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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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

CorePower's Opening Brief sets forth five bases on which this Court should reverse the Opinion. L4 has failed to refute each of CorePower's arguments.

First, the Court of Chancery's failure to enforce salient provisions of the APA ignored an essential requirement of every specific performance claim: that L4 must be ready, willing and able to perform its *own* contractual obligations. As a matter of law, unlike a claim for damages based upon a counterparty's repudiation or contractual breach, a party seeking specific performance must fulfill its own contractual obligations—those obligations are not abrogated. Therefore, L4's contention that CorePower cannot complain if L4 does not perform following CorePower's alleged breach or repudiation on March 26 misrepresents and conflates established precedent, and the Opinion should be reversed.

Second, L4 does not dispute that the warranties issued by L4 following a "bring-down" provision were designed to ensure that the business conveyed at each closing would be substantially the same as that which was diligenced and warranted; *i.e.*, that CorePower would receive the benefit of its bargain. L4 contends that the Court of Chancery's failure to apply the bring-down provision was harmless error. But the avalanche of proof establishes L4's failure to satisfy its obligation to deliver the business housed at the thirty-four yoga studios as warranted; *i.e.*, on each Closing Date. That error was clear, substantial, and warrants reversal. Had the Court of

Chancery faithfully construed and applied the bring-down provision, it would have evaluated L4's actions both before and after March 26.

Third, the Opinion misread the APA and overrode the ordinary course of business warranty with the Franchise Agreement through the Transactional Period. None of L4's actions however—not the massive layoffs, the lease amendments or government subsidies—were called for under the Franchise Agreement. Nor was the franchisor involved in (much less did it "direct") any of those actions. Even if the studio closures were legally required, L4 assumed that risk when it issued absolute and unconditional warranties that its business would be:

- legally compliant;
- contractually compliant, including compliance with the Franchise Agreement; and
- consistent with the day-to-day operations of the studios CorePower diligenced before the pandemic.

Said another way, L4's compliance with one warranty (closure of the studios during the pandemic) does not, as a matter of law, cancel the ordinary course warranty requiring L4 otherwise to operate its business as it had as of January 2019.

The Court of Chancery dismissed the legal significance of L4's overwhelming, non-compliant conduct. On March 19, L4 foresaw and communicated the need to operate outside the ordinary course and by March 24

began those extraordinary actions by writing all of its landlords seeking rent relief and paying only a small fraction of the rent typically due on April 1. Prior to April 1, L4 began preparing to lay off its employees. On April 2 (the day it initiated litigation), L4 laid off all but ten of its 1,500 employees. On April 9, L4 applied for a government subsidy—certifying that the subsidy was required to support its operations. By August, L4 advised its bankers and landlords that all of its studios had been closed for at least 110 days and revenue at its reopened studios had suffered a steep decline of more than 50%. Thereafter and through Fall 2021, operations continued to be depressed, registering dramatic declines in all metrics such as membership and class participation. L4 suffered losses of millions of dollars and failed to preserve the goodwill of its business while not operating the business in compliance with its warranties, instead taking draconian cost saving measures that it mis-characterized as acting as a "good steward."

The last two arguments illustrate that the Opinion runs contrary to the purpose of the specific performance remedy because it fails to place the parties in the position they would have been had the APA been performed as written, to which L4 has no legally sound response.

In sum, applying established legal principles demonstrates that the APA cannot be, as L4 characterizes it, an "as is" and "where is" conveyance of fungible assets.

I. THE OPINION MISAPPLIED THE SPECIFIC PERFORMANCE STANDARD

This Court has been clear that a litigant seeking specific performance must have substantially performed its contractual obligations to be entitled to that extraordinary remedy. *See Peden v. Gray*, 886 A.2d 1278, at *3 (Del. Oct. 14, 2005) (TABLE); OB20-21. The Opinion, however, did not require that L4 establish it substantially performed its contractual obligations and instead ruled that "when 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." Op. 44.

