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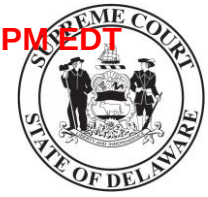

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTH AMERICAN LEASING, INC., a Michigan corporation, DORE & ASSOCIATES CONTRACTING, INC. an Indiana corporation, NASDI LLC, a Delaware limited liability Company and YANKEE ENVIRONMENTAL SERVICES LLC, a Delaware limited liability Company,	)	No. 192, 2020
Defendants Below, Appellants.	)	COURT BELOW: Court of Chancery of the State of Delaware, C.A. No. 2017-0399-KSJM
v.	)	
NASDI HOLDINGS, LLC, a Delaware limited liability company, and GREAT LAKES DREDGE AND DOCK CORPORATION, a Delaware Corporation,	)	
Plaintiffs Below, Appellees.	)	

APPELLEES' ANSWERING BRIEF

POTTER ANDERSON & CORROON LLP

Brian C. Ralston (# 3770)
Mathew A. Golden (# 6035)
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000

Attorneys for Plaintiffs-Below/Appellees NASDI Holdings LLC and Great Lakes Dredge & Dock Corporation

OF COUNSEL:

Michael Dockterman
STEPTOE & JOHNSON, LLP
227 West Monroe St., Suite 4700
Chicago, IL 60606

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NATURE OF PROCEEDINGS

Pursuant to an Ownership Interest Purchase Agreement dated as of April 23, 2014 (the "Purchase Agreement"), Defendant North American Leasing, Inc. ("NALI") purchased two demolition companies, Defendant NASDI, LLC ("NASDI") and Defendant Yankee Environmental Services, LLC ("Yankee") from Plaintiff NASDI Holdings LLC ("NASDI Holdings"). As an integral part of the transaction, NALI, Defendant Dore & Associates Contracting, Inc. ("Dore"), NASDI, and Yankee agreed to indemnify NASDI Holdings and Plaintiff Great Lakes Dredge & Dock Corporation ("Great Lakes") from any losses resulting from claims on surety bonds that Great Lakes agreed to maintain on existing projects. In February 2017, NASDI abandoned work on a large project on the Bayonne Bridge, triggering a payment on the project surety bond exceeding $21 million and a commensurate loss to NASDI Holdings and Great Lakes.[1]

[1] The fact that this was the sale of ongoing businesses, with indemnitors on both sides, can make the names of the parties confusing. "Plaintiffs" in this brief means Appellees NASDI Holdings and Great Lakes. "Defendants" means Appellants NALI, NASDI, Yankee and Dore. Where reference to a particular party is appropriate, that party's name, as defined in the text, will be used. In addition, because the Purchase Agreement defines only Plaintiff NASDI Holdings as the "Seller" and only Defendant NALI as the "Purchaser," the terms Seller and Purchaser will be used in certain limited contexts, particularly for discussion of particular provisions of the Purchase Agreement where those terms are used.

On May 26, 2017, Plaintiffs filed their Verified Complaint seeking indemnity from Defendants for the loss incurred as a result of NALI's actions. On April 8, 2019, the trial court granted Plaintiffs' motion for partial summary judgment on their breach of contract claim. On April 13, 2020, the trial court granted Plaintiffs' motion for entry of final judgment, and on May 8, 2020, the trial court entered a Final Order and Judgment against Defendants in the amount of $21,934.028.56. Defendants have appealed from the trial court's decisions on the motion for partial summary judgment and the motion for entry of final judgment and from the judgment itself.

Defendants' statement of the "Nature of the Proceedings" contains six pages of argument. Plaintiffs will reserve their detailed response for the Argument portion of this brief, but Defendants' statement reveals serious defects in their grounds for appeal.

First, Defendants argue that Plaintiffs failed to give notice of their indemnity claim for losses on the surety bond by the Termination Date referenced in the notice provision of the Purchase Agreement. That date, however, applies only to certain claims for breach of Sellers' contractual representations and warranties. All other claims, including Sellers' claims relating to surety bonds, are subject to a "reasonable time" limitation. The exception for breaches of Sellers' representations and warranties is delineated plainly in the survival and notice provisions of the agreement, and is also consistent with structural aspects of the agreement.

Defendants also assert that a separate provision of the Purchase Agreement provides an "exclusive remedy" of equitable subrogation if Plaintiffs miss the purported deadline for an indemnity claim. But the provision to which Defendants refer actually says that the *indemnity provisions* are the exclusive remedy, and then preserves equitable subrogation as an *additional* remedy. Moreover, the exclusive-remedy provision on its face is unrelated to *notice* of a claim: it does not mention notice or refer to the agreement's notice provisions, and it contains no deadlines for a claim. In summary, Defendants' argument requires significant and impermissible revisions to the relevant provisions of the Purchase Agreement.

Second, Defendants assert that they did not waive their right to seek a reduction of damages based on their set-off/recoupment defense. But that assertion is founded on a fundamental misrepresentation of the record below: that Defendants could not have waived the set-off/recoupment defense because Plaintiffs sought summary judgment only on liability and had not substantiated the amount of their damages. In reality, Plaintiffs expressly moved for summary judgment in the precise amount of $20,934,028.56, and provided documentary evidence substantiating every penny. Defendants' "Nature of the Proceedings" also fails to mention that, after the trial court had granted summary judgment on Plaintiffs' breach of contract claim, Defendants made a motion for reargument -- and even in that context failed to raise their defense of set-off/recoupment. In fact, Defendants' motion for reargument

sought to preserve another defense, unclean hands, but made no similar effort to preserve the set-off/recoupment defense. That failure made Defendants' waiver even more emphatic.

Third, Defendants assert that the trial court refused to consider evidence that allegedly supports a reduction in damages. The record is clear that Defendants did not present this evidence in response to the motion for summary judgment. Nor did they present it on their motion for reargument. They first presented the evidence -- over one thousand pages -- only after Plaintiffs moved for entry of a final judgment order. The evidence, including lengthy deposition transcripts and exhibits, was not from this case. Rather, it was from a suit brought by NASDI in New York federal court against the general contractor on the project that NASDI had abandoned. And, despite their efforts to obscure the fact on this appeal, Defendants presented all of that evidence to the trial court in support of their set-off/recoupment defense – the defense that they had already waived. In arguing for consideration of that evidence here, Defendants have simply repackaged their set-off/recoupment defense as a more generic question of "damages." But the waiver is inescapable.

