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Case Number 109,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CorePower Yoga, LLC, CorePower Yoga Franchising LLC,	)	
Defendants-Below/Appellants,	)	No. 109, 2022
v.	)	Court below – Court of Chancery of the State of Delaware,
Level 4 Yoga, LLC,	)	C.A. No. 2020-0249-JRS
Plaintiff-Below/Appellee.	)	

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

NATURE OF THE PROCEEDINGS

On November 27, 2019, Appellants CorePower Yoga, LLC and CorePower Yoga Franchising LLC (collectively, "CorePower") contracted to acquire the business housed at thirty-four yoga studios owned and operated by one of its franchisees, Appellee Level 4 Yoga, LLC ("L4"), under an asset purchase agreement ("APA"). To facilitate an orderly transfer of the business, the APA assigned L4's studios to one of three tranches and provided for three closings: April 1, July 1 and October 1, 2020. The APA terms included: (i) a bring-down provision preceding sixteen pages of warranties; (ii) an absolute and unqualified ordinary course of business warranty guaranteeing that L4 would operate the business in a manner consistent with its past custom and practice from before January 2019; and (iii) warranties bolstering the ordinary course warranty guaranteeing, among other things, the business would also be legally and contractually (including the franchise agreement) compliant, the studios were not closed, no lease had been modified or amended, no additional debt had been incurred, standard employment policies had been followed and L4 had not suffered a material adverse effect ("MAE"). The APA did not contain a *force majeure* provision to reallocate the risk assumed by L4 under the bring-down provision and its warranties. Nor did the APA contain closing conditions or a termination provision that might have altered the parties' common law remedies.

As the first closing approached, COVID-19 devastated the health and fitness industry. The facts are not in dispute. By March 19, L4 acknowledged that the studios were not operating in the ordinary course (as warranted) and observed that all aspects of the business had changed. L4 likewise advised that extraordinary action – departing from the past practice and custom – would be required at the studios (specifying employment, marketing and leasing deviations). On March 24, L4 wrote to its landlords requesting rent abatements and lease restructurings and, on April 1, paid only a small fraction of the rent for the studios typically due. All of L4's studios were closed by government mandate by April 1. On April 2, implementing what it had been planning in March, L4 notified all but ten of its 1,500 employees that they were being laid off. By April 9, L4 applied for a government PPP subsidy certifying the severe impact of the COVID-19 pandemic meant L4 required the subsidy to support its operations.

Meanwhile, on March 20, as it became apparent from L4's communications that L4 was unable to deliver on its end of the bargain (well-run studios as had been diligenced and warranted), CorePower requested the parties adjourn the closing scheduled for April 1. L4 refused, feigning full compliance with its obligations under the APA, and threatened litigation. On April 2 (the same day as its massive layoffs), L4 commenced a lawsuit seeking specific performance of the APA, alleging that:

> Both Plaintiff and Defendants have closed their yoga studios around the country in compliance with temporary orders from state and local authorities to contain COVID-19. Since the pandemic arrived in the United States, that has become the "ordinary course of business."

After trial, despite undisputed proof of the drastic departures from L4's ordinary course of business (as defined in the APA), the Court of Chancery ordered CorePower to specifically perform the terms of the APA. In so doing, the court misapplied precedent and failed to require that L4 be ready, willing and able to perform its contractual obligations (deliver the business as warranted) on each closing date. Nor did the court enforce the APA as written – particularly the bring-down provision requiring warranty compliance throughout the transactional period and at each closing. Instead, the Court of Chancery held that CorePower lost the bargained-for structure of the APA on March 26 when it communicated its intent not to close on April 1. Said another way, the court excused L4's contractual performance after March 26 (when the court evidently found CorePower repudiated the APA). The Court of Chancery substituted a subjective "good steward" standard for that which was contractually required and rewrote the APA into an "as is" transaction.

As in *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, the proof adduced at trial of L4's departure before and after April 1 from its routine pre-pandemic business was overwhelming: shut down studios, a massive layoff,

restructured leases, revenue declines, operational deficits and workarounds. 268 A.3d 198, 209 (Del. 2021). Nonetheless, unlike *AB Stable*, the Court of Chancery held that the drastic departures from past practice did not constitute a warranty breach. First, the court did not apply the warranties after March 26. Second, despite the absolute and unqualified ordinary course of business language, the court held L4 complied with that warranty because prior to March 26 it followed CorePower's operational lead. The court also awarded L4 damages for operating losses it had incurred while operating the business after the first closing date.

CorePower respectfully requests that this Court reverse and remand the Memorandum Opinion ("Opinion") and Final Judgment and Order ("Judgment") because the Court of Chancery's rulings conflict with well-settled specific performance precedent, violate contract interpretation principles, and disturb deal precedent.

SUMMARY OF ARGUMENTS

1. The Opinion erroneously applied the specific performance standard and relied on inapposite authority, leading to the flawed conclusion that L4 was entitled to the extraordinary remedy of specific performance in contravention of established precedent. Applying the law correctly, the court would have determined that L4 was not entitled to specific performance of the APA because L4 failed to show its own substantial performance of the APA: delivery of yoga studios as warranted at each closing.

2. The Opinion misconstrued the bring-down provision in the APA because it improperly considered extrinsic evidence and conflated the warranties with a closing condition, rendering the provision meaningless. The proper construction requires that the court analyze L4's compliance with the warranties at each closing date.

3. The Opinion erroneously substituted a "good steward" standard for the clear and unambiguous warranties in the APA. Applying the warranties as written, the court would have found that L4 materially breached the APA, including the ordinary course and MAE warranties.

4. CorePower's counterclaim for damages as a substitute for specific performance should not have been dismissed because it would have been the appropriate mechanism for adjusting the equities between the parties and placing

them in the same position as if the contract had been performed. The claim should be remanded for a determination on the merits.

5. The Opinion erroneously awards damages for items not allowed under the terms of the APA, which created an inequitable result. Had the court appropriately balanced the equities, it would have excluded certain items from the damages calculation.

STATEMENT OF FACTS

A. THE APA

This case pivots on the clear and unambiguous language of the APA. Thereunder, CorePower was to acquire the business housed at thirty-four yoga studios being operated by its largest franchisee, L4. A570-A571, A2227-A2285. The APA was the product of a prolonged negotiating process beginning when a call option was triggered and moving through a "Call Option Exercise Agreement" which contemplated the APA. A570-A571, A2090-A2099, A2191-A2221. Several negotiated points are likewise reflected in the language of the APA:

1. Staggered closings to facilitate an orderly and efficient transfer and integration of the business housed at the thirty-four studios (A815-A818, A1295-A1304, A2227-A2234);
2. An adjustment in the purchase price compensating L4 for facilitating that efficient transfer of those well-run studios (A571-A573, A815-A818, A1295-A1304, A2186-A2190, A2227-A2234); and
3. Cancellation (with a cancellation payment) of studios that did not satisfy CorePower's standards (A572-A573, A2227-A2229).

