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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TOMER HERZOG and DANIEL KLEINBERG, Defendants Below/ Appellants/Cross-Appellees, v. 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 of the State of Delaware C.A. No. 7906-VCG

APPELLEES' REPLY BRIEF IN SUPPORT OF THEIR CROSS-APPEAL

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INTRODUCTION[1]

Great Hill is entitled to an award of its reasonable attorneys' fees under straightforward readings of two separate provisions in the Merger Agreement. The Founders agreed in Section 10.02 to indemnify Great Hill for "any actual loss . . . whether or not arising out of third party claims (including . . . reasonable legal fees and expenses)" in connection with the representations in the contract. By Section 10.02's plain terms, that includes Great Hill's legal fees incurred while pursuing its claims against the Founders for contractual breaches. And when there is litigation among parties to the contract and no party wins outright, Section 12.10 awards fees "on an equitable basis." Great Hill succeeded throughout years of pre-trial proceedings and won claims in fraud and contract on the main question in the case. So Great Hill is entitled to its fees under that provision as well.

The Court of Chancery decided otherwise by committing multiple interpretive errors. The court improperly presumed that Section 10.02 does not cover attorneys' fees for first-party litigation, even though its plain text says it does. The court then did not articulate the proper standard for an equitable award of fees under Section 12.10 and did not address Great Hill's arguments under the standard, wrongly concluding that Great Hill was not entitled to fees.

[1] Great Hill incorporates by reference the Table of Defined Terms in its Answering Brief.

For their part, the Founders repeatedly avoid confronting Section 10.02's plain text. They first argue that release of the Escrow Amount moots Great Hill's indemnification claim, but the Merger Agreement and the Founders' own litigation conduct show otherwise. The Founders then urge application of a categorical presumption that indemnification agreements do not cover attorneys' fees for first-party claims absent a showing of clear and unequivocal language. Even if the presumption applied, it offers no support to the Court of Chancery's decision, because the Merger Agreement provides the clear and unequivocal language necessary to overcome it. And in any event, the presumption finds no footing in this Court's precedent and has been rejected by persuasive appellate authority.

As to Section 12.10, the Founders attempt a remarkable recasting of the proceedings below. They argue that the claim for which they were held liable was peripheral, despite that it concerns the *exact same subject* as the "most serious allegations of fraud" at the heart of the case. *Liability*, 2018 WL 6311829, at *43. The Founders take their revisionism to the point of arguing that they somehow *won* the dispute on the contract claim, even though the Court of Chancery entered judgment *against* them on it.

Finally, the Founders' assertion that the Court of Chancery was somehow *required* to declare one party predominant—in whole or in part—ignores that

Section 12.10 mandates an "equitable" determination when no party fully prevails, and precedent and common sense dictate that sometimes the equitable result is for neither party to recover fees.

This Court should reverse the Court of Chancery's decision as to Great Hill's fee request and affirm it as to the Founders' request.

ARGUMENT

I. Great Hill Is Entitled To Attorneys' Fees Under Section 10.02's Indemnification Provision.

Section 10.02 of the Merger Agreement requires the Founders to indemnify Great Hill for "any actual loss" in connection with claims for contractual breaches, "whether or not arising out of third party claims," and "including . . . reasonable legal fees and expenses." B176. The Court of Chancery did not follow the provision's plain meaning, and instead misapplied a presumption that indemnification provisions categorically do not apply to first-party claims for fees absent certain contract language. As Great Hill's answering brief demonstrated, that holding was contrary to the Merger Agreement's language and to precedent. Great Hill Answering Br. at 22-29.

Attempting to justify the Court of Chancery's interpretive error, the Founders labor to keep the focus away from Section 10.02's actual language. Their arguments are meritless. Their belated assertion (at 9-12) that Great Hill's Section 10.02 claim has been mooted by the release of the Escrow Amount contradicts the text of the Merger Agreement and the Founders' own representations to the Court of Chancery. Their defense (at 14) of the Court of Chancery's application of a categorical presumption that indemnification provisions do not to apply to first-party claims fails, because Section 10.02 contains the "clear and unequivocal" language necessary to overcome the presumption. And even if that were not the case, the

presumption itself is contrary to the ordinary meaning of indemnification and has been rejected by appellate courts across the country.