Defendants' efforts to argue from the evidence in the New York case again glosses over one of their own motions, this one an early motion to dismiss or stay the proceedings in Delaware pending resolution of the New York litigation. The trial court rejected that argument, ruling that the outcome in the New York case is

irrelevant to Defendants' status as the "ultimate indemnitor" in this case. When Defendants tried to raise the same issue in response to Plaintiffs' motion for entry of final judgment, the trial court again decided against Defendants, ruling that its decision was law of the case. Defendants did not even bother to address that issue in their opening brief here.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly ruled that Plaintiffs' indemnification claim against Defendants was timely made pursuant to the unambiguous terms of the Purchase Agreement.

2. Denied. The trial court correctly ruled that Defendants waived their affirmative defense of set-off/recoupment by failing to raise it on Plaintiffs' motion for summary judgment or in Defendants' own motion for reargument following the trial court's award of summary judgment to Plaintiffs.

3. Denied. The trial court correctly declined to consider evidence, developed in a New York case, that Defendants presented in support of their set-off/recoupment defense because (1) Defendants' had waived the set-off/recoupment defense; and (2) the trial court had already ruled that the pendency of the New York case should not delay Plaintiffs' recovery against Defendants, and that earlier ruling was law of the case.

STATEMENT OF FACTS

A. The Parties

NASDI Holdings is a Delaware limited liability company. (A25) Great Lakes is a corporation organized under the laws of the State of Delaware, and is the parent of NASDI Holdings. (A25)

NALI is a corporation organized under the laws of the State of Michigan, controlled by Arthur Dore, Sr. and Arthur Dore, Jr. (A25)

Dore & Associates is a corporation organized under the laws of the State of Indiana. Dore & Associates provides "services" to NALI and effectively operates NALI, NASDI, LLC, and Yankee. (A25)

NASDI is a limited liability company organized under the laws of the State of Delaware, and was, prior to April 23, 2014, an asset of NASDI Holdings. (A25)

Yankee is a limited liability company organized under the laws of the State of Delaware, and was, prior to April 23, 2014, an asset of NASDI Holdings. (A25)

B. The Terms of the Purchase Agreement

Prior to April 23, 2014, NASDI Holdings and its corporate parent, Great Lakes, owned and operated two companies, NASDI and Yankee. NASDI provided demolition and site-redevelopment services on projects throughout the United States. (A26-27)

On April 23, 2014, NASDI Holdings and Great Lakes entered into the Purchase Agreement. (A27)

In § 7.7(a) of the Purchase Agreement, Great Lakes agreed that existing performance and payment bonds shall remain in place until such time as the bonds are no longer required under the relevant contract. In relevant part, the provision reads as follows:

> 7.7 Company Surety Bond Obligations
>
> (a) Parent [Great Lakes] hereby agrees that each of the Performance/Payment Bonds set forth on Schedule 1.1(a) shall remain in place until such time as such bond is no longer required under the contract with respect to which such bond was put in place(as such contract is now in effect).

(A291)

Section 9.2(e) of the Purchase Agreement provides that Defendants shall indemnify NALI and its affiliates (including Great Lakes) for all losses, resulting from post-closing events, that relate to the surety bonds addressed in § 7.7(a). (A297)

Section 9.3 provides for notice of indemnity claims pursuant to Section 9.2. In general, such claims must be made "within a reasonable time" after the indemnitee becomes aware of the claim. This requirement applies to claims pursuant to Section 9.2(e), like those of Plaintiffs, for losses arising out of surety bonds. An exception to the "reasonable time" general rule, which imposes stricter time limits, applies only to claims by Purchaser based on breaches of certain of Seller's representations or warranties. Those stricter time limits apply to those types of claims because Seller's

representations and warranties themselves are subject to expiration provisions in Section 9.5. (A297-99)

C. The Bayonne Bridge Project, the Bonds, and RelatedAgreements

Prior to the Purchase Agreement, NASDI had entered into a subcontract, dated July 1, 2013, with Skanska Koch Kiewit Infrastructure Co. (JV) ("Skanska") to perform certain demolition work for a total subcontract price of $20,359,375 in connection with Skanska's prime contract with the Port Authority of New York and New Jersey for the replacement of the main span roadway and approach structures of the Bayonne Bridge. (A29-30) Work under the prime contract was scheduled in four stages, and NASDI's demolition work related only to Stages 1, 2, and 4. (A722-23, A770-71) The subcontract required NASDI to procure and furnish separate performance and payment bonds in the penal sums equal to that subcontract price. (A29-30; A308-60)

In compliance with the subcontract's requirement, NASDI, as principal, procured from Fidelity and Deposit Company of Maryland and Zurich American Insurance Company ("Zurich"), as surety, and furnished to Skanska, as obligee, separate performance and payment bonds in support of NASDI's Bayonne Bridge subcontract obligations, each in the sum of $20,359,375 and dated August 6, 2013 (the "Bonds"). The Bonds were secured by an Agreement of Indemnity and an Equipment Utilization Agreement previously executed by Great Lakes, NASDI

Holdings, NASDI and Yankee in favor of Zurich. The Bonds were later included on Schedule 1.1(a) to the Purchase Agreement so that, in connection with the sale of NASDI, Great Lakes became obligated to maintain the Bonds until they are no longer required under the Bayonne Bridge subcontract. (A30, A362-63, A365-66)

The sale of NASDI required a new contractual arrangement concerning the Bonds. Zurich consented to release Great Lakes, NASDI Holdings, NASDI and Yankee from their obligations under their prior Agreement of Indemnity and Equipment Utilization Agreement with respect to certain bonds, including but not limited to the Bonds, and agreed to maintain the Bonds, but did so in exchange for three new agreements. (A368-78)

First, Dore & Associates, NALI, River Front LLC, NASDI and Yankee executed a General Indemnity Agreement dated April 23, 2014, by which agreement those parties became obligated to indemnify and hold Zurich and its affiliates harmless from any loss or liability arising from or related to the Bonds. (A31, A380-396)

