotels. Op. 41. The court also found no fewer than twenty instances in which Seller or its counsel had been untruthful or intentionally misleading.

To simplify, unknown to Buyer, a Chinese national named Hai Bin Zhou a/k/a "Andy Bang" and various affiliated persons and entities had a history going back to 2008 of asserting intellectual property claims against Seller's parent Anbang on three continents, through respectable counsel, and meeting with some success. In the wake of the Chinese government's arrest and conviction of Anbang's CEO and founder, Zhou and affiliated parties asserted that they owned nearly all of the hotels pursuant to an agreement under the Delaware Rapid Arbitration Act ("DRAA agreement") to resolve their prior intellectual property claims against Anbang. Allegedly pursuant to the DRAA agreement, deeds transferring title to those hotels to Zhou-related entities were recorded in California. And Zhou and his affiliates brought litigation to enforce a supposed arbitration award in the California Superior Court and the Delaware Court of Chancery and Superior Court (the "DRAA litigation"). Seller's parent defended that litigation while the sale was pending, all without any disclosure to Buyer.

As the court found, rather than inform Buyer of these troubling issues, Seller and its counsel actively misrepresented and concealed them from Buyer. Seller knew that these facts, if revealed, would prevent Buyer from obtaining complete title

insurance and securing the financing necessary to close the deal. It described the situation to law enforcement at the time as a "sophisticated fraud scheme." Op. 33. Seller now seeks to minimize the DRAA agreement and related court actions as "ludicrous," "nonsensical," and "obvious" fraud. But the trial court, which also presided over the Chancery action to enforce the DRAA agreement, disagreed. It found that Buyer experienced legitimate "alarm bells" about the effect on title (Op. 212), and that Seller and its counsel had engaged in a cover-up that "destroyed their own credibility by initially withholding information about the Fraudulent Deeds, then providing misleading half-truths about their origins, and later failing to disclose" the DRAA litigation (Op. 215).

Buyer knew none of these alarming facts. Buyer learned of the fraudulent deeds only shortly before entering the Sale Agreement. The resulting cloud on title destroyed Buyer's attempt to secure financing at signing notwithstanding Seller's misleading portrayal of the issue at the time as just a trivial scam by a "twenty-something-year-old Uber driver with a criminal record" (Op. 40). The parties addressed this risk to title by drafting a new specific provision in the Sale Agreement related to the fraudulent deeds. To protect Buyer, that provision conditioned Buyer's obligation to close on both the expungement of the fraudulent deeds from the public record and the issuance of title insurance that did not exclude the fraudulent deeds from coverage. A2951 (§ 7.3(c)). As the court found, while the expungement

condition was eventually satisfied, the title insurers never issued the required title insurance policy.

To the contrary, months later, when Buyer, its lenders and the title insurers belatedly learned what Seller had been hiding—including that Seller had engaged in months of litigation about the undisclosed arbitration agreement—the title insurers sensibly protected themselves. They issued title commitments containing a broad exception to coverage of defects in title related to the DRAA agreement and anything arising from or disclosed in the DRAA litigation. The court found, based on the plain language of the title commitments, the unanimous testimony of both sides' experts, and the credible testimony of Buyer's real estate counsel, that the exception encompassed the fraudulent deeds. Accordingly, the court ruled that the title insurance condition failed, giving Buyer a separate and independent basis to terminate.

Both rulings are legally correct. Seller asserts no factual error as to the ordinary course ruling and shows none as to the title insurance ruling. To prevail on appeal, Seller must overturn both rulings. It cannot overcome either. The outside termination date (of either June 10 or September 10, 2020) has long passed through no fault of Buyer, rendering futile Seller's continued efforts to seek specific performance. This Court should affirm the judgment for Buyer.

SUMMARY OF ARGUMENT

(1) Denied. The trial court correctly ruled that Seller breached the ordinary course covenant by making "massive" and "unprecedented" changes to the hotels' operations without Buyer's prior consent. The court followed settled Delaware law in construing the contractual phrases "only" in the "ordinary course of business" and "consistent with past practice" in accordance with their plain meaning and by enforcing the "Buyer's consent" provision as written. As correctly applied by the court, the ordinary course covenant required Seller to obtain Buyer's consent before deviating from normal and routine operations between signing and closing. Seller chose not to do so.

(a)(i) Denied. The court correctly determined that Seller breached the ordinary course covenant by making "massive" and "unprecedented" changes to normal business operations without Buyer's advance consent, even if those changes were reasonable responses to unexpected circumstances. Such covenants operate to ensure that the business the buyer receives at closing is essentially the same one it bought at signing, and that the seller does not deviate from normal operations without first obtaining the buyer's consent.

(ii) Denied. The court correctly interpreted the material adverse effect ("MAE") and ordinary course provisions as serving two distinct purposes. Natural disasters and other systemic risks do not constitute an MAE. But the ordinary course

covenant ensures that Buyer has a say in any fundamental changes Seller seeks to make to the business in response to such events. Seller's contrary interpretation ignores these distinct purposes and the plain language and structure of the Sale Agreement.

(iii) Denied. The court correctly construed the phrase "consistent with past practice" as requiring a comparison with the business's own past practice. That interpretation does not read the phrase "ordinary course of business" out of the covenant; it is Seller that reads language out of the contract by failing to give meaning to the "past practice" phrase. The court's construction does not turn the covenant into a "straitjacket" simply because it requires Seller to engage in discussions with Buyer and obtain the Buyer's consent before deviating from normal operations. Based on "overwhelming evidence," the court properly found that the "massive" changes to the hotels' operations were "unprecedented" and "wholly inconsistent with past practice," and that was not clearly erroneous.

(b) Denied. Seller waived this argument below, as the trial court found and Seller does not contest. In any event, the court correctly found that Seller failed to comply with the ordinary course covenant "in all material respects," and that was not clearly erroneous. Seller errs in arguing that its failure to seek consent should be excused as immaterial because its changes were reasonable. By flouting the consent provision, Seller denied Buyer its bargained-for opportunity to participate

in decisions about any actions taken outside of the ordinary course. That denial was material under Delaware law, which strictly enforces notice and consent provisions.

(2)(a) Denied. The court correctly ruled that the title insurance condition failed because the title insurers did not offer coverage over the fraudulent deeds. Faced with uncertainty regarding the title risks in this multi-billion dollar transaction due to Seller's deception, the title insurers issued title commitments with a broad and unambiguous exception to coverage that encompassed the fraudulent deeds, as both sides' experts agreed. Seller's arguments and extrinsic evidence cannot contradict the plain meaning of those commitments.

(b) Denied. The court correctly found that Buyer did not cause the failure of the title insurance condition. Expert and percipient witness testimony, which the court carefully considered and credited, showed that Buyer's counsel at all times used commercially reasonable efforts to attempt to close the transaction, consistent with his professional and ethical obligations to his client and to the title insurers. Indeed, Seller's own title insurance expert conceded that Buyer's counsel acted properly—testimony the court found dispositive but Seller ignores. This was not clear error, but even if it was, the court also correctly found that the title insurers, represented by the deans of the title insurance industry, decided independently to issue the broad DRAA exception, as Seller's own title insurance expert agreed. The court's causation findings were not clear error.

COUNTERSTATEMENT OF FACTS

A. The Relevant Provisions Of The Sale Agreement

The Sale Agreement provided that Seller would sell to Buyer, for $5.8 billion, all of the interests in Strategic Hotels & Resorts LLC ("Strategic"), which owns fifteen luxury hotels in the United States. As relevant here, the parties agreed to the following provisions.

Ordinary Course Covenant. Section 7.3(a) provides that Buyer's obligation to close is conditioned upon Seller "hav[ing] performed in material respects all obligations and agreements and complied in all material respects with all covenants and conditions required by this Agreement to be performed or complied with by it prior to or at the Closing." A2950-51. Among those covenants is an ordinary course covenant. Section 5.1 provides that:

> between the date of this Agreement and the Closing Date, unless the Buyer shall otherwise provide its prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed), the business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects.

A2932-33.

MAE Representation. Separate from and independent of the ordinary course covenant, Seller represented and warranted in section 3.8 that:

> Since the date of the Balance Sheet [July 31, 2019], … there have not been any changes, events, state of facts or developments, whether or not in the ordinary course of business that … have had or would reasonably be expected to have a Material Adverse Effect.