A. The Section 10.02 Claim Is Not Moot.

The Merger Agreement provides for indemnification claims following release of the Escrow Amount. Section 10.02(c) of the Merger Agreement provides that "amounts" owed on Section 10.02(a) claims, like those asserted by Great Hill here, "shall first be made to the extent possible from the Escrow Account and thereafter shall be made directly by an Effective Time Holder … based on such Effective Time Holder's Pro Rata Share of the applicable Loss." B178. The Merger Agreement also makes clear that indemnification claims under Section 10.02(a) apply "after the Effective Time" subject to a Survival Period defined in Section 10.01. B175-76. The Survival Period is in some instances longer than the one-year Escrow Period—for instance, certain enumerated representations survive for the relevant limitations period (three years)[2] plus thirty days. Merger Agreement § 10.01(a)(i) (B175).

Under the Founders' incorrect interpretation, if claims as to these surviving representations and warranties are not made within the one-year Escrow Period, and

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[2] *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011) (breach of contractual representation is presumptively governed by three-year statute of limitations).

the Escrow Amount is accordingly released,[3] any post-release claim is moot. The survival right would effectively be nullified, and the obligation of the Founders to pay their *pro rata* share when it is not available from the Escrow Amount would be a dead letter. That result is contrary to the bedrock principle that a contract must be read in a manner that both gives meaning to *all* its provisions and avoids illogical results.[4] Because the text of the Merger Agreement allows post-release indemnification claims, Great Hill's Section 10.02 claim is not moot. *Cf. Seiff v. Tokenize Inc.*, 2020 WL 6791233, at *4 (Del. Ch. Nov. 19, 2020) (rejecting assertion that claim under indemnification agreement was moot where plain language of agreement still "provide[d the] right" plaintiffs sought to enforce).

The Founders' own arguments below reinforce this conclusion. After the Court of Chancery entered judgment, the Founders moved to amend the judgment based on their position that release of the Escrow Amount mooted their counterclaims regarding their asserted rights to a *pro rata* share and release of the Escrow Amount, as opposed to a dismissal of the counterclaims on the merits that

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[3] *See* Merger Agreement § 10.12 (B182) (Escrow Amount released after expiration of one-year Escrow Period unless there is a pending claim).

[4] *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions illusory or meaningless.") (citation and internal quotation marks omitted); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1161 (Del. 2010) ("We cannot countenance such an absurd interpretation of the contract.").

would prejudice future assertion of those alleged rights. *See* A878-A907. The Court of Chancery then issued an amended judgment to make clear dismissal of the counterclaims was not on the merits. Founders' Opening Br. Ex. B. Tellingly, the Founders *did not* argue that release of the Escrow Amount mooted Great Hill's Section 10.02 fee claim. The Court of Chancery entered final judgment denying that claim on the merits. *Id*. That the Founders took care to point out that release of the Escrow Amount mooted their counterclaims, and *not* Great Hill's fee claim under Section 10.02(a), confirms what the Merger Agreement already makes plain: Great Hill's claim remains viable.

B. The Plain Text of Section 10.02 Entitles Great Hill to Attorneys' Fees.

On the merits, the Founders continue to dodge the text of Section 10.02. They effectively concede that, if Section 10.02 *does* apply to first-party claims, Great Hill is entitled to fees under the provision. They therefore largely stake their position on the argument that the Court of Chancery properly applied a categorical presumption that indemnification provisions do not apply to first-party claims unless they state so "clearly and unequivocally." The argument fails, for two independently sufficient reasons.

First, even if the presumption were proper (which it is not, *see infra* at 9-11), the Merger Agreement contains the necessary "clear and unequivocal" language to overcome the presumption.

