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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TOMER HERZOG and DANIEL KLEINBERG, Defendants Below/ Appellants/Cross-Appellants, *vs.* GREAT HILL EQUITY PARTNERS IV, LP, GREAT HILL INVESTORS LLC, FREMONT HOLDCO, INC., and BLUESNAP, INC. (F/K/A PLIMUS), Plaintiffs Below/ Appellees/Cross-Appellants.	No. 160, 2021 Court Below-Court of Chancery C.A. No. 7906-VCG

DEFENDANTS BELOW/APPELLANTS' ANSWERING BRIEF IN OPPOSITION TO CROSS-APPELLANTS' OPENING BRIEF AND REPLY BRIEF IN SUPPORT OF THEIR APPEAL

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NATURE OF PROCEEDINGS

Great Hill, despite having lost on all but the most modest of the claims it asserted against the Founders, nonetheless claims the Court of Chancery should have awarded it attorneys' fees.[1] To support that argument, Great Hill relies on an argument that is now moot, asks the Court to read the Merger Agreement in a way untethered from the accepted rules of contract interpretation and Delaware law, and retreats from its previous position that its chief claim in the Court of Chancery was fraud.

Lest Great Hill's brief engender any confusion, the Founders ask this Court to bear in mind certain basic points:

- Great Hill principally bases its attorneys' fee request on the indemnification provision of the Merger Agreement, Section 10.02(a). But the parties agreed that any indemnification would be funded exclusively from the $9.2 million escrow fund established by the Merger Agreement and, earlier this year, Great Hill agreed to disbursement of the escrow funds and signed "joint written instructions" authorizing the release of the escrow funds per the terms of the Merger Agreement. A870-871, A891-92. Accordingly, Great Hill has mooted its claim for

[1] The Founders will use the same defined terms in this brief as they did in their opening brief.

attorneys' fees as a form of indemnification since no court could provide a remedy even if Great Hill somehow prevailed in its request for fees under Section 10.02.

- In an attempt to avoid the conclusion that the parties to the Merger Agreement intended the more specific prevailing-party provision of Section 12.10 to govern attorneys' fees in a case between and among the parties to that agreement rather than the more general indemnification provision of Section 10.02, Great Hill offers an argument that the two provisions are not inconsistent because the former covers fees up to the $9.2 million escrow amount and the latter covers the rest.[2] But nothing in the Merger Agreement (or elsewhere) supports Great Hill's argument, and Great Hill makes no meaningful effort to demonstrate otherwise.

- When it turns to arguing that it should alternatively receive a fee award under the prevailing-party provision of the Merger Agreement, Section 12.10, Great Hill contends that, despite its repeated representations to the Court of Chancery that fraud and aiding and abetting fraud were its central claims, its chief claim was really a breach of a representation and warranty related to a failure to disclose the potential loss of Plimus' business relationship with PayPal. But Great Hill's characterization of its case is in the record—indeed, the Founders cited and quoted those representations in their opening brief to this Court—and Great Hill does not

[2] Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal at 28-29.

reconcile its statements to the Court of Chancery with its new position in this Court. It just ignores what it said.

- In its effort to persuade the Court that it prevailed on what it now claims was the chief issue in the trial court—the breach of a representation or warranty by failing to disclose the possibility that PayPal would terminate its relationship with Plimus—Great Hill focuses myopically on the Court of Chancery's liability opinion. But, in its damages opinion, the trial court held that Great Hill had not proven injury from that nondisclosure and, so, the trial court awarded no damages. A claim for breach of representations and warranties is a claim for breach of contract, and, in Delaware, a party must prove injury to prevail on a breach-of-contract claim. Thus, Great Hill did not prevail on that portion of its claim.

- Great Hill accused the Founders of aiding and abetting fraud, civil conspiracy, unjust enrichment, and breaches of contractual representations and warranties, and it demanded that the Founders share in $122 million in alleged damages. In the end, the Court of Chancery held that Great Hill failed to prove its claims for aiding and abetting fraud, conspiracy, and unjust enrichment. The Court held that Great Hill failed to prove that its alleged injury from the breach of representation regarding PayPal's termination threat was anything but speculative and, so, Great Hill did not prevail on that claim—the very claim it now asserts was

the chief one in the case.[3] Thus, the Founders prevailed on the chief claims in the case, whether they be fraud and aiding and abetting fraud or the PayPal representation.

- The Merger Agreement provides that a party that prevails in part "shall" recover its fees "on an equitable basis." In their opening brief, the Founders demonstrated that "shall" is mandatory such that the Court of Chancery had to award fees and the only "equitable" inquiry was how to allocate those fees to account for the modest claims on which the Founders lost. Great Hill does not meaningfully confront that analysis, pointing instead to inapt cases to support the idea that the Court of Chancery had some broad discretion to simply refuse to award fees at all.

While this litigation was complex, contentious, and lengthy, the attorneys' fees issue is ultimately straightforward. The parties included in their Merger Agreement a specific provision governing fee shifting in litigation between and among them. Under Delaware law, a court is to decide which party prevailed by asking who predominated on the chief issue. Here, on the claims Great Hill asserted against the Founders, the Founders plainly predominated on the chief issues and, so, as between them and Great Hill, the Founders were the only prevailing parties. The

[3] As the Founders noted in their opening brief, the only damage award against them related to a different representation-and-warranty claim, one related to excessive chargeback fines, and the Founders agreed to pay their *pro rata* shares of the $12,255.74 total.

