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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JULIA HAART, Petitioner-Below/Appellant, v. SILVIO SCAGLIA, Respondent-Below/Appellee, and FREEDOM HOLDING, INC., and ELITE WORLD GROUP, LLC, Nominal Respondents-Below/Appellees.	)	No. 333, 2022 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0145-MTZ

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATMENT

This dispute arises from Scaglia's vindictive reaction to Haart's request for a divorce. After years of holding out Haart as an equal owner of Freedom and lauding Haart's performance as EWG's CEO, Scaglia retaliated within days of Haart's request by seeking to erase Haart from Freedom and EWG.[1] Scaglia's personal animus towards Haart has been evident throughout these proceedings and continues on appeal through irrelevant and unsupported personal attacks.

Haart will not credit most of these attacks with a response. However, one requires correction straightaway. Scaglia negatively twists Haart's "fake it till you make it" mantra. AB at 2. Haart is a successful businesswoman who clawed her way out of poverty to make a better life for her children. The full quote from her autobiography, *Brazen*, states: "***Fake it till you make it is my mantra. I faked being confident until I finally internalized it***." A1512 (emphasis added). Although it should not require explanation, Haart's mantra—based on the Torah—is hardly the nefarious admission Scaglia paints it as. The only party who was "faking" documents and facts for his own personal gain was Scaglia, and the Trial Court erred in adopting his position that Haart was not a 50% owner of Freedom.

[1] Capitalized terms have the same meanings as set forth in Appellant's Opening Brief ("OB"). References to Appellees' Answering Brief are cited herein as "AB at __."

ARGUMENT

I. THE TRIAL COURT INCORRECTLY INTERPRETED THE ERAS.

A. The Trial Court Erred In Its Interpretation Of The Plain Language Of The ERAs.

The ERAs unambiguously effectuate the transfer of 50% of all classes of capital stock of Freedom "and thus change the structure of ownership such that FREEDOM shall be owned 50% by each shareholder." A660, A830. In an attempt to defeat the plain language of these two fully-executed ERAs drafted by Scaglia's associates and *signed by Scaglia eight times*, Scaglia advances three arguments: (i) that the absence of the word "transfer" in the 50% Ownership Clause precludes any interpretation that the ERAs transferred shares, (ii) that the parties did not intend for the ERAs to transfer any shares, and (iii) that the defenses of consideration and mutual mistake preclude a finding that the ERAs transferred shares. Each argument fails.

1. Scaglia's Argument That The ERAs Lack Transfer Language To Rebut The Plain Language Is Erroneous.

Scaglia's interpretation of the plain language of the 50% Ownership Clause relies solely on the lack of the word "transfer" in any of the recitals of the ERAs. *See* AB at 29. This ignores that Section 1 of the ERAs is entitled "Transfer." A660; A830. Undeterred by that, Scaglia posits that because "[n]one of the recitals describe a transfer of Freedom stock," the sole purpose of the ERAs was to "restructure the

ownership of EWG and the Elite businesses under Freedom."[2] AB at 27; 29; 30 ("[No] part of the ERAs describes a transfer between Freedom's stockholders"). Contrary to Scaglia's argument, there are no magic words for a transfer of stock. Here, there is no other mechanism of control or membership interest in Freedom or EWG other than ownership of stock. *See, e.g.*, *Bamford v. Penfold, L.P.*, 2020 WL 967942, at *18-19 (Del. Ch. Feb. 28, 2020) (applying a plain meaning interpretation to an ownership recital where "own 100%" of the company meant 100% of the equity of the company"). Accordingly, the language "change the structure of ownership," where the only basis for ownership is stock, is not legally distinct from the phrase "transfer of stock." *See NBC Universal, Inc. v. Paxson Commc'ns Corp*., 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005) ("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."); *Maven Techs., LLC*