A2920; *see* A2906-07 (§ 1.1) (MAE definition).

Title Insurance Condition. Seller informed Buyer in August 2019 that fraudulent deeds had been recorded on six of Strategic's California hotels. Op. 39-42. The deeds purported to transfer title to those hotels to entities associated with Zhou—a fact Seller knew but did not disclose to Buyer. Op. 12-15, 19-25, 39-42. Seller had learned about some of the fraudulent deeds as early as December 2018, and knew, but did not disclose, that its parent company Anbang had defended various trademark actions filed by Zhou's entities in the United States, Canada, Hong Kong, and Europe, and that Zhou was represented by Venable LLP. Op. 12-19, 26-27, 39-44. Seller further knew as early as January 2019 (Op. 27-31) that some of the same Zhou-related entities and persons connected to the fraudulent deeds also purported to have an agreement to arbitrate with Anbang, and no later than August 2019 (Op. 42) that those same Zhou-related entities were seeking to enforce a DRAA arbitration in the Court of Chancery. Seller's deal counsel "Gibson Dunn immediately understood the connection between the DRAA Chancery Action and the Fraudulent Deeds." Op. 43.

Although Buyer knew none of these important details because Seller concealed them, the risk to title even from a twenty-something-year-old Uber driver with a felony conviction (Op. 6) was too great, and Buyer's lenders refused to "fund into a deal with a cloud on title" (Op. 46). The parties therefore agreed to a new

condition to closing whereby (i) Seller would have to show the fraudulent deeds were expunged from the public record *and* (ii) the title insurers would have to provide title insurance covering the risk from the fraudulent deeds, issuing a policy:

> either (A) without taking exception therefrom for the Fraudulent Deeds or (B) issuing affirmative insurance (which may be in the form of an endorsement) providing coverage over the Fraudulent Deeds in form and substance reasonably acceptable to Buyer.

A2951 (§ 7.3(c)).

B. The Breach Of The Ordinary Course Covenant

The court concluded that Seller breached the ordinary course covenant (§ 5.1) and thus failed to satisfy the covenant compliance condition (§ 7.3(a)). Op. 149-88. The court relied on overwhelming evidence that, by the end of March 2020 and without any government mandate, Seller had dramatically departed from its prior business practice in response to the COVID-19 pandemic—without Buyer's advance consent. Op. 171-77, 185-86; *see* B20-22 (Strategic memorandum). Strategic closed two hotels entirely and began operating the others in a state it described as "'closed but open.'" Op. 90, 172. All services and amenities (room service, restaurants, gyms, pools, spas, health clubs, club lounges, valet parking, retail shops, and concierge and bellhop services) were closed or severely limited. Op. 172. Over 5,200 full-time employees were laid off or furloughed, and operations were largely reduced to skeleton staffing, such that the hotels must rehire and retrain employees and will face challenges in resuming normal operations. Op. 172-74.

With its hotels essentially closed, Strategic also put non-essential capital spending on hold and curtailed various support operations. Op. 173. These "major operational changes" placed the hotels into what the court described as a "quasi-catatonic state." Op. 180.

Seller cannot reasonably dispute that these drastic actions were unprecedented and inconsistent with past business practices, as the court found. Op. 172-74. As Strategic's own Chief Operating Officer admitted, Strategic "made major material changes to its business when compared to its past practice as a result of COVID-19" (Op. 173) *before* seeking Buyer's consent (Op. 180, 188), and Strategic had the "final" word on these changes (B110 (859:7-20) (Hogin)). Both sides' experts agreed. Op. 173-74.

It was only well after these drastic changes were made that, on April 2, 2020, Seller belatedly made a perfunctory request for Buyer's "consent" to depart from the ordinary course. Op. 188. Buyer declined to consent to that after-the-fact request, explaining that Seller had not provided sufficient information (despite Buyer's requests) to assess Seller's actions. *E.g.*, A4756.

The court rejected Seller's legal arguments seeking to interpret the ordinary course covenant as permitting these actions. Op. 150-71. The court concluded that the term "ordinary course of business" means routine operations (Op. 153-59), and that evidence regarding how other companies responded to the COVID-19 pandemic

was not relevant because the covenant requires that Seller operate the hotels "only in the ordinary course of business consistent with past practice" (Op. 160-65).

C. The Failure Of The Title Insurance Condition

The court additionally ruled that Seller failed to satisfy the title insurance condition (§7.3(c)), giving Buyer independent grounds to terminate. Op. 189-223. Seller failed to provide the title insurers documentation enabling them to issue title insurance that did not contain an exception for the fraudulent deeds.

To the contrary, the title insurers issued title commitments for each property that refused to cover the fraudulent deeds. Op. 192-96. They did so after belatedly learning that Zhou-affiliated parties had filed a flood of adverse claims in Delaware and California courts seeking to enforce the DRAA agreement purportedly granting the Zhou entities title to the hotels in resolution of the parties' long-standing trademark and stockholder disputes. Op. 91-97. While Seller continued to conceal its extensive knowledge of these events from Buyer and the title insurers, one of the lenders learned of the DRAA Chancery action in late February 2020 and informed Buyer. Op. 77-78.

The record contains ample evidence to support the court's conclusion that Buyer perceived the DRAA agreement and DRAA litigation as a credible threat to its ability to obtain title insurance and thus obtain financing for the deal. In particular, the filings in the DRAA Chancery action included a lengthy letter from respected

counsel at DLA Piper, which Zhou had purportedly retained, detailing why the Zhou parties might be entitled to a transfer of the hotels. As the court found, the DLA letter was a "game changer" (Op. 85) that "raised alarm bells" (Op. 212) for Buyer and its counsel. Contrary to Seller's repeated insistence until that point that Buyer had nothing to fear from obviously fraudulent filings by a criminal twenty-something-year-old Uber driver, the DLA letter suggested that the DRAA agreement and DRAA litigation might well be legitimate. Op. 82-86.

Once aware of this information, the title insurers deliberated about whether they could possibly issue an owner's title insurance policy. Op. 91. Seller and its counsel lobbied them heavily to do so, urging them in letters, emails, memoranda, and phone calls to discount any risk from the deeds, the DRAA agreement or the DRAA litigation. Op. 92-96. Seller's advocacy included a lengthy April 9, 2020 call with the leading decision makers at the title insurers (Op. 95), and a final ask on April 13, 2020, that the title insurers "issue policies without taking exception for the Fraudulent Deeds" (Op. 96). The title insurers invited Buyer's counsel to express a view only late in a separate call on April 10, 2020. Op. 95.

On April 13, 2020, the title insurers issued title commitments that included a broad exception from coverage (the "DRAA exception"). Op. 192. The DRAA exception excluded "[a]ny defect, lien, encumbrance, adverse claim, or other matter resulting from, arising out of, or disclosed by" the DRAA agreement (which, at this

point, Seller had not provided to the title insurers) or the DRAA litigation and any "rights, facts, and circumstances alleged [or disclosed] therein." Op. 96-97, 193; *see* A4881.

The court concluded that "[t]he DRAA Exception plainly encompasses the Fraudulent Deeds, causing the Title Insurance Condition to fail." Op. 197; *see* Op. 193-94. In so ruling, the court credited the testimony of both parties' title insurance experts as well as Buyer's real estate counsel—all of whom agreed that the DRAA exception encompassed the fraudulent deeds. Op. 197. The court rejected Seller's argument that the title insurance condition was satisfied merely because the DRAA exception did not expressly reference the fraudulent deeds. Op. 196-99.

The court gave three independent reasons why the DRAA exception encompassed the fraudulent deeds. *First*, the fraudulent deeds "result[] from, aris[e] out of, or [are] disclosed by" the DRAA agreement because those deeds were prepared and filed pursuant to a durable power of attorney purportedly granted by that agreement. Op. 193-94. *Second*, the fraudulent deeds "result[] from, aris[e] out of, or [are] disclosed by" the DRAA California litigation "and the rights, facts, and circumstances disclosed therein" because an affidavit submitted in that proceeding identifies all of the fraudulent deeds and the facts and circumstances surrounding them. Op. 194-95. *Third*, the fraudulent deeds "result[] from, aris[e] out of, or [are]

disclosed by" the DRAA Chancery action "and the rights, facts, and circumstances disclosed therein" because Seller's parent provided the court in that action with copies of the fraudulent deeds and both sides described the facts and circumstances of the deeds extensively in that proceeding. Op. 195-96.