Second, Great Lakes executed a Guarantee and Indemnity Agreement dated April 23, 2014, by which Great Lakes guaranteed the obligations of the Dore Indemnitors pursuant to the Dore Indemnity and became obligated to indemnify and hold Zurich and its affiliates harmless from any loss or liability arising from or related to those Bonds. (A31, A398-409)

Third, in order to secure the obligations of the Dore Indemnitors pursuant to the Dore Indemnity and the obligations of Great Lakes pursuant to its Guarantee and Indemnity Agreement, Great Lakes executed a Letter of Credit Agreement dated April 23, 2014. (A31, A411-14) That agreement required Great Lakes to provide a Letter of Credit in favor of Zurich in the amount of $20,000,000, which amount was later increased by amendments to $30,000,000. (A31-32) Great Lakes procured a Letter of Credit No. 68069363 issued by Bank of America in favor of Zurich in the initial amount of $20,000,000, which amount was later increased to $30,000,000 (the "Letter of Credit"), to satisfy this contractual requirement. (A32, A416-19)

D. Termination of NASDI's Contract and Resulting Action by Zurich

NASDI had completed its work on Stages 1 and 2 of the Bayonne Bridge project in 2014. (A729) Stage 3 of the project did not involve any demolition by NASDI. NASDI was scheduled to begin work on Stage 4 in early 2017. (A730)

On February 13, 2017, NASDI gave Skanska a Notice of Termination of the Bayonne Bridge subcontract, stating NASDI's intention to demobilize from the site immediately. (A32, A421-23)

On February 14, 2017, NASDI Holdings gave notice to NALI, pursuant to Section 9.3(a) of the Purchase Agreement, that NASDI's failure to perform under the Bayonne Bridge subcontract may result in losses for which Appellants are

obligated to indemnify Appellees pursuant to § 9.2(e) of the Purchase Agreement. (A32, A425-26)

On February 23, 2017, Skanska declared NASDI in default and terminated the Bayonne Bridge subcontract after NASDI failed to remobilize for completion of the demolition work. On the same date, Skanska notified Zurich of NASDI's default and made a demand on Zurich for performance under the performance bond. (A32, A428-30, A432-33)

On February 24, 2017, Zurich notified Great Lakes that Zurich would look to Great Lakes, pursuant to the Guaranty and Indemnity Agreement, the Letter of Credit Agreement, and the Letter of Credit, for indemnity relating to all loss, cost, or expense that Zurich has incurred or expended, or may in the future incur or expend, by reason of the Bonds. (A33, A435-36)

E. Siefert Associates Claim

Siefert Associates LLC ("Siefert") was a subcontractor to NASDI on the Bayonne Bridge project. (A33)

On March 2, 2017, Siefert filed a proof of claim under the payment bond, alleging that NASDI failed to pay $328,554 for labor and materials provided by Siefert (the "Siefert Claim"). (A33, A438)

On April 5, 2017, NASDI Holdings gave notice to NALI, pursuant to § 9.3(a) of the Purchase Agreement, that Siefert's claim may result in losses for

which Appellants are obligated to indemnify Appellees pursuant to § 9.2(a) of the Purchase Agreement. (A33, A440-41)

F. Zurich's Draw on The Letter of Credit

In a letter to Great Lakes dated May 11, 2017, Zurich informed Great Lakes that Skanska had transmitted to Zurich invoices requesting reimbursement under the performance bond as well as Skanska's estimate of the cost of completing the work on NASDI's Bayonne Bridge subcontract. In that same letter, Zurich informed Great Lakes that Zurich had completed its investigation of the Siefert Claim and, on April 14, 2017, had transmitted a check in the amount of $327,946.75 in partial satisfaction of the Siefert Claim. The letter also informed Great Lakes that Zurich had set a reserve in the sum of $20,538,584.55 and that Zurich had already incurred losses of $327,946.75 on the Siefert Claim and expenses of $17,347.10. Accordingly, the letter stated that Zurich had begun the process of drawing down on the Letter of Credit in the amount of $20,883,878.40. (A33-34, A443-44)

On May 22, 2017, Zurich completed the draw on the letter of credit in the amount of $20,881,824.00 plus $52,204.56 for bank fees. (A34)

On June 17, 2019, PNC Bank informed Great Lakes that Zurich had again drawn on the Letter of Credit and PNC Bank had paid to Zurich $1,000,000.00 from Great Lakes' account. (A700, A702-03)[2]

G. The Proceedings Below

Plaintiffs filed their Verified Complaint on May 26, 2017. (A24-39) The Verified Complaint stated three causes of action: (1) breach of contract, (2) equitable subrogation, and (3) declaratory judgment. On March 9, 2018, Plaintiffs moved for summary judgment on their breach of contract claim and on their declaratory judgment claim. (A445-48) In a Memorandum Opinion dated April 8, 2019, the trial court granted summary judgment against Defendants on the breach of contract claim. (Open. Br. Ex. A) Defendants filed a motion for reargument, which the trial court denied on May 28, 2019. (B1-6; B7-10)

On July 15, 2019, Plaintiffs moved for entry of final judgment. (A660-70) The trial court granted the motion on April 13, 2020. (Open. Br. Ex. B) The trial court entered the judgment below on May 8, 2020. (Open. Br. Ex C)

[2] In June 2017, Zurich's rights under the original Letter of Credit issued by Bank of America were transferred to a new Letter of Credit issued by PNC Bank. (A705, A707-09)

ARGUMENT

I. THE NOTICE PROVISIONS IN THE PURCHASE AGREEMENT DO NOT BAR PLAINTIFFS' CLAIM

A. Question Presented

Whether the trial court correctly ruled that the Termination Date in the Purchase Agreement applies only to claims for indemnification based on Seller's representations and warranties, not to claims, like Plaintiffs', relating to a surety bond.

B. Scope of Review

This Court reviews issues of contract interpretation *de novo*. *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014).

C. Merits of the Argument

Defendants argue that Section 9.3 the Purchase Agreement requires that all claims for indemnification must be made by the defined "Termination Date," March 31, 2016. That date, however, applies only to indemnification claims based on a breach of Sellers' representation or warranty; it does not apply to Seller's own claims relating to a surety bond, which are not related to representations and warranties and are treated quite distinctly in the Purchase Agreement. Defendants' argument ignores not only the specific language of Section 9.3, but also the broader structure of the Purchase Agreement as reflected in Section 9.3.

