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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTHERN GOLD HOLDINGS, LLC, Defendant Below, Appellant, v. REM OA HOLDINGS, LLC and SIFT FIXED US002, LLC, Plaintiffs Below, Appellees, -and- REM EQ HOLDINGS, LLC, Nominal Defendant Below, Appellee	)	No. 465, 2023 Court Below: Court of Chancery of the State of Delaware C.A. No. 2022-0582-LWW

REPLY BRIEF OF DEFENDANT-BELOW/APPELLANT NORTHERN GOLD HOLDINGS, LLC

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A. Plaintiffs Cite No Authority (Because There Is None) For Evaluating The Validity Of A Written Consent As A Binding Contract Not Subject To Testing Under Equitable Principles.

As detailed in Northern Gold's Corrected Opening Brief ("DOB"): "The trial court erred in evaluating the validity of the Written Consent approving the Commitment Letter as if it was a commercial contract between opposing arms-length parties, instead of applying equitable principles to determine the validity of a written consent approving a 'financing' transaction where one 50% member does not disclose that the terms of a 'financing' transaction gives him 'sole discretion' to dilute the other member below 50%." (DOB 21 (emphasis added); DOB 20-32.)

"The trial court cited no authority holding (and Defendant is aware of none) that the Court of Chancery evaluates such a written consent under contract law to the exclusion of considering equitable principles." (DOB 22.)

In their Answering Brief ("PAB"), Plaintiffs do not (because they cannot) cite a single case for the trial court's unprecedented proposition.

Instead, Plaintiffs push all their chips to the middle of the table on the unprecedented (and meritless) argument that a written consent is, as a matter of law,

a "contract" or "binding document" between LLC members. (*See* PAB 5, 21 ("Nevertheless, the outcome of this appeal is dictated by a simple rule: 'Delaware law holds sophisticated parties to their contracts.'").)

In other words, Plaintiffs argue that the validity of the Written Consent is not evaluated under equitable principles, but solely under "Delaware's straightforward rules on the enforcement of binding agreements." (PAB 1 (citing *Cantor Fitzgerald, L.P. v. Ainslie*, 2024 WL 315193, at *1 (Del. Jan. 29, 2024) ("The courts of this State hold freedom of contract in high—some might say, reverential—regard."); Opinion 47 ("Delaware is a 'contractarian' state.")); *see also* PAB 7-8 ("Delaware law enforces contracts and other binding documents…."); PAB 9 ("Nothing in law or equity suggests that a sophisticated contracting party … may be excused from the effect of the document he freely signed."); PAB 20 ("Delaware will enforce that contract against that party, good or bad."); PAB 21 ("Whether the Written Consent is a typical 'contract' is irrelevant because it is a binding document….").)

But Plaintiffs' argument crumbles at the slightest touch. As a matter of law, a written consent is <u>not</u> a "contract" <u>between</u> members of an LLC or a "contract" between stockholders of a corporation. Rather, it is an authorization by the equity holders <u>for an action by</u> the LLC or corporation.

In the corporation law context, any action required to be taken at a meeting of stockholders may be taken, in lieu of such meeting, by the signed written consent of

a majority of the stockholders.[1] Similarly, LLC members may act by written consent.[2] It is undisputed that "[t]he LLC Agreement permits the members to act by written consent." Opinion *19. It is also undisputed that "[b]ecause neither Northern Gold nor REM OA held more than 50% of the units, they were both required to consent to the Company's execution of the Commitment Letter and the issuance of the warrant to SIFT Fixed." Opinion *18.

A written consent stands in stark contrast to a binding written contract. A contract requires that "parties intended that the contract would bind them and … the parties exchange legal consideration." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1212-13 (Del. 2018) ("One of the first things first-year law students learn in their basic contracts course is that, in general, 'the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.' In other words, there must be a 'meeting of the minds' that there is a contract supported by consideration.") (emphasis added).

