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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ICATECH CORPORATION AND EMPRESAS ICA, S.A.B. DE. C.V. Defendants and Counterclaim Plaintiffs-Below, Appellants, v. PAUL V. FACCHINA, SR., individually and as Sellers' Representative, Plaintiff and Counterclaim Defendant-Below, Appellee.	)	No. 121, 2021 Court Below - Superior Court of the State of Delaware C.A. No. N17C-09-163 PRW CCLD CONSOLIDATED

APPELLANTS' OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On June 28, 2013, ICATech bought the privately held Facchina Companies ("Companies") from their founder and CEO, Paul Facchina, Sr. ("Facchina"). ICATech's parent, Empresas, signed the Purchase and Sale Agreement ("PSA") as a guarantor. Certain required governmental approvals delayed closing until April 14, 2014, when ICATech paid $60 million. The PSA also provided for up to $40 million in future contingent performance bonuses.

In September 2017, Facchina sued seeking a declaration that (1) ICATech owed a $30,647,509 accelerated bonus payment and (2) he was entitled to certain escrow funds. ICATech answered and counterclaimed seeking the return of the money ICATech paid for the Companies on the grounds that Facchina had fraudulently induced ICATech's purchase by making false representations in the PSA and concealing information that he was required to disclose.

A five-day bench trial was held in November 2019. The parties filed post-trial briefs and submitted cross-motions for costs and fees. The Trial Judge denied all claims in an October 29, 2020 Decision After Trial ("Opinion"). He later denied the cross-motions for costs and fees. ICATech appealed the adverse rulings made by the Trial Judge and respectfully submits this opening brief on appeal.

SUMMARY OF ARGUMENT

I. Facts

a. In December of 2012, Facchina entered a preliminary agreement to sell the Companies to ICATech. As the terms of the PSA were being negotiated, one of his Companies, Facchina Construction of Florida ("FCF"), sought Facchina's approval to pursue construction of the Grove at Grand Bay ("Grove"), a high-rise condominium project owned by the Martin family.

b. Facchina reluctantly approved pursuit of the Grove despite his extraordinarily acrimonious prior experience with the Martins on Quantum, a condominium project built by Facchina-McGaughan ("F-McG"). F-McG was not one of the Companies slated to be bought by ICATech. One of Quantum's significant problems was that the concrete work had been broken-up among various subcontractors, which was the operational policy followed by F-McG.

c. F-McG failed in 2007, and Facchina created FCF as a new company. Not surprisingly, in the wake of F-McG's failure and the problems at Quantum, FCF adopted the policy of never breaking-up the concrete work. Instead, FCF would award its projects' concrete work to a single subcontractor, a policy consistently followed by FCF until the Grove.

d. Facchina was also concerned about the Grove's unconventional geometry. Each floor was offset from the floor above and below it and twisted around an unusual, large steel structure in the building's core. Facchina's Companies had no experience with this twisting geometry. (Opinion 21-22).

e. So, when Facchina approved pursuit of the Grove, he specifically directed FCF's President, Jesus Vazquez ("Vazquez"), not to break-up the concrete work among different subcontractors. "Concrete on all contracts, high-rise contracts are critical," so Facchina "wanted one package, just one guy to manage, not two or three or five, whatever may be, one."

f. FCF signed the initial Grove contract on January 24, 2013. It contained no price or schedule because the plans were incomplete. Vazquez began working with the Martins on an amendment to that contract by which FCF would commit to build the Grove for a guaranteed maximum price within a specific time using subcontracting arrangements acceptable to them both ("GMP Amendment").

g. During this time, Facchina learned that Vazquez had violated his instructions and FCF's established policy by surreptitiously breaking-up the Grove's concrete work in negotiating the proposed $125 million GMP

Amendment. The proposed $125 million price for the Grove was $53 million more than FCF's next largest contract and $80 million more than any contract at Facchina's other Companies. Facchina approved the GMP Amendment as presented, rather than insisting upon adherence to his instructions and FCF's established concrete policy. Facchina understood that rejecting the GMP Amendment would draw questions from ICATech, delay the Companies' sale, and perhaps kill the deal. The GMP Amendment was signed on May 30, 2013. The PSA was signed less than a month later.

h. Facchina knew then that Vazquez could not be trusted to follow company policy or obey instructions, even on such vital matters, but Facchina kept quiet about that, too. This was an intentional omission intended to deceive ICATech and ensure that it continued to value Vazquez.

i. In the PSA, Facchina assured ICATech, that:

(1) none of the Companies had entered any contracts or taken any actions that were not done in the ordinary course of business or were inconsistent with past practices; *he knew that was not true;*

(2) there were no undisclosed "Material Adverse Effect[s]"; *he knew that was not true*; and

(3) all material contracts were listed on the appropriate schedule to the PSA; *he knew that, too, was not true*.

j. When the closing was delayed, ICATech required Facchina to produce updated schedules and renew his representations to account for the intervening months; as before, Facchina concealed the truth with falsehoods. He even concealed the truth while serving as Chairman of the Board for the Companies. The truth only emerged when Charles McPherson ("McPherson"), Facchina's hand-picked Chief Operating Officer, was deposed.

k. After discovery, Facchina moved for Summary Judgment on ICATech's fraud claim, and his counsel submitted the following statement of facts based on McPherson's and/or Facchina's own deposition testimony:

(i) The Grove job turned out to be a financial disaster (McPherson);

(ii) One of the prime causes of the disaster was the concrete (McPherson);

(ii) Facchina and McPherson had been adamant that all the concrete work should be performed by one subcontractor, not different segments parceled out to various contractors (Facchina and McPherson);

(iv) Facchina and McPherson expressly instructed Vazquez not to break-up the concrete work (Facchina and McPherson);

(v) Nonetheless, Vazquez, behind their backs and without their knowledge, did precisely that (Facchina); and

(vi) Breaking-up the concrete work, all by itself, turned the job into a nightmare of huge delays and cost overruns (McPherson).

II. Legal Propositions

a. When ICATech pointed out that the facts admitted by Facchina's counsel *proved* that his representations in the PSA were false, Facchina's motion was denied. At trial, Facchina changed course completely. He denied having instructed Vazquez not to break-up the Grove's concrete work, praised him for the way he had broken-up the concrete work, and otherwise contradicted each of the above admissions. The Trial Judge disregarded the facts admitted by Facchina's counsel and the inconsistencies with Facchina's testimony and repeatedly accepted Facchina's self-serving testimony, even when contradicted by Facchina's deposition testimony, documents admitted into evidence and the Trial Judge's own factual findings.

b. The Trial Judge's Opinion erroneously ignores that:

1. three of the major representations in the PSA were indisputably false considering the Trial Judge's own findings and documentary evidence.

2. Facchina knew they were false because, as found by the Trial Judge, Facchina reviewed the Grove's GMP estimates and approved the GMP Amendment, each of which showed that the concrete work had been broken-up.