[2] Scaglia points to testimony that the purpose of the ERAs was "'to clarify that EWG would be the reporting entity for financial purposes and keep it sort of separate from Freedom.'" AB at 12 (citing A1916). But this testimony is *not referencing the 2019 ERA*, but rather the circumstances of the *2020 ERA* (intended to fix certain errors in the 2019 ERA. A1915-23. Indeed, Scaglia repeatedly incorrectly references certain language unique to the 2020 ERA, as well as testimony regarding the background and purpose of the 2020 ERA, to support his plain language interpretation of the *2019 ERA*. AB at 1; 2; 5; 18; 25 (citing footnote 56, which relates *only to the 2020 ERA*, as evidence that Haart's argument as to the purpose of the 2019 ERA is incorrect); 28 (arguing that the ERAs only intended to memorialize the transfer in Section 1.3, which was *not even present in the 2019 ERA*); 12 (*ibid.* n.3).

v. Vasile, 46 N.Y.S.3d 720, 722 (N.Y. App. Div. 2017) (citing *New York State Thruway Auth. v. KTA–Tator Eng'g Servs., P.C.*, 78 A.D.3d 1566, 1567 (2010) ("It is well settled that a contract must be read as a whole to give effect and meaning to every term ... Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible.'")). Scaglia does not—and cannot—cite to any authority requiring the word "transfer" instead of "change."[3]

Scaglia repeatedly relies on the Trial Court's erroneous finding that the sole purpose of the ERAs is reflected in their title, "Entity Restructuring Agreement," to merely restructure the ownership of EWG and the Elite businesses under Freedom and transfer no stock. AB at 2; 5; 27; 32. Scaglia, however, conceded that he planned a "'***restructuring*** of Freedom ***to give [] Haart equal control' of EWG*** if and when it became a public company." AB at 20 (citing A389) (emphasis added). The record demonstrates that Scaglia considered restructuring agreements as a vehicle to transfer ownership of Freedom. *Id.*

Scaglia also contends that Haart's plain language interpretation is "chronologically impossible." AB at 1; 18. Incredulously, Scaglia bases this

[3] Scaglia's argument that the ERAs could not have transferred preferred stock because Scaglia had transferred Haart common stock prior to the ERAs is illogical. The ERAs specify that the structure of Freedom would be changed such that it would thus "be owned 50% by each shareholder." Naturally, 50% ownership would encompass both common and preferred stock, a point that Scaglia conceded at trial. A437-38.

contention on the fact that Haart did not know of the existence of preferred stock as of the date of execution of the 2019 ERA. As an initial matter, the only reason Haart did not know of the existence of preferred stock is because Scaglia hid it from her. And, nevertheless, whether or not Haart knew about the preferred stock is of no moment. It is undisputed that the preferred stock existed and could be transferred as of the effective date of the 2019 ERA. *See* A642-58.

2. Scaglia Overstates And Misconstrues The Evidence In Support Of His Interpretation Of The ERAs.

Scaglia's brief consistently contradicts itself and miscites the record to argue the purpose of the ERAs was not to transfer stock or change ownership. For example, Scaglia repeatedly cites to the same footnote in the Opinion to assert that "the trial court found Haart's testimony on the central question in the case—the purpose of the ERAs—to be 'not credible.'" AB at 1; 2; 3[4]; 5; 18; 25; 36 (citing Ex. B 14 n.56). This footnote relates only to the 2020 ERA and Haart's testimony that Scaglia used the 2020 ERA to apologize to Haart—an argument not relevant to whether the 2019 ERA effectuated the transfer. Scaglia's attempts to use evidence regarding the creation of the 2020 ERA to reflect the intent behind the 2019 ERA is erroneous and irrelevant—the 2019 ERA already transferred all classes of capital stock to Haart. Contemporaneous evidence proves that the 2020 ERA simply sought

[4] Scaglia mistakenly references footnote 46 here.

to remedy certain errors and confirmed the transfer. *See* A438; A753-59; A827; *see also* OB at 9-10.