The Written Consent at issue here is the form for member authorization for the Company to enter into the "Commitment Letter" with a third party – it is not a

[1] 8 *Del. C.* § 228; *Allen v. Prime Computer, Inc*., 540 A.2d 417, 419-20 (Del. 1988) (section 228 authorizes a majority of stockholders to act by written consent in lieu of a meeting).

[2] 6 *Del. C.* § 18-302 (LLC members may act by written consent).

binding contract detailing rights and obligations between the signatory members REM OA and Northern Gold themselves. Furthermore, the Written Consent is not a contract because it does not provide for member Northern Gold to be paid consideration by member REM OA in exchange for signing the Written Consent.

Plaintiffs say the Written Consent is a contract because it is "a document that the Members signed to memorialize their willingness to be bound by it." (PAB 20-21 (citing *Off. Comm. of Unsecured Creds. of Motors Liquid Co. v. JPMorgan Chase Bank, N.A.*, 103 A.3d 1010, 1015 (Del. 2014)).) But that case has nothing to do with treating a written consent as a contract between signatories. *JPMorgan Chase Bank*, *1017-18 (termination statements under UCC § 9-509, 510, 513 effective when secured party authorizes the filing).

Similar to Plaintiff's argument, the trial court held that the Written Consent was a contract because of the circular logic that the Written Consent was a document that Northern Gold signed. Opinion *21 n.276 (citing *United Health All, LLC v. United Med., LLC*, 2013 WL 6383026, at *6 (Del. Ch. Nov. 27, 2013)). But that case says no such thing. *United Health*, at *8 ("[B]ecause the parties did not reach agreement on all material terms of the settlement, I conclude that they did not form an enforceable [settlement] agreement.").

The trial court held the Written Consent was a contract even though signatory member Northern Gold received no consideration because "the $10 million loan

provided consideration to the Company, whose benefit was indirectly shared with Northern Gold." Opinion *21 n.276 (citing *Agostino v. Hicks*, 845 A.2d 1110, 1124 (Del. Ch. 2004)) (emphasis added). But that case has nothing to do with treating a written consent as a contract between signatories. *Agostino*, at 1123 (claim that defendant impeded "value maximizing transaction" is mismanagement derivative claim that "represents a direct wrong to the corporation that is indirectly experienced by all shareholders") ("Nor is there any claim that the preclusion of alternative, value-maximizing transactions implicates a contractual right of plaintiff." (emphasis added)). Noticeably, Plaintiffs do not state anything about Northern Gold receiving contractual "consideration"; perhaps recognizing that under such ill-logic every derivative claim would now be considered a direct claim.

Another reason the Written Consent was not a "contract" between REM OA and Northern Gold somehow giving Soura "sole discretion" to dilute Northern Gold to minority status: any such contract would need to be "clear and unambigous." (DOB 23 (citing *Daniel v. Hawkins*, 289 A.3d 631, 645 (Del. 2023) (holding that contracts that purport to eliminate voting rights, such as an irrevocable proxy, must be "clear and unambiguous")).) Plaintiffs attempt to distinguish *Hawkins* by arguing that the Written Consent "is not ambiguous" and that Northern Gold was not deprived of any voting rights because it "was a 50% owner, not a majority controller." (PAB 34 n.12.) Plaintiffs' argument is meritless because the Written

Consent does not state at all (much less "clearly") that Soura can dilute Northern Gold to minority status. Furthermore, diluting Northern Gold below 50% obviously deprives it of voting rights to approve or disapprove of all REM EQ actions. *See Third Point LLC v. Ruprecht*, 2014 WL 1922029, at *21 (Del. Ch. May 2, 2014) ("Delaware case law relating to the concept of negative control addresses situations in which a person or entity obtains an explicit veto right through contract or through a level of share ownership or board representation at a level that does not amount to majority control, but nevertheless is sufficient to block certain actions….").