3. the PSA's terms conclusively proved that Facchina intended for ICATech to rely on his representations because their truth was a condition precedent to ICATech's obligation to close. Similarly, this condition precedent and the undisputed testimony of ICATech's Chief Financial Officer proved that ICATech closed in reliance on the truthfulness of Facchina's representations.

4. ICATech suffered a $56.4 million[1] loss by relying on Facchina's major misrepresentations, the falsity of which was actively concealed by Facchina until the Companies ran out of money.

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[1] Facchina returned $3.6 million of the purchase price.

5. Facchina's decision to conceal the serious problems with the Grove and the risks facing FCF because of Vazquez's unreliability, and hide their obvious impact on the Companies' value from ICATech, simply cannot stand under Delaware law. The facts draw a straight, descending red line of losses connecting the financial disaster at the Grove that resulted from Facchina's decision to accept and hide Vazquez's malfeasance to the collapse of the Companies. The Opinion erroneously ignores these facts.

6. The failure of the Trial Judge to sanction Facchina's behavior flies in the face of Delaware's commitment to honesty in contracting and degrades the sanctity under Delaware law of an acquirer's ability to rely on a seller's representations.

7. Parties, particularly businesses, select Delaware and Delaware law to govern their contracts in reliance on the premium that Delaware courts place on honesty in acquisitions like this one. "Contractually binding, written representations of fact ought to be **the most reliable of representations**, and **a law intolerant of fraud should abhor parties that make such representations knowing they are false.**" *ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1057 (Del. Ch. 2006) (emphasis

added). When courts fail to protect buyers who have been deceived, they erode the trust vested in them. For these reasons, the Trial Judge's decision must be reversed.

STATEMENT OF FACTS

A. Facchina and His Companies

In 1987, Facchina founded the first of his Companies, Facchina Construction Company Inc. ("FCCI"). (A1516 at 11:1-12:11).[2] FCCI specialized in concrete work, heavy civil projects, such as roads, bridges and runways, and site development in the Mid-Atlantic Region. (A0706). Facchina is a concrete expert and has a sophisticated understanding of the steel and concrete portions of project structures. (Opinion 20).[3] McPherson was the Chief Operating Officer, second only to Facchina. (A1520 at 25:11-21).

B. Facchina Expands to Florida

In 2003-2004, Facchina acquired a South Florida general contracting business that became F-McG. (A1518 at 17:16-21). On its high-rise projects, F-McG consistently broke-up the concrete work into five to eight separate subcontracts. (A1524 at 41:15-42:12).

By August of 2007, F-McG had developed serious problems, the most serious being a high-rise project called Quantum. (A1657 at 91:19-20; A1660 at 102:5-

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[2] "A__" references are to the Appendix to Appellants' Opening Brief filed herewith.

[3] Copies of the Opinion, the Final Order and Judgment ("Final Order"), and the March 24, 2021 Letter Order ("Order") are attached as Exhibits A, B and C, respectively.

104:16). Quantum generated roughly 120 lawsuits. (A1660 at 103:8-15). These disputes caused an extraordinarily acrimonious relationship between Facchina and Quantum's owner, the Martins. (A0171 at 241:8-242:6). The decision to break-up the concrete work among several subcontractors was a significant problem at Quantum. (A1652 at 69:6-70:11).

C. Facchina Construction of Florida (FCF)

After suspending F-McG's operations, Facchina created FCF as his new general contracting business.[4] (Opinion 20). Vazquez, F-McG's former operations manager, became FCF's President. (A1519 at 23:1-5). Because of the Quantum debacle, FCF's operational policy forbade breaking-up the concrete work on its projects. (Opinion 21). FCF's policy required hiring a single subcontractor for a project's concrete work, so FCF had only "one belly button to push" and that subcontractor would "be [the] one guy that's going to hire all these other people and manage them." (A1652 at 70:1-18). As Facchina stated in his deposition, "it was a well-known fact from everyone's point of view I wanted one package, just one guy to manage, not two or three or five, whatever it may be, one." (A0173 at 251:16-19). This was important because, as Facchina testified, "[c]oncrete on all contracts, high-rise contracts are critical…100 percent." (A01587 at 43:5-8).

[4] F-McG and its liabilities were specifically excluded from the sale. (A0679).

D. Facchina Accepts A Preliminary Offer to Buy His Companies

On December 17, 2012, Facchina accepted ICATech's Non-Binding Preliminary Offer ("Preliminary Offer") to acquire his Companies. (A0421). ICATech's parent, Empresas, was a Mexican contractor with substantial experience building roads, bridges, tunnels, and airports, but with little high-rise construction experience. (A1847:18-A1848:12). ICATech was particularly interested in learning about high-rise construction. (A1848:1-12). The Companies were attractive because ICATech could learn from and leverage Facchina's high-rise construction management capabilities while using its parent's experience and larger balance sheet to grow the Companies. (A1848:4-12; A1849:2-9).

Because construction is a service business, retaining the senior management of the Companies was critical to ICATech. (A1848:19-A1850:8). Their retention was a specific condition precedent to closing. (A0658; A0693). Vazquez's retention was particularly important because he led the high-rise construction business. (A1858:22-A1860:6).

E. FCF Pursues Construction of the Grove

Shortly after Facchina accepted the Preliminary Offer, FCF signed an initial contract to build the Grove, another condominium project being developed by the Martins. (A0431; A1584 at 29:10-21). Facchina was reluctant to give his approval for this initial contract because of his prior extraordinarily acrimonious relationship

with the Martins on the Quantum project. (A0171 at 242:1-10). Facchina was also concerned about the Grove's unconventional geometry. (A0171 at 243:3-A0172 at 245:1). Each floor was designed to twist around a very unusual steel structure in the building's core. (Opinion 21). His Companies had no experience working on a project with twisting geometry. (Opinion 21-22). The concrete package was a critical piece of building the Grove. (A1587 at 43:5-8).

Facchina conditioned his approval on the assurance that the Grove's concrete work would not be broken-up. (Opinion 22). Both Facchina and McPherson expressly instructed Vazquez not to break-up the Grove's concrete work. (Opinion 22). These instructions mirrored FCF's policy of assigning concrete work to a single subcontractor. (Opinion 21). Nevertheless, Vazquez violated the policy on the Grove.

The initial Grove contract contained no price or schedule because the plans were incomplete. (A0431-A0521; A1585 at 33:23-35:14). Instead, the contract laid out a detailed process whereby FCF and the Martins would negotiate a GMP Amendment, specifying the guaranteed maximum price, schedule, and subcontracting arrangements. (A0437-A0439 §§ 3.5-3.7). The subcontracting decisions were initially reflected in FCF's estimates. (A0522; A0526). At trial, Facchina categorically denied having had any involvement or participation in the estimates, even after they were shown to him. (A1551 at 152:10-16; A1588 at 46:4-

47:15). The Trial Judge rejected this testimony: "Facchina reviewed the estimates and made many comments about the structure. The steel and concrete portions of the structure were with[in] Facchina's area of expertise." (Opinion 22).