Likewise, Scaglia erroneously cites to Haart's cross examination on four occasions for the proposition that Haart "conceded at trial" that the ERAs were "never intended to transfer anything as between Haart and Scaglia." AB at 1; 5; 13; 29. Haart's only testimony, however, was the word "no" in response to a convoluted question on cross-examination.[5] This cherry-picked testimony from a non-lawyer regarding contractual interpretation—a confirmation that the word "transfer" was not present in the 50% Ownership Clause[6]—is not a concession regarding intent. Haart never "conceded" that the ERAs do not transfer, or never were intended to transfer, any stock. In fact, she repeatedly testified to the contrary. *See, e.g.*, A321 (testifying that the "change the structure of ownership" language effectuated a 50% transfer), A326 (confirming that Haart believed the statement in the D&Os, that "50% of Freedom Holding shares have been transferred" to Haart through the ERAs, to be correct); A347 (Haart testified "I had 50 percent" when discussing the ERAs);

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[5] "Q: And there's no statement in this document, this ERA document, that says Silvio is transferring shares to you, is there?

A: No."

[6] As discussed herein (*supra* at 2, 3), the 50% Ownership Clause instead uses the language "change the structure of ownership," and Section 1.1 of the ERAs is entitled "Transfer."

A348 (ERA "says we agree to transfer all of our membership interests"). Scaglia's overreliance on this out-of-context, miscited, one-word answer cannot overcome the plain language of the ERAs.

3. Scaglia's Lack Of Consideration And Mutual Mistake Arguments Also Fail.

Scaglia incorrectly argues that any promise to transfer Freedom preferred stock to Haart is unenforceable for lack of consideration. AB at 32. Haart unquestionably provided consideration for the transfer. In exchange for the transfer, she agreed to the Management Agreement (A1032-40) to serve as CEO of EWG, forgoing an employment agreement that would otherwise have guaranteed her, among other things, a salary and severance. She did this in reliance on her equal ownership of the Companies to provide her with a say in the Companies' direction and a share in the Companies' potential future financial upside. *See* OB at 7; A360; *see also Llamas v. Titus*, 2019 WL 2505374, at *5 (Del. Ch. June 18, 2019) (member interest transferred for nominal consideration); *Carlson v. Hallinan*, 925 A.2d 506, 525 (Del. Ch. 2006), *opinion clarified*, 2006 WL 1510759 (Del. Ch. May 22, 2006) ("Plaintiffs proved the existence of consideration. In return for his salary and position, [Plaintiff] contributed his time and the resources."); *KNET, Inc. v. Ruocco*, 45 N.Y.S.3d 126, 128 (N.Y. App. Div. 2016) ("consideration for shares may consist of money or other property, tangible or intangible; labor or services actually received by or performed for the corporation for its benefit or in its formation …") (internal

quotations omitted). There can be no dispute that the unambiguous promise to transfer 50% of all classes of Freedom stock to Haart is enforceable.

Scaglia also includes one sentence in his brief purporting to raise a mutual mistake defense, yet puts forth no argument in support of the defense, thereby waiving it. Any assertion of a "mutual mistake" is contradicted by the bountiful extrinsic evidence—including Scaglia's admissions—that he intended to make Haart an equal co-owner of Freedom. *See infra* at 9-11; OB at 10-15.

4. The Trial Court Erred In Rendering Section 1.1 Of The ERAs Meaningless By Extinguishing Language Unfavorable To Scaglia.

The weakness of Scaglia's proffered reading is further shown by the fact that it extinguishes an entire provision of the ERAs. Scaglia concedes that "'[S]ingle clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract'" (AB at 30, citing *Bijan Designer for Men, Inc. v. Fireman's Fund Ins. Co.*, 705 N.Y.S.2d 30, 33 (N.Y. App. Div. 2000)), yet that is exactly what the Trial Court did in adopting an interpretation of Section 1.1 that made it meaningless.[7] The Trial Court incorrectly relied on the errors in the ERAs (as a result of being drafted by Scaglia's non-lawyer associates) and Scaglia's incredulous extrinsic evidence to hold that Section 1.1 of the 2019 and 2020 ERAs

[7] The Trial Court acknowledged this was an "unusual and undesirable" result under New York law. Ex. B at 35.

was "meaningless" and that Sections 1.2 and Sections 1.3 of the 2020 ERA were proper—thereby extinguishing *only* Section 1.1 and rendering the 50% Ownership Clause superfluous. *See Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.*, 472 N.E.2d 315, 318 (N.Y. 1984) ("In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless."); Ex. B at 34-35. This was reversible error.