The text of Section 10.02 could hardly be clearer on the point: The Founders agreed to "indemnify" Great Hill for "any actual loss . . . whether or not arising out of third party claims (including . . . reasonable legal fees and expenses)." B176. The Founders offer no basis in the text of the contract for why this language does not clearly and unequivocally embrace first-party claims for attorneys' fees. And there is more. The Merger Agreement is careful to include two distinct notification provisions—one, Section 10.02(c), addresses notices of claims under 10.02(a) or (b); the other, Section 10.02(d), sets forth specific instructions *for notice of any Third Party Claim*. B176-77. Concluding that these provisions do *not* show the contract contemplates first-party claims like Great Hill's would render much of the provisions' language meaningless. *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) (repeating familiar canon against surplusage in contract interpretation).[5]

The Founders cite (at 14-15) two trial-court opinions holding language "very similar to the language at issue here" to be insufficiently clear to overcome the presumption, but the cases offer no support for their position. The judgment

[5] The Founders claim that Great Hill did not argue below that the Founders' position would render language in Section 10.02 superfluous. Not so. Great Hill argued the point when briefing its fee request to the Court of Chancery. BR 7-11. The fact that Great Hill has cited *additional* contractual context to support the same argument does not somehow make it a new "question[]" that was not "fairly presented to the trial court." Supr. Ct. R. 8.

underlying the fee award in *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525 (Del. Super. Ct. Nov. 22, 2016), was vacated by this Court. *Exelon Generation Acqs., LLC v. Deere & Co.*, 176 A.3d 1262 (Del. 2017) (en banc). And the indemnification provision in *Ashland LLC v. Samuel J. Heyman 1981 Continuing Trust*, 2020 WL 6582958, at *6-8 (Del. Super. Ct. Nov. 10, 2020) lacked any confirmatory evidence from other provisions of the contract, like the separate notification provisions in the Merger Agreement here, to demonstrate that the parties specifically contemplated both first-party and third-party claims. *See supra at* 8.

Second, the Court of Chancery's extratextual presumption is itself mistaken. This Court has never endorsed it and it should decline to do so here.

As a number of appellate courts across the country have concluded, the Court of Chancery's presumption is contrary to the plain meaning of indemnification and ordinary legal principles, including those of Delaware law. The Ninth Circuit's decision in *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1031 (9th Cir. 1992), is instructive. There, the district court, applying Delaware law, rejected application of a merger agreement's broadly worded indemnification provision to a first-party claim for attorneys' fees, reasoning that a promise to "indemnify" is in its ordinary sense limited to third-party claims. *Atari Corp.*, 981 F.2d at 1031.

The Ninth Circuit reversed in relevant part. The court first observed that nothing in the plain meaning of "indemnify" suggests exclusion of first-party claims:

"The plain, unambiguous meaning of 'indemnify' is not 'to compensate for losses caused by third parties,' but merely 'to compensate.'" *Atari Corp.*, 981 F.2d at 1032 (citing *Black's Law Dictionary* 769 (6th ed. 1990)). The indemnification provision also "could have" easily been drafted to prohibit first-party claims, but it was not. *Id*. The Ninth Circuit emphasized that Delaware law "construes indemnification provisions liberally," and that this Court has not hesitated to hold that expansive indemnification language applies in "novel" circumstances. *Id.* (citing *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 (Del. 1983) (plain language of indemnification bylaw not limited to suits where director is defendant, but also applied where director is plaintiff)). The court therefore held that the indemnification provision applied to claims for attorneys' fees in first-party actions.[6]

The same principles apply here. Again, the text is emphatic: the provision applies "whether or not arising out of third party claims," and it "includ[es] … reasonable legal fees and expenses." The parties could certainly have carved out first-party claims—merely revising "whether or not arising out of" to "arising only out of" would have done the trick. But they did not, and that choice has legal significance. Failure to give force to it would render the "whether or not" clause

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6 *See also, e.g.*, *Caldwell Tanks, Inc. v. Haley & Ward, Inc.*, 471 F.3d 210, 215 (1st Cir. 2006) (applying Massachusetts law and rejecting similar presumption); *Chesapeake & Potomac Tel. Co. of Va. v. Sisson & Ryan, Inc.*, 234 Va. 492, 503 (Va. 1987) (rejecting policy argument against application of indemnification to claims for attorneys' fees for first-party claims).

surplusage, violating a basic canon of construction. *See Kuhn Constr.,* 990 A.2d at 396-97. And Delaware courts do not hesitate to enforce the plain meaning of indemnification provisions in the face of arguments about how those provisions are supposedly presumed to operate. *Hibbert*, 457 A.2d at 342-44. Indeed, they have routinely permitted indemnification of attorneys' fees for first-party claims even under less clearly worded provisions than the one at issue here.[7]