The estimates clearly showed that the Grove's concrete work, costing more than $30 million, had been broken-up among five subcontractors (Morrow, Capform, C&C, Cemex, and Titon) for specific, individual amounts. (A0522; A0526; A1586 at 38:12-A1587 at 43:8).

At trial, McPherson explained (A1655 at 82:2-4) that it was critical for everyone to be "on board" with executing the GMP Amendment (A1855-A1327), since it represented FCF's commitment to "deliver the project for not more than a certain amount and not longer than a certain timeframe." (A1655 at 81:19-82:1). Given this, McPherson explained "we weren't going to take a $130 million project without [Facchina] saying it was okay." (A1655 at 81:6-10). The GMP Amendment was recommended by Vazquez to Facchina for his review and approval. (A1655 at 81:14-82:14). Facchina approved it (Opinion 22), and, on May 30, 2013, FCF executed the GMP Amendment establishing a price of $125 million. (A1186). This price was $53 million more than FCF's next largest contract (A0736) and $80 million more than any contract of the other Companies. (A0734-0735).

Yet at trial, Facchina denied having any role in the GMP Amendment or even seeing the contract until three days before the trial, characterizing his role as being

"None. Zero." (A1528 at 59:10-18). When shown the GMP Amendment, Facchina denied knowing what was in the document or having any role in the GMP's pricing. (A1586 at 39:12-18; A1588 at 46:22-23; 47:13-15). The Trial Judge rejected this testimony: Mr. Facchina "approved the GMP Amendment, in part, because it included 'a conditional bond,' which gave him 'great comfort.'" (Opinion 22). The detailed description of the concrete subcontracts was on page 4 of the GMP Amendment; the Conditional Bond was on pages 138-143. (A1188; A1322-A1327).

The concrete description in the GMP Amendment exactly matches the description in the estimates in terms of scope of work and costs. (A1188-A1189; A0522; A0526). The subcontract costs were identified in the exhibits and GMP Amendment as being the "Final Bought Prices" for each subcontract. At the Companies, the word "Bought" meant "awarded to a separate contractor [, *i.e.*,]…the package is procured." (A1523 at 38:5-7). The Titon subcontracts were effective April 1, 2013, (A0739-A0749), while the Capform and C&C subcontracts were effective April 26 and May 14, 2013, respectively. (A0530-A0622; A0942-A1040).

F. The PSA

Less than one month after execution of the GMP Amendment, Facchina executed the PSA on June 28, 2013. (A0623). In PSA Section 2.6, Facchina represented that since December 31, 2012, except as listed on Schedule 2.6, none of the Companies has:

> "(i) suffered any Material Adverse Effect" [which was defined as "an effect (or circumstance involving a prospective effect) on the business, operations, assets, liabilities, results of operations, cash flows, condition (financial or otherwise) or prospects of the Companies or the acquired Subsidiaries that is, or could reasonably be expected to be materially adverse…"]; and
>
> (v) "taken any action or entered into or authorized any Contract or transaction other than in the ordinary course of business and consistent with past practice that has not already been disclosed hereunder[.]"

(A0630; A0686).

PSA Schedule 2.6 did not reveal that the Grove's GMP Amendment and its subcontracts for the concrete work had not been entered into in the ordinary course of business and consistent with past practice. (A1103-A1112). Nor did it reveal that FCF had suffered a Material Adverse Effect as a result having executed the GMP Amendment and committed to breaking-up the concrete work in violation of FCF's standard operational policy and the express instructions of Facchina and McPherson. (*Id*.).

Facchina also represented that Schedule 2.12(b) was "a correct and complete list of all the Contracts of the following types to which any of the Companies is a party or by which any of them is bound…"

- any Contract under which any of the Companies has agreed to provide Construction Services;

- any Contract in excess of $50,000 or lasting longer than six (6) months; or
- any Contract, including any subcontract, pursuant to which any third party agrees to perform any services that are required to be performed by the Companies under any other Contract.

(A0637).

Jennifer Carpenter, an engineer and long-time Facchina employee, testified that she:

- was responsible for placing the Companies' Contracts into the Sellers' electronic Data Room (A0304 at 18:7-21; A0305 at 24:1-A0306 at 26:1);
- personally uploaded the Companies' Contracts into the Data Room (*Id.*);
- relied on FCF personnel to provide its Contracts (A0306 at 26:2-27:4);
- prepared PSA Schedule 2.12(b) by *personally* reviewing the contracts in the Data Room (A0310 at 43:1-22 and A0315 at 64:2-19); and
- was careful in preparing the schedules because she knew it was important for the schedules to accurately reflect what was in the data room. (A0315 at 64:10-19).

None of the Grove's six concrete subcontracts was listed on Schedule 2.12(b), even though the Estimates and the GMP Amendment showed a "Final Bought Price" for each subcontract. Although the subcontracts in the record each had an effective date prior to May 14, 2013, and the GMP Amendment listing them was signed on May 30, 2013, it is undisputed that they were not shown on Schedule 2.12(b) when the PSA was signed.

Between the PSA's execution and the Closing, FCF obtained only three more contracts to build high-rise projects: Apollo, Job #2013004; FIU, Job #2013006; and Crimson, Job 2014002. (A1167). The concrete work on each was awarded to a single subcontractor. (A1184; A1410). The Grove was FCF's only high-rise project that did not use a single subcontractor for its concrete work.

When Schedule 2.6 was supplemented at Closing, it still did not reveal that the GMP Amendment and its subcontracts for the concrete work had not been entered in the ordinary course of business and consistent with past practice or that FCF had suffered a Material Adverse Effect ("MAE") as a result having executed the GMP Amendment and broken-up the concrete work in violation of FCF's standard operational policy and the express instructions of Facchina and McPherson. (A1113-A1118).

None of the Capform, C&C, and Titon subcontracts was listed on the Supplemental Schedule 2.12(b) before Closing; however, fourteen other Grove subcontracts were listed. (A1179-A1181).

The conditions precedent to ICATech's obligation to close included a requirement that the representations made by the Sellers in the PSA were true and correct in all material respects on June 28, 2013 and on the Closing Date. (A0656).

ICATech relied on the truthfulness of the representations made in the PSA in purchasing the Companies. (A1853:18-A1855:17). If ICATech had known that the representations were false because the Grove's concrete work had been broken-up in violation of Facchina and McPherson's express instructions, ICATech would not have closed. ICATech would have killed the deal, particularly because ICATech so valued Vazquez's experience in vertical construction and because the Miami-based business was an essential factor in ICATech's purchase of the Companies. (A1861:13-A1862:17).