L4 fails to explain how the Opinion follows the articulated standard for specific performance. Instead, L4 injects into the Court of Chancery's reasoning concepts that do not appear in the Opinion, misconstrues precedent, and in doing so illustrates how the Opinion disregards CorePower's bargained-for rights under the APA. The Opinion's award of specific performance was a reversible abuse of discretion for all of the reasons set forth below. *See Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982); *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

A. THE COURT OF CHANCERY IMPROPERLY IGNORED THE BARGAINED-FOR STRUCTURE OF THE APA

L4 argues that inherent in the Opinion's ruling that the APA's bargained-for

structure was lost as of March 26 is a holding that L4 was thereafter excused from performing its obligations under the contract. AB25-26; Op. 44-45. In support of that proposition, L4 contends its performance was excused because: (i) the Court of Chancery found that CorePower materially breached the APA on April 1 (in contravention of the Court of Chancery's express finding that the bargained-for structure of the APA was lost on March 26) and (ii) CorePower "caused the condition—the closure of Level 4's studios and a termination of its revenue—on which CorePower relied to walk away on April 1." AB26. These justifications do not withstand analysis.

1. MATERIAL BREACH ALONE CANNOT EXCUSE L4'S PERFORMANCE

The Opinion's evident determination that CorePower's repudiation or breach discharged L4's obligation to continue to perform disturbs election of remedies precedent. Following an anticipatory breach, a non-breaching party has an election: it can treat the contract as terminated and sue for damages or it can continue its obligations under the contract and seek specific performance. OB23; *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009). L4 chose to seek specific performance. This Court should reverse the Opinion because an award of specific performance based solely on a counterparty's breach, without analysis of the non-breaching party's performance, would make every contract breach eligible for a specific performance remedy—a

result contrary to established election of remedies law and the extraordinary nature of specific performance relief. *See* OB22-25.

Additionally, the finding that CorePower's alleged material breach alone was sufficient ignores that a party seeking specific performance must demonstrate it is ready, willing and able to perform its own obligations. *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at *32 (Del. Ch. Mar. 30, 2017); OB20-21. Requiring a party to prove only that a counterparty materially breached to excuse its own contractual compliance would obviate the ready, willing and able component of the legal standard. This cannot be the result under Delaware law.

L4 incorrectly relies upon the Court of Chancery's citation to the *Brasby* case in asserting that L4's material breach was excused; the Court of Chancery cites to *Brasby* in analyzing whether *L4* was in material breach of its obligations such that *CorePower's* obligations had been discharged. AB25; Op. 71 n.256. The *Brasby* opinion issued by the Superior Court does not concern specific performance. *Brasby v. Morris*, 2007 WL 949485, at *4 (Del Super. Mar. 29, 2007) (analyzing, among other things, section 2-609 of the Delaware Uniform Commercial Code). Neither the Court of Chancery nor L4 cite a single case in which a court has ordered specific performance based solely on the existence of a counterparty's material breach of its obligations. The Court of Chancery abused its discretion in finding such excusal.

2. COREPOWER DID NOT CAUSE THE CONDITION OF L4'S INABILITY TO PERFORM

Without reference to the Opinion, L4 contends that the Court of Chancery found L4 was excused from its continued performance under the APA because CorePower "caused the condition—the closure of Level 4's studios and a termination of its revenue—on which CorePower relied to walk away on April 1." AB26. While it is unnecessary to argue against reasoning that does not appear in the Opinion, had the Court of Chancery applied prevention doctrine principles as L4 suggests, the record does not support a finding that L4 was excused from performance.

The prevention doctrine requires some deliberate action to thwart the other side's compliance with its obligations. *Snow Phipps Grp. v. KCAKE Acquisition, Inc.*, 2021 WL 1714202, at *54 (Del. Ch. Apr. 30, 2021). "[I]f it can be shown that the condition would not have occurred regardless of the lack of cooperation, the failure of performance did not contribute materially to its non-occurrence and the rule does not apply." *Id.* at *52 (quotation omitted).

The record here shows that CorePower did not thwart L4's compliance with the APA. Instead, on March 20, responding to L4's March 19 email reflecting the overarching impact of the COVID-19 pandemic on L4's business and observing that all aspects of that business had been impacted, CorePower offered to adjourn the transaction. A1333-A1337, A2391. CorePower did not interfere with L4's

obligations, but instead was being reasonable in the face of an unprecedented pandemic.