Significantly, the APA contained an integration clause whereby the parties undertook to be bound by the language of the APA and not rely upon negotiating

history (including the Call Option Exercise Agreement and all other negotiations, undertakings, understandings or agreements). A2268.

B. SALIENT PROVISIONS OF THE APA

1. THE BRING-DOWN PROVISION

The APA contained seller's warranties spanning sixteen pages. Introducing those warranties, the APA provided:

> [I]n order to induce the Buyer to enter into and perform this Agreement and to consummate the Contemplated Transactions, the Seller hereby represents and warrants to the Buyer, as of the date hereof and as of the applicable Closing Date, as follows . . .

A2234. Simply put, at each closing, CorePower was contractually entitled to receive the business and studios operating as warranted.

2. SELLER'S WARRANTIES

Several warranties issued by L4 embodied in the APA are central to this case. Pursuant to section 3.6, L4 warranted that:

> Absence of Certain Developments. Since January 1, 2019, the Business has been conducted in the Ordinary Course of Business…

A2236. That ordinary course of business – before January 1, 2019 was defined in the APA as follows:

> "Ordinary Course Of Business" means an action taken by any Person in the ordinary course of such Person's business which is consistent with the past customs and practices of such Person (including past practice with respect to quantity, amount, magnitude and frequency and

> standard employment policies and past practices with respect to management of cash and working capital) which is taken in the ordinary course of the normal day-to-day operations of such Person.

A2280.

In addition to the warranty that L4's business was being conducted consistent with its own past practices before January 2019 with respect to quantity, amount, magnitude, frequency and employment policies, section 3.6 of the APA embodied thirteen specific warranty provisions. Among other things, L4 warranted that:

- There had been no material loss affecting the business conducted at the studios or an "Acquired Asset" (including goodwill and intangibles);
- L4 had not closed any facility, business or operation;
- No account payable was delayed;
- No lease was amended or terminated; and
- There had been no MAE, *i.e.*, "a material and adverse effect on the business, assets, liabilities, financial condition, property or results of operations of the Seller, taken as a whole." (A2236-A2238, A2273, A2279).

L4's warranties also reflected the parties' expectations. A1308-A1316, A2268. For instance, in section 3.4, L4 warranted that its business would not only be operating in the ordinary course but that its operations were (and would be on each closing

date) legally and contractually compliant – particularly compliant with its obligations under its franchise agreements. A2235.

Notably, the APA did not contain a *force majeure* clause or other similar provision that might have reallocated the risk L4 assumed having issued warranties. Nor did the APA contain closing conditions or a termination clause wherein the sophisticated parties might have altered common law remedies – particularly, those established remedies for a warranty breach. A2222-A2337.

C. THE FRANCHISE AGREEMENT

L4 was required to comply with franchise agreements. Indeed, it warranted that it was in full compliance with those contracts (among others). A2122-A2124, A2235. But L4 was also responsible for its own day-to-day business (*i.e.*, that which was warranted as being in the ordinary course) as well as those actions taken in response to the COVID-19 pandemic. A927-A928, A2075-A2089. Thus, as L4 conceded:

- L4 was responsible for the normal day-to-day operations at the studios;
- L4 bore sole responsibility for its employees;
- L4 was solely responsible for layoffs (or furloughs); and
- L4 was responsible for legal compliance (A799-A814, A927-A934, A944-A947, A2083-A2085).

Accordingly, starting on March 24, L4 dealt directly with its landlords to restructure virtually all of its leases. A821-A830, A874-A875, A1217-A1218, A2416-A2426, A2483-A2484. Moreover, L4 independently decided in March to close studios to "prioritize health and wellness." A924-A925, A2384-A2386. In any event, as L4 alleged in its complaint and was a stipulated fact, by April 1 (the first scheduled closing date) government mandates required that all the studios be closed. A68-A70, A574.

D. L4'S CHANGES MATERIALLY DEPARTED FROM THE BUSINESS COREPOWER BARGAINED FOR

1. CHANGES BEFORE APRIL 1

- On March 19, L4 emailed CorePower (i) confirming it was not operating in the ordinary course; (ii) contemplating actions at the studios that would depart from "ordinary course" past practice (specifying actions in marketing, leasing and employment); (iii) warning of employee discord – "not normal times"; and (iv) advising it had written off anticipated cash flow it had expected to earn through the last scheduled closing in October. A575-A576, A2387-A2388.
- On March 24 (and March 25), L4 communicated with its landlords seeking to restructure its leases. A821-A830, A874-A875, A1217-A1218, A2416-A2424, A2483-A2484. This

generic request to landlords advised:

- It had been forced to close studios and was unable to open and resume ordinary business;
- It could not generate revenue; and
- It was unable to pay rent. A2403, A2416-A2424, A2416-A2424.

- By April 1, all the studios were shut down by government mandate. A68-A70, A574, A774-A777.

2. CHANGES AFTER APRIL 1

- In April, L4 paid approximately $17,000 in rent; *i.e.*, compared to its normal rental payment of approximately $300,000. A827-A828, A1217-A1218.
- After several days of preparation, on April 2 (the same day it filed its complaint alleging it was ready, willing and able to perform its obligations under the APA) L4 held a Zoom meeting with its employees advising its business had been devastated and announced a massive layoff; all but ten of its 1,500 employees were laid off. A793-A801, A959-A963, A2427, A2442-A2444.
- On April 9, L4 applied for a PPP loan wherein L4 certified that a $1.5 million government subsidy was necessary for it to

continue as a viable business. A850-A855, A2434-A2441.

- L4 continued to communicate with landlords and on August 18 advised that:
    - Studios were closed at least 110 days;
    - After reopening, studios were closed again;
    - Revenue at reopened studios suffered a steep decline – more than 50%. A836-A838, A999, A2454-A2457.

  As a result of this process, L4 amended most of its leaseholds, dramatically reducing its rental obligation and deferring $1.2 million in rental payments to 2021. A844-A850, A1139-A1140, A2428-A2433, A2458-A2460, A2463-A2464, A2481, A2727-A2729.

- As the studios reopened, operations were vastly different than before the pandemic. By March 2021, operational differences included, among others, a 42% decrease in membership, a 37% decrease in class capacity, a 71.9% decrease in class attendance, imposition of social distancing and mask requirements, ceasing equipment rentals and locker room use, and imposing enhanced cleaning protocols. A887-A890, A1006-A1015, A2448, A2451-

A2453, A2470, A2683-A2685, A2707-A2712.

- The operations following reopening generated completely different economic results (a revenue decline in excess of 50%) as those that were experienced before the pandemic. A836-A842, A999, A2471-A2478, A2522-A2528, A2567, A2569, A2571.
- In October, L4 permanently closed four studios. A845, A2461-A2464.