B. Even If The ERAs Are Ambiguous, The Trial Court's Assessment Of The Extrinsic Evidence Was Clearly Erroneous.

A plethora of relevant extrinsic evidence demonstrates that, to the extent the ERAs are ambiguous, the parties intended for the ERAs to transfer 50% of all Freedom stock to Haart. Scaglia attempts to distract from the overwhelming factual record by minimizing the contemporaneous evidence and pointing to several irrelevant communications that characterized only Scaglia's position, not Haart's understanding of the agreements. AB at 36-37. These factually inaccurate attempts to minimize Haart's bountiful extrinsic evidence fail.

1. The Extrinsic Evidence Overwhelmingly Confirms That The ERAs Effectuated The Transfer Of 50% Of Freedom Stock To Haart.

The record is replete with instances (both contemporaneous and after-the-fact) where Scaglia—or individuals at his direction—made representations that Haart owns 50% of Freedom as a result of the 2019 ERA. *See* OB at 10-15; 27-28. Haart pointed to *over 21* such representations by Scaglia or his associates to the

government, the public, potential buyers, third parties, EWG employees,[8] and amongst themselves, which either directly reference the ownership structure established in the ERAs or affirmatively state that Haart owns 50% of all classes of Freedom stock. OB at 10-15. Some of these representations even included reference to the ERAs.[9] Scaglia does not meaningfully contest these statements. *See infra* at 11-16.

The Trial Court erroneously reduced these abundant representations to a "string of miscellaneous documents" (Ex. B at 42), which is both contrary to the record and the legal standard which requires the Trial Court to breathe "sensible life" to the contract. *OptiNose AS v. Currax Pharms., LLC*, 264 A.3d 629, 638 (Del. 2021); *In re Gawker Media LLC*, 588 B.R. 337, 345 (Bankr. S.D.N.Y. 2018) (in interpreting ambiguity, "disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were

[8] The Opinion recognizes that Scaglia made numerous contemporaneous representations "indicating Scaglia and Haart were equal or fifty-fifty partners in Freedom," but then fails to properly link those representations to the 2019 ERA. Ex. B at 39.

[9] *See e.g.*, A959 (October 2020 D&O questionnaire signed and reviewed by Scaglia stating "*[i]n April 2019 50% of Freedom Holding shares have been transferred from Silvio Scaglia (who owned previously 100%) to Julia Hendler (now Julia Haart),*" *in a clear reference to the ERAs)* (emphasis added). The Trial Court acknowledged as such—because the ERAs were backdated to April 1, 2019, "facially, this statement suggests the ERAs effectuated this transfer." Ex. B at 38.

striving to attain") (internal quotations omitted). Scaglia's repeated statements and actions only make sense if the ERAs were intended to (and did) transfer 50% of Freedom to Haart. *See, e.g.*, *Glob. Energy Fin. LLC v. Peabody Energy Corp.*, 2010 WL 4056164, at *28 (Del. Super. Ct. Oct. 14, 2010) (Delaware law gives significant weight to "the parties' actions and course of conduct in interpreting a contract"); *see also* A753-59 (O'Brien confirming that the 2020 ERA achieves the "outcome that … was the original intention" of the 2019 ERA). Any finding to the contrary is erroneous.

2. Scaglia's Attempts To Minimize The Overwhelming Extrinsic Evidence Fail.

Scaglia consistently misconstrues the timeline to conflate the 2019 and 2020 ERAs in an attempt to minimize the contemporaneous extrinsic evidence. *Supra* at 2 n.3. In doing so, Scaglia makes the false assertions that, "[i]n reality, there is not a single pre-litigation document that references the ERAs as instruments through which Haart acquired Freedom stock" and that "none" of Haart's "documents reference the ERAs as the source of Haart's ownership of Freedom stock." AB at 35; 37. This ignores that the ERAs were used, repeatedly, to represent to third parties the reorganized structure of Freedom and EWG and Scaglia's and Haart's equal co-ownership. *See generally* OB at 10-15. And, directly contradicting Scaglia's claims, the Trial Court acknowledged that the multiple D&O Questionnaires (prepared less than a year after the execution of the 2019 ERA and several weeks