Merger Agreement provides that a party that prevails in part as the Founders did is entitled to an award of attorneys' fees "on an equitable basis," which, in context, means calculated with regard to the extent of the party's success in the litigation.

The Court of Chancery correctly held that Great Hill is entitled to no fee award, but it incorrectly held that it could deny the Founders' request for attorneys' fees notwithstanding the language of the Merger Agreement and the Founders' overwhelming success.

The Founders ask this Court to grant them relief and to deny relief to Great Hill.

RESPONSE TO CROSS-APPELLANTS' SUMMARY OF ARGUMENT

1. Denied. As an initial matter, because Great Hill agreed to the release of the entire escrow fund and because the Merger Agreement provides that the escrow fund is the exclusive source to pay indemnification claims, Great Hill's claim for attorneys' fees as a form of indemnification is moot. Moreover, the Court of Chancery correctly held that the indemnification provision in Section 10.02 does not apply to allow recovery of attorneys' fees arising from claims between and among the parties to the Merger Agreement in that (1) the indemnification provision does not clearly express the parties' intent to indemnify one another for attorneys' fees in first-party actions and (2) the express fee-shifting provision in Section 12.10 further demonstrates the parties' intention that requests for attorneys' fees for first-party actions be governed solely by Section 12.10.

2. Denied. It is denied that the Court of Chancery abused its discretion when it denied Great Hill's motion for attorneys' fees under Section 12.10 because, despite its late-in-the-day effort to say otherwise, the chief issue in the case as between Great Hill and the Founders was aiding and abetting fraud/conspiracy to commit fraud, an issue on which the Founders prevailed. Moreover, even if the chief issue were the representation-and-warranty claim regarding PayPal as Great Hill now contends, the Founders were prevailing parties on that claim. Proof of injury is a necessary element of a claim for breach of contract, and the Court of Chancery

held that Great Hill's claim to damages regarding PayPal was unacceptably speculative and awarded none.

STATEMENT OF FACTS

The Founders incorporate by reference the statement of facts in their opening brief.

ARGUMENT

I. GREAT HILL HAS MOOTED ITS CLAIM FOR ATTORNEYS' FEES BASED ON THE INDEMNIFICATION PROVISION IN SECTION 10.02(A) OF THE MERGER AGREEMENT.

A. Question Presented

Whether Great Hill's voluntary agreement to release all remaining funds in the escrow account prior to the entry of the Court of Chancery's final order and judgment mooted its claim for attorneys' fees as a form of indemnification since the Merger Agreement provides that the escrow account would be the exclusive source of funds to pay indemnification claims.

B. Scope of Review

The issue is one of contract interpretation, which is a matter of law that this Court reviews *de novo*. *See Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).[4]

C. Merits Argument

In Delaware, as elsewhere, there must be an active case or controversy at all stages of a case. *See NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 435 (Del. Ch. 2007). The mootness doctrine requires a court to dismiss a claim "if the substance of the dispute disappears due to the occurrence of certain events following the filing of an action." *Id*. (quotation omitted). "If a grant

[4] Because Great Hill's claim became moot after the Court of Chancery concluded its substantive work, this Court is not actually reviewing any determination of the Court of Chancery.

of relief cannot have any practical effect on the existing controversy, the dispute is moot." *Id.* (quotation omitted).

Here, Great Hill claims it is entitled to an award of attorneys' fees under Section 10.02(a) of the Merger Agreement, which sets out various indemnification obligations. As the Founders will demonstrate below, that provision does not allow for an award of attorneys' fees for "first-party" claims such as those in this case. But there is a threshold issue that precludes the Court's reaching the merits. Great Hill has rendered its claim moot.

To understand the mootness issue, it is important to consider certain related provisions of the Merger Agreement. Section 2.08 creates an escrow account into which $9.2 million was deposited, with each Effective Time Holder (including the Founders) deemed to have contributed to that amount in proportion to his, her, or its shares.[5] Section 10.01 establishes a "survival period" on which "all other representations and warranties in this Agreement, the Company Closing Certificate and the Parent Closing Certificate shall terminate," which is 12 months after the closing date on the Merger Agreement.[6] Under Section 10.03(b), those funds "will be the sole source of funds from which to satisfy the Effective Time Holders'

[5] Merger Agreement § 2.08. B129

[6] Merger Agreement § 10.01. B175.

indemnification obligations under Section 10.02(a)(i) [which is the source of Great Hill's demand for attorneys' fees] ...."[7] The escrow account was to remain funded from the closing date on the Merger Agreement to 12 months after that date.[8] Section 10.12 describes how the escrow funds are to be distributed after that 12-month period, and it provides "that such portion of the Escrow Amount will remain in escrow after the expiration of the [12-month period] as may be required to satisfy the full amount of any claims made prior to the expiration of the [12-month period], but not yet fully adjudicated or otherwise finally resolved and paid."[9]

In summary, the parties agreed that $9.2 million would be placed in escrow, that it would be the sole source of any indemnification payments, and that it would be disbursed at the later of 12 months after closing or when the last timely indemnification claim was adjudicated or in some other way resolved and paid.