The Founders next offer a clutch of additional arguments for erasing or revising Section 10.02, but none has merit. They assert (at 17-18) that the Court of Chancery was right not to enforce the provision's plain meaning because it would somehow "conflict" with Section 12.10's supposedly "more specific" prevailing-party provision. The argument gets basic contract construction backwards. The provisions are not in conflict; they are complementary. Indeed, the existence of Section 12.10 only "bolsters" the conclusion that Section 10.02 covers Great Hill's attorneys'-fee claim. *See Cobalt Operating, LLC*, 2007 WL 2142926, at *32

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[7] *See, e.g.*, *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009); *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1256 (Del. 2004); *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *32 (Del. Ch. July 20, 2007). The Founders' argument (at 16) that these cases "did not" explicitly "address" an argument that the provisions should be limited to third-party claims misses that it was a *necessary predicate* for the holdings in all three cases that the indemnification provisions at issue apply to first-party claims.

(existence of separate attorneys'-fees provision "bolstered" the "correctness of . . . interpretation" that indemnification provision covered attorneys' fees).

A comparison of the provisions reveals their distinct and mutually reinforcing structures. Section 10.02 concerns first- and third-party claims; Section 12.10 covers only the former. Section 10.02 concerns recovery of a capped sum ($9.2 million); Section 12.10 does not so limit recovery. Section 10.02 is limited to specific classes of claims (*e.g.*, liability for breach of representations and warranties, or fines for violation of credit-card-association rules on excessive chargebacks); Section 12.10 is not. Section 10.02 imposes notice requirements; no notice is required for Section 12.10. And as the Founders themselves note (at 17), Section 12.10 requires satisfying a prevailing-party or equitable standard, and Section 10.02 does not. In other words, the provisions offer distinct legal remedies governed by distinct standards, and giving effect to Section 10.02 still leaves an array of applications of Section 12.10 that the indemnification provision would not cover.[8] And even if there were a conflict, as the summary above demonstrates, it is Section 10.02, not Section

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[8] *See, e.g.*, *Hyatt v. Al Jazeera Am. Hldgs. II, LLC*, 2016 WL 1301743, at *6 (Del. Ch. Mar. 31, 2016) (refusing to find conflict between advancement and indemnification because, although they "are closely related, each are distinct types of legal rights") (citation and internal quotation marks omitted); *Davis v. EMSI Hldg. Co.*, 2017 WL 1732386, at *5 (Del. Ch. May 3, 2017) (enforcing plain meaning of contractual provision when that "construction … fit[] perfectly within the schemes" of related provisions).

12.10, that is the more specific provision—it addresses reimbursement for precisely the kind of contract claim at issue, sets a maximum recovery, and requires satisfaction of specific procedures.

Finally, the Founders claim (at 20) that "even if Section 10.02(a) were construed to apply to first-party claims, it is expressly limited … to fees 'paid in investigation' of those claims." The Founders offer no reasoning to support this interpretation—and of course, "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 n.12 (Del. 2004) (citation omitted). The argument is in sore need of justification, too, given that it requires turning a blind eye to most of the language in the provision, which covers "any actual loss"[9] and mentions "investigation" costs in a non-exclusive "including"[10] list.

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9 *Cf. Delle Donne & Assocs., LLP*, 840 A.2d at 1256 (provision requiring indemnification for "all" losses was "very broad in scope," warranting reimbursement of "fees incurred to enforce the contractual indemnity provision").

10 *Cf. CorVel Enter. Comp., Inc. v. Schaffer*, 2010 WL 2091212, at *2 (Del. Ch. May 19, 2010) ("The choice of the word 'including' in this clause would suggest that the drafter had something more expansive in mind.").