The record likewise shows that L4 took multiple independent actions outside of the ordinary course of its business to address the pandemic. L4 admits that it was responsible for the normal day-to-day operations at the studios; that it bore sole responsibility for its employees; that it was solely responsible for layoffs (or furloughs); and that it was responsible for legal compliance. A799-A814, A927-A934, A944-A947, A2083-A2085. L4 also admits it independently restructured virtually all of its leases starting on March 24. A821-A830, A874-A875, A1217-A1218, A2416-A2426. L4 independently 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 also chose to permanently close four studios. A845, A2461-A2464. At bottom, L4's independent decisions (as a good steward of assets or otherwise) to alter its ordinary course operations and the government mandates affected L4's performance regardless of what actions CorePower allegedly took.

L4's reliance upon CorePower's ethical and proper nationwide communication on March 15 to all its members is misplaced. AB13, 39. On March 16, L4 independently decided to close studios to "prioritize health and wellness." A924-A925, A2384-A2386. Moreover, by April 1 government mandates required

that all the studios be closed. A68-A70, A574. Indeed, as observed in CorePower's Opening Brief, the foundation of L4's lawsuit—as it alleged in its Complaint—was that the closure of its studios was due to government mandates requiring shutdowns across the fitness industry. *Id*.; OB11-12. In other words, CorePower's March 15 nationwide communication to all its members was not a breach of any agreement or otherwise wrongful; nor did that communication alone cause the closure of L4's studios at any time during the Transactional Period. And, as noted above, L4 assumed the risk of franchisor action when issuing unqualified warranties that it was in compliance with its Franchise Agreement and at the same time operating in the ordinary course (as it had before January 2019).

L4's attempt to shift the blame to its franchisor's response to the pandemic should not be well received. There is no basis upon which the Court of Chancery could have found that CorePower's deliberate actions caused L4's inability to perform such that L4's performance had been excused. Indeed, the Court of Chancery did not make that finding and any such finding would have been an abuse of the court's discretion. *See* OB19-27.

3. L4'S RELIANCE ON INAPPLICABLE CASE LAW DOES NOT REMEDY THE LEGAL FLAWS IN THE OPINION

L4 cites inapposite cases to support its position that its own performance is not a required element of its specific performance claim. *See Peden*, 886 A.2d 1278, at *3-4 (TABLE) (affirming grant of motion to dismiss buyer's claim for specific

performance of a land sale contract because buyer was twice in breach of contract); *Twin Willows, LLC v. Pritzkur, Tr. for Gibbs*, 2021 WL 3172828 (Del. Ch. July 27, 2021) (Master in Chancery final report determining that Court of Chancery has subject matter jurisdiction over plaintiff's claims because buyer alleged a viable claim for specific performance of land sale contract); *Alexander v. Petrey*, 2005 WL 1413303 (Del. Ch. June 7, 2005) (denying summary judgment because buyer showed a factual dispute, which, if true, could entitle him to specific performance of a land sale contract); *Morgan v. Wells*, 80 A.2d 504 (Del. Ch. 1951) (denying motion to dismiss buyer's specific performance claim because complaint alleged facts sufficient supporting a claim for specific performance of land sale contract).

None of these property transfer cases (all factually and procedurally distinguishable) establish directly or by analogy that L4 was excused from its performance. None held that the party seeking specific performance was excused from an obligation. None awarded specific performance. Certainly, none of these cases involve the same complexities as in this case where the parties had a heavily negotiated APA that provided for staggered closings and interim performance at a contractually specified standard. The Opinion did not cite any of these cases as a reason to extinguish L4's obligation to show it was ready, willing and able to perform. This Court should not rely on reasoning not appearing in the Opinion.

B. THE COURT OF CHANCERY'S FINDING THAT L4 NEED BE READY, WILLING AND ABLE TO PERFORM ONLY AT THE TIME OF JUDGMENT IS LEGALLY FLAWED

L4 relies upon the *Osborn* case to support the Court of Chancery's finding 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. As explained in CorePower's Opening Brief, *Osborn* cannot be read so broadly. OB26-27.