Plaintiffs argue that the validity of the Written Consent should be construed (as the trial court did) under contract principles, the exact same as an LLC agreement. (PAB 20-21 (citing 6 *Del. C.* § 18-1101(b)); PAB 1 (citing *Ainslie*, 2024 WL 315193, at *1).) But this argument ignores the critical distinction between an LLC agreement (a contract between members) and a written consent (authorization by a majority of the members for the LLC to take some action). Accepting this argument would be a sea-change in Delaware law, as it means that stockholder approval (by written consent or at a meeting) of any corporate action required by a certificate of incorporation or bylaws would be governed by contract law, not fiduciary law. *See Airgas, Inc. v. Air Prod. & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply."). The implication

of such ruling is startling: all of the landmark Delaware cases deciding the validity of equity holder (*i.e.*, shareholder or member) action by vote on fiduciary grounds are now out the window, because only contract principles apply.

Similarly, affirming the trial court's decision would also be a sea-change in Delaware law regarding LLC manager or corporation director approval (by written consent or at a meeting) of any LLC or corporate action permitted by an LLC Agreement or Certificate of Incorporation or bylaws – such approvals would now be governed by contract law, not fiduciary law. *See* 8 *Del. C.* § 141(a) ("[T]he powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised … as shall be provided in the certificate of incorporation." (emphasis added)); § 141(f) ("Unless otherwise restricted by the certificate of incorporation or bylaws," directors can act by unanimous written consent in lieu of a board meeting); 6 *Del. C.* § 18-402 (LLC Agreement can provide that management of the LLC can be by "the decision of members owning more than 50 percent" or by one or more managers "chosen in the manner provided in the limited liability company agreement"); § 18-404(d) ("Unless otherwise provided in a limited liability company agreement," LLC managers can act by written consent).

To repeat, neither Plaintiffs nor the trial court cites any authority for evaluating the validity of a written consent as a binding contract immune from equitable principles. This is not surprising because under Delaware law, the validity

of a written consent is tested for equity. (DOB 21 (citing *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 96-97 (Del. 2021) (noting that every action needs to be "twice-tested"; legal authority "must be exercised consistently with equitable principles"))); *Kerbawy v. McDonnell*, 2015 WL 4929198, at *12 (Del. Ch. Aug. 18, 2015) ("[I]f a fiduciary breaches his or her disclosure obligations in connection with soliciting stockholders' votes or consents, and the Court finds that such breaches 'inequitably tainted the election process,' that could be grounds for setting aside otherwise valid votes or consents." (emphasis added)); *New Enter. Associates 14, L.P. v. Rich*, 292 A.3d 112, 148-49 (Del. Ch. 2023) ("[D]irectors of a private company owe a duty of full disclosure when selectively soliciting consents."); *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 389 (Del. 2010) (citing *Len v. Fuller*, 1997 WL 305833, at *5 (Del.Ch. May 30, 1997) (barring record holder from voting shares by written consent after corporation exercised option to acquire shares) (emphasis added)); *Freeman v. Fabiniak*, 1985 WL 11583, at *7 (Del. Ch. Aug. 15, 1985) ("[I]t would be inequitable to allow a holder of record who holds mere legal title to stock to act by consent in a manner contrary to the wishes of the true owner." (emphasis added)); *Schreiber v. Carney*, 447 A.2d 17, 26 (Del. Ch. 1982) ("Because vote-buying is so easily susceptible of abuse it must be viewed as a voidable transaction subject to a test for intrinsic fairness." (emphasis added)); *see also Coster v. UIP Companies, Inc*., 300 A.3d 656, 664 (Del. 2023) ("In Justice Herrmann's oft-

quoted words, 'inequitable action does not become permissible simply because it is legally possible.'").

B. Application Of Equitable Principles (Not Contract Principles) Establishes That Plaintiffs Were Not Entitled To Relief Under Section 18-110 Because Northern Gold's Signing Of The Written Consent Did Not Validly Approve The Commitment Letter.

Perhaps recognizing the error of their absolute "contractarian" position regarding a written consent, Plaintiffs make their lead argument under Supreme Court Rule 8 and state "Northern Gold's post-trial briefing did not argue that the trial court failed or refused to consider equitable considerations." (PAB 19.)