The court further rejected Seller's argument that Buyer's real estate counsel Robert Ivanhoe of Greenberg Traurig supposedly caused the failure of the title insurance condition. Op. 205-23. The court found that Ivanhoe "acted properly" by apprising the title insurers of the risks associated with the fraudulent deeds and related DRAA litigation. Op. 219; *see* Op. 213-16; B99 (603:22-635:3) (Ivanhoe). The testimony from both parties' experts was uniform on this point, and the court found "dispositive" the testimony of Seller's own title insurance expert, who "concluded that Ivanhoe acted appropriately when communicating with the Title Insurers." Op. 210; *see* Op. 216-20.

As the court explained, Ivanhoe acted properly under the knowledge-of-the-insured doctrine, which provides that "a title insurer can deny coverage for a claim if the insured withheld knowledge relating to the claim from the title company before the title company issued the policy." Op. 217. The court also found that Ivanhoe's actions comported with "the nature of drafting practice in the title insurance industry," which prefers "to exclude known risks through exceptions, then provide coverage for specific exceptions through endorsements." Op. 218.

The court further found that, even if it was wrong about Ivanhoe's conduct, Ivanhoe still did not cause the title insurers' "independent decision to include the DRAA Exception." Op. 220; *see* Op. 220-23. Given the size of the risk, which was large enough to bankrupt the title insurance industry, the title insurers were "'a veritable who's who of the most senior title insurance professionals in America.'" Op. 220 (quoting B86 (206:7-11) (Kravet Dep.)). Seller's own title insurance expert agreed that the title insurers acted independently. Op. 221 (citing B97 (158:21-159:4) (Chernin Dep.)).

D. The Final Order And Judgment

The court entered final judgment for Buyer on all counts in Seller's complaint and on Buyer's counterclaims relating to failure of the covenant compliance condition and failure of the title insurance condition. OB Ex. B (¶¶2-3). The court directed Seller to return Buyer's $581 million deposit (plus statutory interest), and awarded Buyer its attorneys' fees and transaction costs. *Id.* (¶¶7-10); Op. 228-41.

The court did not reach several of Buyer's other grounds for terminating the Sale Agreement, and thus dismissed those portions of Buyer's counterclaims without prejudice to reinstatement in the event of remand (OB Ex. B (¶6)). The court nevertheless stated that some of those unresolved grounds "have merit given [its] factual findings," including Buyer's contentions that Seller breached "covenants which required Seller to provide Buyer with notice of communications from

governmental authorities [A2938 (§ 5.5(d))], to use commercially reasonable efforts to eliminate impediments to closing [A2937 (§ 5.5(a))], [and] to keep Buyer reasonably informed about the Fraudulent Deeds [A2943 (§ 5.10(a))]." Op. 108 n.185. The court likewise stated "there is reason to think it would be inequitable to award specific performance" (Op. 105 n.184) given its findings that Seller and its counsel "committed fraud about fraud" (Op. 41).[1]

[1] The court's rejection of Buyer's pandemic-related MAE argument (Op. 119-48) is not at issue on appeal.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT SELLER BREACHED THE ORDINARY COURSE COVENANT

A. Question Presented

Whether Buyer properly terminated the Sale Agreement because Seller breached the ordinary course covenant by making "massive" and "unprecedented" changes to the hotels' operations without seeking or obtaining Buyer's prior consent. This issue was preserved below. A1571-78; A1791-94.

B. Scope Of Review

This Court reviews interpretation of unambiguous contracts *de novo*. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). Because Seller does not appeal the ordinary course ruling for clear factual error (OB 30; *see* OB 8 n.2), the court's factual findings govern on appeal. This Court reviews the materiality standard *de novo* but reviews its application to the facts for clear error. *See Zirn v. VLI Corp.*, 621 A.2d 773, 777-78 (Del. 1993).

C. Merits Of Argument

The trial court correctly ruled that Buyer properly terminated the Sale Agreement because Seller made "massive" and "unprecedented" changes that "departed radically from the normal and routine operation of the Hotels" as measured by "past practice," "resulting in a departure from the ordinary course" in breach of the ordinary course covenant and therefore the covenant compliance

condition. Op. 149, 171-74. This Court should affirm the trial court's well-reasoned ruling, which provides clear guidance to M&A practitioners consistent with long-standing Delaware precedent.

1. The Court Of Chancery Correctly Interpreted The Ordinary Course Covenant

In concluding that Seller did not operate the hotels "only in the ordinary course of business consistent with past practice," the court correctly interpreted the covenant and properly gave meaning to all its phrases.

"Ordinary course of business." The court ruled that the "ordinary course of business" refers to "how the business routinely operates under normal circumstances" and not to "what is ordinary in a pandemic." Op. 153; *see* Op. 153-59. In cases spanning more than a decade, the Court of Chancery has consistently equated the ordinary course of business with the "normal and ordinary routine of conducting business." *Ivize of Milwaukee, LLC v. Complex Litig. Support, LLC*, 2009 WL 1111179, *9 (Del. Ch. Apr. 27, 2009); *accord Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc.*, 2021 WL 1714202, *38 (Del. Ch. April 30, 2021); *Anschutz Corp. v. Brown Robin Capital, LLC*, 2020 WL 3096744, *11 (Del. Ch. June 11, 2020); *Project Boat Holdings, LLC v. Bass Pro Grp., LLC*, 2019 WL 2295684, *20 n.196 (Del. Ch. May 29, 2019); *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2014 WL 5654305, *17 (Del. Ch. Oct. 31, 2014).

These decisions align with the plain, dictionary meaning of the phrase "ordinary course of business." *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."). For instance, Black's Law Dictionary defines "course of business" as: "The normal routine in managing a trade or business. – Also termed *ordinary course of business*; *regular course of business*; *ordinary course*; *regular course*." *Black's Law Dictionary* (11th ed. 2019). Likewise, *Black's* defines "ordinary" as: "Occurring in the regular course of events; normal; usual." *Id.*; *see* Op. 153-54 (citing same *Black's* definition).

The court's interpretation of "ordinary course" also makes practical sense given the central purpose of ordinary course covenants, which is "to reassure a buyer that the target company has not materially changed its business or business practices during the pendency of the transaction." *Anschutz*, 2020 WL 3096744, at *11; *see Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, *83 (Del. Ch. Oct. 1, 2018) (ordinary course covenants "add an additional level of protection for the buyer" and "help ensure that 'the business [the buyer] is paying for at closing is essentially the same as the one it decided to buy at signing'") (quoting Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries & Divisions* § 13.03, at 13-19 (2018 ed.)); *Snow Phipps*, 2021 WL 1714202, at *38 (same); *see also* B89

(113:21-23) (Solomon Dep.) (Seller's "ordinary course" expert testifying that "[t]he general principle here is to get the business, to preserve the business in the same shape [as] when you bought it").

"Consistent with past practice." The court also correctly interpreted the phrase "consistent with past practice" as further constraining the inquiry to require a comparison with the business's own past practices—and not with present practices or how other companies have operated. Op. 160-61. This interpretation is grammatically required. "Arguably, an obligation to conduct business only 'in the ordinary course, consistent with past practice,' is a stricter standard than one which merely refers to the 'ordinary course.'" Kling & Nugent, *supra*, § 13.03 at n.1. And a contract provision requiring "efforts consistent with past practice" obligates a party to undertake efforts "consistent with ***its*** practice," not the practices of others. *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 2729860, *31 (Del. Ch. June 26, 2017) (emphasis added).

Seller errs in suggesting (OB 39) that the court's interpretation of the "past practice" language "reads the phrase 'ordinary course of business' out of the covenant." The court in fact read the covenant as a whole and recognized that each phrase has meaning and imposes a distinct obligation. Actions consistent with past practice do not satisfy the obligation to operate in the "ordinary course of business" unless they are part of ordinary course of business. Some changes might have

happened before but still fall outside of the ordinary course of business if they were not part of normal and routine practice. Here, the changes were neither normal nor precedented, so neither part of the clause was met. It is Seller (not Buyer) that would read language out of the contract by failing to give any meaning and effect to the "past practice" phrase. This Court "will not read a contract to render a provision or term 'meaningless or illusory.'" *Osborn*, 991 A.2d at 1159 (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).