Osborn concerns a buyer seeking specific performance of a handwritten land-sale contract for a beach house where the contract specified a twenty-year performance period. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1155-58 (Del. 2010). Because the parties disputed the fundamental nature of the contract (whether it was a sale or lease), it was only after the court settled the parties' legal ownership rights that the buyer could obtain financing to consummate the transaction. *Id*. at 1160-61. At that juncture, the court ruled that the buyer would have ninety days to secure financing for closing as time was not of the essence. *Id.* at 1161.

Unlike the plaintiff in *Osborn*, L4 did not seek an extension of a Closing Date. Rather (even though time was not of the essence), L4 refused CorePower's March 20 proposal for an extension. A1333-A1337, A2391, A2396. Then on April 2, it instituted a lawsuit and thereafter amended its Complaint after each Closing Date. OB15-16; A58-A79, A86-A111, A182-A209. In each pleading L4 alleged it was

ready, willing and able to perform under the APA—not that it required an extension to fulfill its obligation. *Id*. L4's attempt to strain the unique facts of *Osborn* as a basis to overwrite the complex APA structure, convert it into a single-close transaction and suspend the parties' bargained-for warranty obligations until the date of judgment should be rejected.

In short, *Osborn* cannot be applied for the broad proposition that a party must only be ready, willing and able to perform at the time of judgment because that incorrect premise cannot be reconciled with the fundamental principle that a party seeking specific performance must show it substantially performed its contractual obligations. *Peden*, 886 A.2d 1278, at *3 (TABLE); OB20-21. The Court of Chancery's misapplication of *Osborn* is reversible error. *See* OB26-27.

C. THE COURT OF CHANCERY'S CONSTRUCTION OF SPECIFIC PERFORMANCE BETRAYS THE EXPRESS TERMS OF THE APA

The Court of Chancery's attempt to distill the transaction down to L4's ability to perform its obligations at a single closing at the time of judgment not only lacks support in case law but also betrays the text of the parties' agreement, specifically the APA warranties.

The bring-down provision embodied in the APA instructs that L4 had to be ready, willing and able to perform at the date of the signing of the APA and at each Closing Date. A2234. The Opinion held that CorePower forfeited the structure of

the APA by allegedly repudiating on March 26 (Op. 44-45); however, at that time none of CorePower's performance obligations had yet come due. Contrary to L4's assertion that *Willow Bay* and *Carteret* are different because they deal with "a *future* contractual obligation," (AB26) (emphasis in original), future performance is precisely what the APA contemplated in setting three staggered Closing Dates. On March 26, all of the Closing Dates under the APA were future obligations. The Court of Chancery should have applied *Willow Bay* and *Carteret* and followed the election of remedies precedent, requiring L4 to continue to perform following its election to seek specific performance. *See* OB22-25. Its failure to do so is an abuse of discretion. *See Id*.

The Court of Chancery likewise ignored the text of the ordinary course of business warranty when concluding that L4 is able "to deliver to CorePower the studio assets it contracted to deliver in the APA." Op. 81. That conclusion simply ignores material provisions included in the APA—including those warranties L4 issued to induce CorePower's performance—that L4 failed to fulfill. *See* III.B *infra*. That conclusion also ignores L4's failure to deliver goodwill and intangible assets associated with the business by not delivering well-run studios operating as warranted. A1442-A1443. Nor, as L4 asserts, did Mr. Kenny's testimony debunk this correct reading of the APA. AB28. Rather testifying on the last day of trial as a rebuttal witness, Mr. Kenny recognized the salience of the warranties L4 issued

and that: (i) those warranties would be applicable at Closing (just as the "bring-down" provision specifies); and (ii) those warranties would ensure CorePower received the full benefit of its bargain—studios operating as in the past and in a manner that generated substantial goodwill. A1442-A1443.

At bottom, L4 was unable to establish that 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) (citation omitted).

Moreover, even at the time of judgment, L4 could not deliver what the APA required—thirty-four operating studios that had been functioning in the ordinary course of business since January 2019. *See* III.B. *infra*. Until re-direct at trial, L4 had claimed four of the studios were permanently closed—that it had "thr[own] the keys at the landlords." A717, A845, A1117-A1118, A2461-A2462, B65-67, B107-109, B225-B228. In any event, L4 does not contend that those four studios can be transferred in any Closing now. The Opinion's holding that L4 is ready, willing and able to perform its APA obligations is an abuse of discretion. *See* OB19-27.