II. Great Hill Won On The Chief Issue In The Case And Is Entitled To An Equitable Award Of Fees Under Section 12.10.

The parties agree that no one fully prevailed in the case. So the question under Section 12.10 is whether any party is entitled to an equitable award of reasonable attorneys' fees. As its answering brief demonstrated, Great Hill is entitled to such an award, because it proved multiple claims about the key substantive issue in the litigation after repeatedly defeating years of pre-trial challenges mounted by an array of tightly coordinated defendants. Great Hill Answering Br. 34-39. By failing to recognize this record, or even address the relevant standard, the Court of Chancery abused its discretion.[11]

The Founders respond with more revisionary history—this time not of the contract, but instead of the litigation itself. And in a last-ditch effort to generate a fee award, they insist the Court of Chancery was *compelled* to award fees of some sort, even if equity is best served by an award of zero to the litigants. Their arguments do not bear scrutiny.

A. Great Hill Prevailed on the Chief Issue in the Case.

In their first effort at rewriting this litigation, the Founders (at 24) assert that Great Hill's case centered *exclusively* on supposedly unsuccessful claims of fraud,

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11 *Nixon v. Blackwell*, 626 A.2d 1366, 1370 (Del. 1993) (reversing where "the Court of Chancery applied erroneous legal standards and made findings of fact which were not the product of an orderly and logical deductive reasoning process").

and not also on the related contractual misrepresentations proven against the Founders. That is incorrect.

For one thing, Great Hill *was* successful in proving the "most serious allegations of fraud" in the case—those concerning the actual state of Plimus's relationship with PayPal, its critical payment processor. *Liability*, 2018 WL 6311829, at *43. The Court of Chancery found that Tal, whom the Founders installed as Plimus's CEO and to whom they deferred to represent their interests in the merger, was liable for fraudulent inducement and fraud because he concealed from Great Hill "PayPal's credible threats of termination" and a fine from PayPal arising from a significant violation of card-industry rules. *Id.*. The court concluded that "Tal intended for Great Hill to rely on Tal's false representations in order to induce Great Hill to proceed with the transaction." *Id.* at *44. The court was equally clear that the misrepresentation concerning the PayPal relationship was enormously harmful—it caused a "major disruption to Plimus's business," and it "hurt Plimus's reputation." *Id.* at *30, *44.

Throughout the case, the Court of Chancery understood the close nexus between these successful allegations against Tal and the allegations against the Founders. The court refused to dismiss fraud claims against the Founders, explaining:

> [A]s directors, it strikes me as unlikely that they were unaware of the impending and allegedly catastrophic loss of the relationship with PayPal. . . .
>
> I can infer that Herzog and Kleinberg, together with Goldman and Klahr, as Plimus directors, collectively had control over the Company's CEO, the apparent ringleader of the alleged fraud relating to payment processors. As large blockholders within the Company, they also had a financial motive not to exercise that control to stop him.

Motion to Dismiss, 2014 WL 6703980, at *21 (footnote omitted). The court ultimately held the Founders liable for breach of representations in the Merger Agreement concerning Plimus's relationship to PayPal, because "Plimus … was aware of the PayPal representatives' declarative statements that PayPal would send a termination notice once certain conditions were met," and so Plimus was aware "of an *intent* to terminate" the relationship. *Liability*, 2018 WL 6311829, at *47.

In other words, the contractual-misrepresentation allegations Great Hill proved against the Founders concerned the *exact same subject* as the "most serious allegations of fraud" the Founders proved against Tal. This is not just so as a matter of logical implication; the Court of Chancery expressly recognized the inextricable connection between the two claims. The court observed that the "liability for th[e] non-disclosure" of the PayPal termination threats "stems from fraud—in the case of Tal—and indemnification for breach of contract—in the case of the Indemnification Defendants," including the Founders. *Damages*, 2020 WL 948513, at *18 (footnote

omitted). And "[w]hile the source of liability is different—tort vs. contract," the harm suffered from the conduct was "identical." *Id*.