after the execution of the 2020 ERA) affirmatively endorse the intent and effect of the ERAs. *See* A876-1018; *see also* Ex. B at 38. Those Questionnaires, signed by Scaglia and prepared at his direction, state: "In April 2019 50% of Freedom Holding shares have been transferred from Silvio Scaglia (who owned previously 100%) to Julia Hendler (now Julia Haart)." A922; A959. Scaglia also incorrectly asserts that "most" of Haart's extrinsic evidence was "drafted by individuals unfamiliar with the company's capital structure." AB at 38. Not only is this uncited assertion false, the vast majority of documents cited by Haart were admittedly prepared by Scaglia or his associates (AB at 38-39, n.14), and Scaglia concedes that, as a result of the ERAs, *objective third parties construed ownership as equal*. *See, e.g.*, *Meritxell, Ltd. v. Saliva Diagnostic Sys., Inc.*, 1998 WL 40148, at *6 (S.D.N.Y. Feb. 2, 1998).

Faced with irrefutable extrinsic evidence contradicting his interpretation, Scaglia falls back on his implausible, inconsistent testimony that the crucial business documents referencing his and Haart's equal ownership of Freedom were "hastily prepared" (AB at 38), and he never noticed their errors, despite flaunting himself as a business "wizard." OB at 30 (citing A365). This assertion is facially unbelievable and contradicted by contemporaneous written evidence. OB at 29-31; *see also* A826-27 (Scaglia discussing the draft ERAs and D&Os with his advisors); A947-48 (Scaglia "checked [] and [was] fine with" the D&Os); A769 (Scaglia forwarding the 2020 ERA to Barbieri); A375; A1052 (Scaglia testifying that, in signing a two-page

board minutes, he only read the bottom of the page, and failed to notice the massive, shaded columns in the middle of the page labeling Haart as a 50% co-owner). Neither Scaglia's post-hoc claims of sloppy draftsmanship nor ignorance justify rewriting the ERAs to suit him. *See Toyota Motor Credit Corp. v. Figuereo*, 143 N.Y.S.3d 864 (N.Y. Civ. Ct. 2021) (TABLE). The Trial Court wrongly infused its reading of the ERAs with Scaglia's incredulous reasoning, in clear error. *See CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041-42 (Del. 2016); *Badr v. Hogan*, 554 N.E.2d 890, 891 (1990) (trial court committed reversible error as to testimony regarding party's credibility); *see also, e.g., Dunn Auto Parts, Inc. v. Wells*, 155 N.Y.S.3d 507 (N.Y. App. Div. 2021) (inferences drawn from extrinsic evidence must be reasonable).

3. Scaglia's Bare-Bones Extrinsic Evidence Should Not Have Been Credited By The Trial Court.

Scaglia attempts to downplay the contemporaneous evidence by pointing to his own bare-bones extrinsic evidence. AB at 33-34; 35-37. None of this "evidence" contradicts that both the plain text and extrinsic evidence confirm the 2019 ERA intended to (and did) transfer "all classes of stock" to Haart.

Scaglia primarily relies on a handful of "admissions" purportedly revealing that Haart relied solely upon the Stock Power as the vehicle transferring her shares. AB at 21-22; 36-37. Scaglia urges the Court to adopt the Opinion's finding that these "admissions" show that "Haart knew no later than January 2021 that she held

less than 50% of Freedom's preferred shares." AB at 36; Ex. B at 21. According to Scaglia, because Haart sent the Stock Power (and not the ERAs) to Cousin her claim that the "ERAs transferred her Freedom stock is a litigation invention." AB at 35. This assertion is contradicted by the contemporaneous evidence surrounding Haart's exchange with Cousin and Scaglia's repeated statements. Indeed, Scaglia and his associates referenced the ERAs as transferring Haart 50% of the company since at least 2020. A877-910; A922; A949-83; A985-1018; *see also* A1019 (tax return signed by Scaglia listing Haart and Scaglia as both owning "50% or more of the total voting power of all classes of the corporation's stock …"); A1070-77 (sending 2020 ERA to "cover the control issue"). All these so-called-admissions show is that in January 2021, Haart asked whether the Stock Power contradicted the ERAs, the parties' agreements, and Scaglia's countless representations, and the author repeatedly assured her it did not.