The argument is not logical. Northern Gold could not know the trial court would not apply the numerous applicable cases Northern Gold repeatedly cited in its Counterclaim (A0391), pre-trial briefing (A0740-41), and post-trial briefing (A1576-79). (*See* DOB 24-26; *see also infra* at 10-11.) The holding of these cases – cited to the trial court – establish, as a matter of equity, that Plaintiffs were not entitled to relief under Section 18-110 because Northern Gold's bare signing of the Written Consent given to it by REM OA did not validly approve the undisclosed dilutive terms of the Commitment Letter.[3]

[3] Contrary to Plaintiffs' assertion of the "abuse of discretion" standard (PAB 18-19), "[w]hether…an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed de novo." (DOB 21)

- *Adlerstein v. Wertheimer*, 2002 WL 205684, at *10-12 (Del. Ch. Jan. 25, 2002) (invalidating board issuing dilutive preferred stock "through trickery or deceit");
- *VGS, Inc. v. Castiel*, 2000 WL 1277372, at *5 (Del. Ch. Aug. 31, 2000) (finding merger invalid where board failed to give advance notice to controlling member; two LLC managers owed a fiduciary duty of loyalty to the LLC, LLC members, and fellow LLC manager to disclose their plan to authorize the dilutive merger in order to allow fellow LLC manager and member to exercise his voting control to protect his controlling position);
- *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1264-65 (Del. 1989) (lockup agreement enjoined; breach of fiduciary duty by inside director to mislead other directors);
- *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 863 (Del. 2015) (fraud on the board when advisor did not disclose its self-interest to board approving transaction); and
- *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 115-16 (Del. Ch. 2006) ("Because I am crafting a remedy for a breach of the LLC Agreement that should be equitable…." (emphasis added)) ("Eureka should not be bound to manage and operate an LLC with a co-member with which it never intended or agreed to go into business.").

The trial court did not address any of these cases, which would have resulted in judgment in favor of Northern Gold. *See also Bäcker*, 246 A.3d at 97 (citing *Adlerstein*, 2002 WL 205684, at *8-9); *OptimisCorp v. Waite*, 137 A.3d 970, 2016 WL 2585871, at *3 (Del. Apr. 25, 2016) (TABLE) (rejecting Court of Chancery's criticism regarding the *VGS* and *Adlerstein* line of cases and noting that the line of cases involve finding of inequity where "all directors are [not] fairly accorded material information").

Plaintiffs argue that the foregoing cases "are factually dissimilar from this case." (PAB 30, 29-33.) Why? "Because Italia could simply have refused to sign the Written Consent without further information, the equitable underpinnings of those cases renders them inapposite." (PAB 30.) "Italia had ample opportunity to protect his interests because the SIFT transaction was **explicitly disclosed to him** in advance and *he could have refused to sign the Written Consent at any time*." (PAB 32 (underline and italics original) (bold added).)[4]

But in all the foregoing cases, the victim of the trickery or deceit could have always asked more questions about the agenda before attending or proposed action

[4] Query how Plaintiffs can state "explicitly disclosed" when the trial court found Soura committed repeated perjury by claiming to have given Italia a copy of the Commitment Letter?

before voting. If Plaintiffs' "distinguishing" and the trial court's holding is accepted, it would effectively overrule the *VGS/Adlerstein/ Bäcker/Mills/RBC* line of cases.

C. The Policy Reasons for Reversal.

As discussed in Northern Gold's Opening Brief: "In cases involving inequitable behavior in diluting a 50% member and repeated perjured testimony to the trial court, the Court of Chancery should live up to its raison d'être and act as a court of equity." (DOB 25-30.)

In their Answering Brief, Plaintiffs do not address this point of the Court of Chancery's historical role as a court of equity in this type of internal-entity dispute (not as a contractarian court of law), and do not mention the foregoing cited authorities on this point. *See The Long Form – February 9, 2024*, The Chancery Daily (Feb. 9, 2024) ("As a matter of policy – whatever that actually means – there seem to be legitimate questions regarding whether Delaware is well-served by freedom of contract on steroids.") ("Matters such as *REM OA Holdings, LLC, et al. v. Northern Gold Holdings, LLC*…have featured seemingly quite egregious efforts to conceal the actual terms of a contract from a party who would not agree to them, hoping that party will simply sign off without drilling down to discover what was concealed (which is what happened).").