E. L4 REPUDIATES ITS WARRANTY OBLIGATIONS AND INSISTS UPON A ONE-SIDED TRANSACTION

On March 20, CorePower responded to L4's March 19 email – agreeing that the business was not being operated in the ordinary course and that virtually all aspects of the business had been impacted by the COVID-19 pandemic. A576-A577, A2391-A2395. CorePower sought to adjourn the first closing date scheduled for April 1. *Id.* On March 22, L4 refused to adjourn the closing, reversed course, and claimed that it was operating in the ordinary course of its business. A1333-A1337, A2391, A2396. In so doing, L4 reneged on its APA obligation to deliver the studios as those studios had operated as of January 2019. *See* A2222-A2337. Instead, L4 posited a new normal – namely, that it was operating as others (including CorePower) were during the pandemic (concededly "unique" and "unprecedented" actions). A2396. Upon learning of L4's new position, CorePower confirmed its

belief that L4 was unable to perform its obligations under the APA (observing that a request for adequate written assurances would thereby be futile) and again suggested that the parties adjourn the scheduled closing and work collaboratively. A2391, A2396-A2397, A2404, A2411. On March 25, L4 responded by threatening litigation designed to enforce the APA but also to "excuse [L4's] obligation to sell the business to [CorePower]." A2411.

On March 26, CorePower responded, emphasizing that it remained a "motivated buyer" and was disappointed that L4 rejected its request to postpone the closing scheduled for April 1. A2413. L4 was likewise advised that its obligation to deliver the business as warranted was not excused and that L4 was repudiating its essential obligation under the APA. *Id*.

F. THE COURT OF CHANCERY PROCEEDING

On April 2, L4 initiated its lawsuit alleging that it was ready, willing and able to perform its warranty obligations: by conveying closed studios while it had begun the process in March of restructuring its leases and planning layoffs for nearly all of its employees that it announced the same day. A58-A79, A2403, A2416-A2424, A2442-A2444, A2483-A2484. According to L4, such operations became the ordinary course of business after the pandemic. A70. CorePower moved to dismiss the complaint. A80-A83. The court denied CorePower's motion to dismiss (A84-A85), after which on August 28, 2020 (after the schedule July closing date) L4

amended its pleadings (A86-A111) and CorePower filed its Answer, Affirmative Defenses and Verified Counterclaims (A112-A181).

L4 again amended its pleadings on November 5, 2020 (after the scheduled October closing date). A182-A209. Each amended complaint alleged L4 was prepared to perform fully under the APA. *Id.*, A86-A111.

CorePower amended its counterclaims in response to L4's second amended complaint. A210-A283. In relevant part, CorePower's second counterclaim pleads alternatively that if the court awards specific performance of the APA, CorePower seeks damages in lieu of specific performance arising from L4's inability to perform its obligations as specified in the APA. A272-A274.

On January 1, 2021, L4 moved to dismiss CorePower's counterclaims. A284-A286. After briefing and oral argument, the court dismissed CorePower's second counterclaim and otherwise denied L4's motion. A287-A562. The court reasoned that CorePower's specific performance counterclaim collided with the post-closing indemnification that was provided for in the APA. A550-A555.

The matter was tried over five days, beginning on August 9, 2021. During trial, L4 brought a cardboard box to the courtroom, arguing that its obligations boiled down to delivery of only those "assets" that fit into the box, consisting of hard copies of the leases and keys to the studios. A1043-A1046. Ultimately, however, L4 conceded: (i) it was required to deliver the goodwill and intangibles of the business

operating at its yoga studios; and (ii) that goodwill devolved from the warranties (particularly the ordinary course warranty) contained in the APA. A1064-A1065, A1443-A1444.

The parties submitted cross post-trial opening and answering briefs, and the court held post-trial argument on December 9, 2021. A1449-A2015. The day before post-trial argument, this Court rendered its decision in *AB Stable*, 268 A.3d 198 (Del. 2021), and the Court of Chancery allowed the parties to submit supplemental post-trial submissions regarding the implications of that decision. A1851-A1852, A2016-A2038.

On March 1, 2022, the Court of Chancery issued its Opinion, finding L4 is entitled to specific performance, declaring that the APA is in full force and effect, awarding damages for operating losses L4 had allegedly sustained as a "good steward" of the assets, pre- and post-judgment interest and prevailing party costs. Op. 44-45, 79-87. The court ordered L4 to submit an implementing order on notice to CorePower and required the parties to confer regarding calculations for certain operating losses and interest. Op. 87. The parties did not agree on the calculations and submitted competing letters to the court. A2039-A2060. The court accepted L4's calculations and entered the Judgment on March 22, 2022. *See* Judgment. The Judgment denied CorePower's ability to seek contractual post-closing remedies: a post-closing adjustment to the purchase price and an indemnity applicable from and

after closing. *Id.* 4, n.5.

ARGUMENT

I. L4'S CLAIM FOR SPECIFIC PERFORMANCE FAILS BECAUSE IT WAS NOT READY, WILLING AND ABLE TO PERFORM UNDER THE TERMS OF THE APA

A. QUESTION PRESENTED

Did the trial court err when it determined L4 was entitled to specific performance when L4 was not ready, willing and able to perform its obligations under the APA? CorePower preserved this question at A583, A661-A662, A890-A891, A1546-A1554, A1738-A1743.

B. SCOPE OF REVIEW

The Court reviews the Court of Chancery's award of specific performance for abuse of discretion. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. MERITS

The court abused its discretion when it refused to apply governing precedent and the applicable standard establishing the basis for the remedy of specific performance. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982) (applying an incorrect legal standard is an abuse of discretion); *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954) ("Where, however, the court in reaching its conclusion overrides or misapplies the law . . . an appellate court will not hesitate to reverse.").

1. THE COURT OF CHANCERY APPLIED THE WRONG STANDARD

a. *A Party Seeking Specific Performance Must Show It is Ready, Willing and Able to Perform*

The legal standard governing L4's specific performance claim is well-settled. Delaware courts will order specific performance of a contract only where the party seeking relief establishes that

> (1) a valid, enforceable, agreement exists between the parties; (2) the party seeking specific performance was ready, willing, and able to perform under the terms of the agreement; and (3) a balancing of the equities favors an order of specific performance.

Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship, 2017 WL 1191061, at *32 (Del. Ch. Mar. 30, 2017). As a party seeking specific performance, L4 "must prove by clear and convincing evidence that [it] is entitled to specific performance[.]" *Id.* (internal quotation and citation omitted).

In Delaware, "[s]pecific performance is an extraordinary remedy that is only available where the parties are capable of performing under the agreement." *Charlotte Broad., LLC v. Davis Broad. of Atlanta LLC*, 2013 WL 1405509, at *6 (Del. Ch. Apr. 2, 2013). A litigant seeking specific performance must prove that it has substantially performed its contractual obligations. *Peden v. Gray*, 886 A.2d 1278, at *11 (Del. Oct. 14, 2005) (TABLE) ("Specific performance will not be granted to a party who is in default of a material obligation under the contract[.]");

Twin Willows, LLC v. Pritzkur, 2021 WL 3172828, at *1 (Del. Ch. July 27, 2021); *Montgomery v. Tueros*, 2011 WL 683925, at *2 (Del. Ch. Feb. 23, 2011) (denying specific performance where petitioner could not legally perform the contract); *Alexander v. Petrey*, 2005 WL 1413303, at *1 (Del. Ch. June 7, 2005) ("A party seeking specific performance, as a general matter, must be in compliance with the terms of his agreement[.]"); *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. 1953) (denying specific performance and holding "[specific performance] will not be [granted] in favor of a complainant who fails to show either substantial performance on his part or that he offered to discharge the duty imposed upon him by his contract.").