Accordingly, the Founders' attempt to drive a wedge between two successful claims (the fraud claim against Tal and the contractual-misrepresentations claim against the Founders) that were *on the same subject* and involved *the same harm* makes no sense as a matter of fact. It makes no better sense as a matter of law, either. The "traditional" standard in Delaware for assessing success in the context of attorneys' fees is "all or nothing," not "claim-by-claim." *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454, at *2-3 & n.13 (Del. Ch. Jan. 5, 2018) (collecting authority). The Founders' approach is antithetical to that standard.[12]

B. Great Hill Proved the Founders Breached Contractual Representations Concerning PayPal's Relationship with Plimus.

Ultimately, the Founders (at 25) all but concede that the contractual misrepresentations regarding the PayPal relationship represent an "important issue," and that Great Hill's success on that claim could support an equitable fee award. So

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[12] The Founders' repeated complaint (at 28-29) that the Court of Chancery's attorneys'-fee analysis was not conducted defendant-by-defendant fares no better. Given the Defendants' lockstep approach to the litigation, a defendant-by-defendant analysis would have been inappropriate. Great Hill Answering Br. 41; *cf. Valeant Pharm. Int'l v. Jerney*, 2007 WL 2813789, at *17 (Del. Ch. Mar. 1, 2007). And the Court of Chancery made clear that going through that defendant-by-defendant analysis would make no difference to the outcome. *Fees*, 2020 WL 7861336, at *6 n.72. For the reasons explained in this Section, that is correct.

the Founders are left to attempt (at 24-25) their most ambitious revision of the proceedings below, by arguing that they were *not* actually held liable for contractual misrepresentation of the PayPal relationship at all. That assertion is simply untrue.

Start with the basics of what transpired below. The Court of Chancery's opinion on the merits was clear. The Founders, along with the rest of the Indemnification Defendants, "breached Section 3.26(b)," because PayPal had clearly manifested an "*intent* to terminate" its relationship with Plimus before consummation of the merger. *Liability*, 2018 WL 6311829, at *47. The injury was obvious—a "major disruption to Plimus's business" that "hurt Plimus's reputation." *Id.* at *30, *44. Accordingly, the court entered final judgment for Great Hill on Count V of the Amended Complaint—the indemnification claim under which Great Hill alleged that the Founders breached contractual representations regarding, among other things, the PayPal relationship. *See* Founders' Opening Br. Ex. B.

The Court of Chancery's holding in its *Liability* opinion and its entry of final judgment on the indemnification claim reflect that Great Hill demonstrated all the elements of a breach of contract as to the PayPal relationship: "(i) a contractual obligation, (ii) a breach of that obligation by the defendant, and (iii) a *causally related injury* that warrants a remedy." *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *47 (Del. Ch. Nov. 30, 2020) (emphasis

added). The Founders' position depends on a sleight of hand that confuses proving the *fact of injury* with securing a certain *quantum of damages* sought.

The Founders seek to undo not just basic principles of liability, but also the fundamentals of equitable fee awards. "Delaware law is clear" that "the outcome of the substantive issues, not damages," determines whether a party is entitled to an equitable award of fees. *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC,* 2009 WL 1111179, at *14 (Del. Ch. Apr. 27, 2009) (awarding fees to plaintiff that proved breach of contract but received "nominal damages of one dollar"). And for good reason. A myopic focus on damages misses other important interests at play in commercial lawsuits, such as protection of reputation and clarification and vindication of legal rights.

The Founders' contrary policy also "would lead to perverse results." *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *3 (Del. Ch. Apr. 27, 2004). "Notwithstanding the fact that [Great Hill] prevailed on all pretrial motions and the substantive issue at trial," the Founders would be transformed into prevailing parties just because the Court of Chancery awarded Great Hill less damages than it sought. *Id*. That "is simply contrary to the reality of the litigation as well as the dictates of common sense." *Id*.; *see also*, *e.g.*, *ADI Techs., Inc. v. Milspray, LLC*, 2013 WL 12250012, at *3 (E.D. Va. Jan. 16, 2013) (noting that damages awards "do not necessarily reflect the difficulty of issues involved or the relative merits of the

parties' positions, and accordingly, an allocation of fees and costs on the basis of the amounts the parties won or lost in their claims is not an equitable basis").