G. Facchina Becomes Chairman of the Board

In June of 2014, Facchina became Chairman of the Board of Directors of FCCI, the other Companies' parent. (Opinion 27; A0757). His annual salary was $272,226, and for this he was required to devote his full business time to serving as Chairman. (A1335; 1353-weekly salary was $5,235.13). The Companies' senior officers learned of the Grove's serious problems in the spring of 2015, causing the

Board to meet in Miami in August 2015 to discuss the growing problems at the Grove, most of which involved the concrete work. (A1723:12-23; A1730:14-21). Capform, which had the largest concrete subcontract, was removed from the job on July 2, 2015. (A0930). C&C had been issued repeated notices of noncompliant work, the majority of which were not corrected. (A0938). The Martins had stopped paying FCF due to the substantial defective concrete work, which Capform and C&C refused to correct. Instead, they blamed each other and alleged gaps in FCF's subcontracting process, forcing FCF to hire additional personnel to remedy the defective work. (A1724:16-A1730:21).

Facchina attended that Miami meeting as Chairman. (A0771). These dire developments were discussed in some detail, but Facchina never advised the Board of Vazquez's duplicity in breaking-up the Grove's concrete work. (A0771-A0775). And there is no evidence that ICATech was ever informed of Vazquez's malfeasance until McPherson's deposition. (A1734:23-A1735:6).

The Companies lost $16.4 million in 2015 and another $8.3 million in the first six months of 2016. (A0829; A1052). By August of 2016, the Grove had become the Companies' biggest problem, as a result of Vazquez breaking-up its concrete work, causing them to run out of money. (A1057; A1630 at 215:4-216:19; A1692 at 230:12-22). The Companies sought financial assistance from Travelers, their primary bonding company. (A1787:16-A1788:2). Before responding, Travelers

examined the Companies' records and discovered a $41 million deficit at the project level, the major part of which was on FCF's projects. (A1827:18-1829:10; A1831:1-5). Travelers declined to provide financial assistance and demanded that the Companies acknowledge being in default. (A1692 at 232:3-20). On August 25, 2016, the Companies acknowledged their default of the 28 Travelers-bonded contracts because they were unable to pay for labor and materials and complete their performance (A1060), and, shortly thereafter, acknowledged being in default on four other contracts bonded by Berkshire, a second surety. (A1693 at 234:17-235:9). Travelers and Berkshire then seized the revenues from their bonded contracts. (A1704:11-A1707:4). As of September 30, 2016, deprived of those revenues, the Companies' yearly losses had climbed to $33.6 million, and their combined net worth had plummeted to negative $2.2 million. (A1068-69). FCCI suspended all operations by the end of 2016. FCF remained in operation with Travelers' supervision and financing to complete its bonded contracts. (A1829:11-A1830:5).

H. Revelations, Admissions, Inconsistencies, and Credibility Issues in the Litigation

Facchina moved for summary judgment on ICATech's fraud claim. His motion relied, in part, on the following statements of fact based on Facchina's and/or McPherson's depositions:

- "The Grove job turned out to be a financial disaster."

- "One of the prime causes of the disaster was the concrete."
- "Seller Representative (Facchina) and McPherson had been adamant that all the concrete work should be performed by one subcontractor, not different segments parceled out to various contractors."
- "Seller Representative (Facchina) and McPherson expressly instructed Vazquez not to break-up the concrete work."
- "Nonetheless, Vazquez, behind their backs and without their knowledge, did precisely that."
- "Breaking-up the concrete work, all by itself, turned the job into a nightmare of huge delays and cost overruns."

(A0086-A0089).

ICATech opposed Facchina's motion, in part, on the grounds that these statements of fact actually established that the representations made by Facchina in PSA Sections 2.6(i) and (v) were false. (A0194-A0197). Facchina's motion was denied. (A0205-A0208).

And then, at trial, Facchina contradicted his deposition testimony by denying that he instructed Vazquez not to break-up the Grove concrete work. (A1528 at 58:1-13). The Trial Judge accepted this testimony despite having already found:

"Mr. Facchina's approval to take on the Grove had been given on the express condition that the concrete work would not be broken-up. Indeed, both Mr. Facchina and McPherson expressly instructed Vazquez not to break-up the concrete portion of the contract work on the Grove project." (Opinion 22, 40-41). The Trial Judge provided no explanation for the inconsistency between these findings.

ARGUMENT

Under Delaware law, a claim of common law or legal fraud requires the plaintiff to prove each of the following: "(1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance. *ABRY Partners*, 891 A.2d at 1050 (citation omitted).

I. Facchina Falsely Represented That FCF Had Done Business in the Ordinary Course and Consistent with Past Practice, Not Suffered An MAE and Listed All of Its Material Contracts

A. Question Presented

Whether the Trial Judge erred in not finding that the representations made by Facchina in PSA Sections 2.6(i)(v) and Section 2.12(b) were false? (Opinion 44).

B. Standard and Scope of Review

The interpretation and application of contract terms are questions of law that the Supreme Court reviews *de novo*. *Alta Berkeley VI C.V. v. Omneon, Inc*., 41 A.3d 381, 385 (Del. 2012); *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Merits of Argument

(i) ICATech claimed that Facchina falsely represented in PSA Section 2.6(v) that none of the Companies had "taken any action or entered into or authorized any Contract or transaction other than in the ordinary course of business and consistent with past practice." (A0191). The Trial Judge ignored ICATech's claim with no explanation.

The Trial Judge did however find: "as a matter of operational policy, FCF would not[break-up] the concrete work under its general contracts, as had been done by F-McG. The record shows that FCF consistently followed this policy of assigning the concrete work to a single subcontractor until the Grove project." (Opinion 21). The Trial Judge also found: "Mr. Facchina's approval to take on the Grove had been

given on the express condition that the concrete work would not be broken-up. Indeed, both Mr. Facchina and McPherson expressly instructed Vazquez not to [break-up] the concrete portion of the contract work on the Grove project." (Opinion 22).

Ignoring these express instructions and violating FCF's operational policy, the Grove's concrete work was divided into six subcontracts awarded to five subcontractors. This was not the *ordinary course of business* and was *inconsistent with past practice*, so the GMP Amendment, and its six concrete subcontracts should have been shown on Schedule 2.6 when the PSA was signed on June 28, 2013, and later at Closing. **They were not shown either time.** Therefore, Facchina's representation in PSA Section 2.6(v) was false when the PSA was signed and at Closing. The Trial Judge's failure to so rule is an error of law.

(ii) ICATech claimed that Facchina falsely represented in PSA Section 2.6(i) that none of the Companies had suffered an MAE. The Trial Judge ignored this claim with no explanation.

It is important to focus on the ordinary meaning of the parties' words defining what constituted an MAE that had to be disclosed. MAE definitions vary greatly, as recognized by Vice Chancellor Laster in *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*, 2020 WL 7024929 (Del Ch. Nov. 30, 2020).