The court's "past practice" interpretation also accords with established Delaware authority. Contrary to Seller's suggestion (OB 39), the court's discussion of this requirement cited not only *Mrs. Fields* but also *Akorn*, 2018 WL 4719347, at *88, noting that that decision had looked at comparable companies only under an ordinary course covenant that did ***not*** include the phrase "consistent with past practice." Op. 160-61. Moreover, another recent Court of Chancery case is in accord. *See Snow Phipps*, 2021 WL 1714202, at *38. Applying the identical standard the court used here, *Snow Phipps* found an ordinary course covenant met only on entirely different facts. In *Snow Phipps*, unlike here, the seller's changes were neither extraordinary nor unprecedented: a partial revolver draw had been made before, was never used, and was quickly repaid, and the seller historically had reduced costs in tandem with sales. *Id*. at *20, *39.

Nor did the court below ignore the "past practice" language in *Anschutz*, 2020 WL 3096744, at *11-12, *ChyronHego Corp. v. Wight*, 2018 WL 3642132, *8 (Del. Ch. July 31, 2018), and *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, *7 (Del. Ch. Nov. 19, 2013), as Seller wrongly suggests (OB 38-39). The court simply read those cases as holding that ***fraudulent*** conduct "cannot constitute the ordinary course of business under any circumstances," even if a company had engaged in such fraud in the past "as part of its normal practice." Op. 154-55 n.242. That categorical rule supports Buyer, as it reaffirms that both "ordinary course of business" and "past practice" have independent meaning, and both were breached by Seller's actions here.

"Only." The court also gave meaning to the term "only," which modifies both "in the ordinary course of business" and "consistent with past practice." A2932-33 (§ 5.1). The court correctly interpreted this term as supporting the conclusion that "the parties created a standard that looks exclusively to how the business has operated in the past." Op. 161. Seller's grammatical quibble with this interpretation (OB 39 n.8) is misplaced; there is no comma in the full phrase "only in the ordinary course of business and consistent with past practice," as Seller would wrongly insert; the term "only" applies equally to both phrases.

"Unless the Buyer shall otherwise provide its prior written consent." The court further gave meaning to the phrase requiring Buyer's consent to any departure

from the ordinary course of business. Op. 187-88. The ordinary course covenant here is not a straitjacket that precludes adaptation to changed circumstances like a pandemic; it just requires that Seller obtain consent from Buyer first. As the court explained:

> Compliance with a notice requirement is not an empty formality. Notice to the buyer is a prerequisite because it permits the buyer to engage in discussions with the seller and if warranted, seek information about the situation under its access and information rights. The buyer then can protect its interest. For example, it can propose reasonable conditions to its consent, and it can anticipate and account for the implications of the non-ordinary course actions when planning for post-closing operations.

Op. 187. Scholarly commentary discussing the trial court's decision with approval makes a similar point. *See* Guhan Subramanian & Caley Petrucci, *Deals in the Time of Pandemic*, 121 Colum. L. Rev. (forthcoming 2021), at 61 (describing decision as "straightforward and commonsensical"), https://ssrn.com/abstract=3799191. As the commentators explain: "In the absence of any need to reach agreement with the buyer on actions outside the ordinary course, the seller would be, in effect, playing with the buyer's money. The seller could take actions that are too risky, too cautious, or simply opportunistic with respect to the buyer." *Id*. Here, the opportunity to discuss unprecedented changes before they were made might have led to a fruitful negotiation as to "the optimal mitigation approach." *Id*. at 63. But no such negotiation occurred.

Contrary to Seller's suggestion (OB 31-36), a buyer retains an interest in such a dialogue even where a seller pursues only reasonable responses to changed circumstances. A seller may face a choice among many reasonable options when confronted with challenging operational decisions. An ordinary course covenant including a consent right ensures that Buyer has a voice in such decisions.

Seller, in contrast, would effectively read the consent provision out of the contract and abandon these important principles. Seller insists (OB 41-42) that it may ignore the consent requirement whenever its actions are reasonable under the circumstances. By minimizing as a mere "foot fault" (OB 42) its failure to obtain Buyer's advance consent to the shuttering of the hotels' operations, Seller ignores the important dialogue-promoting purpose of consent provisions in ordinary course covenants like the one here, and defies the basic Delaware contract principle of giving meaning to all terms in a contract.

Finally, the Court should disregard Seller's assertion (OB 33) that Buyer would have consented here because it made similar changes at its own affiliates' hotels when COVID-19 began. Seller did not develop that record at trial, none of those hotels was under a sale contract, and in any event, Buyer's affiliates sought the advance consent required by the operative agreements with their lenders (A5307-08).

2. The Court Of Chancery Correctly Declined To Rewrite The Agreement To Measure "Ordinary Course" By "Reasonableness"

In light of the court's correct interpretation of the ordinary course covenant, Seller errs in asserting (OB 31-36) that the covenant should be interpreted to allow it to take any "reasonable, industry-standard steps" (OB 31) it unilaterally deems appropriate in the "face of external commercial challenges" (OB 34)—no matter how greatly those steps depart from the business's normal and ordinary operations and past practice. The court correctly considered and rejected this argument. Op. 153-59, 161-65.

To begin with, such an interpretation is foreclosed by the plain meaning of "only" in the "ordinary course of business" and "consistent with past practice," as discussed above. Adopting Seller's approach would rewrite the parties' contract to replace the objective past practice requirement with a vague industry standard.

In addition, Seller's argument effectively imports a "commercially reasonable efforts" qualifier into the ordinary course covenant, but that is foreclosed by the text and structure of the Sale Agreement. As the court explained, "the drafters of the Sale Agreement knew how to craft an efforts-based provision when they intended to do so." Op. 165. For example, the phrase "commercially reasonable efforts" appears in the "Inventory Maintenance Covenant" and "Organizational Preservation Covenant" of section 5.1. Op. 164-65; *see* A2932-33 (§ 5.1). In contrast, section

5.1's ordinary course covenant "imposes an overarching obligation that is flat, absolute, and unqualified by any efforts language." Op. 163. If Seller had wanted to include a "commercially reasonable efforts" qualifier in the ordinary course covenant, it could have bargained for one. *See, e.g.*, *Akorn*, 2018 WL 4719347, at *84 ("the Company shall, and shall cause each of its Subsidiaries to, use its and their *commercially reasonable efforts* to carry on its business in all material respects in the ordinary course of business") (emphasis added); Kling & Nugent, *supra*, § 13.03 at n.5 (suggesting that sellers negotiate "an *efforts* standard in the ordinary course covenant"). The ordinary course covenant here contained no such clause. Reading a reasonable efforts qualifier into it thus would smuggle in language that Seller "did not obtain for itself at the negotiating table," *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, *7 (Del. Ch. June 21, 2012).

Seller's "commercial reasonableness" interpretation also finds no support in Delaware precedent. To the contrary, as the court correctly observed (Op. 156-57), *Cooper* rejected any effort to make commercial reasonability the touchstone for "ordinary course of business." *Cooper* involved a buyer's successful termination of a merger agreement based on the failure of the seller (Cooper) and its subsidiary to operate in the ordinary course of business. 2014 WL 5654305, at *1. The minority partner of Cooper's subsidiary opposed the announced merger and used his authority to cause an unprecedented work stoppage at the subsidiary. *Id.* at *17. Cooper

responded, in turn, by "suspending payments to [the subsidiary's] suppliers" in an effort to "put pressure" on the subsidiary and end the stoppage. *Id.* at *4, *17. The inquiry in *Cooper* was whether Cooper and its subsidiary had operated normally—not whether they had acted reasonably in response to the unprecedented crisis. *See id.* at *15-17.

In *Cooper*, as here, operations were substantially curtailed, such that there was a disruption to the "normal and ordinary routine of conducting business." *Id.* at *17. And in *Cooper*, as here, it was irrelevant that the seller's curtailment of business operations (through the suspension of payments to suppliers) was "perhaps a reasonable reaction" to extraordinary circumstances. *Id.* *Cooper*'s rejection of a "reasonability" standard, moreover, is rooted firmly in the unbroken line of cases equating the ordinary course of business with routine operations. *See id.* (citing *Ivize*, 2009 WL 1111179, at *9).