After the Court of Chancery resolved the fee issue, it entered a final order and judgment on April 7, 2021, and then an amended final order and judgment on April 22, 2021.[10] That amended final order and judgment recited the results of the case,

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[7] Merger Agreement § 10.03(b). B178.

[8] Merger Agreement § 2.08. B129.

[9] Merger Agreement § 10.12. B182.

[10] The amended final order and judgment is attached to the Founder's opening brief as Exhibit B.

noted which amounts would be payable from the escrow account to Great Hill and then noted that the remainder of the funds in the escrow account was released.[11]

In light of Section 10.03(b)'s mandate that the escrow funds are to be the sole source to pay any indemnification claims, Great Hill's agreement to provide joint written instructions to the Escrow Agent authorizing the release of the escrow funds referred to in Section 2.08 renders Great Hill's current request for attorneys' fees as a form of indemnification moot. Letter to Vice Chancellor Glasscock dated April 6, 2021, A870-872; Letter from Susquehanna Growth Equity dated April 7, 2021, A891-892. Even if this Court agreed with Great Hill's merits argument, neither this Court nor the Court of Chancery could as a practical matter provide Great Hill relief on that claim because there are no funds available to do so. *See Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003) (case is moot if court cannot provide relief).

The Founders ask the Court to dismiss Great Hill's claim for fees under Section 10.02(a) as moot.

[11] *Id.*

II. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT THE PARTIES DID NOT INTEND FOR SECTION 10.02 OF THE MERGER AGREEMENT TO PERMIT A CLAIM FOR ATTORNEYS' FEES ARISING FROM FIRST-PARTY CLAIMS BETWEEN OR AMONG THE PARTIES TO THE MERGER AGREEMENT.

A. Question Presented

Whether the language of the Merger Agreement, read as a whole, demonstrates that the parties intended that any potential fee-shifting between or among them in a later dispute be controlled solely by the prevailing-party fee provision in Section 12.10 and not by Section 10.02(a).

B. Scope of Review

The issue is one of contract interpretation, which is a matter of law that this Court reviews *de novo*. *See Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits Argument

1. The Court of Chancery correctly held that Section 10.02 of the Merger Agreement does not indicate an intention to allow an award of attorneys' fees for a first-party action such as this one.

Great Hill asserts that it should be allowed to recover its attorneys' fees under Section 10.02 of the Merger Agreement, which provides for indemnification. The Court of Chancery correctly rejected that argument.

As the Court of Chancery explained, for an indemnification provision to cover attorneys' fees for actions between parties to the agreement—what have been referred to as "first-party" actions—the indemnification provision must expressly

and unequivocally make clear that the parties intended that there be such an award.[12] The court was correct.

Indemnification provisions "are presumed not to require reimbursement for attorneys' fees incurred as a result of substantive litigation between the parties to the agreement absent a clear and unequivocal articulation of that intent." *TranSched Sys. Ltd. v. Versyss Transit Solutions, LLC*, 2012 WL 1415466, at *1-2 (Del. Super. Mar. 29, 2012). There is no language in Section 10.02 that clearly and unequivocally demonstrates that the parties to it intended for awards of fees for first-party cases.

Great Hill argues that such intent may be divined from the fact that Section 10.02(a) defines indemnifiable losses to include

> any actual loss, liability, damage, obligation, cost, deficiency, Tax, penalty, fine or expense, *whether or not arising out of third party claims* (including interest, penalties, reasonable legal fees and expenses, court costs and all amounts paid in investigation, defense or settlement of any of the foregoing) ....[13]

The Court of Chancery noted that there are few Delaware cases addressing what language is sufficiently specific, but one of those cases addresses language very

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[12] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 7861336, at *5 (Del. Ch. Dec. 31, 2020) ("Fee Opinion") (citing *Senior Housing Capital, LLC v. SHP Senior Housing Fund, LLC*, 2013 WL 1955012, at *44 (Del. Ch. May 13, 2013)).

[13] Great Hill Answering Br. at 25 (quoting Merger Agreement, § 10.02(a), B176) (emphasis added).

similar to the language at issue here. In *Ashland LLC v. Samuel J. Heyman 1981 Continuing Trust*, 2020 WL 6582958 (Del. Super. Nov. 10, 2020), the Superior Court considered whether an indemnification provision that defined losses to include "reasonable attorneys' and consultants' fees and expenses), whether or not involving a Third Party Claim" allowed for fee-shifting in first-party claims. *Id.* at *4. The Superior Court concluded that language was insufficiently clear to express an intention to award fees arising from a first-party claim. *Id.* Notably, the agreement in *Ashland*—like the one here—included a separate fee-shifting provision, and the Superior Court held that "[i]f the parties use fee-shifting language in one section of the agreement and fail to include such language in another, it 'indicates a lack of intent to create a clear and unequivocal agreement to shift fees in first-party actions." *Id.* at *7 (quoting *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525, at *2 (Del. Super. Nov. 22, 2016)).