Scaglia's reliance on the Stock Power as "powerful" extrinsic evidence is likewise irrelevant. Before the Stock Power was executed, half of the preferred stock was transferred to—or intended to be transferred to—Haart, through the 2019 ERA. Several months *after* the Stock Power was executed, the 2020 ERA was executed to confirm that the 2020 ERA achieved the "outcome that … was the original intention" of the 2019 ERA. A753-59.

Scaglia also references certain messages between Haart and Feinman purportedly showing that Haart "knew" she did not own 50% of Freedom. To the contrary, Feinman, who drafted the 2019 ERA and whom Haart "trusted … with everything in [her] life," (A362) told her that ownership of Freedom was equal in every way. *Id.* Indeed, there is no evidence in the record of Feinman ever rebutting Haart's assertion that she was an equal co-owner of Freedom until February 10, 2022—two days after Scaglia executed the First Written Consent. *See, e.g.*, A1635 (Feinman stating on February 7, 2022 that "Freedom is owned by Julia and Silvio equally").[10]

Scaglia also relies on a handful of text messages with Haart in 2022 where she allegedly acknowledges his control of Freedom. *See* AB 36-37. Scaglia, of course, omits that in those same text messages, Haart affirmatively states that "we own 50/50." A1626. These messages do not admit Scaglia's ownership percentage—rather, a frustrated Haart was simply acknowledging Scaglia's attempted betrayal.

To that end, Scaglia reiterated throughout the case that, although he would "never" give up control, he understood the importance of holding out Haart as an equal partner to his wife, investors, the public, and his own company. *E.g.*, AB at 15; A371; A375; A383-84; A385; A391. Boiled down, it is Scaglia's argument that

[10] *Compare* A1635; Ex. B at 25 n.117 (discrediting Feinman's testimony) *with* AB at 22 ("Feinman refused to lie. On February 10, 2022, Feinman confirmed … that 'Silvio Scaglia controls the preferred shares …'").

was he was perfectly content to misrepresent the facts for his own pecuniary gain. The Trial Court rewarded Scaglia for his intended misdirection and erroneously credited his testimony. Crediting Scaglia's cherry-picked extrinsic evidence, including statements that he explicitly contradicted, was reversible error. *Badr*, 554 N.E.2d at 891.

4. The Court's Failure To Properly Consider The Doctrine of *Contra Proferentum* Was Erroneous.

It is black letter law that "when all other guides to interpretation of the contract have failed to resolve the ambiguity," any ambiguity must be construed against the party who prepared it. *Cob Shipping Can. Inc. v. Trans Mktg. Hous., Inc.*, 1993 WL 300043, at *4 (S.D.N.Y. Aug. 4, 1993); *67 Wall St. Co. v. Franklin Nat'l Bank*, 333 N.E.2d 184, 187 (N.Y. 1975). Here, rather than rejecting Haart's interpretation of the ERAs by rendering a contractual provision meaningless, the Trial Court was required to consider the doctrine of *contra proferentum* as the final branch on the decision tree. *See M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.*, 432 F.3d 127, 142 (2d Cir. 2005) ("[C]ourts should not resort to *contra proferentum* until after consideration of extrinsic evidence.") (internal citations omitted). The failure to do so was clearly erroneous. *See PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) ("Therefore, to the extent that [respondent] drafted an ambiguous document ... they cannot now claim the benefit of the doubt in construing any ambiguities.") (internal quotations omitted).

Scaglia erroneously asserts that the doctrine only applies where a party has "no voice." AB at 40 (citing *Sci. Applications Int'l Corp. v. State*, 876 N.Y.S.2d 182, 184 (App. Div. 2009)). The "no voice" rule purportedly set forth in *Science Applications* actually derived from *Wall Street*, which Scaglia's citation omitted. *Id.*; *see also* AB at 40. In *Wall Street*, the court merely set forth the general proposition that "a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language." *67 Wall St. Co*, 333 N.E.2d at 187. Nowhere is a party *required* to have "no voice" for the doctrine to apply.