Nor is it enough that a plaintiff be ready, willing and able to perform going forward. A plaintiff must also show it "has performed all [of its] obligations thus far under the contract." *Thompson v. Burke*, 1985 WL 165736, at *3 (Del. Ch. June 7, 1985). The purpose of ordering the extraordinary remedy of specific performance is to ensure that a party ordered to perform receives "substantially the agreed exchange from [the party seeking specific performance]." Restatement (Second) of Contracts § 363, cmt. a (1981).

b. *Performance Required by the APA*

When these established standards are applied, it is clear that, in order to succeed on its claim for specific performance, L4 must prove by clear and

convincing evidence it continued to perform its obligations under the APA. Here, that means the delivery of the business operated at the thirty-four yoga studios as warranted: consistent with how that business was routinely operated before January 2019 (including past practice with respect to quantity, amount, magnitude, frequency and standard employment policies). A2236-A2238, A2280. Moreover, the APA provided that L4 must deliver the business as warranted on each of the scheduled closing dates. A2234.

Additionally, the intangible assets and goodwill associated with the well-run business at the thirty-four yoga studios was a required closing delivery under the APA. A2227-A2229, A2273. While initially denying its obligation to deliver goodwill (asserting that its obligation was limited to the delivery of fungible assets theatrically presented to the court in a box (A1043-A1046)), L4 ultimately admitted that the APA tethered the delivery of goodwill to L4's obligation to operate the business in the ordinary course as warranted (A1443-A1444).

c. *The Court's Erroneous Application of Specific Performance*

Despite well-settled Delaware law, the Court of Chancery determined that L4 was not required to prove its performance under the terms of the APA in order to secure an order requiring specific performance. Instead, according to the court:

> [W]hen CorePower communicated to Level 4 that it would not perform under the APA as of March 26, the bargained-for structure of the APA was lost, and when that was lost,

> so too was CorePower's justification for non-performance based on subsequent actions or omissions by Level 4. When CorePower failed to perform on April 1, Level 4 correctly perceived that, from that point forward, it was merely a steward of CorePower's assets.

Op. 44-45. The court explained that it applied to L4's behavior a "good steward" standard in place of the APA terms to purportedly "mitigate damages." Op. 45, 83.

The court's determination does not withstand analysis. Even had CorePower repudiated its obligation to close on or before April 1, L4 was not relieved of its APA obligations when it sought specific performance of the APA. It is settled that:

> A party confronted with repudiation may respond by (i) electing to treat the contract as terminated by breach, (ii) by lobbying the repudiating party to perform, or (iii) by ignoring the repudiation.

W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009). These options are mutually exclusive.

Accordingly, even if CorePower repudiated the APA on March 26, L4 had an election. It could have treated the APA as terminated and brought a lawsuit for damages based on anticipatory breach. Instead, L4 elected to ignore the alleged repudiation and treat the APA as still in effect. L4 instituted an action for specific performance. As explained in *Willow-Bay*:

> A suit seeking specific performance is, however, in effect, an assertion not that the promisee elects to finalize the breach claimed and calculate his damages now, but rather that the promisee treats the mutual obligations as being still in force.

Willow-Bay, 2009 WL 458779, at * 5 (emphasis added).

The sharp distinction between a damage claim and specific performance was well-illustrated by then-Chancellor Allen's decision in *Carteret Bancorp*, *Inc. v. Home Group, Inc.*, 1988 WL 3010, at *5 (Del. Ch. Jan. 13, 1988):

> [C]onceptually, a suit for specific performance of a promise to do an act promised to be done at a future date is a very different thing than a suit seeking damages for an anticipatory repudiation. While a court might be justified in discounting to their present value future damages that will occur as of the time of performance, it would in no event be justified in requiring actual performance prior to the time agreed to.

(emphasis added). Accordingly, before April 1, L4 could not have instituted its specific performance lawsuit and that is likely why the action was not commenced until April 2. A58-A79. This also explains why L4 amended its complaint after each scheduled closing date when the parties' performance became due. A86-A111, A182-A209. Indeed, as recognized in *Carteret*, CorePower could have withdrawn its alleged repudiation before each closing date. *Carteret*, 1988 WL 3010, at *6.

Nonetheless, the court did not require L4 to establish it was willing or able to perform its APA obligations after March 26. Instead, after that date L4's contractual contraventions – "actions" and "omissions" – were excused and CorePower "lost" the benefit of its bargain. Op. 44-45. That ruling upends the election of remedies principle that applies following every material breach. According to the Opinion, so long as there is a material breach by one party the other party can demand specific

performance if it takes steps to mitigate damages regardless of whether it can perform its own contractual obligations. That cannot be the result under Delaware law. This ruling was an abuse of discretion: voiding the mutual obligations, determining that the bargained-for structure of the APA was lost, excusing L4's contractual contraventions ("actions" and "omissions") and requiring L4 merely to be a steward to CorePower to mitigate damages as a substitute for its compliance with its representations and warranties.

2. THE COURT OF CHANCERY RELIED UPON INAPPOSITE AUTHORITY

The Court of Chancery supports its Opinion using inapposite authority. The court relied on *Preferred Inv. Servs. v. T&H Bail Bonds, Inc.*, 2013 WL 3934992 (Del. Ch. July 24, 2013) and *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church*, 2006 WL 2567916 (Del. Super. Aug. 31, 2006) for the proposition that "[t]he party first guilty of a material breach of contract cannot complain if the other party subsequently does not perform." Op. 44-45 n.164. However, neither case involved specific performance but instead concerned a party's ability to recover damages following a material breach. *Preferred*, 2013 WL 3934992, at *11, 17; *Commonwealth*, 2006 WL 2567916, at *19-20. The court's citation to *Williston* likewise does not concern specific performance, but rather circumstances justifying a refusal to perform. 14 Richard A. Lord & Samuel Williston, *Williston on Contracts*, section 43:5 (Nov. 2021 Update). The court cited *McKinley v. Casson*,

80 A.3d 618 (Del. 2013) for the proposition that a plaintiff generally has a duty to mitigate damages following a breach by defendant. Op. 45 n.165. That case challenges evidentiary rulings in a personal injury action arising from a motor vehicle accident. *McKinley*, 80 A.3d at 620, 627. It adjudicates whether a jury should have been allowed to hear evidence that an injured person was not wearing a helmet as an argument that the person failed to mitigate its damages. *Id.* None of this authority supports the court's specific performance findings or analysis.