Reflecting ICATech's severe disadvantage in understanding critical information about the privately held Companies and their high-rise projects, the PSA broadly defines an MAE as "an effect (or circumstance involving a prospective effect) on the business, operations, assets, liabilities, results of operations, cash flow, condition (financial or otherwise) or prospects of the Companies or the Acquired Subsidiaries, that are or could be reasonably expected to be materially adverse…." (A0686).

The Trial Judge found that the Companies had no experience building a project with the Grove's twisting geometry and unusual large steel core. Surely, the fact that FCF's most costly and structurally challenging project was being constructed in a manner that violated Facchina's express instructions and FCF's standard operational policy (*i.e.*, Vazquez's decision to break-up the concrete package, critical work on a high-rise project that represented nearly 25% of the Grove's $125 million GMP) and the resulting revelation that Vazquez could not be trusted were each a circumstance *involving a prospective effect on FCF* that could be reasonably expected to be materially adverse.

Facchina admitted as much when his counsel stated in moving for Summary Judgment that the "Grove was a financial disaster" and that "(b)reaking up the concrete work, all by itself, turned the job into a nightmare of huge delays and costs overruns." (A0087; A1995). The Grove became the Companies' largest problem,

causing them to run out of money in August 2016 and be taken over by Travelers and Berkshire.

The fact that FCF had suffered an MAE by executing the GMP Amendment was required to be shown on PSA Schedule 2.6 when it was signed less than a month later, and again nine months later when Schedule 2.6 was supplemented for Closing. **It was never shown**. Facchina's representation in Section 2.6 was therefore false. The failure of the Trial Judge to so rule is an error of law.

(iii) ICATech claimed that the representation made in Section 2.12(b) was false because none of the six subcontracts covering the concrete work was listed on PSA Schedule 2.12(b) initially or at Closing. Again, the Trial Judge ignored this claim with no explanation.

The Grove's concrete subcontracts were each made by May 14, 2013 and required to be listed on PSA Schedule 12.2(b) when it was signed and supplemented for Closing. ***They were not listed***. Facchina's representation in Section 2.12(b) was therefore false. The failure of the Trial Judge to so rule is an error of law.

The Opinion violates Delaware's commitment to honesty and truth in contracting and derogates its commitment to the sanctity of an acquirer's ability to rely on a seller's representations by ignoring the three false major representations made by Facchina. "Contractually binding, written representations of fact ought to be the most reliable of representations…" *ABRY Partners*, 891 A.2d at 1057. The

Trial Judge's failure to even address the evidence of their falsity is an inexplicable abuse of discretion.

II. Facchina Reviewed and Approved the Grove's GMP Estimates and GMP Amendment, Each of Which Showed that the Concrete Work Had Been Broken-Up

A. Question Presented

Whether the Trial Judge erred in failing to find that Facchina knew or believed that his representations in Section 2.6 (i) and (v) were false or made them with a reckless indifference to the truth? (Opinion 44).

B. Standard and Scope of Review

In reviewing a Trial Judge's factual findings, the Supreme Court reviews the entire record to determine whether these findings are the product of an orderly logical deductive process and sufficiently supported by the record, and, when the findings are clearly wrong and the doing of justice requires their overturn, it makes contradictory findings of fact. *See Levin v. Smith*, 513 A.2d 1292, 1301 (Del. 1986); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits of Argument

The Trial Judge failed to make any finding as to whether Facchina knew that his representations in PSA Sections 2.6(i)&(v) were false or made with reckless indifference to the truth. Instead, the Trial Judge merely stated: "there is no evidence that Mr. Facchina knew before closing how Vazquez had awarded the Grove concrete packages." (Opinion 44). That finding was an abuse of discretion because

the Trial Judge ignored substantial documentary evidence proving that Facchina did know.

Three critical documents clearly show that the Grove's more than $30 million of concrete work had been broken-up into six separate subcontracts, each with a specific price; the May 1, 2013, Estimate (A0522), the updated May 15 Estimate (A0526), and the GMP Amendment (A1188-89). Facchina could not possibly have reviewed these three documents without recognizing that the concrete work had been broken-up, so, at trial, he simply denied having had any involvement. After being shown the estimates, Facchina denied knowing anything about them and described his involvement in the estimates or pricing as being "absolutely zero." (A1588 at 47:13-15). Similarly, when asked about his involvement in approving the $125 million GMP Amendment, he answered "zero, zero" and denied even seeing the Grove contract until three days before trial. (A1588 at 46:22 and A1528 at 59:10-18).

The Trial Judge rejected Facchina's obviously false testimony. "Mr. Facchina reviewed the estimates and made many comments about the structure. The steel and concrete portions of the structure were with[in] Mr. Facchina's area of expertise." (Opinion 22). The Trial Judge also found that Facchina "approved the GMP Amendment, in part, because it included 'a conditional bond,' which gave him 'great comfort.'" (*Id*.). Facchina did not tell the truth at trial.

All of this demonstrates that it was an abuse of discretion for the Trial Judge to find "no credible evidence that Mr. Facchina knew before the closing that Vazquez had awarded the Grove concrete packages to more than one subcontractor." (Opinion 40).

It is an abuse of discretion to accept obviously false, self-serving testimony in the face of overwhelming documentary evidence - evidence that compelled the Trial Judge to make findings that directly contradicted Facchina's key defense, *i.e.*, that he did not know the concrete work had been broken-up. The Trial Judge was obliged to explain this illogical outcome. Instead, he ignored this irreconcilable conflict. The Opinion provides no orderly logical deductive process, as required under Delaware law, to support a finding that Facchina was ignorant of Vazquez's malfeasance. *See, Levitt*, 287 A.2d at 673.

The Trial Judge's rejection of Facchina's testimony regarding his "zero, zero" familiarity with the estimates and the GMP Amendment, and the unexplained conflicts between the documents' content and Facchina's self-serving testimony renders the acceptance of Facchina's testimony clearly erroneous. *See Levin*, 513 A.2d at 1301 (the Trial Court's reliance upon the credibility of a witness and disregard of his conduct and record-keeping to the contrary was clearly erroneous); *See also, Cede & Co v. Technicolor, Inc*, 758 A.2d 485, at 492, n.36 (Del. 2000) (quoting the U.S. Supreme Court reasoning with approval, "factors other than

demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination."). And courts should be suspicious of a party who, after his "initial defensive angle did not pan out," changes his story, as Facchina did at trial. *Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, 2007 WL 2142926, at *2 (Del. Ch. July 20, 2007).