Scaglia did not dispute that Feinman and the drafters of the ERAs lacked independence, even admitting that he "relied on Barbieri and Feinman to prepare and review [his] corporate documents." AB at 38. Accordingly, while the Trial Court need not have considered the doctrine due to the overwhelming amount of extrinsic evidence in favor of Haart's interpretation, it was reversible error for the Trial Court to have relied on extrinsic evidence and decided in Scaglia's favor without weighing the ambiguity against Scaglia. Had the Trial Court properly applied *contra proferentum*, the only conceivable outcome would be to construe the ERAs against Scaglia, as the drafter, and thus in favor of Haart's interpretation.

II. HAART WAS CONSTRUCTIVELY DELIVERED FREEDOM PREFERRED STOCK.

As an initial matter, the parties disagree regarding the appropriate standard of review this Court should apply to the Trial Court's failure to apply the doctrine of constructive delivery. *Compare* OB at 37 *with* AB at 41. Under either standard of review, the elements of constructive delivery were met and the Trial Court's Opinion should be reversed.

The objective intent of the ERAs was to change the structure of Freedom to be owned equally by Scaglia and Haart. The doctrine of constructive delivery effectuates this structural change and validated the transfer of Freedom's ownership to Haart. *See* OB at 37-41. In particular, if (i) there is unmistakable intention to transfer title, even without physical transfer, and (ii) delivery proceeds to a "point of no return," then constructive delivery applies. *McAllister v. Kallop*, 1995 WL 462210, at *17 (Del. Ch. July 28, 1995), *aff'd*, 678 A.2d 526 (Del. 1996). Both elements were met here. *See* OB at 39-41.

Scaglia asserts the circular argument that because Haart was never delivered physical stock certificates, constructive delivery does not apply. AB at 42-44. Scaglia further asserts that constructive delivery applies only "'when actual transfers of physical possession is impractical.'" AB at 42 (citing *Kallop v. McAllister*, 678 A.2d 526, 531 (Del. 1996)). Not so. As Scaglia recognizes, constructive delivery depends on the factual circumstances, and in *Kallop* this Court indicated that

physical delivery of the stock certificate was impractical under the particular circumstances; not that it was a prerequisite for constructive delivery to apply in all instances. *Kallop*, 678 A.2d at 529. Indeed, *Kallop* contains a lengthy examination of constructive delivery under the common law and Article 8 of the UCC, and never states that physical impracticability of delivery is a perquisite element to invoke the doctrine. *Id*. at 529-532. Scaglia's additional authority for this proposition does not hold otherwise. AB at 42-43.[11] Scaglia mistakenly cites to the dissenting opinion in *Cohn*, as the majority in *Cohn* held that constructive delivery *did* occur—despite the fact that there was no physical impracticability to delivery. *In re Cohn*, 176 N.Y.S. 225, 229 (N.Y. App. Div. 1919). Similarly, Scaglia mistakenly relies upon *In re Estate of Szabo*. AB at 42. There, the court stated that "where a transfer of a part interest in stock certificates is concerned, a symbolical delivery would be sufficient for it is the only kind of delivery that would be practicable under the circumstances." *In re Estate of Szabo*, 176 N.E.2d 395, 396 (N.Y. 1961).

Unlike the cases relied on by Scaglia to show a lack of intent to transfer shares, AB at 43, here the overwhelming contemporaneous evidence demonstrates that Scaglia intended to transfer 50% of all shares of all classes of Freedom stock to

[11] As a preliminary matter, the New York cases Scaglia relies on are inapplicable here, as Delaware law applies. *See McAllister*, 1995 WL 462210, at *17; *see also* OB at 38.

Haart. Under the specific facts in this case, the elements for constructive delivery were met.