The court cites *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, 2021 WL 2886188 (Del. Ch. July 9, 2021) for the proposition that the "party seeking to justify its non-performance must demonstrate that the justification existed 'at the time' the party elects not to perform." Op. 44-45 n.164 (internal citation omitted). Whether a breaching party's alleged breach is justified does not affect the requirement that a non-breaching party continue to perform its obligations when it seeks an award of specific performance. *See* I.C.a. *supra.*

The court cites *Osborn*, 991 A.2d 1153, for the proposition that the "argument that a party was not able to perform at some historical point in time did not preclude order of specific performance when party stood ready and willing to perform at the time of judgment." Op. 81 n.282. That case involved a contract for the sale of land where the buyer, seeking specific performance, had not secured financing for the property at the time of trial. *Osborn*, 991 A.3d at 1161. The court adjourned the

closing date (time was not of "the essence") to allow the buyer to perform; *i.e.*, to obtain financing. *Id.* In this case, unlike the buyer in *Osborn*, L4 did not seek an adjournment allowing it to perform. Ironically (while time was not of the essence), it turned down CorePower's request (as a motivated buyer) that the April 1 closing date be adjourned. A576, A2391-A2395, A2411-A2415. In any event, while the buyer's performance was adjourned in *Osborn*, its obligation was not excused or displaced by a "good steward" standard as in this case.

At bottom, the trial court used the wrong legal framework to analyze L4's specific performance claim. Such a misapplication is an abuse of discretion. *Giuricich*, 449 A.2d at 240. The Judgment should be reversed and remanded for findings consistent with the terms of the APA.

II. L4'S WARRANTY COMPLIANCE WAS CONTRACTUALLY REQUIRED ON EACH CLOSING DATE

A. QUESTION PRESENTED

Did the trial court err in construing the bring-down provision in the APA? CorePower preserved this question at A584-A585, A652-A653, A1151-A1153, A1311-A1342, A1483-A1486, A1541-A1546, A1705-A1706.

B. SCOPE OF REVIEW

The Court reviews "questions of law and contract interpretation *de novo*, with the objective of determining the intent of the parties from the language of the contract." *Cox Communs., Inc. v. T-Mobile US, Inc.*, 2022 WL 619700, at *5 (Del. Mar. 3, 2022) (citation omitted).

C. MERITS

The Opinion failed to enforce the bring-down provision as written. Section 3.6 of the APA unambiguously provided: (i) that L4's representations and warranties (as Seller) were given as an inducement for CorePower to execute the APA as well as to perform and consummate the Contemplated Transaction (*i.e.*, to close); and (ii) that those representations and warranties were thereby expressly given when the APA was signed and throughout the transactional period – on each scheduled closing date. A2236-A2238. The trial court provided an explanation for its refusal to so apply the bring-down provision: (1) questioning the evidence CorePower adduced of actual inducement; and (2) explaining the language contained

in the preface to section 3 [the bring-down provision] is a "far cry from the typical condition to closing that the APA conspicuously lacks." Op. 33-34 n.136.

1. EVIDENCE OF INDUCEMENT IS UNNECESSARY

Extrinsic evidence of actual inducement is unnecessary given the unambiguous language of the APA. *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."); *Goss v. Coffee Run Condo. Council*, 2003 WL 21085388, at *7 (Del. Ch. Apr. 30, 2003) ("[A] court is precluded from resorting to extrinsic evidence to interpret contractual language which is plain and clear on its face, or to create an ambiguity.").

The APA provided that the bring-down provision was given "in order to induce the buyer to enter into and perform the agreement and to consummate the contemplated actions." A2234. Hence, CorePower was not required to adduce additional proof it was so induced. *ITG Brands, LLC v. Reynolds Am., Inc.*, 2019 WL 4593495, at *12 (Del. Ch. Sep. 23, 2019) (where contract term was unambiguous, "[extrinsic] evidence is irrelevant and may not be considered by the court."); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *12 (Del. Ch. Nov. 2, 2007) (declining "to consider extrinsic evidence and hold[ing] that the plain meaning of [contract section]" sets forth obligations).

Inducement is evidenced by the actual language of the APA. Therefore, the court's adjudication based upon evidence of CorePower's inducement as a substitute for the plain unambiguous language of section 3 of the APA is a reversible error.

2. THE BRING-DOWN PROVISION WAS NOT PART OF A CLOSING CONDITION

The Opinion was unquestionably correct: the bring-down provision was not included in a closing condition. Op. 33, n.136. Indeed, as observed above, the APA did not contain closing conditions. *See* Statement of Facts B.2. *supra.*

But, the bring-down provision certainly applies to the warranties issued by L4. Those warranties were given as an inducement for CorePower to perform and consummate the contemplated transactions – meaning each of the staggered closings (on April 1, July 1, and October 1). That is why those warranties were not only issued when the contract was signed but "on each applicable closing date." A2234. Thus, CorePower was assured that the business acquired at the staggered closings would be the same business it decided to acquire when the APA was executed. *See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *68 (Del. Ch. Nov. 30, 2020) *aff'd* 268 A.3d 198.

The absence of closing conditions does not eviscerate L4's warranty obligations. *See Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *85 (Del. Ch. Oct. 1, 2018). Nor does such an omission alter CorePower's remedy in the event of a material warranty breach. Rather, the absence of language either qualifying

L4's absolute and unconditional warranties (such as an efforts or *force majeure* clause) or alternative language altering the common law doctrine of material breach (commonly included in closing conditions and/or termination provisions) reinforces the efficacy of CorePower's common law remedy devolving from L4's warranty failure. And this is particularly so because section 8.11 of the APA expressly reaffirms the parties' entitlement to common law remedies. A2269.

The court's failure to apply the plain and unambiguous language of the APA impermissibly deletes from the APA CorePower's bargained-for rights, which constitutes reversible error. *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 61-64 (Del. 2019) (the Court of Chancery erred in ignoring language of a contract term); *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 821 (Del. 2018) (court erred in looking to extrinsic evidence of the parties' intent because the agreement was unambiguous). It also invalidates the court's factual application as set forth in part III.C *infra.*

III. L4 BREACHED ITS ORDINARY COURSE WARRANTY

A. QUESTION PRESENTED

Did the trial court err when it misapplied legal principles from binding precedent in interpreting the ordinary course of business provision in the APA and does that incorrect interpretation make the trial court's application of the facts clearly erroneous? CorePower preserved this question at A585-A586, A654-A665, A986-A1015, A1481-A1537, A1726-A1738, A2026-A2036.

B. SCOPE OF REVIEW

The Court reviews *de novo* the Court of Chancery's contract interpretation of the ordinary course provision. *AB Stable*, 268 A.3d at 209. The Court reviews the Court of Chancery's application of the facts for clear error. *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 96 (Del. 2021).

C. MERITS

The Court of Chancery erred in determining that the absolute and unqualified ordinary course warranties issued by L4 (as Seller) should not be enforced as written.