Seller's preferred authority, *FleetBoston Financial Corp. v. Advanta Corp.*, 2003 WL 240885 (Del. Ch. Jan. 22, 2003) (applying Pennsylvania law, *id.* at *6 n.12), is not to the contrary, as the court correctly explained (Op. 158-59). Contrary to Seller's depiction (OB 32-33), *FleetBoston* did not suggest that even unprecedented changes are part of the ordinary course of business if they are responsive to market conditions and consistent with industry standards. Rather, *FleetBoston* ruled that a marketing strategy pursued by the seller of a consumer

credit card business did not breach the ordinary course covenant precisely because the strategy was ***not*** unprecedented. 2003 WL 240885, at *26. The court there noted it was "give[n] the most pause" by the buyer's claim that the seller had "dramatically and pervasively" lowered its credit standards to attract new balances from existing customers, but ultimately found the claim "fail[ed] for lack of proof." *Id.* at *27.

Here, by contrast, the court found "[o]verwhelming evidence" of "massive" and "unprecedented" changes that "departed radically from the normal and routine operation of the Hotels." Op. 110, 171-74. Seller identifies no error, let alone clear error, in that well-supported factual finding. These "massive" and "unprecedented" changes also negate Seller's argument (OB 39-40) that "there was no breach here [because] 'consistent' does not mean 'identical.'" The changes were "wholly inconsistent with past practice" under any definition of the term. Op. 173.

3. The Court Of Chancery Correctly Interpreted The MAE Provision And The Ordinary Course Covenant As Distinct

Seller fares no better in maintaining (OB 36-38) that the exclusions in the MAE definition for certain systemic risks are also implied limitations on the ordinary course covenant. Rather, as the court rightly ruled, that position is foreclosed by the plain language and structure of the Sale Agreement and the distinct purposes of MAE provisions and ordinary course covenants. Op. 165-71.

First, the ordinary course covenant contains no MAE limitation. Instead, it incorporates a far lower standard of materiality: Seller must comply "in all material

respects," a standard that prohibits deviations that "significantly alter the total mix of information available to the buyer when viewed in the context of the parties' contract." Op. 167; *see Snow Phipps*, 2021 WL 1714202, at *38. The parties knew how to impose an MAE standard when they so desired, and did so elsewhere in the Sale Agreement. *See, e.g.*, A2917-20, A2929 (§§ 3.1(a), 3.3(a)(iv), 3.8, 3.9(a), 4.3(b)). The Court should reject Seller's attempt to "add new terms and conditions to the contract that simply do not exist within the four corners of the agreement." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 356 (Del. 2020). Indeed, Seller's argument threatens to impair the operation of *all* covenant closing conditions because future sellers could invoke circumstances excluded from the MAE definition as an excuse for their non-compliance with any type of covenant.

Second, Seller's argument ignores that MAE provisions and ordinary course covenants serve different purposes. An MAE provision "is concerned primarily with a change in valuation [of the target business], irrespective of any change in how the business is being operated." Op. 169; *accord Akorn*, 2018 WL 4719347, at *53. An ordinary course covenant, on the other hand, "is primarily concerned with a change in how the business operates, irrespective of any change in valuation." Op. 170; *accord Anschutz*, 2020 WL 3096744, at *11. "[B]ecause the provisions guard against different risks," the court correctly concluded that "the contractual results could be different." Op. 170.

Seller ignores the distinct purposes of the provisions in arguing that the ordinary course covenant was breached by the same circumstances that are carved out of the MAE provision. In fact, the circumstances are different in important respects. The court ruled that the contractual MAE definition excludes the COVID-19 pandemic as a qualifying event. Op. 120-42. By contrast, Seller breached the ordinary course covenant by its ***response*** to the pandemic: unilaterally placing the hotels "in a quasi-catatonic state" (Op. 180) without first obtaining Buyer's consent.

Relying on a recent decision by a Canadian court, Seller wrongly argues (OB 37) that the trial court here allowed "the more general ordinary course provision to … override the more specific MAE provision" (quoting *Fairstone Fin. Holdings Inc. v. Duo Bank of Can.*, 2020 ONSC 7397, ¶190 (Can. Ont. Super. Ct. of Justice) (A6532-33)). Neither provision in fact "overrides" the other, however, because there is no conflict between them. *See Sonitrol*, 607 A.2d at 1184 (doctrine that specific provisions trump general provisions "presumes an inconsistency"). The court read the two provisions harmoniously, giving effect to both.

Cooper similarly provides no support for Seller's interpretation here. According to *Cooper*, an event carved out of the MAE definition ***can*** "be viewed as triggering breach of the ordinary course covenant" (OB 37) if that outcome reflects "a rational business purpose." 2014 WL 5654305, at *19. But here, it serves such a purpose for the parties to exclude natural disasters and calamities from the MAE

definition while ensuring through the ordinary course requirement that Buyer has a say in any fundamental changes that Seller wishes to make in response to such events. As correctly interpreted by the court, the ordinary course covenant and MAE provision do not conflict but rather represent a harmonious way of allocating risk and ensuring Buyer receives a company "essentially the same as the one it decided to buy." *Akorn*, 2018 WL 4719347, at *83.

4. The Court Of Chancery Correctly Found Seller's Breach Material

The court found as a matter of fact, subject only to clear error review, that Seller failed to comply with the ordinary course covenant "in all material respects," and that its breach was never cured. Op. 188; *see Zirn*, 621 A.2d at 777-78. Seller does not even try to contest those findings as clearly erroneous or argue that its deviation from the ordinary course of business was immaterial.

Instead, Seller argues (OB 40-43) that its failure to procure Buyer's ***consent*** was immaterial because Buyer could not have reasonably withheld its consent under the terms of the covenant. The court correctly rejected that argument. Op. 187-88. To begin with, the court found that argument waived because it was presented for the first time in a post-trial reply brief footnote. Op. 188. On appeal, Seller does not argue that the finding of waiver was error. *See* Del. Supr. Ct. R. 8; *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. C & J Energy Servs., Inc.*, 2018 WL

508583, *6 n.27 (Del. Ch. Jan. 23, 2018). In any event, the argument fails on the merits.

First, it is a non sequitur for Seller to assert that, because its departure from the ordinary course was "reasonable," and Buyer may not "unreasonably withhold" its consent, Seller's failure to seek or procure Buyers' consent must have been immaterial. Whether Seller's responses to COVID-19 were reasonable and whether the Buyer still could have reasonably withheld consent are different questions. A buyer might "reasonably" withhold consent even to those changes that are objectively "reasonable," for example because it views them as too risky or inconsistent with its post-closing business model. But here there is no evidence in the record on the distinct question whether Buyer had reasonably or unreasonably withheld consent before Seller implemented the changes. This absence of evidence is fatal to Seller's argument that its failure to procure consent was immaterial.

Second, Seller's argument ignores that the very purpose of the consent provision is to promote dialogue between the parties before a seller makes any material changes in the business before closing. Denying a buyer its bargained-for opportunity to participate in decisions about whether an extraordinary event warrants deviation from the ordinary course of business and past practice is inherently material. *Cf. Telecom-SNI Inv'rs, LLC v. Sorrento Networks, Inc.*, 2001 WL 1117505, *9 (Del. Ch. Sept. 7, 2001) ("[The consent provisions] are designed to

provide … leverage in negotiations regarding the future of Sorrento. The denial of the leverage which Plaintiffs reasonably believed they had secured through their bargain restructures the commercial relationship between Plaintiffs and Sorrento ….”), *aff'd*, 790 A.2d 477 (Del. 2002).

Third, Seller provides no reason to deviate from Delaware authority enforcing contractual notice and consent provisions as written. *See, e.g.*, *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*, 2019 WL 1223026, *3 (Del. Ch. Mar. 14, 2019) (allowing seller to terminate a merger agreement where buyer, “in the context of [a] $1 billion-plus merger, simply forgot to give [the] notice” required in the agreement).