II. THE APA WARRANTIES REQUIRED L4 TO COMPLY ON EACH CLOSING DATE

Unambiguous on its face, the bring-down provision provides that L4's representations and warranties as Seller were to (i) induce CorePower to sign the APA and close on the sale of thirty-four yoga studios and (ii) apply on each of the scheduled Closing Dates. OB8, 28-31. Ignoring the significance of the bring-down provision, the trial court mistakenly considered extrinsic evidence and tasked CorePower with showing it was actually induced to execute the APA. Op. 33-34, n.136; OB28-30. The court then denigrated the provision's intended effect deciding that it had no application whatsoever because it was not a closing condition. Op. 33-34, n.136; OB30-31.

The trial court's rulings lack merit as a matter of law. OB29-30. Indeed, so manifest were the trial court's errors that L4 now concedes that no showing was required from CorePower of actual inducement and concurs that the bring-down provision was never a closing condition. AB30-31. Instead, to prop up the Opinion, L4 argues that the error in failing to construe and give effect to this salient provision was "at most, harmless error." AB31.

The law which L4 cites does not support its position that the trial court's failure to apply the bring-down provision was "harmless error." In *White v. Panic*, 783 A.2d 543 (Del. 2001), this Court affirmed dismissal of a shareholder derivative action for corporate waste due to the shareholder's failure to meet the heightened

pleading requirements under Court of Chancery Rule 23.1. In sharp contrast, in this case the Court of Chancery after a full merits five-day trial failed to apply fundamental principles of contract construction to the APA and give effect to a critically important contract term central to this dispute. *See Nationwide Emerging Managers, LLC v. NorthPointe Hldgs., LLC*, 112 A.3d 878, 894-96, 899 (Del. 2015) (reversing and remanding decision because it misinterpreted contractual provisions).

Similarly in *Kroll v. City of Wilmington*, 2022 WL 1075399, at *3 (Del. Apr. 11, 2022), this Court's decision remanding the case for further consideration (*i.e.*, of a police officer's failure to challenge a dishonesty charge in the departmental hearing), supports CorePower's view that a reversal and remand should be granted in this case to determine the proper application of the bring-down provision.

Lastly, L4 now concedes that the trial court determined that "the parties did not disclaim common law rights in the APA." AB32; A2269. The Opinion acknowledged that L4 "offered no principled basis in law or fact to support the notion that either of these contracting parties intended to waive their common law rights with respect to the APA or otherwise." Op. 42. Nonetheless, the trial court refused to address the import or application of the bring-down provision on CorePower's contractual and common law rights and remedies. The trial court's refusal to recognize CorePower's common law rights and remedies devolving from L4's failure to satisfy its warranty obligations throughout the Transactional Period—

as expressly required by the bring-down provision—constitutes reversible error. *See* OB31.

III. L4'S WARRANTY BREACHES

The trial court misinterpreted the ordinary course warranty; added a gloss to that term which L4 now concedes is clear and unambiguous; burdened CorePower with showing justification not to close, another flawed application of the law; and discounted the multitude of undisputed evidence of L4's material breaches of the ordinary course warranty. S*ee* OB34-39.

A. THE ORDINARY COURSE PROVISION ON ITS FACE WAS TETHERED TO L4'S OPERATIONS BEFORE JANUARY 2019

L4 concedes that *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 268 A.3d 198 (Del. 2021), sets the applicable standard for the ordinary course of business when: "an ordinary course provision includes the phrase 'consistent with past practice' or a similar phrase." AB33-35. L4 also agrees that textually, the APA ordinary course provision is defined by L4's past custom and practice prior to January 2019, *i.e.*, the ordinary course of *its* normal day-to-day operations specifically as to the quantity, amount, magnitude and frequency and *its* standard employment policies. AB35; A2280. In other words, as this Court instructs, a seller'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; AB34. The trial court's task clearly was to assess L4's operations prior to January 2019 against L4's actions during the pandemic. That did not happen.

B. THE OPINION FAILED TO APPLY THE CONTRACTUAL WARRANTIES AS WRITTEN

Despite agreeing with the ground rules cited above in order to assess L4's compliance with the ordinary course warranty it made in the APA, L4 now argues that this case differs from *AB Stable* in that CorePower is both the buyer and L4's franchisor. AB35. This baffling argument fails under *AB Stable* and the plethora of undisputed evidence before the trial court. *See* III.A *supra*; OB33-34, 39-44.