Deere is also instructive. There, the indemnification provision included language very similar to that in Section 10.02(a), defining "Losses" as not limited to those "arising out of third party claims," and to include "reasonable legal fees" paid in investigation of those losses. There too, the court found no "clear and unequivocal agreement to shift fees ... in connection with a dispute between parties." *Deere*, 2016 WL 6879525, at *2. As in those cases, there is no basis under Section 10.02(a) for indemnification of fees incurred in this first-party litigation.

Great Hill points to three cases to support its contention that the language of Section 10.02(a) is clear and unequivocal, but none supports that proposition. In *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185 (Del. 2009), there is no indication that anyone challenged whether the agreement's language was clear enough to allow an award of fees in a first-party action, and the Court did not address that issue. The same is true of *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926 (Del. Ch. July 20, 2007),[14] and *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244 (Del. 2004).

The Court of Chancery was right to conclude that Section 10.02(a) does not demonstrate that the parties to the Merger Agreement intended for fee-shifting in first-party disputes.

2. The parties included in the Merger Agreement a specific "prevailing-party" provision and, under well-established rules, the inclusion of that provision negates any notion that the more general indemnification provision could allow attorneys' fees in a case such as this one.

Even if the rule discussed in the previous section did not resolve the issue, more general rules of contract construction would.

Under Delaware law, a contract should be construed as a whole to give effect to the parties' intentions. *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961

[14] In *Cobalt Operating*, the plaintiff was indisputably the prevailing party and was entitled to fee-shifting under the agreement's prevailing-party provision.

(Del. 2005). "Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." *Id.*

Great Hill argues that both Section 10.02 and Section 12.10 can support an award of attorneys' fees in first-party litigation such as this. That is not so because they conflict. Section 12.10, which the parties all agree applies to first-party litigation, only allows an award of attorneys' fees to a prevailing party, and, if that party prevails in part, only on an "equitable basis." As the parties agree, Delaware law has a specific test to determine whether a party has prevailed: it asks if that party predominated in the litigation on the "chief" issue. *See Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454, at *2 (Del. Ch. Jan. 5, 2018). But Section 10.02 refers not at all to a "prevailing party," and—at least as Great Hill apparently interprets it—allows Great Hill an award of all of its attorneys' fees (up to $9.2 million) even if it won only on a minor issue such that it would not be considered a prevailing party under the predominance-in-the-litigation analysis applicable under Section 12.10.[15] Had the parties to the Merger Agreement intended such an uneven

[15] The fact that Section 10.02(a) does not refer to a "prevailing party" also cuts against any suggestion that it demonstrates the parties' intention that it allow an award of fees in a first-party case since that language is so commonly used when agreements anticipate that the parties to it might engage in litigation. *See TranSched*, 2012 WL 1415466, at *3.

opportunity for fee awards, they would presumably have said so. When there is such a conflict, the more specific provision controls—or at the very least qualifies the more general provision. *See DCV Holdings, Inc.*, 889 A.2d at 961. Here, Section 12.10 is the more specific provision because it allows a fee award in a narrower and more carefully circumscribed circumstance. *Id*. at 962 (narrower provision is more specific). Therefore, Section 12.10 applies to first-party claims or, at the least, qualifies Section 10.02 such that any fee request under Section 10.02 would have to satisfy the requirements of Section 12.10, which Great Hill's request cannot.

Great Hill seeks to avoid this straightforward application of well-established law by arguing that Sections 10.02 and 12.10 do not conflict because "Section 10.02 addresses the disbursement of a defined amount of indemnification funds while Section 12.10 extends to recovery of reasonable attorneys' fees beyond those reserved funds."[16] Great Hill offers no argument to support that interpretation, and there could be none since absolutely nothing in the text of the Merger Agreement supports it. Certainly, if the parties had intended such an unusual mechanism for awarding fees—with one provision covering fees to a certain maximum and the other covering fees beyond that maximum—they would have at least hinted at it in their written agreement.

[16] Great Hill Answering Br. at 28.

3. Great Hill's new argument about harmonizing Sections 10(a) and (b) with Sections 10.02(c) and (d) is without merit.

Great Hill contends that Section 10.02(a) must somehow permit first-party claims because a contrary interpretation would render other provisions meaningless.[17] Great Hill specifically points to Sections 10.02(c) and (d), the first of which sets out notice requirements for indemnification claims under Sections 10(a) and (b) and the second of which sets out notice requirements for third-party claims.[18] Great Hill asserts that "Section 10.02 cannot reasonably be interpreted to be limited to third-party claims in light of these additional provisions addressing third-party claims separately. To hold otherwise would render Section 10.02(a) and (c) surplusage."[19]

As an initial matter, Great Hill did not make that claim below and, so, may not make it now. *See* Del. Supr. Ct. R. 8.

Even if the argument had been properly preserved, it would not help Great Hill's position. While Great Hill's argument is less than clear, it seems to be that the distinct notice provisions demonstrate that the parties to the Merger Agreement understood there might be both first-party and third-party claims for indemnity. That

[17] Great Hill Answering Br. at 26.

[18] B176-77.