1. THE CLEAR AND UNAMBIGUOUS LANGUAGE – UNQUALIFIED BY AN EFFORTS CLAUSE OR OTHERWISE

It is well-settled that "Delaware adheres to the 'objective' theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party." *Sunline Commer. Carriers, Inc. v. CITGO Petro.*

Corp., 206 A.3d 836, 846 (Del. 2019) (quotation omitted); *see also Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1267 (Del. 2017). "When the contract is clear and unambiguous, [Delaware courts] will give effect to the plain-meaning of the contract's terms and provisions[.]" *Sunline Commer. Carriers*, 206 A.3d at 846 (quotation omitted).

Similar to the well-defined provision recently addressed in *AB Stable*, 268 A.3d 198, the ordinary course provision in the APA is clear and unambiguous. The APA ordinary course provision: (i) measures performance solely upon L4's past custom and practice before January 2019 – actions taken in the ordinary course of L4's normal day-to-day operations (*i.e.*, with respect to quantity, amount, magnitude and frequency and standard employment policies); and (ii) is absolute and unqualified – there was no efforts clause nor any other provision that might have reallocated systemic risk such as a *force majeure* or a termination provision.

As in *AB Stable*, L4's "compliance is measured by its operational history and not that of the industry in which it operates." *AB Stable*, 268 A.3d at 212. The language used in the ordinary course provision – consistent with past practices – requires a comparison of: (i) how L4, the seller, operated (in its daily routine) prior to January 2019; with (ii) L4's actions responding to the COVID-19 pandemic with respect to: studio closures, lease amendments, deferred payment obligations, government subsidies, and impaired relationships with employees. *See id.*; III.C.3.

infra. In other words, the measuring stick for comparison is the way L4's business operated before January 2019. A2236-A2238, A2280.

Like the provision analyzed in *AB Stable*, there is no efforts qualifier. *AB Stable*, 268 A.3d at 212-13; A2280. Thus, as in *AB Stable*, looking to actions of others to judge a pandemic response is not permitted because doing so "is more analogous to a commercially reasonable efforts provision." *AB Stable*, 268 A.3d at 213; *see also Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2014 WL 5654305, at *15 (Del. Ch. Oct. 31, 2014) (The obligation to "conduct [a company's] business in the ordinary course of business consistent with past practice . . . imposes an unconditional obligation."). Delaware contracts written by sophisticated parties will not be rewritten. *AB Stable*, 268 A.3d at 213 n.59.

2. THE COURT OF CHANCERY FAILED TO APPLY THE CONTRACTUAL WARRANTIES AS WRITTEN

The Court of Chancery's incorrect reading of the warranty provisions in the APA is illustrated by its flawed application of those provisions. L4's ordinary course was not measured by comparison to its own historical performance – much less its operational history before January 2019. Op. 24, 64-68, 73-79. Nor was it measured in terms of "past practice with respect to quantity, amount, magnitude and frequency and standard employment policies" as set forth in the APA. A2280.

Instead, the court measured L4's performance against the post-pandemic actions by CorePower and others in the industry. Op. 24, 64-68, 73-79. For instance,

the court did not compare the restructuring of L4's leases (writing to all landlords on March 24 and receiving a massive rental reduction by April 1) to L4's past operations. A821-A830, A874-A875, A1217-A1218, A2403, A2416-A2424, A2483-A2484. Rather, the court found the "measures were consistent with CorePower's own mitigation efforts." Op. 76. The court did not compare massive employee layoffs with L4's pre-pandemic operations. A795-A800, A959-A963, A2427, A2442-A2444. Rather, it found that L4 "followed CorePower's lead by laying off employees." Op. 74. The court ignored undisputed proof at trial from L4's expert Mr. Mordaunt that L4 materially departed from its historical performance in the number of members, revenue, revenue projections, operable studios and staff during the pandemic and on each of the closing dates. A1114-A1127.

In essence, the court accepted L4's allegation that a new ordinary course of business emerged after the pandemic: "since the Pandemic arrived the studios closed by government mandate has become the ordinary course of business." A70. Thus, the court found that the closed studios, massive layoffs, lease amendments and other departures from the way L4's business operated before the pandemic became the ordinary course of business: "that these actions were consistent with Level 4's ordinary course of business, in each respect, Level 4 followed the example set by its franchisor." Op. 67.

The court likewise did not consider the full transactional period when analyzing L4's compliance with its ordinary course warranty. Rather, it observed that L4's application for a PPP loan – certifying that due to COVID-19's impact it required the subsidy to support its operations – was submitted on April 9

> after CorePower walked away from the transaction and cannot be proffered as evidence to excuse CorePower's failure to close on [April 1].

Op. 79. Nor did the court analyze whether closing all of L4's studios at the same time for over 110 days was consistent with L4's past practices while even L4's expert agreed that such an extended closure for a pandemic did not resemble reasons for past closures. A1145-A1147, A2454-A2457. Rather, the court decided that on March 26 (when CorePower refused to close), the shutdown of the studios was merely "temporary." Op. 74. Similarly, because the court performed no ordinary course analysis post-March 26, it wrote off L4's layoffs and lease amendments as inconsequential and "temporary." Op. 43-45.

Moreover, even if L4's contractual contraventions (its "actions" and "omissions") were excused after March 26, the Court of Chancery improperly qualified – as only applicable to "temporary" actions – the express warranties (specifically given by L4 as an inducement for CorePower to close) guaranteeing that the studios would not be closed, leases would not be amended, and standard employment policies followed. *Emmons v. Hartford Underwriters Ins. Co.*, 697

A.2d 742, 746 (Del. 1997) ("Contract interpretation that adds a limitation not found in the plain language of the contract is untenable"). As this Court has explained "[i]mplying terms that the parties did not expressly include risks upsetting the economic balance of rights and obligations that the contracting parties bargained for in their agreement." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 350 (Del. 2020).

The court also incorrectly focused on the interplay between L4's franchise obligations and its post-pandemic conduct before April 1. L4 was under no obligation to amend leases, layoff employees, secure a PPP loan and other actions taken outside its routine day-to-day business. A799-A814, A850-A855, A927-A928, A2075-A2089. Rather, L4 conceded that it was solely responsible for such conduct. *Id.* Conversely, L4 unquestionably was required by government mandate to close its studios by April 1. A574, A774-A777. L4 likewise was required to follow the system standards established by CorePower (its franchisor). A2075-A2089, A2122-A2124, A2222-A2337. But, by issuing an absolute and unconditional warranty (*i.e.*, without qualification by an efforts or *force majeure* clause), L4 assumed the risk of contractual and legal compliance. A2235. It warranted its operations would resemble its past operations (pre-pandemic) and that those ordinary course operations would be contractually and legally compliant. *See* Statement of Facts B.2. *supra.* Closure of all of its studios (whether contractually or legally required) constituted a warranty breach.

Replacing the text of the ordinary course provision with compliance with CorePower's system standards renders the language of the ordinary course of business and specific warranties as "mere surplusage." *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) (court must "read a contract as a whole and . . . give each provision and term effect, so as not to render any part of the contract mere surplusage."). Such a finding is contrary to fundamental contract interpretation principles. *See id.*; *see also Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) ("Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.").