L4 was a sophisticated party represented by equally sophisticated deal counsel in the transaction. It willingly agreed to be bound by an ordinary course provision restricting L4's compliance to its historical operations, and thereby forced a comparison of L4's actions before January 2019 to L4's actions "since" that date and particularly during the pandemic. A2236. That L4 contracted with its franchisor made no difference because the APA clearly set forth the ordinary course standard L4, as seller, chose to accept and agreed to satisfy. Moreover, L4 warranted that it would operate its business in accordance with that contractually defined standard while, at the same time, complying with its Franchise Agreement and other legal requirements. A2235. Said another way, the trial court was required to adjudge L4 by the provision set forth in the APA, not by the buyer or anyone else in the industry's course of conduct.

The trial court took a detour and trained its sights on CorePower's actions instead of L4's failings, improperly adding a gloss to the definition of ordinary

course and measuring L4's post-pandemic actions against others in the industry, and importing System Standards from the Franchise Agreement. Op. 24, 64-68, 73-76. The standard was not cost cutting measures implemented by CorePower and others in the fitness industry to address the devastating consequences of the COVID-19 pandemic. Nor was the standard the example (or lead) set by CorePower or others in the industry attempting to address the serious health and safety concerns emerging as the pandemic seized the country. Rather, the applicable standard upon which L4 should have been judged was its own business operations—that routine and regular business—as was conducted before January 2019 and before the COVID-19 pandemic struck. A2280.

The trial court also erroneously modified the ordinary course definition holding that L4's actions to close its yoga studios for 110 days were "temporary" (Op. 74-75), that layoffs for which L4 began preparing in March (A797-A803, A958-A962) were "temporary" (Op. 73-74), and that lease amendments and rent deferrals were "temporary" (*Id*. at 75-76). Adding such surplusage to the plain, unambiguous ordinary course warranty (*i.e.*, since January 2019 the studios had not been closed, the leases had not been amended, and standard employment practices had been followed) is not defensible. *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."). The trial court's version

and interpretation of the ordinary course provision does not reflect the plain and unambiguous language embodied in the APA.

The gloss added to the definition of ordinary course also violated the integration clause in the APA. The integration clause overrode all prior understandings or agreements, including L4's repeated reliance on the Call Option Agreement and the Call Option Exercise Agreement. A2268. L4 agreed to be bound by the language of the APA, and the Court of Chancery's application of L4's compliance with System Standards as part of the ordinary course warranty negates the integration clause.

C. L4 EXPERIENCED AN MAE

Contrary to L4's specious assertion, the record before this Court is filled with unequivocal proof that L4 suffered an MAE. L4's EBITDA plummeted from pre-pandemic value in excess of $4 million to negative $2.5 million in 2020. A842-847, A1268-1282. The decline continued over the scheduled Closing Dates in 2020 and through trial. *See* OB43-44.

While L4's expert closely mimicked L4's theory of its case and focused on L4's business operations prior to March 20, 2020, he also conceded that L4's performance and its projections declined over the contract period through trial. The key revenue drivers accounting for 80% of L4's revenue were not met in that prolonged period. A1102-1106, A1113-1117, A1176-1177. Mr. Mordaunt's

admissions were corroborated by detailed membership and class attendance data charts prepared by Robert Reilly, CorePower's expert, resulting in a negative deviation of more than 50%. A1237-A1291, 2508-2553. The yearly revenue thus declined from $18 million to $5.5 million, a loss of 69%. A1264-A1266. Mr. Reilly's analysis also included an estimate of the contract value based upon the formula that the parties used to value L4's business and showed it diminished over 50% by April 1 (to $11.8 million) and further diminished to $3.7 million through July and October Closing Dates. A1348-A1354.

IV. THE COURT OF CHANCERY ERRED IN DISMISSING COREPOWER'S COUNTERCLAIM

The Court of Chancery improperly dismissed CorePower's counterclaim for damages in lieu of specific performance before trial. The dismissal opined that the requested relief was barred by the exclusive remedy provision in APA Section 6.8. A552-A553. The Court of Chancery then concluded in its post-trial Judgment that those same indemnification provisions had expired and were unenforceable by CorePower. Judgment 4 n.5. These decisions separately and together are an error as a matter of law and should be reversed and remanded for further proceedings. *See Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 262 (Del. 2017).