The suspicions voiced in *Cobalt* are particularly applicable in viewing the story spun by Facchina at trial which was (i) contradicted by the documentary evidence showing he had to have known prior to Closing that the Grove's concrete work had been broken-up, (ii) internally inconsistent with respect to his instructions to Vazquez and the damage done to the Grove by breaking-up the concrete work (iii) implausible on its face with respect to him having had no involvement with the Grove's estimates or the $125 million GMP Amendment and (iv) a complete flip-flop from the facts asserted by his counsel during Summary Judgment. The Opinion contains no logical explanation for rejecting Facchina's testimony that he had no involvement with the estimates or the GMP Amendment, but accepting Facchina's

self-serving testimony that he did not know prior to Closing that Vazquez had broken-up the Grove's concrete work. The Trial Judge's findings are irreconcilable.

The Supreme Court should therefore enter its own factual finding that Facchina knew that Vazquez had broken-up the Grove's concrete work and that Facchina's representations in Section 2.6(i)&(v) were intentionally false when the PSA was signed and when closed.

III. The PSA's Terms Confirm that Facchina Intended for ICATech to Rely on His Representations

A. Question Presented

Whether the Trial Judge erred in applying Delaware law to determine whether Facchina intended to induce ICATech to rely on his representations in the PSA? (Opinion 42).

B. Standard and Scope of Review

The statement of the relevant Delaware law and its application to the terms of the PSA are questions of law subject to *de novo* review by the Supreme Court. *Alta Berkeley*, 41 A.3d at 385; *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

The Trial Judge found that ICATech had "not demonstrated that Facchina misrepresented or did not disclose information with the intent to induce it to purchase FCCI." (Opinion 42). This finding does not accurately reflect Delaware law. "Under Delaware law, a claim of common law or legal fraud requires the plaintiff to prove…(3) the defendant intended to induce the plaintiff to act or refrain from acting." (Opinion 38). Thus, for this element of fraud, ICATech is required to prove only that Facchina intended to induce ICATech to rely on his representations in the PSA.

The PSA irrefutably proves Facchina intended to induce ICATech to buy his Companies when he made reassuring representations in the PSA itself. PSA Section

5, "Conditions Precedent to Obligations of Purchaser," makes ICATech's obligation to close subject, as a condition precedent, to Facchina's representations being true and correct in all material respects as of the date of the PSA and the Closing Date. (A0656 § 5.1).

Misapplying Delaware law regarding Facchina's intent to induce ICATech to rely on the truth of his representations is an error of law.

IV. ICATech Justifiably Relied on the Truthfulness of Facchina's Representations.

A. Question presented.

Whether the Trial Judge erred in ruling that ICATech failed to prove its actual reliance on any false statement or omissions by Facchina? (Opinion 44).

B. Standard and Scope of Review

The application of Delaware law to the terms of the PSA and the undisputed evidence of record are questions of law subject to *de novo* review by the Supreme Court. *Alta Berkeley*, 41 A.3d at 385; *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

The Trial Judge's conclusion that ICATech failed to prove its actual reliance on any false statement or any omissions by Facchina is not supported by logical explanation or rationale. This conclusion ignores the provisions in the PSA with respect to the issue of ICATech's reliance. Because the truthfulness of Facchina's representations was a condition precedent to ICATech's obligation to close, the fact that ICATech closed is conclusive proof of its reliance on Facchina's representations.

This is confirmed by the undisputed testimony of ICATech's CFO that it relied on the truthfulness of Facchina's representations in closing on the PSA. He confirmed that, had ICATech known that the representations were false because Vazquez had broken-up the Grove's concrete work among various subcontractors

and in so doing had violated Facchina's express instructions, ICATech would have killed the deal. ICATech was heavily relying on Vazquez regarding vertical construction and the Miami-based business. (A1861:13-A1862:9). The Opinion offers no rationale for disregarding this testimony.

The Trial Judge's misapplication of Delaware law regarding ICATech's reliance on Facchina's representations in the PSA is an error of law.

V. ICATech Lost $56.4 Million As A Result of Having Been Fraudulently Induced by Facchina To Buy His Companies

A. Question Presented.

Whether the Trial Judge erred in concluding that ICATech was not injured by its reliance on Facchina's representations because there was no evidence that ICATech suffered losses on the Grove proximately caused by the fraud it alleged? (Opinion 44).

B. Standard and Scope of Review

The application of Delaware law to the facts are questions of law subject to *de novo* review by the Supreme Court. *Alta Berkeley*, 41 A.3d at 385; *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

ICATech did not seek to recover any losses on the Grove which was, as admitted by counsel for Facchina, a "financial disaster" where the "breaking-up of the concrete, all by itself, turned the job into a nightmare of huge delays and cost overruns." Those losses were incurred by FCF after Facchina defrauded ICATech. The Trial Judge's finding of "no evidence that ICATech/Empresas suffered any losses on the Grove proximately caused by the fraud it alleges here" is irrelevant to ICATech's right to recover its actual damages. (Opinion 44). ICATech lost $56.4 million when it was fraudulently induced by Facchina to buy his Companies.

Where, as here, a purchaser is fraudulently induced into paying $56.4 million, and the wrongdoer conceals his fraud until after the Companies had become worthless, the purchaser's actual damages are the amount fraudulently obtained by the wrongdoer. And it is undisputed that the amount ICATech was fraudulently induced to pay was $56.4 million.

VI. The Trial Judge Erroneously Ignored Facchina's Admissions That the Grove's Concrete Work Was Wrongfully Broken-Up Causing Huge Delays and Cost Overruns

A. Question Presented.

Whether the Trial Judge erred in failing to treat the following statements of fact made on behalf of Facchina by his counsel as either judicial or evidentiary admissions? (A0287-A0288; Opinion 37-44).

1. The Grove job turned out to be a financial disaster.

2. One of the prime causes of the disaster was the concrete.

3. Facchina and McPherson were adamant that all the concrete work should be performed by one subcontractor, not different segments parceled out to various contractors.

4. Facchina and McPherson expressly instructed Vazquez not to break-up the concrete work.

5. Nonetheless, Vazquez, behind their backs and without their knowledge, did precisely that.

6. Breaking-up the concrete work, all by itself, turned the job into a nightmare of huge delays and cost overruns.

B. Standard and Scope of Review.

Application of the relevant Delaware law to the evidence is a question of law subject to de novo review by the Supreme Court. *Alta Berkeley*, 41 A.3d at 385; *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

Facchina's counsel's statements of fact were each based on the sworn testimony of Facchina and/or McPherson. By asserting these facts, Facchina's counsel represented to the Trial Judge and ICATech that these facts could not be genuinely disputed. Before the trial, ICATech moved to have these statements of fact treated as judicial admissions. (A0209-A0218). The Trial Judge denied ICATech's pretrial request (A0287-A0288) and ignored ICATech's post-trial requests (A2020-A2021; A2084-A2085) without ever explaining why these highly relevant statements of fact by Facchina's counsel were not treated as either judicial or evidentiary admissions.