[19] Great Hill Answering Br. at 27.

is undoubtedly true but beside the point. The Founders have never suggested that Section 10.02 precludes *all* first-party claims. After all, the only claim on which Great Hill prevailed against the Founders was a first-party claim for indemnity, and the Founders conceded that claim. The Founders' argument—and the Court of Chancery's holding—was narrower: that Section 10.02 does not include language specific enough to demonstrate that the parties to the Merger Agreement intended for that provision to allow fee shifting in litigation over first-party claims. And, as noted, Section 10.02(c)'s notice requirement actually cuts against Great Hill's current argument, not in favor of it. *See TranSched,* 2012 WL 1415466. For all the reasons discussed above, that narrow argument is correct and not at all inconsistent with other provisions of the Merger Agreement.

Finally, even if Section 10.02(a) were construed to apply to first-party claims, it is expressly limited, as Great Hill previously recognized, to fees "paid in investigation" of those claims.[20] Great Hill's submission in connection with its Fee Motion suggests that such investigatory fees totaled less than $116,000 and would

[20] Founders Brief in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs at 5, A836. Great Hill argued in its damages brief that Section 10.02(a) entitled them to "indemnification for the significant fees and costs that [they were] forced to incur to investigate Defendants' fraud and contract breaches." AR55. *See also* AR70-71 (Plaintiffs acknowledging that Plaintiffs had previously taken the position that recovery of attorneys' fees under Section 10.02 was limited to those related to investigation).

not have been, in any case, recoverable as they fell under the $500,000 deductible in the Merger Agreement.[21]

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The Court of Chancery correctly determined that Section 10.02 does not authorize an award of attorneys' fees in first-party litigation such as this, and the Founders ask this Court to affirm that determination. In the alternative, the Founders ask the Court to hold that any fee request under Section 10.02 is qualified by the requirements of Section 12.10, a determination that would compel the same conclusion for the reasons the Founders discuss in the next section.

[21] Section 10.03(a)(i). B178.

III. THE COURT OF CHANCERY CORRECTLY DENIED GREAT HILL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES UNDER § 12.10 SINCE, UNDER THE PROPER ANALYSIS, GREAT HILL WAS NOT A PREVAILING PARTY.

A. Question Presented

Whether, under the proper analysis of prevailing-party status, Great Hill could be considered a prevailing party with respect to the Founders when (1) Great Hill itself identified the "chief issues" as fraud and aiding and abetting fraud and Great Hill lost on the bulk of its fraud claim and entirely on its aiding-and-abetting fraud claim and (2) even if the "chief issue" were breach of representations and warranties as Great Hill has now shifted to allege, Great Hill lost on the specific representation-and-warranty claim on which it now focuses.

B. Scope of Review

The issue is a matter of law that this Court reviews *de novo*. *See Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits Argument

In their opening brief, the Founders argued that Section 12.10's "Prevailing Party" provision has two parts: the first that allows a prevailing party that prevails on all issues to recover all of its reasonable fees and the second that allows a party that has prevailed in part to recover its fees on an equitable basis.[22]

[22] Founders Opening Br. at 25.

The Founders further explained that, for either of those parts, the Court of Chancery was required to determine if any given party prevailed by asking who predominated on the "chief" issue in the case. *See Mrs. Fields Brand*, 2018 WL 300454, at *2.[23]

Great Hill agrees with the Founders that the Court of Chancery erred by not using the predominance-in-the-litigation test.[24] But Great Hill argues incorrectly that it was Great Hill that prevailed on the chief issue. That is not so.

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[23] Founders Opening Br. at 31-32. The fact that the parties did not refer to the predominance-in-the-litigation standard in the Merger Agreement is immaterial. First, the law presumes that existing law is incorporated into contracts. *Koval v. Peoples*, 431 A.2d 1284, 1285 (Del. Super. Ct. 1981) ("The laws in force at the time and place of making the contract enter into, and form a part of it as if they had been expressly referred to, or incorporated in, its terms."). Second, both sides in this appeal agree the parties to the Merger Agreement intended that the trial court employ the predominance-in-the-litigation standard and, so, there is no conflict.

[24] Great Hill Answering Br. at 5. Great Hill contends that the Founders waived their argument that the predominance-in-the-litigation standard should apply. That is not so. In their brief opposing Great Hill's fee motion, the Founders expressly asserted that "Delaware courts determine which party is the prevailing party by looking to predominance over substantive issues" and "[i]t is undeniable that the Founders predominated in the litigation and won the substantive issues that formed the heart of this lengthy, complex litigation." Defendant Tomer Herzog and Daniel Kleinberg's Brief in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs at 1, 7. A832, A838. Further, in their brief in support of the motion for fees, the Founders argued that because they prevailed on nearly all of Plaintiffs' claims, they should be awarded their fees on an equitable basis. Defendants' Opening Brief in Support of their Joint Motion for Awards of Fees, Costs, and Expenses at 12, A753. There was no waiver. Moreover, even if there had been, it is not clear that it would matter since Great Hill concedes the Court of Chancery's error. *See also* AR74-79 (arguing that the Founders had predominated and were entitled to fees).