1. The Purchase Agreement Reflects an Indemnification Framework Based on the Subject Matter of the Claim for Indemnification

Section 9.2, titled "Indemnification of Seller," describes Defendants' obligations to indemnify Seller for seven specific types of "Losses." The first type of loss, set forth in Section 9.2(a), is one arising out of a breach of a representation or warranty in the Purchase Agreement. The fifth type of loss, set forth in Section 9.2(e), is one "arising out of, relating to or incurred in connection with" surety bonds. (A297) Section 9.2 therefore draws a clear distinction between the indemnification obligation relating to a breach of a representation and warranty and the indemnification obligation relating to surety bonds, which is the obligation Plaintiffs sought to enforce by their claim.

While Section 9.2 of the Purchase Agreement spells out the events that give rise to Seller's indemnification rights, Section 9.3 of the Purchase Agreement is simply a notice provision. It describes how, once Seller has sustained a loss within the scope of Section 9.2, Seller gives notice of a *claim* for indemnity to the other party. The distinction between a "Loss" in Section 9.2 and a "Claim," first defined in Section 9.3, is important. A "Claim" refers to the "claim for Indemnification . . . for Losses . . . ," or, in other words, the mechanism for asserting Seller's rights under Section 9.2. (A297)

Section 9.5 of the Purchase Agreement, which is specifically referenced in Section 9.3, addresses the expiration and survival of certain representations and warranties in the agreement. Section 9.5 has nothing to do with surety bonds. That subject is covered by Section 7.7 of the Purchase Agreement, which establishes a "Bond Covenant Termination Date" and sets out the conditions under which the parties' bond-related obligations under that section come to an end.

2. The Notice Provisions in Section 9.3 Generally Require Notice of a Claim Within a Reasonable Time, with an Exception for Claims Relating to Seller's Representations and Warranties

Section 9.3 provides generally that a party seeking indemnity shall give notice of a claim "within a reasonable time" after becoming aware of it. And then a comma appears, followed by this modifying clause: "but in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the 'Applicable Claim Period')." (A297) Then another comma appears, so that the "in any event" clause is set off by commas from the rest of the provision. The sentence then continues: "arising out of or resulting from: (a) any item Indemnified pursuant to the terms of Section 9.1 or 9.2 . . . ." (A297) The "in any event" clause is plainly set apart from the rest of the sentence, which without that clause states very directly that a party claiming indemnity "shall give notice of a Claim . . . within a reasonable time after the Indemnitee becomes aware of the existence of any potential Claim . . .

arising out of or resulting from: (a) any item Indemnified pursuant to the terms of Section 9.1 or 9.2 . . . ." In other words, all claims arising out of any of the specific types of Losses identified in Section 9.2 must be made within a reasonable time of awareness of the claim.

The "in any event" clause textually modifies Section 9.3's general rule requiring notice within a reasonable time, which applies to all types of indemnifiable losses. The next question is whether the modifying clause relates to a particular kind of loss. It does. The clause requires notice "before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the 'Applicable Claim Period')." Section 9.5 deals solely with survival of representations and warranties given to the Purchaser, providing that some remain in effect until the Termination Date, some survive indefinitely, and some survive until the expiration of the statute of limitations plus 60 days. The "in any event" clause in Section 9.3, therefore, is an exception to the "reasonable time" notice requirement providing that the time within which Purchaser would be required to give notice of claims for any breaches of representations and warranties by Sellers cannot be shorter or longer than the survival periods of the representations and warranties set forth in Section 9.5. Providing for such consistency between the time for a claim notice and survival of the representation or warranty makes perfect sense. The parties wanted to make

clear that the notice provisions would not give rise to an inference that there could be a claim for breach of a representation or warranty that had already expired.

3. Defendants' Interpretation of Section 9.3 Is Incorrect

Defendants' interpretation of Section 9.3 rests entirely on a theory that the "in any event" clause cuts off the running of "a reasonable time" and therefore applies to all claims for indemnity, regardless of subject matter. (Open. Br. 24-25) Defendants' view of Section 9.3, however, ignores the fact that the "in any event" clause is set apart from the rest of the section. Not only have Defendants ignored that fact in their argument, they have also tried to conceal it from this Court, editing out one of the commas that sets the clause apart when quoting the provision in their brief. Here is Defendants' edited version:

> An Indemnitee shall give notice of a Claim . . . within a reasonable time after such Indemnitee becomes aware of the existence of any potential Claim . . . but in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the "Applicable Claim Period"), arising out of or resulting from: (a) any item Indemnified pursuant to the terms of Section 9.1 or 9.2 . . .

(Open. Br. 23) And here is the unedited provision:

> An Indemnitee shall give notice of a Claim under this Agreement, whether for its own Losses or for Losses incurred by any other Purchaser Indemnified Person or Company Indemnified Person, as applicable, pursuant to written notice of such Claim executed by an officer of Purchaser or Seller, as applicable (a "Notice of Claim"), and delivered to Seller and Parent or Purchaser, as applicable (such receiving party, the "Indemnitor"), within a reasonable time after such Indemnitee becomes aware of the existence of any potential Claim by

> such Indemnitee for Indemnification under this ARTICLE 9, but in any event before the later of the Termination Date or the survival period provided in Section 9.5 with respect to particular representation or warranty to which the matter applies (the "Applicable Claim Period"), arising out of or resulting from: (a) any item Indemnified pursuant to the terms of Section 9.1 or 9.2 . . . (A297)

The full provision shows that the words "but in any event" are not part of the main body of Section 9.3, but rather the first words *after* the comma that sets off the "in any event" clause. As explained above, the carefully circumscribed "in any event" clause relates only to Purchaser's claims based on Seller's representations and warranties. All other claims, including those based on a surety bond, are subject only to the "reasonable time" limitation. The "in any event" clause is inapplicable here, therefore, because Plaintiffs' claim is a claim by the Seller and because that claim does not relate to representations and warranties.