III. THE TRIAL COURT INCORRECTLY FOUND THAT SCAGLIA HAD NOT ACQUIESED IN HAART'S EQUAL OWNERSHIP OF FREEDOM.

The trial record contains overwhelming evidence that Scaglia repeatedly represented (both privately and publicly) that Haart owned 50% of Freedom. *See* Ex. B at 43-44. Scaglia never attempted to correct these representations, and the Trial Court acknowledged that he *benefitted* from those representations. *See* Ex. B at 22-23 (finding Scaglia made representations to "bring value to EWG and accelerate a potential deal"); 40-41 (finding Scaglia made representations to "appease his wife" and to "position [Haart] as the best person in the world" in order to make the company more attractive to investors). Under the undisputed factual record, acquiescence applies. *See Bershad v. Curtiss-Wright Corp*., 535 A.2d 840, 848 (Del. 1987) (applying acquiescence where a party "accepts the benefits of the transaction").

The fact that Scaglia held Haart out as a 50% owner at all relevant times does not, as Scaglia claims, fail alongside an erroneous interpretation of the ERAs. AB at 46. Rather, the two support each other, as his repeated statements confirm both the plain language of the documents that transferred the shares to Haart, and that Haart had no reason to question the meaning of those documents. The doctrine of acquiescence bars Scaglia from now arguing to the contrary. *See* OB at 44 (citing

Simple Glob., Inc. v. Banasik, 2021 WL 2587894, at *13 (Del. Ch. June 24, 2021), *judgment entered*, (Del. Ch. 2021)). Scaglia does not credibly argue otherwise.

Scaglia incorrectly asserts that, despite "'fail[ing] to either notice or correct'" various documents describing Haart as an equal owner of Freedom, he somehow did not acknowledge the truth of those statements. AB at 47 (citing Ex. B at 18). This argument is not credible,[12] and misconstrues Delaware law.[13] The Trial Court recognized that Scaglia told "potential investors, other third parties, and tax authorities that [Haart and Scaglia] owned Freedom equally," therefore recognizing the legitimacy of the transfer and reaping the benefits of presenting Haart to the public as a co-owner. Ex. B at 1. Yet Scaglia boasts, and the Trial Court accepted, that he "always wanted to retain control" and was not willing to share it. AB at 11; Ex. B at 15-16; A383. Scaglia cannot now credibly claim retaining control was important to him, while at the same time claiming he paid no attention to the details and so errantly made repeated external representations of equal ownership. *See*

[12] For example, Scaglia claims that, "[a]fter the ERA was first executed in November 2019, Scaglia never told Haart or anyone else that document gave Haart 50% of Freedom's preferred stock." AB at 46. This assertion is not supported by any cites, and is contradictory to the record. *See, e.g.*, A876-946; A947-1018; A1019; *see supra* at 11-12.

[13] This assertion is a concession that acquiescence applies. *See Lehman Bros. Holdings Inc. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *9 n.56 (Del. Ch. Feb. 25, 2014), *aff'd*, 105 A.3d 989 (Del. 2014) (holding "inaction or silence on the part of a [party], in certain circumstances, can bar a [party] from relief both equitable and legal.").

Lehman Bros. Holdings Inc. 2014 WL 718430 at *9 n.56 (the "doctrine of acquiescence has been characterized is as estoppel by silence or estoppel by inaction"); *see also State v. Sweetwater Point, LLC*, 2022 WL 2349659, at *4 n.54 (Del. Ch. June 30, 2022) ("with acquiescence, it is the … actions or inactions in response to another's assertion of rights").

Scaglia's conduct and outward acceptance "acknowledged the legitimacy" of Haart's 50% ownership to further himself Haart's expense. *Clements v. Rogers*, 790 A.2d 1222, 1238 n.46 (Del. Ch. 2001); *see also Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008) ("[A]ny course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."). By holding otherwise, the Trial Court improperly denied Haart equitable relief in the face of Scaglia's repeated outward acceptance.

CONCLUSION

For the foregoing reasons, and those set forth in Appellant's Opening Brief, Haart respectfully requests that this Court (i) reverse the Court of Chancery's decision that Haart does not own 50% of all classes of Freedom stock, and (ii) reverse the Court of Chancery's decision that Haart was validly terminated from her positions at Freedom and EWG.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2022, a copy of **APPELLANT'S REPLY BRIEF** was served via File & Serve*Xpress* upon the following counsel of record:

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