Additionally, the trial court erred by treating repeated perjury (a criminal offence) by Soura as "a minor role in the overall story." Opinion *8-9; (DOB 28-30).

Plaintiffs' first rebuttal is that, contrary to the trial court's holding, "Soura did not commit perjury." (PAB 38; PAB 35 ("The trial court's discussions of credibility determinations … is a far cry from a determination of perjury").)

But this is just impermissible denial or reargument of the trial court's holding of Soura's repeated perjury. Opinion *8 ("Soura and Italia adamantly stick to their stories, but one of them is lying. The May 10 meeting was not Schrödinger's cat: either Soura gave Italia the Commitment Letter in Ilion, or he did not…. Soura's version of the day's events is both illogical and inconsistent. Thus, I cannot find that Soura gave Italia a printed copy of the Commitment Letter during the Ilion meeting."); (DOB 29).

Apparently giving up on its denial of perjury, Plaintiffs go on to argue the classic defense of "[e]ven assuming a false statement from Soura … it was irrelevant"; Italia "signed everything freely and voluntarily without once asking for the Commitment Letter." (PAB 36.) Plaintiffs also use a lot of whataboutism[5]

[5] Whataboutisms is "the act or practice of responding to an accusation of wrongdoing by claiming that an offense committed by another is similar or worse." https://www.merriam-webster.com/dictionary/whataboutism

regarding statements by Italia regarding actions not relevant to the validity of the Written Consent. (PAB 36-37 n.13&14.)

But Soura's repeated perjury was anything but "irrelevant" or a "minor" matter; it was, by Plaintiffs' own admission, the main issue in case:

> Your Honor, we submit, of course, that the only reason Mr. Italia was able to understand the commitment letter and what it entailed is because he had received it and reviewed it [in Ilion, NY on May 10, 2021] and understood its terms.

(DOB 28 (citing statements made by Plaintiffs' counsel to the trial court).) Tellingly, Plaintiffs never address this admission to the Court.

Plaintiffs deny that an "affirmance will 'condone perjury as a "minor" matter and will do damage to the trial court's reputation as a court of equity'" by stating that the case law Northern Gold cited "relates to circumstances far more egregious than any of the facts here." (PAB 37-38.)

That is an odd defense. One would be hard pressed to think of Plaintiffs seeking a remedy from the Court of Chancery by repeatedly lying to that court on the main issue of the case as somehow less "egregious" than a party denied relief from the Court of Chancery based on violations of discovery obligations, attempting to evade securities laws by seeking an annual meeting, or penny stock fraud. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (false evidence presented to a court "cannot complacently be tolerated consistent[] with the good

order of society"); *Figgie Int'l, Inc. v. Alderman*, 698 So. 2d 563, 567-68 (Fla. Dist. Ct. App. 1997) ("The ultimate sanctions of dismissal or default are justified by the repeated presentation of false testimony under oath which is ultimately uncovered by the assiduous efforts of opposing counsel."); *see also* DOB 28-29 (citing cases).

Perhaps an even odder defense is Plaintiffs' argument that even if Northern Gold did not validly authorize the dilutive terms of the undisclosed Commitment Letter, it should nevertheless be diluted because "SIFT Fixed [was] an [i]nnocent and [b]ona [f]ide [p]urchaser." (PAB 39-40.) As a threshold matter, the trial court made no such finding regarding SIFT Fixed, much less any claim of reliance. Furthermore, no such defense exists that would somehow bind Northern Gold to the invalidly approved dilutive issuance. *See Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994) (no vested contract rights obtained by third-party from "a board acting in violation of its fiduciary duties" or upon "the determination that the actions of the…Board were invalid"); *see also In re Loral Space & Commc'ns Inc*., 2008 WL 4293781, at *32 (Del. Ch. Sept. 19, 2008) (remedy for invalid issuance of dilutive stock is to convert it to non-voting stock such that "MHR will hold 57% of the total equity of Loral, but remain at its prior level of voting power (35.9%). It thus retains substantial value….").