Defendants similarly argue that the bond-related claims must be made within the "Applicable Claim Period" defined in the "in any event" clause. (Open. Br. 25) But again, Defendants have ignored the comma setting off the "in any event" clause and the distinct subject matter of that clause. The "Applicable Claim Period" is expressly defined by reference to "the Termination Date or survival period in Section 9.5" and applies only to Purchaser's claims for any Seller breaches of representations and warranties. When the "in any event" clause is read as written, modifying the broader "reasonable time" requirement of Section 9.3, the "Applicable Claim

Period" does not apply to any Seller indemnity claims or bar the bond-related claims here.

4. "Termination Date" Only Relates to Representation and Warranty Claims

Although it is clear from Section 9.3 alone that the "Termination Date" in that Section applies only to Purchasers' claims based on Seller's representations and warranties, it is instructive to consider the two other places where the term "Termination Date" appears in the Purchase Agreement. As noted above, the term appears in Section 9.5 in connection with survival of certain Seller representations and warranties made to the Purchaser. The term appears in only one other place, in Section 9.1(c), which deals generally with the amount to which a "Purchaser Indemnified Person" may be entitled on its indemnity claim. The next to last sentence in Section 9.1(c) provides that the "Companies," *i.e.*, the companies being sold, shall maintain certain insurance coverage "until the Termination Date, or such longer time as there remains a contested claim of Company Breaches." (A296-97) A "Company Breach" is defined in Section 9.1(a)(i) as "a breach of or default in any of the representations or warranties" given to the Purchaser. (A295) The term "Termination Date" in Section 9.1(c), therefore, also relates strictly to Seller representations and warranties. In summary, *every time* "Termination Date" is used in the Purchase Agreement, it relates only to Seller representations and warranties given to the Purchaser. The "Termination Date" was the mechanism by which the

parties limited the survival of certain representations and warranties of the Seller and established a definite end to Purchaser's potential claims based on those representations and warranties. That date has no relevance to Plaintiffs' claims under Section 9.2(e) for indemnification of Losses relating to the surety bonds at issue here.

5. The Trial Court's Well-Reasoned Conclusion Is Correct

The trial court correctly recognized that the "in any event" clause applies only to claims involving representations and warranties. The trial court stated that Defendants, by "zeroing in on the words 'in any event,'" "lose sight of the purpose of the indemnification provisions as a whole." (Open. Br. Ex. A at 12) After noting the various types of possible Losses set out in Section 9.2, the trial court concluded that the "in any event" clause "does not affect indemnification claims relating to the Letter of Credit [securing the bond]." (*Id.* at 13) The clause "applies solely to the first type of loss set forth in Section 9.2(a) – loss arising out of a breach of a representation or warranty in the Purchase Agreement; the 'reasonable time' requirement applies to the other six types of losses." (*Id.*) The trial court observed that the "in any event" clause "roughly parallels" Section 9.5 governing survival of Seller's representations and warranties. (*Id.*) As the trial court summarized it, the "in any event" clause was intended to address claims based on representations and

warranties, "not to cut short indemnification rights relating to the Letter of Credit [securing the bond]." (*Id.* at 13-14)

Defendants argue that the trial court erred by "pivoting to an extra-contractual interpretation based on the 'purpose of the indemnification provisions as a whole.'" (Open. Br. 25) But of course there is nothing "extra-contractual" about examining the text of all of the relevant provisions of the contract itself, which is exactly what the trial court did. The trial court properly considered how the parties had first set up the indemnity provisions by category of loss in Section 9.2 and then examined how the notice provisions in Section 9.3 were designed to apply to those categories. Noting that the "in any event" clause cited to Section 9.5 and then focusing on the purpose of that section and why it was cited in Section 9.3, the trial court correctly concluded that the "in any event" clause only applied to claims relating to representations and warranties.

6. The Provision on Equitable Subrogation Is Irrelevant

Defendants argue that Section 9.7 of the Purchase Agreement designates equitable subrogation as Plaintiffs' sole remedy when the time to file a claim based on a surety bond has expired. (Open. Br. 3, 17, 27-30) In fact, Defendants suggest that the existence of that remedy makes it "fair" to accept their interpretation of Section 9.3 even though their interpretation is not supported by the contract language. (*Id.* 26-27) Defendants' argument is misplaced.

a. The Purpose and Terms of Section 9.7

Section 9.7 is completely separate from the indemnity provisions of Section 9.2 and serves an entirely different purpose. Section 9.7, titled "Exclusive Remedy," states that the indemnification rights in the Purchase Agreement "are and shall be the sole and exclusive remedies of the parties to this Agreement . . . with respect to this Agreement and the transactions contemplated hereby." (A299) The provision does not limit or even address those indemnification rights; it simply says that contractual indemnification is the sole remedy for a party's violation of the terms of the Purchase Agreement. Section 9.7 does, however, set forth two remedies that the parties may pursue *in addition to* their contractual rights of indemnification: "Notwithstanding the foregoing, nothing in this Agreement shall limit (i) any Person's liability for such Person's common law fraud or (ii) any rights of subrogation [Great Lakes] may have under or with respect to [surety bonds and related contracts]." (A299)

Section 9.7 does not say or suggest that equitable subrogation is Plaintiffs' sole remedy for a claim based on a surety bond after the Termination Date. Neither the concept of sole remedy nor the Termination Date is mentioned in the provision. Conversely, there is nothing in Section 9.2 or 9.3 suggesting that Plaintiffs must look to Section 9.7 and equitable subrogation to make a claim relating to a surety bond after the Termination Date. Section 9.3 does not mention Section 9.7, equitable

subrogation, or claims based on a surety bond. There is not the slightest textual indication that the parties intended to limit Plaintiffs' surety bond claims to equitable subrogation after the Termination Date.