Finally, Seller errs in suggesting (OB 42 n.9) that it did not make any substantial changes to its business operations until after its belated notice to Buyer on April 2, 2020. The court found that Seller “had already made major operational changes” before then (Op. 188 (citing B20-25)), and that factual finding is not clearly erroneous. Such changes included “furloug[h]ing and laying off employees,” “employing skeleton staffing,” closing the Four Seasons Silicon Valley and moving up the scheduled closing of the Four Seasons Jackson Hole, “put[ting] all non-essential capital spending on hold,” shutting down or eliminating amenities, “cancel[ling] all non-critical contracts,” and ceasing all spending on fixtures, furniture, and equipment. B20-22. Seller chose to pursue these massive and unprecedented changes ***before*** seeking and obtaining Buyer’s consent. Seller

"admitted" this fact at trial (Op. 187), and Seller forfeited any argument that it could have cured that breach (OB 42) when it failed to do so after Buyer gave notice of default.

For all these reasons, the court correctly found that Buyer properly terminated the Sale Agreement due to Seller's breach of the ordinary course covenant.

II. THE COURT OF CHANCERY CORRECTLY RULED THAT THE TITLE INSURANCE CONDITION FAILED

A. Question Presented

Whether Buyer properly terminated the Sale Agreement because the title insurers refused to issue title insurance covering the fraudulent deeds as required by the title insurance condition and Buyer did not cause the failure of that condition. This issue was preserved below. *See, e.g.*, A1556-58; A1764-78

B. Scope Of Review

This Court reviews *de novo* the interpretation of the unambiguous Sale Agreement and the title commitments. *Osborn*, 991 A.2d at 1158. This Court reviews factual findings only for clear error, *id.*, and with "enhanced" deference "[w]hen [those] factual findings are based on determinations regarding the credibility of witnesses," *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000).

C. Merits Of Argument

1. The Court Of Chancery Correctly Found That The DRAA Exception Encompasses The Fraudulent Deeds

Seller's challenge to the court's title insurance condition ruling rests on the faulty premise (OB 44) that California law governs the scope of the title commitments. That argument is doubly waived: Seller neither presented it below nor made any supporting argument in the body of its opening appeal brief. Del. Sup. Ct. R. 8, 14(b)(vi)(A)(3); *Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968, 980

(Del. 1980). In any event, the Sale Agreement expressly specifies that Delaware law shall govern not just the interpretation of that agreement but also "all disputes or controversies arising out of or relating to [that] Agreement or the transactions contemplated [t]hereby." A2956 (§ 9.8). Based on that provision, Seller identified Delaware as the governing law in its complaint. A201 (¶14).

Under Delaware law, because the DRAA exception is unambiguous, the plain language controls. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).[2] And as the court rightly determined, the "plain language" of that exception shows the title commitments except the fraudulent deeds from coverage, thereby causing the title insurance condition to fail. Op. 199.

Specifically, the DRAA exception, contained in the title commitments for each property, excludes from coverage "[a]ny defect, … adverse claim, or other matter resulting from, arising out of, or disclosed by [the DRAA agreement or the DRAA litigations] and the rights, facts, and circumstances disclosed [or alleged] therein." A4881. As the court correctly concluded, this exception excluded the fraudulent deeds from coverage for three independent reasons: (i) the fraudulent deeds "ar[ose] out of" the DRAA agreement because that agreement "provide[d] the

[2] *See also George v. Auto. Club of S. Cal.*, 135 Cal. Rptr. 3d 480, 492 (2011) (parol evidence "not admissible if it contradicts a clear and explicit policy provision" and "[c]ourts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists").

authority on which Hai Bin Zhou … relied when recording the fraudulent deeds" in a provision that granted a power of attorney for parties to "directly transfer the ownership of the assets by signing a Grant Deed" (Op. 193-94); (ii) the fraudulent deeds were "disclosed by" a letter, exhibits, argument, briefing, and status updates in the DRAA Chancery action that included "copies of the Fraudulent Deeds" and/or "referenced the deeds" (Op. 195-96); and (iii) the fraudulent deeds were "disclosed by" an affidavit filed in the Alameda action that "identifies all of the Fraudulent Deeds and describes the facts and circumstances surrounding the deeds" (Op. 194-95).

Additionally, as the court noted, "[b]oth sides' title experts agreed" that the DRAA exception "plainly encompasses" the fraudulent deeds. Op. 197 (citing A1469 (1263:16-22) (Chernin); B114-15 (1442:4-1443:11) (Nielsen)). Seller's title insurance expert testified about the DRAA California litigation:

> Question: … [A]ny facts or circumstances disclosed in the Alameda action are excepted from coverage under the title commitment. Correct?
>
> Answer: Correct.
>
> Question: And what that means is any encumbrance, claim, or other matter arising from the grant deed that we were just looking at is excepted from coverage under the exception in the title policy commitment. Correct?
>
> Answer: Yes, I think so.

A1469 (1263:10-22) (Chernin) (spacing altered and objections omitted).

Attempting to avoid its expert's concession and the DRAA exception's plainly broad scope, Seller for the first time turns (OB 46-48) to canons of construction and dictionary definitions. Those efforts are irrelevant and unpersuasive. Interpretive canons are intended to resolve ambiguities, not interpret unambiguous text. *See, e.g.*, *Emerging Eur. Growth Fund, L.P. v. Figlus*, 2013 WL 1250836, *4 (Del. Ch. Mar. 28, 2013). And the industry-specific testimony from the parties' title insurance experts controls over dictionary definitions. *See, e.g.*, *Lorillard*, 903 A.2d at 740. The court correctly interpreted each of the DRAA exception's unambiguous terms:

"*Any defect, … adverse claim, or other matter.*" Seller wrongly asserts (OB 46) that the court determined the fraudulent deeds were only an "other matter" and equated "other matter" with "anything at all"—words Seller places in quotation marks although nothing like it appears in the court's opinion. Seller did not raise this argument below (it is thus waived), and the court had no need to reach that issue because both parties' experts agreed that the fraudulent deeds were a "defect, … adverse claim, or other matter." *See* B47 (¶153), B49-50 (¶156) (Nielsen Rep.) (Buyer's expert: "[t]he [DRAA] Exception … fully encompasses [the fraudulent deeds]," including through the use of "[t]he 'any defect' phrase [which] is used when a title insurer intends to exclude all varieties of interests or defects in title …."); A1469 (1263:16-22) (Chernin) (Seller's expert agreeing that "any encumbrance,

claim, or other matter arising from the [fraudulent deeds] … is excepted from coverage under the [DRAA] exception").

Even if the court *had* skipped over the fact that the fraudulent deeds were a "defect" and an "adverse claim" and concluded that they were just an "other matter," the principle of *ejusdem generis* would not cast doubt on that ruling. Contrary to Seller's assertions, the fraudulent deeds were an "other matter" even under Seller's interpretation because they remained a "presently existing ... risk to title" (OB 46). Though Seller now expresses confidence that the fraudulent deeds were void and unable to affect title (OB 46), it was not so sure at the time of closing, when it conceded uncertainty. Op. 92, 94, 96.[3] The title insurers likewise maintained an express exception for the fraudulent deeds in the title commitments issued in March 2020 (*e.g.*, A4151, A4166), notwithstanding the insurers knew that "appeal deadline[s] ha[d] … passed" on some of those judgments (B3-4). Expert opinion and recent California authority further confirm that the quiet-title judgments were not immune from collateral attack.[4] Indeed, Seller was never able to present clean

[3] *See* B19 (Seller's March 24, 2020 letter to Buyer and the title insurers stating that outcome of potential collateral attack on the quiet-title judgments "cannot be guaranteed, especially in litigation that has not yet been filed"); A4850 (Seller offering "indemnity" to the title insurers for any future claims to enforce "the Fraudulent Deeds").

[4] *See* B60 (¶178) (Nielsen Rep.) (Buyer's expert opining on ways "Seller and Strategic left the title to the California Hotels subject to reasonable doubt even after

title insurance, and Seller remains in litigation with Zhou-related entities (OB 19 n.5).

Seller's repeated characterization (*e.g.*, OB 43, 46, 49) of the fraudulent deeds as "*void ab initio*" in light of the quiet-title judgments is similarly irrelevant. Because the fraudulent deeds—void or not—were excluded from coverage, the title insurance condition failed.[5] Seller had *separate* obligations to obtain a declaration expunging the fraudulent deeds and ensure title insurance. The court correctly treated the two obligations as distinct and ruled that satisfying the expungement obligation did not satisfy the title insurance condition. Op. 200-04. Seller does not appeal that ruling.