Plaintiffs argue the February 2022 consent somehow "ratified" Plaintiffs' trickery, deceit and perjury. (PAB 24-25, 27, 47.) Not so. This consent is invalid for the same reasons the original Written Consent is invalid.

D. The Trial Court Reversibly Erred When It Held That REM OA Did Not Owe Fiduciary Duties To Northern Gold And That Even If It Did, It Did Not Breach Its Duty Of Disclosure.

Plaintiffs contend that the trial court did not err in holding, as a matter of law, that 50% member REM OA did not owe any fiduciary duties to its other 50% member Northern Gold. (PAB 25-29; *contra* DOB 30-32.) This argument is meritless and unprecedented.

It is undisputed that 50% member REM OA owed default fiduciary duties under the LLC Agreement. Opinion *22; (PAB 25). And the default is that 50/50 LLC members owe each other fiduciary duties, the same as in the 50/50 stockholder context. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 670-71 (Del. Ch. 2012) (court looks to fiduciary law applicable in corporation context to determine analogous default fiduciary duties in LLC context).

Importantly, neither Plaintiffs nor the trial court cite any case (and Northern Gold is aware of none) specifically holding, in direct contrast to 50/50 stockholders, that 50/50 members of an LLC do not owe each other fiduciary duties. This is not surprising given that Delaware law has long held that 50/50 stockholders in a corporation owe each other fiduciary duties. *See Wagamon v. Dolan*, 2013 WL

1023884, at *2 (Del. Ch. Mar. 15, 2013) ("In an equal 50–50 joint venture…each partner owes the other 'a fiduciary duty of utmost good faith, fairness and honesty with respect to their relationship to each other and to the enterprise.'"); *Fulk v. Washington Serv. Assocs., Inc.*, 2002 WL 1402273, at *11 (Del. Ch. June 21, 2002) (holding that 50/50 stockholders of the corporation owe each other fiduciary duties as joint venturers); *J. Leo Johnson, Inc. v. Carmer*, 156 A.2d 499, 502 (Del. 1959) ("The relationship of joint adventurers is fiduciary in character…."); *cf. Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.").

Plaintiffs argue that a 50% member is not a "controller" and thus owes no fiduciary duties. (PAB 26-27.) But Plaintiffs fail to distinguish the cases holding that stockholders owning far less than 50% are still considered controllers for purposes of owing fiduciary duties. (DOB 31.) Furthermore, Plaintiffs acknowledge that REM OA can "veto" any Company action and "prevent the Company from acting" (PAB 26), which is the same as control. *See Third Point LLC*, 2014 WL 1922029, at *21 (person or entity has "negative control" when it can veto or block corporate actions).

Plaintiffs then go on to argue that, "[e]ven if REM OA did owe fiduciary duties to Northern Gold, those duties were satisfied" because the Written Consent contained sufficient references to the Commitment Letter such that Northern Gold

was "on inquiry notice" and could have requested more information but chose not to do so. (PAB 27-28.) But the references in the Written Consent to the Commitment Letter and the $10 million financing do not satisfy REM OA's fiduciary duty to actually disclose (not just put on inquiry notice) the material fact that signing the Written Consent authorizes REM OA to dilute Northern Gold below 50%. *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at *13 (Del. Ch. Oct. 27, 2020) (fiduciary has obligation to disclose material information when asking for approval of a transaction; stockholder not on inquiry notice to "rummage through a company's prior public filings to obtain information that might be material"); *see also Arkansas Tchr. Ret. Sys. v. Alon USA Energy, Inc.*, 2019 WL 2714331, at *24 (Del. Ch. June 28, 2019) (same; "[d]isclosures are not supposed to take the form of a scavenger hunt" through public filings).