In fact, Section 9.7 has nothing to do with the *timing* of a claim. The provision is designed to preserve certain extracontractual remedies outside of the otherwise exclusive remedy embodied in the contractual indemnity rights. The provision permits claims for common law fraud, which arise in the exceptional event of intentional conduct, and equitable subrogation, which arise from the rights of a third party, the bonding company. Even Defendants concede that equitable subrogation differs in many respects from an ordinary contractual indemnity claim based on a surety bond, making it even more apparent that the parties did not intend that equitable subrogation was a substitute for a post-Termination Date indemnity claim relating to a surety bond. (Open. Br. 29-30) Rather, the parties used Section 9.7 to preserve two additional specified remedies beyond those made available to them under the Purchase Agreement. The purpose of Section 9.7 is to make the parties' contractual indemnity rights the exclusive remedy under the contract while preserving the extracontractual remedy of equitable subrogation. The parties did not intend to create some ancillary exclusive right in the form of an equitable subrogation claim.

b. Plaintiffs' Letter to the Trial Court Concerning Subject Matter Jurisdiction Does Not Relate to the Issues Here

In their Statement of Facts, Defendants appear to argue that Plaintiffs conceded in a letter to the trial court that equitable subrogation "is the appropriate remedy" for their losses. (Open Br. 15) That mischaracterizes the record. Plaintiffs' complaint contained claims for breach of contract, equitable subrogation, and declaratory judgment. At a hearing in December 2017 on Defendants' motion to dismiss or stay the case, the trial court questioned whether the case was properly before the Court of Chancery and asked Plaintiffs to address the issue in a letter. Plaintiffs explained that their equitable subrogation claim was distinct from their claim for breach of the Purchase Agreement and was asserted "as an additional theory of recovery." (A205-208) The letter did not say that equitable subrogation was the only appropriate remedy or anything close to that. The trial court gave no further attention to the issue.

II. DEFENDANTS WAIVED THEIR SET-OFF/RECOUPMENT DEFENSE

A. Question Presented

Whether the trial court correctly ruled that Defendants had waived their affirmative defense of setoff/recoupment.

B. Scope of Review

This Court reviews a trial court's application of an equitable defense such as waiver for clear error. *BlackRock Credit Allocation Income Tr. v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 981-82 (Del. 2020).

C. Merits of the Argument

1. Plaintiffs Made a Specific Claim for Damages

Defendants' argument that they did not waive their set-off/recoupment defense is based on an incorrect representation of the record: that Plaintiffs moved for summary judgment on liability only. According to Defendants, Plaintiffs did not seek any damages, and therefore Defendants had no reason to seek a reduction in damages based on their set-off/recoupment defense. Defendants repeatedly emphasize this contention throughout their brief, stating that Plaintiffs filed a motion "**as to liability alone**," that Plaintiffs "did not seek to substantiate their amount of damages," that "Plaintiffs did not provide any evidence of . . . the amount it sought on its claim," that Plaintiffs "sought a determination as to liability alone," that "Plaintiffs sought an interlocutory judicial determination of their entitlement to

indemnification claims . . . not a determination of the amount of damages," that "Plaintiffs had filed a motion for ***partial*** summary judgment on liability alone," that Plaintiffs "***sought the trial court's ruling only as to liability***," and that "Plaintiffs averred in their motion for partial summary judgment that they were seeking a ruling as to liability alone." (Open. Br. 4, 5, 17, 18, 32, 34 (emphases in original))

Defendants' statements are simply wrong. Plaintiffs' motion for summary judgment prayed for judgment on its breach of contract claim "in the amount of $20,934,028.56." (A446) Plaintiffs' brief in support of its motion prayed for the same relief and the same specific amount of damages. (A451-79) Plaintiffs did not move for summary judgment on any particular affirmative defense or defenses. It was clear from the motion and brief that Plaintiffs sought judgment on their entire claim, and that they sought judgment in a specific amount.

Defendants are also wrong to say that Plaintiffs did not substantiate the amount of their damages. Plaintiffs relied upon a notice from Zurich, dated May 11, 2017, that Zurich had begun the process of drawing down on the Letter of Credit in the amount of $20,883,878.40. (A443-44) Plaintiffs also cited to their Verified Complaint, which stated that Zurich completed the draw on the Letter of Credit in the amount of $20,881,824.00, plus $52,204.56 for bank fees. (A34)

Defendants could not have overlooked Plaintiffs' damages claim. It was plainly stated, specifically quantified, and fully documented. Yet Defendants never

objected to this evidence and never contested or even addressed the amount of damages sought in the motion. Their waiver argument is therefore defective at its core. Defendants had every reason to raise every defense to the $21 million that Plaintiffs sought on the motion for summary judgment, including and especially their set-off/recoupment defense. Their failure to do so waived that defense.

2. Defendants' Motion for Reargument Compounded Their Waiver

Defendants' waiver argument on this appeal is also contradicted by their motion for reargument on Plaintiffs' summary judgment motion. At that time, faced with an unqualified summary judgment order on Plaintiffs' breach of contract claim and knowing that Plaintiffs had asked for $20,934,028.56 in damages, Defendants *still* did not raise their set-off/recoupment defense. (B1-6) In fact, the reargument motion focused specifically on two *other* affirmative defenses, while never mentioning the set-off/recoupment defense. (B3-5) Even more telling, Defendants argued that their unclean hands defense "remains a valid defense to Plaintiffs' equitable subrogation claim," *i.e.*, the Second Cause of Action, and that "Defendants should be permitted to advance its unclean hands defense to that remaining claim." (B5) Defendants made no similar request to preserve the set-off/recoupment defense as to any claim. There can be no stronger evidence that Defendants knowingly waived the set-off/recoupment defense than their failure even to mention it at a time

when they were obviously assessing their viable defenses after summary judgment had been entered against them on the breach of contract claim.

3. The Law on Waiver Applies to This Case

Defendants argue that the principle of waiver only applies in appeals and trials, not on a motion for summary judgment. (Open. Br. 32-34) Defendants cite no authority for this odd proposition, and Delaware precedent is contrary. Under Delaware law, where an issue is not briefed, it is deemed waived or abandoned. *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.") This principle is not limited to appellate or trial briefs and has been applied, for example, to a brief on a motion to dismiss a case for failure to state a claim. *See In re Crimson Exploration Inc. Stockholder Litig.*, 2014 WL 5449419 (Del. Ch. Oct. 24, 2014); *see also Naughty Monkey LLC v. MarineMax Northeast LLC*, 2010 WL 5545409, at *3 n.35 (Del. Dec. 23, 2010) (affirmative defense in answer was abandoned because not addressed in brief after bench trial), *clarified on other grounds*, 2011 WL 684626 (Del. Ch. Feb. 14, 2011).