The concept of Judicial Admissions is well recognized in Delaware. In *Merritt v. United Parcel Service*, 956 A.2d 1196 (Del. 2008), the Supreme Court held that a letter written by counsel for one party conceding the existence of a partial disability was a judicial admission in that it was a voluntary knowing concession of fact made by counsel to the court. The same rationale was applied in *EF Operating Corporation v. American Buildings.*, 993 F.2d 1046 (3rd Cir. 1993). There, the

Court of Appeals held that statements of fact made by counsel in seeking summary judgment constituted judicial admissions which could not later be contradicted. The Court explained:

> "Representations made in briefs inform opposing parties and the court of concessions, the specific contentions being raised and the facts and laws relied upon to make them. The smooth, efficient working of the judicial process depends heavily upon the assumption that such representations will be made after careful, deliberate evaluation by skilled attorneys who must ultimately accept responsibility for the consequences of their decisions. It goes without saying that one cannot casually cast aside representations, oral or written, in the course of a litigation simply because it is convenient to do so, and under the circumstances here, a reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations."

Id. at 1050-1051 (citation omitted); *see also, LaRue v Steel*, 2016 WL 537614, at *5 (Del. Super. Ct. Feb. 10, 2016) (Judge Wallace treated counsel's statements of fact as judicial admissions by LaRue).

At a minimum, the Trial Judge should have considered these highly relevant factual admissions as evidence, D.R.E. 801(d)(2)(D), and explicitly taken them into account as admissions against interest when making its findings and evaluating Facchina's credibility. *One Virginia Ave. Condominium Ass'n of Owners v. Reed*, 2005 WL 1924195, at 3, n.17 (Del. Ch. Aug. 8, 2005). Ignoring them completely was an abuse of the Trial Judge's discretion.

VII. The Trial Judge's Finding that the Concrete Subcontracts Were in the Data Room Prior to Closing Was an Abuse of Discretion and Clearly Erroneous

A. Question Presented

Whether the Trial Judge erred in admitting JX279 (A1081-A1087), JX281 (A1088-A1101) and JX297 (A1102) and in finding that the subcontracts of Capform, C&C, and Titon at the Grove were placed in the Data Room in July 2013, nearly nine months before closing? (Opinion 26).

B. Standard and Scope of Review

Evidentiary rulings and findings of fact by a Trial Judge are subject to review and reversal if the rulings are an abuse of discretion and the findings are clearly erroneous. *Barrow v. Abramowicz*, 931 A.2d 424, 429 (Del. 2007) and *Levitt*, 287 A.2d at 673.

C. Merits of Argument

First, it must be understood that the presence of these subcontracts in the Data Room would not have revealed that they had been entered in violation of the express instructions of Facchina and McPherson or the standard operational policy of FCF. Their absence however, coupled with the inept attempt to create evidence that they were in the Data Room prior to Closing, is further confirmation of Facchina's pervasive deceit.

The only evidence cited in support of the Trial Judge's finding was the screenshots shown in JX279 (A1081-A1087), JX281 (A1088-A1101), and JX297 (A1102) (the "Screenshots"). On cross examination of the sole witness, Facchina - lawyer Dolores Laputka admitted that she neither prepared the Screenshots (A1888:13-15) nor witnessed their preparation. (A1938:9-13). Despite having no personal knowledge, Laputka said the Screenshots were prepared by a technician employed by her firm. (A1933:9-14; A1934:12-17). No one with any actual personal knowledge of the Screenshots' provenance ever testified.

Moreover, the Screenshots were not created until the summer of 2019. They were not taken from the Data Room prior to Closing. Instead, they were allegedly made from data downloaded to a thumb drive when the Data Room was shut down in 2018. (A1888:3-15; A1934:22-A1935:17). This all prompted a motion to strike the exhibits. Facchina's counsel responded by stating he would be glad to bring the technician to testify when the trial resumed the following Tuesday. (A1939:11-13). At that point, the Trial Judge allowed the exhibits to stand. Facchina never produced the technician.

Delaware Rule of Evidence 901(a) provides that: "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

In *United States v. Bansal*, 663 F.3d 634, 667 (3d Cir. 2011), the Court admitted a screenshot of a website that had been obtained from another website called WayBack Machine. To authenticate that the screenshot was what it purported to be, a witness established the reliability of the WayBack Machine based on her personal knowledge. The Third Circuit found this was evidence "'sufficient to support a finding'" that the screenshots were "'what they purport[ed] to be,'" rendering them admissible under Rule 901(b)(1). (*Id*. at 668). Similarly, in *Specht v. Google, Inc.*, 747 F.3d 929 (7th Cir. 2014), the Seventh Circuit held that testimony from a witness with personal knowledge of the archival service's reliability was necessary to authenticate a screenshot.

Here, the Screenshots were taken long after the Closing and merely represented what was allegedly downloaded from the Data Room onto a thumb drive. There is no basis to conclude that documents were not added to the Data Room during the intervening years. In fact, Laputka admitted "the folders might have had something added to them" when asked to explain why each Screenshot contained a notation that the subcontracts file folder had been modified on December 7, 2018. (A1936:15-A1937:13).

There is no evidence demonstrating the reliability and integrity of the technology used to create the Data Room, the thumb drive, or the Screenshots.

The Trial Judge should have applied an adverse inference to the admissibility and/or reliability of the screenshots, as requested by ICATech. (A2070-A2072)). "'[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable.'" *Hardwick v. State*, 971 A.2d 130, 134 (Del. 2009) (quoting *Demby v. State*, 744 A.2d 976, 978 (Del. 2000)).

The only competent evidence of the Data Room's contents is Carpenter's Supplemental Schedule 2.12(b), (A1179-A1181), that established that these subcontracts were not in the Data Room prior to the Closing. (*See Supra* pp. 15-17). Because the Trial Judge's finding to the contrary was clearly erroneous, the Supreme Court should enter its own finding that the Capform, C&C, and Titon subcontracts were not in the Data Room prior to the Closing.

VIII. There Was No Basis for The Trial Judge to Employ an Adverse Inference In Favor of Facchina Because ICATech Did Not Call Vazquez to Testify

A. Question Presented.

Did the Trial Judge err in ruling that ICATech's failure to call Vazquez warranted an evidentiary inference that Vazquez would have confirmed Facchina's testimony? (Opinion 41-42).

B. Standard and Scope of Review

Evidentiary inferences drawn by the Trial Judge are subject to review and reversal if they are an abuse of discretion. *Barrow*, 931 A.2d at 429; *Levitt*, 287 A.2d at 673.

C. Merits of Argument

ICATech did not call Vazquez, and the Trial Judge inferred that Vazquez would have confirmed Facchina's testimony that the direction he gave to not break-up Grove's concrete work was only a recommendation or advice. This is plainly wrong.