In their opening brief, the Founders quoted at length from Great Hill's representations to the Court of Chancery that this was principally a case about fraud.[25] In its answering brief, Great Hill essentially ignores its earlier representations, perhaps realizing that if fraud were the chief issue the Founders would no doubt be prevailing parties since the Court of Chancery found in the Founders' favor on Great Hill's claims against them for aiding and abetting fraud and conspiracy to commit fraud.

Faced with its failure to prove its fraud-based claims against the Founders, Great Hill pivots and asserts that the real chief issue was "contractual breaches for false representations in the Merger Agreement relating to Plimus's relationship with PayPal."[26]

Great Hill's new position does not withstand scrutiny. The Court of Chancery found two instances in which representations and warranties in the Merger Agreement were breached: (1) with respect to excessive chargeback fines from credit-card companies in July and August of 2011 totaling $12,255.74 and (2) with respect to a non-disclosure of PayPal's threat to terminate its relationship with Plimus.[27] Great Hill itself made clear to the Court of Chancery that the first instance

[25] Founders Opening Br. at 32-34.

[26] Great Hill Answering Br. at 36-37.

[27] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL

was not the chief issue in the case when it told that court that "[t]his case was not brought to collect fines."[28] And, while the second issue—related to PayPal's termination threat—might have been a more important issue, Great Hill did not prevail on it.[29] In its liability opinion, the Court of Chancery found a disclosure violation on that subject but, in its damages opinion, it concluded that Great Hill's purported injury and damages were unacceptably speculative.[30] To prevail on a claim for breach of contract (and fraud) in Delaware, a plaintiff must prove damages. *See Lorenzetti v. Hodges*, 62 A.3d 1224 (Del. 2013) ("On a claim of breach of contract, the plaintiff must prove a) the existence of a contract; b) the breach of an obligation imposed by that contract; and c) resulting damages to the plaintiff."). Since Great Hill did not prove resulting damages from the PayPal-termination-threat non-disclosure, Great Hill did not prevail on that claim. Thus, Great Hill did not

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948513, at *18 (Del. Ch. Feb. 27, 2020) ("Damages Opinion") The Court also found that Tal failed to disclose a GoClickCash fine, which Tal was ultimately responsible to pay as the amount was beneath the deductible in the Merger Agreement.

[28] Plaintiffs' Post-Trial Reply Brief at 112 n.54. A700.

[29] Despite now portraying PayPal's termination threat as the chief issue, Great Hill consistently maintained that each of the four components of the "vast" fraud it had alleged induced Great Hill to enter into and then close the Merger Agreement. Plaintiffs' Opening Post Trial Brief, at 44 (A406), 50 (A412) (claiming that but for the Paymentech fraud, Great Hill would not have closed the merger); 63 (A425) (same for Plimus' risk management/credit card violations; 85 (A447) (same for earn-out dispute); and 203 (A565) (same for representations and warranties).

[30] Damages Opinion, 2020 WL 948513, at *20.

prevail on what it told the Court of Chancery was the chief issue or on what it now tells this Court was the chief issue; instead, it prevailed only on what Great Hill itself recognized and conceded was not a significant issue in the lawsuit.

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The Court of Chancery appropriately rejected Great Hill's fee request. As a matter of law, Section 10.02 of the Merger Agreement could not be a basis for an award of fees in an action such as this. Section 12.10 of the Merger Agreement is no more helpful to Great Hill. To be eligible for an award of attorneys' fees in this case, Great Hill would have to have prevailed on a chief issue (or on chief issues), and it did not.

The Founders ask the Court to reject Great Hill's cross-appeal.[31]

[31] Great Hill hints that it should somehow be considered a prevailing party because it won some interlocutory matters in the Court of Chancery. *See* Great Hill Answering Br. at 11 (asserting that the trial court denied an early motion to dismiss Great Hill's fraud claims against the Founders). Great Hill does not develop that argument and, indeed, it could not. The fact that a plaintiff knows how to make allegations sufficient to elude preliminary dismissal is irrelevant to which party prevailed on that claim when, ultimately, that same plaintiff has been unable to *prove* that its allegations were true.

REPLY IN SUPPORT OF THE FOUNDERS' APPEAL

ARGUMENT

I. THE FOUNDERS PREVAILED ON THE CHIEF ISSUES IN THE CASE.

The parties agree that the Court of Chancery erred when it did not apply the predominance-in-the-litigation standard to the various attorneys' fee requests. *See Mrs. Fields Brand, Inc.*, 2018 WL 300454, at *2; *World-Win Mktg., Inc. v. Ganley Mgmt. Co.,* 2009 WL 2534874, at *2 (Del. Ch. Aug. 18, 2009). The parties disagree, however, about who prevailed and whether the Court of Chancery had discretion to deny fees altogether to a party that prevailed.

There are two threshold issues.

First, Great Hill devotes substantial effort in its answering brief to chiding the Founders for suggesting that they had prevailed in full and, so, were entitled to fees under the first part of Section 12.10.[32] Great Hill tells the Court that the Founders waived such a claim.[33] The problem with Great Hill's argument is that it assumes something that did not occur. The Founders have not suggested that they prevailed in full. They have instead contended that they predominated in the case and prevailed on the chief issue (or issues) in the case such that they were entitled to an

[32] Great Hill Answering Br. at 33.