Relying on *Dohmen v. Goodman*, 234 A.3d 1161 (Del. 2020), Plaintiffs argue that Northern Gold could have refused to sign the Written Consent until it received additional information about the Commitment Letter, but chose not to. (PAB 28-29.) But *Dohmen* is inapplicable, because the Written Consent was not asking Northern Gold to enter into an individual transaction, but was seeking its authorization as a 50% member for the Company to enter into a financing transaction, with no disclosure that Northern Gold would be diluted below 50%. (DOB 31-32.)

Plaintiffs do not address, and therefore concede, that if REM OA breached its fiduciary duty of disclosure regarding the dilutive terms of the Commitment Letter when getting Northern Gold to sign the Written Consent, the Written Consent was not validly approved. (DOB 30 (citing *In Re Mindbody, Inc., Stockholder Litigation*, 2023 WL 2518149, at *32 (Del. Ch. Mar. 15, 2023) (disclosure deficiency negates claim that transaction was validly approved); *Sunder Energy, LLC v. Jackson*, 2023 WL 8166517, at *18-19 (Del. Ch. Nov. 22, 2023) (LLC Agreements not validly approved where managing members breached their duty of disclosure when seeking approval)).)

II. ALTERNATIVELY, EVEN IF THE WRITTEN CONSENT VALIDLY APPROVED THE TRANSACTION CONTEMPLATED BY THE COMMITMENT LETTER (AND IT DID NOT), THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE UNAMBIGUOUS TERMS OF THE COMMITMENT LETTER CONDITION THE ISSUANCE OF ANY WARRANTS UPON NORTHERN GOLD ENTERING AN AGREEMENT CONTAINING PRE-EMPTIVE RIGHTS, WHICH UNDISPUTEDLY NEVER HAPPENED.

The trial court erred as a matter of contract law by holding that the issuance of dilutive Warrants to SIFT Fixed was valid under the terms of the Commitment Letter even though the unambiguous terms of the Commitment Letter conditioned any such issuance upon Northern Gold entering into a pre-emptive rights agreement, and such condition undisputedly never occurred. (DOB 33-44.)

In their Answering Brief, Plaintiffs do not (because they cannot) cite any authority permitting the Court to deem a transaction valid despite failure to satisfy a material condition of the contract. Instead, Plaintiffs merely repeat the trial court's erroneous holdings that the Written Consent authorized Soura to exercise his sole discretion to execute a Warrant Agreement superseding the Commitment Letter – without Northern Gold's entry into a pre-emptive rights agreement. (PAB 41-47.)

Plaintiffs selectively quote language from the Written Consent to argue that Soura was permitted "to negotiate additional agreements to effectuate the SIFT transaction (including the Warrant Agreement) with whatever changes he deemed advantageous in his sole discretion." (PAB 41-42.) Plaintiffs ignore that the "sole discretion" refers to "agreements contemplated by the Commitment Letter" and does

not give Soura "sole discretion" to eliminate the preemptive rights provision in the Commitment Letter itself. (DOB 41.)

Further, Plaintiffs incorrectly and repeatedly assert that Soura had "sole discretion" to eliminate the preemptive rights in the Commitment Letter (PAB 41-42, 44 n.18, 45), notwithstanding that any discretion afforded to Soura is, by the plain language of the Written Consent, limited to changes he "deems in his sole discretion advantageous to the Company." (A0077 (emphasis added).)