Section 6.8 of the APA, providing for a post-Closing (from and after Closing) indemnification, includes an exception for "equitable remedies." A2264. CorePower's counterclaim for damages in lieu of specific performance, itself an equitable remedy asserted *before* Closing, (*see* OB46), is unquestionably allowable under the APA.

CorePower's position is bolstered by the court's ruling after trial refusing to enforce the APA post-Closing remedies—including the indemnity in Section 6.1. That ruling, rendered without L4 requesting such relief in any version of the complaint, pre-trial order, or pre-or post-trial briefing (A75-A79, A105-A109, A203-A207, A586-A587, A685-A757, A1566-A1676, A1765-A1847), that the time to seek post-Closing adjustments or indemnification under Sections 2 and 6 of the

APA had passed, contradicted the express language of the APA. The process prescribed in the APA for post-Closing adjustments has not been triggered because no Closing of the purchase of any Acquired Assets has occurred. A2229. CorePower's obligations for post-Closing adjustments do not begin to run until L4 has delivered a Closing Balance Sheet and Closing Working Capital Statement. A2231-A2233. L4 does not allege that it has delivered these documents.

Similarly, as no Closing has occurred, the deadline for asserting an indemnification claim (15 months after Closing) has not passed. A2263. While L4 maintains that CorePower's requested remand rewrites the APA's terms, it is the Court of Chancery's dismissal and Judgment that have re-written the APA's obligations.

L4 attempts to negate CorePower's challenge to its counterclaim dismissal and the Court's post-trial *sua sponte* denial of APA post-Closing relief, claiming the issue was not preserved because CorePower did not present evidence to support its dismissed counterclaim at trial. AB42, 44-45. That argument is specious. The dismissal of CorePower's counterclaim is preserved as an issue on appeal automatically. OB45. Further, the Court of Chancery would have excluded any evidence that CorePower proffered to support its dismissed counterclaim. *See, e.g.*, *In re Cellular Tel. P'ship Litig.*, 2020 WL 6712177, at *3-4 (Del. Ch. Nov. 12, 2020) (ORDER). L4 has not pointed to a single pleading wherein it requested the negation

of CorePower's post-Closing APA remedies in contradiction of the APA's express terms before or at trial. Thus, CorePower's failure to present evidence on relief not requested cannot bar CorePower's current challenge to that relief as inequitable when coupled with dismissal of its counterclaim. *See Reddy v. MBKS Co.*, 945 A.2d 1080, 1086 (Del. 2008).

V. THE OPINION DID NOT BALANCE THE EQUITIES IN AWARDING SPECIFIC PERFORMANCE DAMAGES

The Opinion's damage award did not "restore the parties to the positions they would have occupied had the contract been lawfully performed" as required when awarding specific performance damages. *Vaughan v. Creekside Homes, Inc.*, 1994 WL 586833, at *1 (Del. Ch. Oct. 7, 1994). Because the Opinion refused to examine L4's performance after March 26 (Op. 44), it similarly failed to meaningfully examine whether the damages alleged had been actually incurred by L4 (*Id*. at 83-84). The failure to address these issues was an abuse of discretion. OB48-49.

In awarding "stewardship" damages, the Opinion inaccurately claimed to capture the losses that "would have been incurred post-closing by CorePower had it adhered to the terms of the APA." Op. 84. Had CorePower closed on the tranches of studios, it would not have owed itself franchise fees. Further, L4 does not dispute that it has not paid the franchise fees. *See* AB46-47. Additionally, Mr. Mordaunt's damage calculation includes $1.2 million in deferred rent—itself the result of a warranty breach (A1138-A1140, A1180, A2237)—that L4 admits it has not paid (A1055-A1056, A1138-A1140, A1180). These factual inconsistencies with the damage award, which CorePower raised at trial and that are not addressed in the Opinion, merit reversal.

CONCLUSION

For all of the reasons CorePower has detailed, the Opinion should be reversed and remanded for further proceedings.

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