[33] Great Hill Answering Br. at 34.

award of attorneys' fees determined on an equitable basis with consideration of the extent of their success.[34] Great Hill's straw man is a distraction.

Second, the Founders argued in their opening brief that the Court of Chancery erred when it failed to consider prevailing-party status on a party-by-party basis.[35] Great Hill responds by pointing to the footnote in the Court of Chancery's fee opinion in which that court asserted that the result would have been no different had it done so.[36] In making that argument, however, Great Hill simply echoes the Court of Chancery's assertion without responding to the Founders' demonstration that, given that a different and separate defendant was found liable for fraud, the result would necessarily have been different analyzed party by party. Great Hill then makes a number of unsupported assertions about coordination among the defendants, but it offers no record citations and fails to explain why coordination, which the Court of Chancery expects when there are multiple defendants, would have obviated the need for the trial court to decide prevailing-party status individually.[37] The Court of Chancery analyzed the defendants' results in the

[34] Founders Opening Br. at 38.

[35] Founders Opening Br. at 27-28.

[36] Great Hill Answering Br. at 41.

[37] Great Hill accuses the Founders of engaging in a "highly-orchestrated tactical defense ... aimed at delaying and preventing a final judgment." Great Hill Answering Br. at 38. Nothing could be further from the truth. The Founders moved for summary judgment on the fraud-based claims because there was no evidence to

aggregate and erred in doing so. The focus should be on the claims asserted against the Founders and the results of those claims.[38]

In previous sections of this brief, the Founders demonstrated that they prevailed on the chief issue asserted against them in this case, whether it be defined as fraud—as Great Hill represented to the Court of Chancery—or as a failure to disclose PayPal's threat to terminate its relationship with Plimus—as Great Hill now contends. In its Liability Opinion, the Court of Chancery "rejected the bulk of Plaintiffs' claims."[39] With respect to the Founders, Great Hill won only on a representation and warranty claim regarding a failure to disclose certain pre-closing

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support those claims as asserted against them. The record evidence was clear that Great Hill knew about the Founders' earnout dispute with Tal and the bonus he would receive in the event of a sale of the company. Great Hill responded to the Founders' motion by submitting a false affidavit in which it claimed it did not know about the dispute, thereby creating a factual issue for trial. Ultimately, the Court of Chancery determined that this testimony was "not credible" and rejected the fraud-based claims. Therefore, it is Great Hill that prolonged the case and increased the Founders' litigation costs. In any event, Great Hill's criticism is nonsensical because the Court of Chancery expected coordination among the defendants. For example, consistent with Court of Chancery practice, at oral arguments and at trial plaintiffs and defendants were afforded an equal amount of time per side. Therefore, defendants were required to allocate time in a way that permits each defendant to address the claims pertinent to them.

[38] The Founders note that their argument would have merit even if the Court of Chancery had not erred in this regard because, either way, *this* Court can and will consider the issue on a party-by-party basis.

[39] Damages Opinion, 2020 WL 948513, at *1.

fines, and Great Hill told the Court of Chancery that "[t]his case was not brought to collect fines."[40]

The Founders prevailed on the chief issue or issues asserted against them, and Great Hill did not prevail. The Founders are entitled to an award of attorneys' fees on an equitable basis.

[40] Plaintiffs Post-Trial Reply Brief at 112 n.54, A700.

II. THE MERGER AGREEMENT DID NOT GIVE THE COURT OF CHANCERY DISCRETION TO DENY FEES ENTIRELY TO PARTIES THAT PREVAILED ON THE CHIEF ISSUES IN THE CASE.

In their opening brief, the Founders parsed the language of the Merger Agreement to demonstrate that a court resolving a dispute under that agreement could not simply decline to award any attorneys' fees to a party that prevailed on the chief issue in the case because of the court's generalized sense of equity.[41] Simply stated, the parties to the Merger Agreement used the word "shall" in Section 12.10, demonstrating their intention that, if a prevailing party prevailed in whole, the trial court was to award all of that party's reasonable attorneys' fees and, if that party prevailed in part, the trial court was to award that party its reasonable attorneys' fees "on an equitable basis"—meaning in context that the fees should be calculated to reflect the extent of the party's success. If the parties to the Merger Agreement had intended for the trial court to have the broad discretion the Court of Chancery assumed here, they would have used the word "may" rather than "shall."

Great Hill makes no meaningful effort to respond to that plain-text analysis, perhaps unsurprisingly since such broad discretion would certainly doom Great Hill's own fee request given the thin reed on which it is based. Instead of addressing the Founders' actual argument, Great Hill repeats its position that the Founders are

[41] Founders Opening Br. at 26-27.

not entitled to any fee award because, in Great Hill's estimation, the Founders did not prevail. As the Founders demonstrate above, that is incorrect.