Plaintiffs cannot side-step *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity*, 624 A.2d 1199 (Del. 1993) with a discussion of burdens for showing bad faith and reasonableness. (PAB 45-46.) Northern Gold presented facts demonstrating Soura's bad faith conduct in concocting and executing a transaction for the purpose of diluting Northern Gold,[6] but regardless of burden, the trial court failed to address good faith or reasonableness and instead erred by finding, "as a matter of law," that elimination of preemption rights was a valid exercise of Soura's discretion without regard to whether Soura ever considered, much less "deem[ed]"

[6] Plaintiffs' reliance on *Glaxo Group Limited v. DRIT LP*, 248 A.3d 911 (Del. 2021) (PAB 46 n.19) to excuse Soura from the obligation of good faith and fair dealing is misplaced. *Glaxo*, 248 A.3d at 918 ("[T]he implied covenant required…exercise [of] discretion…reasonably and in good faith."). As discussed in Argument Section I, *supra*, Soura's inequitable conduct to deprive Northern Gold of its 50% veto right cannot be described as "good faith" under any measure.

the elimination of preemption rights to be "advantageous to the Company." (A0077.)

Plaintiffs further argue that "Northern Gold confuses the *subject matter* of an agreement (*i.e.*, providing a $10 million loan in exchange for warrants) with the *details* of that agreement (such as the preemptive rights provision)" (PAB 44), but Northern God is not confused. Under the trial court and Plaintiffs' sweeping reasoning that the "subject matter" of the Warrant is "providing a $10 million loan in exchange for warrants[,]" the Warrant's integration clause would supersede all "details of that agreement" that are set forth in the other loan documents, including the "Promissory Note" stating the interest rate and repayment date, the "Unconditional Guaranty" between "the Company's wholly owned subsidiaries and SIFT Fixed," and the "Pledge and Security Agreement granting SIFT Fixed a security interest in its loan." Opinion *14 n.185. This makes no sense and demonstrates the patent unreasonableness of defining the "subject matter" of the Warrant to subsume the entirety of "the transaction contemplated by the Commitment Letter." Opinion *11. The Warrant Agreement cannot and does not relieve the Company's obligation to comply with the preemptive rights provision in the Commitment Letter. (DOB 38.)

Plaintiffs do not even attempt to distinguish the authorities cited in the Opinion and repeated on DOB 38, which hold a party to the terms of a contract. As

the trial court deemed Northern Gold bound by the Commitment letter, those same authorities require the Company to satisfy the Commitment Letter's preemptive rights provision.

Plaintiffs' attempt to distinguish this Court's decision in *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482 (Del. 2019), while ignoring other cases that also require good faith and fair dealing (DOB 43), misses the point. (PAB 43.) In any event, here, just as in *Oxbow*, the Members, if they are deemed to have authorized the transaction contemplated by the Commitment Letter, did so "subject to certain restrictions" including that all members, including Northern Gold, "*shall* enter into an agreement containing … Preemptive rights[.]" (DOB 35.) The use of the word "shall" leaves no room for Plaintiffs' suggestion that the preemptive rights provision is merely a "reference" that can be ignored by the parties. (PAB 43 & n.16.) It is undisputed that Northern Gold never entered into any such agreement; therefore, the transaction is invalid.

Northern Gold's argument does not "contain a flaw" as Plaintiffs argue. (PAB 43 n.17.) The trial court applied contractual principles to determine that Northern Gold authorized the transaction contemplated by the Commitment Letter, with knowledge of those terms imputed to Northern Gold. Opinion *20-21. Northern Gold rejects that holding as erroneous for the reasons explained in Section I, *supra,* but in the alternative, if Northern Gold is deemed to have authorized the

Commitment Letter's terms, the Company is not relieved of those terms on the basis that Northern Gold "could not have relied" on terms that it was deemed to have known. Plaintiffs cite no authority offering such relief. (PAB 43 n.17.)

Because a pre-emptive rights agreement was a material and key business term of the Commitment Letter, and cannot be ignored, the trial court erred as a matter of contract law when it held that Northern Gold authorized a transaction issuing warrants to SIFT Fixed in the absence of Northern Gold entering into a preemptive rights agreement.

CONCLUSION

For the foregoing reasons, Northern Gold respectfully requests that this Court reverse the judgment of the Court of Chancery and instruct the Court of Chancery to enter judgment holding that Northern Gold retains its 50% membership interest in the Company.

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CERTIFICATE OF SERVICE

I, M. Paige Valeski, Esquire, hereby certify that on March 20, 2024, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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