A missing witness inference can only be used "'if a party has it **peculiarly** within his power to produce certain witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable.'" *Hardwick*, 971 A.2d at 134 (Del. 2009) (quoting *Demby v. State*, 744 A.2d 976, 978 (Del. 2000)) (emphasis added); *see*

United States v. Ariza-Ibarra, 651 F.2d 2, 16 (1st Cir. 1981) (holding a party having **exclusive control** over a witness who could provide relevant, noncumulative testimony fails to produce the witness, may be subject to an adverse inference.)

Here, there was no evidence that ICATech had any peculiar power or exclusive control over Vazquez, a Miami resident. There is no authority cited for treating the submission of an affidavit as evidence that affiant is under that party's exclusive control or **peculiarly** within that party's power.

More importantly, ICATech had no reason to call Vazquez as a witness. Facchina's admissions during his deposition, McPherson's confirmation of those instructions, and the statements of fact made at Summary Judgment on Facchina's behalf were all the evidence needed to prove that Facchina had expressly instructed Vazquez not to break-up the Grove's concrete work and that Facchina had been adamantly opposed to the concrete work being divided among separate subcontractors.[5] ICATech did not know that Facchina would contradict his deposition testimony and the factual statements made by his counsel. But Facchina knew it. And in the face of the contrary evidence, Facchina had every incentive to call Vazquez to confirm his new story was correct.

Facchina never called Vazquez as a witness.

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[5] Facchina, not ICATech, listed Vazquez as a witness in the Pretrial Order. (A0396).

Given these facts, the Trial Judge abused his discretion in using the fact that Vazquez did not testify to draw an inference that he would have corroborated Facchina's self-serving testimony.

IX. This Case Should Be Remanded with Directions for the Trial Judge to Consider the Imposition of Punitive Damages and to Award Interest

A. Question Presented

If the Supreme Court reverses the Trial Judge and remands the case for entry of judgment for ICATech with regard to its fraud claim, should the Trial Judge be directed to consider awarding punitive damages against Facchina and to include interest in ICATech's judgment? (Opinion 37-44).

B. Standard and Scope of Review

The application of Delaware law to the facts are questions of law subject to *de novo* review by the Supreme Court. *Alta Berkeley*, 41 A.3d at 385; *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

Punitive damages are appropriate where the "defendant's conduct…has been particularly reprehensible, *i.e.* reckless, or motivated by malice or fraud, [or involved]…willful or malicious breaches of contract. *Jardel Co. v. Hughes*, 523 A.2d 518, 529 (Del. 1987). Where "fraud . . . involves breach of trust or confidence, the plaintiff may recover punitive damages . . . to punish the individual defendant and deter similar conduct." *Stephenson v. Capano Dev., Inc*., 462 A2d 1069, 1076-77 (Del. 1983) (citations omitted); Restatement (Second) of Torts, § 908 (1977).

Facchina's fraud was committed willfully and wantonly with careful calculation over the seven-year period from the signing of the PSA in June 2013 until the litigation was submitted for decision in July 2020.

The Fraud in the PSA

ICATech's fraud claim arose from the intentional false representations made by Facchina in the PSA to induce ICATech to buy his companies. Law and policy forbid such duplicity. "Contractually binding, written representations of fact ought to be the most reliable of representations, and **a law intolerant of fraud should abhor parties that make such representations knowing they are false."** *ABRY Partners*, 891 A.2d at 1057 (emphasis added).

Concealment of the Fraud

Shortly after the closing in April of 2014, Facchina became the Chairman of the Board of Directors of FCCI. He was paid $272,226 annually to "devote his full business time" to serving as Chairman.

In the spring of 2015, senior officers of the Companies became aware of serious construction problems at the Grove.

The Martins had stopped paying FCF due to the substantial defective concrete work, which Capform and C&C refused to correct. Instead, they blamed each other and alleged gaps in FCF's subcontracting process, forcing FCF to hire additional personnel to remedy the defective work. In August 2015, the Board of Directors for

the Companies met in Miami in order to discuss these matters; Facchina chaired the meeting. There is no evidence in the meeting's minutes or elsewhere that Facchina ever told his fellow Board members that Vazquez had broken-up the concrete work at the Grove in violation of Facchina's express instructions. (A0771-A0775). Prior to this litigation, there is no evidence of ICATech ever being informed by Facchina that he had expressly instructed Vazquez not to break-up the concrete work.

Facchina Repeatedly Gave False Testimony in the Litigation

Facchina testified that he had no involvement with the Grove's estimates. His testimony was not true, as found by the Trial Judge.

Facchina testified that he had no involvement with the GMP Amendment. His testimony was not true, as found by the Trial Judge.

Facchina testified that he had not known prior to the Closing on the PSA that the concrete work at the Grove had been broken-up among different subcontractors. His testimony was false, as shown by the clear language of the GMP Estimates and the GMP Amendment.

Facchina repeatedly testified that FCF regularly broke up the concrete work on its high rise projects. (A1527 at 54:5-13; A1582 at 23:9-18; A1617 at 164:22-A1618 at 165:3). His testimony was false; the Grove was FCF's only high-rise project where the concrete work was not awarded to a single subcontractor.

Facchina's repeated lack of candor cannot be ignored. *Parfi Holding AB v. Mirror Image Internet, Inc*., 954 A.2d 911, 933 (Del. Ch. 2008) ("The integrity of the litigation process is fundamentally undermined if parties are not candid with the court.").

Punitive Damages Should Be Awarded Against Facchina

Facchina's intentionally false statements in the PSA, the continued concealment of his fraud in violation of his duty of loyalty and care while being well paid to serve as Chairman of the Board of Directors, and his repeated false testimony during the litigation warrant the imposition of substantial punitive damages, both to punish him and deter similar conduct by others.

It is appropriate to award prejudgment interest in fraud cases. *See Stonington Partners, Inc v. Lernout & Hauspie Speech Prod., N.V.*, 2003 WL 21555325, at *5 (Del. Ch. July 8, 2003), *rev'd and remanded for trial on other grounds*, 945 A.2d 584 (Del. 2008). In such matters, interest begins accruing on the date the fraud is perpetrated, and runs through the date of judgment. *Id*.

If the Supreme Court agrees that ICATech was fraudulently induced by Facchina to buy his Companies, the Trial Judge's ruling that ICATech failed to prove it had suffered any loss should be reversed and the case remanded for entry of judgment in the amount of $56.4 million plus pre- and post-judgment interest at the

legal rate, compounded quarterly in favor of ICATech, as Vice Chancellor Laster ordered in the case of *In Re Wayport, Inc. Litig*, 76 A.3d 296 (Del. Ch. 2013).

CONCLUSION

ICATech submits that the decision of the Trial Judge should be reversed and remanded, with instructions that the Judgment be vacated with regard to the portions appealed by ICATech and judgment entered in its favor as requested herein. The Trial Judge should be further instructed to consider and rule on the imposition of punitive damages against Facchina.

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