Finally, the court rejected CorePower's contention that L4 was not operating in the ordinary course of business as defined in the APA "for the same reasons they were rejected when proffered in support of its repudiation excuse." Op. 79. But, when assessing L4's repudiation, the court required a "voluntary" act that was "positive and unconditional." Op. 45-46. The teaching of *AB Stable* however, shows there is no such qualification in the ordinary course warranty contained in the APA. 268 A.3d at 212-13. L4's warranty was absolute and unqualified.

The court's construction strayed from the clear and unambiguous language of the APA and constitutes reversible error. *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 557-59 (Del. 2017) (reversing Court of Chancery

finding that a contract provision was not breached because the court's interpretation "strayed from the language of the [provision].").

3. HAD THE COURT APPLIED THE WARRANTIES CORRECTLY, IT WOULD HAVE FOUND L4 BREACHED ITS WARRANTIES

The court's APA construction was conceptually flawed because it was improperly tethered to the impact of the pandemic on CorePower's operations; *i.e.*, finding L4 was following the lead or example set by CorePower. *See* III.C.2. *supra.* Had the court construed the warranties correctly, it would have determined that L4 was in material breach of its warranties at the time of CorePower's alleged breach and as of each closing date. There is overwhelming evidence that L4's warranty failures (particularly those after March 26 not considered by the trial court) were material – including L4's admissions and expert testimony.

a. *The Breached APA Warranties*

i. Massive Layoffs

L4 conceded that it began implementing steps to lay off virtually all employees several weeks prior to April 1. On April 2, telling employees its business was devastated, L4 notified and laid off all but ten of them. A795-A800, A959-A963, A2427, A2442-A2444. Even after reopening, L4's studios operated with curtailed staffing. A843-A844. Even L4 acknowledged the pandemic's serious impact upon its staff – acknowledged to be the cornerstone of its business. A805,

A2387-A2390. L4 admitted that it had never laid off nearly all of its employees at the same time. A812-A813, A993-A994. Therefore, laying off the majority of employees was a material deviation from its ordinary course of business as defined in the APA – a material deviation from "standard employment policies." A2280.

ii. Closures

All of L4's studios were closed as mandated by the government. A574, A774-A777. As L4 advised its landlords, and as its expert Mr. Mordaunt agreed at trial, those closures of all studios was "unique"; lasted more than 110 days; and had so crippled L4's business, it was unable to pay rent. A810-A857, A1146-A1213, A2396, A2403, A2416-A2424, A2454-A2457. L4 likewise reported to its landlord, bankers and certified to the U.S. Government its business was devastated. *Id.*, A2434-A2441. Moreover, the APA included a provision that expressly recognized the salience of the studios being up and running – not closed. A2237. At the time of Judgment, four studios were permanently closed. A845, A2461-A2464. In any event closing all of its studios for more than 110 days was a material deviation from its ordinary course of business as defined in the APA.

iii. Operations Curtailed

L4 sharply curtailed spending in marketing, capital improvements and all other aspects of the business. A1212-A1216, A2387, A2678-A2679. Other differences in operations included a 42% decrease in membership, a 37% decrease

in class capacity, a 71.9% decrease in class attendance, implementation of social distancing protocols, mask requirements, ceasing equipment rentals, banning locker room use, and implementing enhanced cleaning protocols. A877-A890, A1006-A1015, A2448-A2453, A2683-A2685, A2707-A2712. Therefore, curtailing its operations was a material deviation from its ordinary course of business as defined in the APA.

iv. Lease Amendments

The modification or amendment of leases (even a single lease) was recognized as a departure from the ordinary course of business. A2237. L4 sought to restructure all its leases and was quite successful: rent paid on April 1 dropped from $300,000 to $17,000; approximately $1.2 million of rent was eliminated or deferred. A827-A849, A1217-A1218, A2428-A2433, A2458-A2460, A2463-A2464, A2481, A2727-A2729. L4 acknowledged that it had never amended or restructured all of its leases at the same time. A993-A994. Therefore, in addition to contravening a specific warranty, restructuring all of its leases at the same time was a material deviation from its ordinary course of business as defined in the APA.

v. MAE

Had the court examined the financial decline of L4's business at each closing date, it would have determined L4 suffered an MAE. L4's business unquestionably not only suffered a significant adverse change but also suffered a serious value

deterioration. A1237-A1374. Thus, as L4 told its landlords and employees, its business was devastated. A2428-A2433, A2442. The harm was so serious, a government subsidy was required to support L4's business. A850-A855, A2434-A2441. And L4 had written off anticipated cash flow it had expected to earn through the last scheduled closing in October. A2387-A2388.

As L4's witnesses acknowledged, pre-pandemic EBITDA (the measuring stick the parties used to establish value) was in excess of $4 million. A842-A847. Even taking into account L4's good steward cost cuts, EBITDA in 2020 was negative $2.5 million and L4 claims losses throughout 2021 and into 2022. A1268-A1282. The impact of COVID-19 far exceeded those benchmarks that had been articulated by scholars and the courts; a decline in profits or earnings by more than 40-50% over two consecutive quarters. *See, e.g.*, *Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc*., 2021 WL 1714202, at *30 (Del. Ch. Apr. 30, 2021) ("[t]his court has speculated that 'a decline in earnings of 50% over two consecutive quarters would likely be an MAE,' and '[c]ourts in other jurisdictions have reached similar conclusions.'"). Therefore, an MAE had occurred.

b. *Expert Proof*

L4 called accountant Jeffrey Mordaunt to provide his views with respect to L4's compliance with warranties. Mr. Mordaunt's analysis focused upon March 20 and did not consider the significance of events following that date. A1076-A1092,

A1153-A1159. Even so, Mr. Mordaunt conceded that L4's business performance and its projections that informed his decision were not indicative of what actually occurred during the transactional period. A1104-A1127, A1175-A1186. Simply put, L4 did not come close to meeting its own targets. Rather, key revenue drivers accounting for 80% of L4's revenue were not met; namely, number of employees, number of members, and number of studios open. A1102-A1106. Mr. Mordaunt admitted there was material decrease in those metrics when compared to 2019, the date etched in the APA. A1113-A1117, A1176-A1177.

In sharp contrast, CorePower's expert, Robert Reilly, examined the full transactional period; performing a functional and financial analysis of L4's post-pandemic business as well as appraising the value of the business operated by L4 as "good steward" (using the contractual formula and also investment value). A1237-A1291, A2508-A2553. The functional analysis illustrated an impact in every aspect of L4's business. *See id.* For instance, monthly memberships fell from 11,000 in January 2020 to approximately 5,000 in March; slipped further in June to 2,000 and then returned to 5,000 in October (*i.e.*, more than a 50% deviation). A1248-A1253. Class attendance followed the membership decline, falling from 90,000 (in January) to virtually zero; even a year later, class attendance remained at 36,000. A1253-A1254.