Great Hill then cites cases that are readily distinguishable. It points to In re *Proffitt*, 2012 WL 3542202 (Del. Ch. Aug. 4, 2012), but it is not at all clear why. In the cited opinion, the court addressed a fee request in relation to a petition for partition of property. There was no contract, and the court did not presume to interpret any language relevant to this case. Instead, the party seeking fees relied on the common-benefit exception to the American Rule and its wholly different standard. *Proffitt* does not in any way support Great Hill's argument. Similarly, Great Hill points to *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500 (Del. 2005), for the proposition that "[t]he Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded."[42] But the issue in *Kaung* was whether a party's misconduct rose to the level of bad faith required for a Delaware court to shift fees notwithstanding the American Rule. 884 A.2d at 506. The Court was addressing an issue wholly different than a contract in which the parties agreed that a court "shall" award fees if certain conditions were met.

The Founders prevailed on the chief issue in the case, and the Court of Chancery was mandated to award the Founders at least some portion of their

[42] Great Hill Answering Br. at 42.

attorneys' fees—presumably a large portion given the extent of their success. *See Elf Atochem North Am., Inc. v. Jaffari*, 727 A.2d 286, 296 n.54 (Del. 1999) (quotation omitted) ("it is generally presumed that the word 'shall' indicates a mandatory requirement.").

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In Delaware, a court is to interpret a contract with an eye to determining the parties' intent according to what an objective, reasonable third party would understand from the language of the agreement. *See Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014).

The proper analysis of the attorneys' fee issue is uncomplicated. The parties to the Merger Agreement did not intend for fees to be awarded in first-party actions under the indemnification provision, Section 10.02. They specifically provided for fee shifting in first-party cases in Section 12.10. That provision requires the trial court to award fees to a prevailing party—all reasonable fees to a party that prevails entirely and fees allocated on an equitable basis to a party that prevails in part. The trial court is to determine whether a party has prevailed using the predominance-in-the-litigation standard that asks who won on the chief issue or issues in the case. Following that analysis, as among Great Hill and the Founders, only the Founders were prevailing parties since they won on the claim against them of aiding and abetting fraud and conspiracy to commit fraud—and on what Great Hill now alleges

was the chief issue, the non-disclosure regarding PayPal's threat to terminate its relationship with Plimus. Because the Founders did not prevail *in toto*, they are entitled to an award of attorneys' fees allocated on an equitable basis that takes into account their overwhelming success.

The equities support the result the law compels. Great Hill launched a massive and complex lawsuit that embroiled the Founders in litigation for the better part of a decade. Great Hill made broad, unsupported, and reputation-damaging allegations against the Founders and, by any measure, the litigation was contentious, expensive, and time-consuming. As the Court of Chancery noted in its damages opinion, "the bulk of those wide-ranging allegations were unproved."[43] In the end, Great Hill failed to prove any of its serious allegations against the Founders, winning from them only a fraction of $12,255.74 that the Court of Chancery imposed on certain former Plimus shareholders not because they had acted wrongfully but merely because their status required them to make the payment regardless of any proof of ill intent. To fight off Great Hill's fanciful claims—including significant motions practice, discovery, and trial—the Founders incurred significant attorneys' fees. The Founders should not have to shoulder those fees when all parties to the Merger Agreement intended that there be fee shifting in circumstances like these.

[43] Damages Opinion, 2020 WL 948513, at *16.

The Court of Chancery erred in rejecting the Founders' attorneys' fee request. The Founders supported their fee request with uncontested detailed affidavits by its counsel estimating that 95 percent of their fees were incurred in successfully fending off Great Hill's meritless fraud-based claims and attempts to disgorge merger proceeds under a theory of uncapped indemnification or unjust enrichment.[44] This Court could vacate the judgment below as it regards the fee motions and then itself make an award of fees, costs, and expenses to the Founders based on this evidence, or it could instruct the Court of Chancery to do so.

[44] Defendants' Fee Brief, A737-760; Declaration of Joanna A. Diakos in Support of the Founders' Motion for an Award of Fees, Costs, and Expenses (the "Fee Motion"), A761-779; Declaration of Julie Anne Halter in Support of the Fee Motion, A780-790; Declaration of Lewis H. Lazarus in Support of the Fee Motion, A791-807; Declaration of Tomer Herzog in Support of the Fee Motion, A808-817; Declaration of Daniel Kleinberg in Support of the Fee Motion, A818-826. The Founders also offered to submit redacted invoices if requested by the Court of Chancery. Letter to Vice Chancellor Glasscock dated April 3, 2020, AR64-66. Ultimately, the Court of Chancery did not request them and they are not required under Delaware law. *Id.* at AR65 (citing case law).

CONCLUSION

Appellants/Cross-Appellees Tomer Herzog and Daniel Kleinberg ask the Court to (1) affirm the judgment below to the extent it denied Great Hill's motion for an award of attorneys' fees; (2) vacate the judgment below to the extent it denied the Founders' motion for an award of attorneys' fees, costs, and expenses and (a) award the Founders the reasonable attorneys' fees, costs, and expenses they incurred in successfully defending against Plaintiffs' claims; or (b) remand the matter to the Court of Chancery with instructions for that court to make an award of attorneys' fees, costs, and expenses to the Founders equitably calculated to reflect the extent of their success in the litigation. In addition, the Founders request that the Court remand the matter to the Court of Chancery with instructions to award them the reasonable attorneys' fees, costs, and expenses they incurred following the court's fee decision, including those incurred in connection with this appeal.

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