C. Great Hill Prevailed Throughout the Litigation.

In a gesture symptomatic of their effort to shift the focus of the attorneys'-fees analysis away from the substantive heart of the case to the damages award, the Founders assert (at 26 n.31) that the Court should ignore Great Hill's repeated success at each step leading to trial. The argument, buried as it is in a cursory footnote, is waived. *E.g.*, *Sabree Env. & Constr., Inc. v. Summit Dredging*, LLC, 149 A.3d 517 (Del. 2016) (TABLE) ("[S]tandalone arguments in footnotes are usually not considered fairly raised in any court."). But in any event, the assertion is meritless, because it once more ignores "the reality of the litigation as well as the dictates of common sense." *Comrie*, 2004 WL 936505, at *3.

Accounting for the extent of Great Hill's pre-trial efforts is essential to understanding the scope of its success in the case. Before it even had an opportunity to make its case in court, Great Hill was forced to confront and prevail on an extraordinary array of pre-trial challenges over the course of five years. Great Hill had to win a precedent-setting dispute over interpretation of Section 259 of the Delaware General Corporation Law. *See Privilege*, 80 A.3d 155, 156-60. Great Hill next successfully convinced the Court of Chancery to "largely den[y]" a motion to dismiss. *Motion to Dismiss*, 2014 WL 6703980, at *1. Then Great Hill had to

oppose, and defeat, no less than five motions for summary judgment ranging across all the claims in the case. *Summary Judgment*, 2017 WL 3168966, at *2. Only after all that was Great Hill able, over the course of a ten-day trial, to lay bare the facts proving Tal's fraud and the Founders' contractual misrepresentations.

So Great Hill did not merely win "some interlocutory matters." Founders' Answering Br. at 26 n.31. It sustained its case at every stage of the litigation, through to success on the chief issue at trial. And it did so in the face of uniform and relentless opposition from sophisticated opponents represented by able counsel, with fees approaching $40 million. As the law recognizes, that considerable success warrants an equitable award of fees, regardless of whether the ultimate damages figure was what Great Hill desired. *Comrie*, 2004 WL 936505, at *2-3 (awarding fees when plaintiff "prevailed on all pretrial motions and the substantive issue at trial," even though plaintiff came up well short of full claim for money damages).

D. The Court of Chancery Is Not Required To Award Fees When Equity Supports an Award of Zero.

For the reasons given above, the equities support the Court of Chancery's decision not to award fees to the Founders. Accordingly, any error arising from the court's failure to apply the proper standard to the Founders' fee claim was harmless. *Whittaker v. Houston*, 888 A.2d 219, 224 (Del. 2005) (harmless error where result

below would be the same had the proper standard been applied). *See also* Great Hill Answering Br. 39-42.[13]

The Founders nonetheless insist (at 4) that the Court of Chancery was required to award *some* amount of fees to the parties. The Founders rest that assertion on one word in Section 12.10: "shall." The argument again depends on blotting out inconvenient text. Section 12.10 states the court "shall award a reimbursement of the fees, costs and expenses incurred by such party *on an equitable basis*." B189 (emphasis added). While the record in this case shows Great Hill clearly is entitled to an equitable award of fees for its success on the central issue of the case, it is a matter of common sense that in some circumstances, a case truly has been fought to a draw, and the equitable result is an award of fees to no party.

The Founders' interpretation would make no difference even if it were correct. Requiring the Court of Chancery to issue some quantum of fees would still permit the court to grant an identical nominal sum to both sides; one dollar, for example. The bottom-line result would be the same: a net recovery of zero. Doubtless the Founders would be as unsatisfied with that decision as they are with the one under review—which clarifies that their real objection is to the Court of Chancery's

[13] If the Court were to conclude that the Founders are entitled to a fee award, the Court should remand to the Court of Chancery to determine the reasonableness of the Founders' fee request in the first instance. *See* Great Hill Answering Br. 4 & n.3, 39 n.11.

determination that they did not predominate in the litigation. For the reasons already given, that determination was correct, and the Court should affirm that aspect of the judgment below.

CONCLUSION

Great Hill respectfully asks the Court: (1) to reverse the Court of Chancery's judgment as to Great Hill's motion for attorney's fees, costs, and expenses, and to order the Court of Chancery to grant Great Hill's motion; and (2) to affirm the Court of Chancery's denial of the Founders' motion for attorneys' fees, costs, and expenses.

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Dated: September 20, 2021

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021 true and correct copies of the foregoing were caused to be served by File & Serve*Xpress* on the following counsel of record:

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