Mr. Reilly's analysis showed that the finances of the business operated by L4

in its new "ordinary course" followed the sharp functional decline of the business. A1254-A1255. Yearly revenue declined from $18 million to $5.5 million. A1264-A1266. EBITDA (the basis of the purchase price) likewise turned negative (*i.e.*, negative $2.5 million). A1267-A1270.

The devastating impact of the pandemic and L4's new "ordinary course" – or good steward – operation also resulted in a steep decline in the value of the business. A1348-A1254. Mr. Reilly estimated that the contract value (application of the formula the parties used to value the business in the APA) decreased dramatically:

- Falling more than 50% by the first closing date to $11.8 million; and
- Falling further to $3.7 million through July and October. *Id*.

The data unquestionably confirms what L4 was telling its bankers, landlords and employees. Its business was devastated by the pandemic. Its new mode of operating – whether a "good steward" or new normal – was materially different from that which was warranted – the business operating as it had before January 2019.

For the foregoing reasons, the matter should be remanded for the trial court to apply the facts adduced at trial to the correct interpretation of the APA.

IV. THE COURT ERRED IN DISMISSING COREPOWER'S COUNTERCLAIM

A. QUESTION PRESENTED

Did the trial court err in dismissing CorePower's second Amended Counterclaim based on the court's flawed construction of the APA? This question was fairly presented and is automatically preserved by the trial court's dismissal of CorePower's counterclaim. *Robinson v. Meding*, 163 A.2d 272, 275 (Del. 1960); A272-A274, A370-A373, A489-A539.

B. SCOPE OF REVIEW

The Court reviews *de novo* the Court of Chancery's order granting the motion to dismiss CorePower's second Amended Counterclaim. *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 252 (Del. 2017).

C. MERITS

In Count II of its Amended Counterclaims, as alternative relief if it was required to perform under the APA, CorePower sought damages in lieu of specific performance. A272-A274. The premise of this request was that L4 was unquestionably unable to comply with its obligations under the APA, including its obligation to deliver thirty-four operating studios. *See* III.C.3. *supra*.

The Court of Chancery dismissed CorePower's counterclaim reasoning that the remedy of specific performance collided with the post-closing indemnity remedy provided in section 6.8 of the APA: that allowing CorePower to seek damages in

lieu of specific performance "renders the bargain-for indemnification scheme a nullity." A552-A553. That reasoning is fundamentally flawed for four reasons.

First, the remedy sought does not collide with section 6.8 because section 6.8 applies only from and after closing. A2264. Second, while section 6.8 does provide for an exclusive indemnity remedy, there is an express exception; thus, the sophisticated parties agreed that CorePower would not be precluded or blocked from seeking equitable relief. *Id.* Unquestionably, a damage substitute for specific performance is an equitable remedy. *See Tri-State Mall Associates v. A.A.R. Realty Corp.*, 298 A.2d 368, 371-72 (Del. Ch. 1972). Accordingly, section 6.8 does not preclude the relief CorePower sought. A2067-A2068. Third, the dismissal ruling ignores the different materiality standard governing the warranty provisions and post-closing indemnity and, in so doing, improperly renders the MAE warranty a nullity. Fourth, while not evident during the proceedings (when L4 alleged the post-closing remedies foreclosed CorePower's warranty claims), after receiving the court's Opinion, L4 contended that the post-closing remedies were no longer applicable – having essentially been waived when CorePower failed to close on the closing dates. A2040-A2041. The court agreed stating that CorePower "wrongfully decided to abandon the Transaction . . . altogether. The time to dispute the Final Purchase Price . . . has come and gone." Judgment 4 n.5. Consequently, the post-closing remedies embodied in the APA having been read out of existence, cannot

constitute a basis to deny CorePower's claim for equitable relief.

In balancing the equitable consideration to accompany specific performance, Delaware precedent teaches that equitable adjustments should be made as needed to "restore the parties to the positions they would have occupied had the contract been lawfully performed to begin with." *Vaughn v. Creekside Homes, Inc.*, 1994 WL 586833, at *1 (Del. Ch. Oct. 7. 1994). Permitting CorePower to pursue its claim for damages in lieu of specific performance would well serve equity: to "adjust the equities of the parties in such a manner as to put them as nearly as possible in the same position as if the contract had been performed *according to its term*." *Tri-State Mall*, 298 A.2d at 372 (emphasis in original).

Said another way, the Judgment certainly places L4 in the position it would have been had the contract been performed, awarding the purchase price, damages for operating losses and pre and post judgment interest on both. CorePower, however, is in a very different position than it should be under the APA's terms. This counterclaim should be restored and remanded to the Court of Chancery for a decision on its merits.

V. THE COURT DID NOT BALANCE THE EQUITIES IN AWARDING DAMAGES

A. QUESTION PRESENTED

Did the trial court err in awarding L4 damages for items not allowed under the terms of the APA? CorePower preserved this question at A1180-A1190, A2044-A2048.

B. SCOPE OF REVIEW

The Court reviews the Court of Chancery's damages award for abuse of discretion. *Bhole, Inc. v. Shore Invs.*, 67 A.3d 444, 449 (Del. 2013).

C. MERITS

The Court erred in awarding damages in the form of operating losses to L4 that were not permitted under the APA and that were inequitable when the court did not "restore the parties to the positions they would have occupied had the contract been lawfully performed to begin with." *Vaughn*, 1994 WL 586833, at *1.

The court awarded operating losses that included $1.2 million in deferred rent not contemplated under the APA. Mr. Mordaunt admitted that $1.2 million in deferred rent was not a proper component of his damages calculation because it was not provided for under the APA. A1138-A1140, A1180. It also was not actually paid by L4. A2044-A2048. The operating losses calculation also included nearly $1.4 million in franchise fees L4 owed to CorePower. A2044-A2048. L4, however, did not pay the franchise fees. *Id*. L4 likewise did not sustain a loss due to the

depreciation and amortization of those assets it was holding merely as a "good steward" as it claimed. A2044-A2048. And, the claim of shared overhead included in L4's calculations that was accepted by the court, was never detailed or substantiated. *Id.* The court's operating loss calculation is not supported by the record such that it is an abuse of discretion. *See Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766A.2d 437, 438 (Del. 2000) (factual findings must be supported by the record to be entitled to deference).

The court in fashioning its Judgment failed to balance the equities to account for adjustments that needed to be made to the operating losses calculation. Such failure resulted in the parties being in wholly different positions than they would have occupied had the contract been performed. Should the Opinion and Judgment withstand this Court's scrutiny, at a minimum the operating losses and corresponding interest calculations should be adjusted to exclude the deferred rent, unpaid franchise fees, depreciation and amortization and shared overhead.

CONCLUSION

For the foregoing reasons, the Opinion and Judgment were in error, and this Court should reverse and remand the matter.

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CERTIFICATE OF SERVICE

I, Rebecca L. Butcher, Esquire, hereby certify that on May 13, 2022, a true and correct copy of the foregoing *Appellants' Opening Brief* and *Appellants' Opening Brief Appendix*, were caused to be served on the following counsel of record via File & Serve*Xpress*.

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