In *Jenkins v. Delaware State University*, 2014 WL 4179958 (Del. Ch. Aug. 22, 2014), which is particularly instructive, the parties agreed to submit their case on a paper record in lieu of trial – the equivalent of a summary judgment proceeding. Although the defendants had raised a number of affirmative defenses in their answer,

they failed to brief them. The court therefore treated the defenses "as abandoned." *Id.* at *6 n.69. Likewise here, Defendants included the set-off/recoupment affirmative defense in their answer without assigning it to any particular claim, but when the time came to assert it in briefs in a dispositive proceeding, Defendants never raised it. They failed to do so again on their motion for reargument, knowing that the trial court had found against them on a $21 million contract claim. The defense was thus waived, and the trial court correctly ruled that it was too late to raise the defense in opposition to Plaintiffs' motion for final judgment.

4. Plaintiffs Moved for Summary Judgment on Its Entire Breach of Contract Claim, Including All Affirmative Defenses

Defendants claim that Plaintiffs sought summary judgment on some but not all of Defendants' affirmative defenses and did not address the set-off/recoupment affirmative defense in their summary judgment briefs. (Open Br. 16) The first contention is incorrect, and the second, although accurate, was irrelevant to the outcome in the trial court.

Plaintiffs did not move for summary judgment on *any* particular affirmative defense or defenses. Plaintiffs sought summary judgment on their breach of contract claim as a whole, which brings with it a challenge to *all* of Defendants' affirmative defenses. It should have been apparent to Defendants from the structure of the motion that their set-off/recoupment defense was at issue, particularly when the

motion sought a specific amount of damages. That was the time to assert any defenses that potentially could reduce the award.

Plaintiffs did not directly address the set-off/recoupment defense in their opening brief in support of the motion for summary judgment. Plaintiffs also did not address an affirmative defense directed to Plaintiffs' equitable subrogation claim because Plaintiffs had not moved for summary judgment on that claim. Defendants, with the burden to show a basis for some set-off/recoupment, then had the opportunity to interpose any genuine set-off/recoupment defense in response to Plaintiffs' claim for a specific amount of damages and to argue that the amount must be reduced, presumably supported by some evidence. Defendants, however, responded to the motion without even mentioning the defense. Plaintiffs therefore had no reason to address it in their reply, and the trial court had no reason to address it in its order granting summary judgment.

But more important, Defendants are not claiming on this appeal that they failed to raise the set-off/recoupment defense below because Plaintiffs never raised it. They are claiming that they did not raise it because Plaintiffs allegedly moved for summary judgment *on liability only and did not ask for damages.* According to Defendants, if Plaintiffs' motion had asked for damages, then of course Defendants would have raised the set-off/recoupment defense. But, as demonstrated above, Plaintiffs' motion *did* ask for a specific amount of damages. Under Defendants' own

theory, then, they would have been prompted to assert their set-off/recoupment defense in their response and would have done so whether or not Plaintiffs had raised it in their opening brief. In short, it is irrelevant to Defendants' theory that Plaintiffs did not specifically raise the set-off/recoupment defense in their opening brief, and Defendants' theory completely breaks down because Plaintiffs' motion for summary judgment did, in fact, ask for damages.

III. THE TRIAL COURT CORRECTLY DECLINED TO CONSIDER EVIDENCE CONCERNING DEFENDANTS SET-OFF / RECOUPMENT CLAIM

A. Question Presented

Whether the trial court correctly refused to consider Defendants' evidence on reduction of Plaintiffs' damages because that evidence was offered in support of Defendants' set-off/recoupment defense, which Defendants had waived, and because the evidence originated in a New York case which has no bearing on this case, as the trial court had already ruled.

B. Scope of Review

This Court reviews the trial court's decisions regarding damages awards under an abuse of discretion standard. *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206 (Del. 2012).

C. Merits of the Argument

Defendants' third and final ground for appeal is the trial court's refusal to consider set-off/recoupment evidence first offered by Defendants on Plaintiffs' motion for entry of final judgment. (Open. Br. 37-38) None of that evidence had been offered on Plaintiffs' summary judgment motion itself, and none had been offered on the motion for reargument. Defendants cite no specific authority in support of their argument; they rely simply on the trial court's duty to adhere to vague "principles" in making a damages determination. (*Id.* 37)

The evidence that Defendants presented was developed in a case still pending in New York federal court where Defendant NASDI has sued Skanska, the general contractor on the Bayonne Bridge project, for losses NASDI allegedly sustained. *NASDI v. Skanska Koch Inc. Kiewit Infrastructure Co. (JV)*, C.A. No. 1:17-cv-03578-LTS-HTP (S.D.N.Y.) Specifically, Defendants argue that Plaintiffs' recovery must be reduced to the extent that the evidence shows (1) that Plaintiffs' losses arose prior to the sale of NASDI and Yankee and (2) that Plaintiffs' own negligence caused their losses. (Open Br. 7, 20, 21, 37-38)

Defendants apparently hope that making over their set-off/recoupment evidence as if it were general "damages" evidence will obscure the fact that they waived their set-off/recoupment defense. In opposing the motion for final judgment below, Defendants argued (1) that their set-off/recoupment defense should be adjudicated using the evidence from the pending New York litigation and (2) that, notwithstanding a previous trial court ruling against Defendants on the same argument, the Delaware case was not "ripe" for summary judgment because the New York litigation could result in a determination that Skanska is required to repay some of Plaintiffs' losses on the bonds. (A735-40) The trial court correctly held that (1) the evidence could not be considered to support Defendants' set-off/recoupment defense because they had waived the defense and (2) the trial court had already ruled

that disposition of Plaintiffs' claims should proceed independently of the New York case and that the trial court's earlier ruling is law of the case.

Even if Defendants had contended below, as they do here, that the trial court had generally failed to consider evidence on damages, the result would have been the same. As explained below, Defendants have simply changed the label on their failed arguments.

1. Defendants Have Waived Their Right to Present Evidence on Their Set-Off/Recoupment Defense

Defendants are still asking for untimely consideration of evidence *to support their set-off/recoupment defense and only to support that defense*. Defendants themselves made this clear in their brief on the motion to enter final judgment, arguing that the trial court should weigh the documentary evidence in the New York case "and reduce Plaintiffs' damages accordingly under the doctrine of recoupment." (A736-37) Yet Defendants did not present that evidence in opposition to the motion for summary judgment, and they did not present it on their motion to reargue the summary judgment ruling. Because the trial court correctly ruled that Defendants had waived their set-off/recoupment defense, admission of the evidence is now precluded.