"*Resulting from*" or "*arising out of.*" The fraudulent deeds also did "result[] from" and "aris[e] out of" the DRAA agreement because each of the deeds expressly referenced that agreement on its face as the power of attorney authorizing their execution and the agreement expressly authorized the recording of the deeds. Op. 21-24. Seller maintains (OB 47) that the deeds were "fictional," but does not dispute

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having obtained the default judgments"); *Tsasu LLC v. U.S. Bank Trust, N.A.*, 277 Cal. Rptr. 3d 76, 82-85, 89 (2021) (affirming vacatur of quiet-title judgments where buyer should have "heed[ed] 'warning signs'" and learned of the adverse claimant not named in quiet-title proceedings).

[5] Even if the fraudulent deeds were truly "void," they could still be excluded from coverage. *See generally* J. Bushnell Nielsen, *Title & Escrow Claims Guide* §§ 9, 12.7.6 (2020 ed.) (explaining that title insurers, unlike any others, write policies that avoid all risk and may except even matters that "have been resolved or barred").

that they exist. Seller likewise offers no authority suggesting that deeds cannot "result[] from" or "aris[e] out of" an agreement that is fraudulent. Nor is there any dispute that the title insurers took the DRAA agreement very seriously, refusing to provide insurance over any issues or risks relating to the DRAA agreement despite repeated requests by Seller and its counsel. Well-respected attorneys (*see* Op. 82-86; A4791-96) and the Court of Chancery itself (*see* Op. 71, 213) did so too.

"*Or disclosed by.*" Seller's new argument (OB 48) that something is "disclosed" only when it is first revealed directly conflicts with testimony from Seller's own title insurance expert. Seller's expert twice testified that sophisticated parties in his industry would understand the phrase "disclosed by" in a title commitment to mean "referenced in":

> Q. Based on your experience, what do you understand the phrase, "disclosed by," to mean in the context of an exception like this?
>
> A. Something that was referenced in.

B95 (91:12-15) (Chernin Dep.).

> Question: [B]ased on your experience, you understand Exception 57 to provide that anything referenced in or disclosed by the Alameda action … would not be covered by the title insurer. Correct?
>
> Answer: Correct.

A1467 (1257:17-23) (Chernin); *see* B95 (91:20-92:8) (Chernin Dep.) (opining that "disclosed by" is later "amplifi[ed]" by the concluding clause "and the rights, facts, and circumstances disclosed therein"). Buyer's expert agreed: "it encompasses all

facts and circumstances and matters that are *referred to in* the DRAA blanket agreement and all the circumstances *found in* the agreement or alleged *or referred to in* the lawsuits." B114 (1442:12-16) (Nielsen) (emphases added). Seller's assertion (OB 49) that its own expert was "unqualified to opine on policy interpretation" is frivolous; that expert claims "50 years of combined experience as a title insurance underwriter and a real estate attorney" (A5372).

And even if the Court were to consider dictionary definitions, the court still correctly ruled that the DRAA exception encompasses the fraudulent deeds. In contrast to Seller's narrow legal definition (OB 48), "disclose," when used in a "[n]on-physical sense," means "[t]o make openly known" (*Oxford English Dictionary* Disclose (3d ed. 2013)), to "open up to general knowledge" and "to reveal in words (something that is … not generally known)" (*Webster's Third New Int'l Dictionary* 645 (2002)). Describing and attaching the fraudulent deeds in an affidavit "ma[d]e openly known" and "reveal[ed] in words" the facts and circumstances of those deeds which were "not generally known." Likewise, under Seller's definition (OB 48), the briefs, affidavits, and exhibits in the DRAA litigation did indeed "make [the deeds] … public" and even "ma[d]e the deeds known" to their intended audience—the courts—which had no prior knowledge of them. And because Seller had not provided the DRAA agreement to Buyer or the title insurers before the exception was issued (Op. 20 n.36), the contents thereof also were

"ma[d]e openly known"—or even "ma[d]e known"—when that agreement was finally produced.

Seller's reliance (OB 49-50) on extrinsic evidence to vary the plain terms of the DRAA exception is improper. *See Eagle*, 702 A.2d at 1232. In any event, none of the scattered observations Seller cites (OB 49-50) from insurance agent Marty Kravet conflicts with the plain meaning of the DRAA exception. Kravet was "just the agent and had no decision-making authority." B103 (620:18-19) (Ivanhoe). In any event, Kravet expressly clarified that, regardless of what happened to the prior express exceptions for the fraudulent deeds, the DRAA exception was "a separate exception" that "stands on its own" and he "d[id]n't know" whether that exception encompassed "those Deeds." A1477 (1392:7-10) (Kravet); *see* Op. 198 n.291.

The court also correctly found that the title insurers' deletion of the prior exception expressly mentioning the fraudulent deeds has no bearing on the scope of the DRAA exception. Op. 197-99. Each of the final title commitments contains a "powerful integration clause" meaning, as both parties' title experts agreed, that "the scope of the exceptions in the commitments depends entirely on the words in those exceptions" and not any prior language. Op. 198-99. Seller's own title insurance expert confirmed that the clause meant that "all prior versions are of no effect" and that "modifications or deletions of any exceptions [] cannot be read to create any

affirmative insurance obligations." A1466 (1253:8-1254:18) (Chernin); *see, e.g.*, A4909.

For all of these reasons, the court correctly concluded that the DRAA exception encompassed the fraudulent deeds.

2. The Court Of Chancery Correctly Found That Buyer Did Not Cause The Failure Of The Title Insurance Condition

The court correctly found that Buyer's counsel Ivanhoe did not cause the failure of the title insurance condition for two independent reasons: (a) he did not breach the "commercially reasonable efforts" covenant, and (b) even if he had, he did not cause the title insurers to issue the DRAA exception. Op. 205-23.

a. Buyer's Counsel's Conduct Was Commercially Reasonable

The court concluded—based on detailed and well-supported factual and credibility findings—that Ivanhoe properly "kept the Title Insurers informed about deal-related developments," acted consistent with "personal and professional ethics," and "[ensured that he did not] jeopardize Buyer's coverage under … the 'knowledge of the insured' [doctrine]." Op. 91. Seller identifies (OB 52-57) no error in these findings, let alone clear error.

In concluding that Ivanhoe's communications with the title insurers did not breach Buyer's obligations under the reasonable efforts covenant, the court found "dispositive" (Op. 210, 217) the testimony of Seller's own title insurance expert,

who opined after reviewing communications between Buyer's and Seller's counsel and the title insurers that "they all seem to be working in a normal fashion … toward accomplishing a closing" (A1465 (1249:24-1250:8) (Chernin)).

Never acknowledging its own expert's crucial concession, Seller instead challenges (OB 52, 56) two instances of Ivanhoe's communications with the title insurers. But the court found in its detailed analysis (Op. 210-20) that those communications were proper in the context of a title insurance application and that "Ivanhoe's testimony was credible and supported by corroborating evidence" (Op. 213; *see* Op. 214, 216).

First, the court found that Ivanhoe was guided by best practices and principles of professionalism in providing helpful, candid, and thoughtful responses in March and April 2020 as they sought to understand the title risks posed by the DRAA litigation. Op. 213-14, 216 (unlike Seller's counsel, "Ivanhoe provided the complete, unvarnished truth"), 219. The court properly credited Ivanhoe's testimony that any other practice would have risked his client's coverage. Op. 216, 218.

Second, the court found proper Ivanhoe's conduct when the title insurers requested that he join an in-progress call on April 10, 2020, after they had held a "lengthy call" with Seller's counsel the day before (Op. 95). When the insurers asked Ivanhoe "what he would do in their position" (*id.*), he properly provided his opinion that the fraudulent deeds merited an exception. Op. 215-19. While seller

maintains (OB 56) that Ivanhoe's conduct on this call was improper, the court found, based on the extensive trial record, that "Ivanhoe's communications with the Title Insurers reflected the preferred approach" of obtaining an express endorsement over a listed exception and thus conformed to "standard practice in the industry." Op. 218-20.