2. Defendants Did Not Address the Trial Court's Ruling, based on Law of the Case, that the Outcome of New York Case Has No Bearing on Plaintiffs' Recovery Here

In the trial court, Defendants' took the position that the case was not "ripe" for entry of final judgment because the evidence and results in the New York case could have a future impact on Plaintiffs' recovery here. (A739-40) That position is at least implicit in Defendants' reconstituted argument here concerning damages. For example, Defendants note that Skanska is "endeavoring to prove" in the New York case that Plaintiffs' own negligence caused its loss. (Open. Br. 37-38) Although Defendants have persisted in that position, they have ignored one of the trial court's principal reasons for entering final judgment.

In August 2017, Defendants filed a motion to dismiss or stay this case, arguing as they do now that the New York case "will have a determinative effect on the present litigation." (A75) The trial court denied the motion and specifically rejected Defendants' argument. (A197-98) The court stated, first, that it is unlikely that the New York case would reduce the amounts drawn by Zurich on the Letter of Credit and, second, that Defendants "are the ultimate indemnitor, in other words, they are the last in line, that they should be bearing the risk of loss." (A198) In short, Plaintiffs' claim against Defendants must proceed independent of whatever occurs in the New York case.

When Defendants argued on the motion for entry of judgment that the case was not "ripe" based on the pendency of the New York case, the trial court turned to its earlier ruling on Defendants' motion to dismiss or stay. Concluding that the earlier ruling was law of the case, the trial court stated that "the pendency of the New York action will not prevent entry of final judgment in this action." (Open. Br. Ex. A at 10) On this appeal, Defendants did not even address that conclusion of the trial court. To the extent that Defendants' argument here relies on the pendency of the New York case, therefore, that argument should be rejected.

3. Defendants' Set-Off/Recoupment Theories Lack Merit

Even had Defendants properly presented their set-off/recoupment defense, their two proposed theories of recovery would not have impacted Plaintiffs' entitlement to summary judgment in the amount requested.

a. Plaintiffs' Losses Did Not Occur Pre-Sale

Defendants argue that Plaintiffs' losses are not recoverable under the indemnity provisions of the Purchase Agreement because the losses were incurred as a result of Plaintiffs' conduct prior to the sale. (Open. Br. 8-9, 37) But the pre-closing facts on which Defendants rely are unrelated to the distinct *post-closing* events that led to Plaintiffs' losses. As explained in the Statement of Facts, the Bayonne Bridge project proceeded in four stages. NASDI completed its work on Stages 1 and 2 in 2013 and 2014 and had no subcontract for work on Stage 3. (A729-

30) Stage 4 was set to begin in early 2017 – almost three years after NASDI was sold. (A730) But NASDI never started work, giving Skanska a notice of termination on February 17, 2017. (A733) NASDI was therefore not "kicked [] off the job," as Defendants claim, it was *never on the job*, and it unilaterally declared its intention not to begin work. (A733)

NASDI's failure to proceed on Stage 4 of the project – a *post*-closing event – led directly to Skanska's claim on the bond, Zurich's draw on the Letter of Credit, and thus to Plaintiffs' losses and right to indemnity from Defendants. The money drawn by Zurich on the Letter of Credit was paid to Skanska for costs that it incurred to perform Stage 4 subcontract work that NASDI had refused to perform, and not for any costs incurred in connection with Stages 1 and 2 prior to the sale of NASDI. Defendants' theory that pre-sale events caused Plaintiffs' losses misses the mark.

b. Plaintiffs' Losses Did Not Result from Their Own Negligence

Defendants also argue that the evidence from the New York case shows that Plaintiffs' losses resulted from their own negligence, and recovery of such losses is barred "because Delaware law prohibits indemnification for a party's own negligence." (Open. Br. 20) Although Defendants identified and argued from specific Delaware law in the trial court (A738-39), they do not even identify it for this Court.

Defendants' reluctance to discuss the Delaware law is not surprising. The statute that they cited in the trial court, 6 *Del. C.* § 2704(a), has no application to the facts here, as Plaintiffs established in the trial court. (A1790) The statute applies only to contracts for construction in Delaware. The indemnification provision here appears in the Purchase Agreement, which is a contract for the purchase and sale of two businesses, not a construction contract. And the Bayonne Bridge project is in New York and New Jersey, not Delaware. Moreover, the indemnity provision at issue here does not involve negligence at all; it requires Defendants to indemnify Plaintiffs for losses arising out of the surety bond and the agreements related to the surety bond, including Plaintiffs' agreement with Zurich to provide a Letter of Credit and the Letter of Credit itself. (A252; A297) Defendants thus agreed to indemnify Plaintiffs for their contractual obligations to a third party. Such an indemnity agreement is valid under Delaware law. *See Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *8 (Del. Super. Feb. 8, 2016), *aff'd*, 150 A.3d 1209 (Del. 2016).

Defendants' negligence theory also is flawed because Plaintiffs' losses were in fact caused strictly by Defendants' own conduct. Defendants refused to begin work on Stage 4 of the project in February 2017, which led inevitably to the draw on Plaintiffs' Letter of Credit to pay Skanska for performing NASDI's Stage 4 subcontract work. Defendants never explain how Plaintiffs' allegedly negligent

conduct on Stages 1 and 2 of the project, prior to the sale of NASDI in April 2014, has any connection with Defendants' complete failure to perform *any work at all* on Phase 4.

In summary, Defendants' set-off/recoupment defense, even if it had not been waived, would not have affected the result. Their theories of recovery are based on evidence that is irrelevant to Plaintiffs' rights to indemnity under the Purchase Agreement.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court affirm the judgment of the trial court.

POTTER ANDERSON & CORROON LLP

By: */s/ Brian C. Ralston*
Brian C. Ralston (# 3770)
Mathew A. Golden (# 6035)
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000
Attorneys for Plaintiffs-Below/Appellees NASDI Holdings LLC and Great Lakes Dredge & Dock Corporation

OF COUNSEL:

Michael Dockterman
STEPTOE & JOHNSON, LLP
227 West Monroe St., Suite 4700
Chicago, IL 60606
Tel: (312) 577-1300
Fax: (312) 577-1370

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