Seller's argument (OB 56) that Ivanhoe was in fact "trying to tank the deal" is thus baseless. It conflicts with the court's findings that Ivanhoe's conduct conformed with the practice in the title insurance industry, which prefers placing affirmative coverage in an endorsement to a policy—thereby documenting the insurer's knowledge and acceptance of coverage on the face of the policy. Op. 95, 218-19; B91 (140:20-141:3) (Mertens Dep.); B93 (87:4-10) (Stein Dep.); B96 (106:9-21) (Chernin Dep.). And Ivanhoe testified that he *did* want the deal to close (*see* A1432 (760:4-15)), and was pursuing this preferred endorsement approach (B106 (632:10-11) (closing would require Seller to "tak[e] whatever action that the title companies would require *to insure over these exceptions*") (emphasis added). The Sale Agreement itself contemplates use of an "endorsement" to satisfy the title insurance condition. *See* A2951 (§ 7.3(c)).

Seller's criticism of Ivanhoe's conduct also conflicts with the knowledge-of-the-insured doctrine, as the court rightly found (Op. 220). Under that doctrine, a title insurer may deny coverage for any claim as to which the insured had relevant

knowledge that it failed to disclose prior to obtaining coverage. *See* Op. 91, 217-18; J. Bushnell Nielsen, *Title & Escrow Claims Guide* § 11.3.1 ("failure to disclose a material risk voids coverage"). And contrary to Seller's position (OB 55-56), the good-faith disclosure obligation does not end when a fact can be said to be "known to the insurer." *See* Graydon Staring & Dean Hansell, *Law of Reinsurance* § 9:2 (2021) (citing *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 510 (1883)).

The risk of voiding coverage is especially potent where an insured makes only a partial, and rosy, disclosure of a risk. *See, e.g.*, *Commonwealth Land Title Ins. Co. v. IDC Props., Inc.*, 547 F.3d 15, 22 (1st Cir. 2008) ("A prospective insured cannot select and present only favorable information on a subject and delete less favorable information on the same point, even if no follow up questions are asked.") (applying Rhode Island law); *Grayson, Givner, Booke, Silver & Wolfe v. Old Republic Ins. Co.*, 152 F.3d 925, *4 (9th Cir. 1998) (unpub.) (holding under California law that an insured's omission of risk-related opinions contained in an internal memo voided coverage); Steven Plitt, et al., *Couch on Insurance* § 84:2 (3d ed. 2020) ("A half-truth … can potentially render an insurance policy void.").

As *Old Republic* shows, California statutory law, though never raised below, dictates the same result. And because Ivanhoe was asked a direct question, any dishonest answer would be governed *not* by Cal. Ins. Code § 339 but by § 359, which punishes *any* material misrepresentation with rescission. *See Dinkins v. Am. Nat'l*

Ins. Co., 154 Cal. Rptr. 775, 782 (1979) ("California courts have consistently treated misrepresentation and concealment as distinct alternative defenses in the context of insurance coverage.").

Seller further errs in arguing (OB 56) that Ivanhoe and the court below "conflat[ed] … coverage for the fraudulent deeds with … protection against the DRAA Litigation." Seller ignores that those two things were interdependent: the fraudulent deeds arose out of the DRAA agreement, and the alleged purpose of the DRAA litigation was to enforce the DRAA agreement and validate the fraudulent deeds. Op. 193-96; *see* Op. 33-34, 43, 64-65, 68, 84. And even if they were separate, the Sale Agreement still required Seller to deliver at closing "good, valid and marketable title … free and clear of any Encumbrance" including "any … claim … or other restriction of any kind." A2919, A2924 (§§ 3.4, 3.14(a)); *see* A2903 (§ 1.1) (defining Encumbrance). Ivanhoe thus rightly pushed for good and marketable title free and clear of any claim. *See* B36 (Seller explaining its need for clean title, even post-termination).

Finally, this Court should decline Seller's invitation (OB 54-56) to convert the "commercially reasonable efforts" covenant from "an obligation to use reasonable efforts" (Op. 210) into an obligation to close at all costs. An efforts covenant like the one here not only "does not require a party 'to sacrifice its own contractual rights for the benefit of its counterparty,'" it also permits parties "to take

all reasonable steps to solve problems." *In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556, *92-93 (Del. Ch. Aug. 31, 2020) (citations omitted), *aff'd* 2021 WL 1733458 (Del. May 3, 2021). Unlike an obligation to "tak[e] any and all actions"—a different standard that leaves no room for "attempting to solve problems," *id.*—a "commercially reasonable efforts" covenant seeks to ensure that parties' actions be "*both* commercially reasonable *and* advisable to enhance the likelihood of consummation," *Williams Co. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 272 (Del. 2017) (quoting *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 749 (Del. Ch. 2008)); *see* Op. 208.[6]

Here, the court properly found that pushing to close without good and marketable title or clean title insurance would have been commercially *un*reasonable, and would not have enhanced the likelihood of consummation. Op. 216-20. Indeed, it would have been commercially *impossible* given that Seller was required to represent its good and marketable title at closing. *See supra*, at 51. And without clean title insurance, lenders would not finance the transaction or refinance the properties upon debt maturity. *See* A1469 (1263:23-1266:13) (Chernin); B36;

[6] Unlike in *WaveDivision Holdings, LLC v. Millennium Digital Media Sys., LLC*, 2010 WL 3706624 (Del. Ch. Sept. 17, 2010) (cited OB 53), where execution of the sale agreement "did nothing to slow" the seller's shadow campaign "to develop an alternative to the sale" (*id.* at *1, *18), the court below found that Ivanhoe's conduct was a good-faith attempt to obtain the insurance coverage needed to consummate the transaction (Op. 216-20).

B112-13 (1306:24-1308:24) (Greenspan) (discussing B2). The court rightly found that Ivanhoe was not obligated to go down that path. Op. 207-10; *cf. Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1272 n.34 (Del. 2017) (no contractual obligation to perform "where some unexpected occurrence (like a hostile municipality) rendered it commercially unreasonable to continue").

b. Buyer's Counsel Did Not Cause The Addition Of The DRAA Exception

Even if Buyer's counsel did somehow breach the "commercially reasonable efforts" covenant, the court correctly found that the title insurers independently decided to include the broad DRAA exception. Op. 220-23. That finding is not clear error, and is alone sufficient to reject Seller's title insurance condition argument. Witness testimony was unanimous that "title insurers are independent and make their own decisions independent of whatever advocacy seller's counsel or buyer's counsel presents." A1470 (Chernin); *see* B85 (202:23-22) (Kravet Dep.) (similar). And Seller's expert testified that this case—in which a senior group of professionals, representing all the major title insurers in the United States, jointly determined to include the DRAA exception—was no exception. Op. 220-21; B97 (158:21-159:4) (Chernin Dep.)

The record does not support Seller's baseless speculation (OB 58-59) that "all Ivanhoe had to do to ensure the satisfaction of the condition was ask the insurers to clarify that the DRAA exception did not encompass the deeds, and they would have

done so." To the contrary, the evidence showed that the title insurers declined to clarify or amend the title commitments even after Seller's counsel repeatedly implored them to issue title insurance acceptable for the transaction, or alternatively for lender refinancing. Op. 222; B36.

The court thus correctly reached the only conclusion supported by the record: that the "deans of the insurance industry"—"a veritable who's who of the most senior title insurance professionals"—had made an independent determination based on a wealth of information from Buyer, Seller, and their own investigation. Op. 95, 220; *see* Op. 91-97, 221-22; A4608; A4848-49. Seller identifies no error, let alone clear error, in those findings.

Finally, Seller fares no better in asking the Court (OB 58-59) to read the word "caused" in section 7.4 of the Sale Agreement contrary to its plain meaning. Seller invokes the "'substantial factor' rule [which] was developed judicially, primarily for cases involving multiple defendants, out of concern that an application of the but-for rule would allow each defendant to escape responsibility." *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991) (cited OB 68). But here, "caused" simply means "caused." *See id.* ("Most simply stated, proximate cause is [defined in Delaware as] that direct cause without which the accident would not have occurred."). And though Seller now contends (OB 58-59) that the court wrongly placed the burden on it to prove causation (as Buyer properly requested (A1767-68), *see* Op. 118-19), that

issue is irrelevant given the court's determination that "the burden of proof did not play a role in the case" because "the evidence was not in equipoise" (Op. 10).

For all these reasons, the court correctly found the title insurance condition failed.

CONCLUSION

The judgment should be affirmed.

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