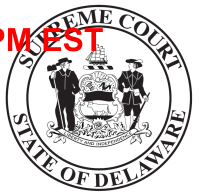
EFiled: Mar 05 2024 02:34PM EST
Filing ID 72245181
Case Number 49,2024



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RESTANCA, LLC, a Delaware limited liability company, on its own behalf and in its capacity as Sellers' Representative, and REBY, INC., a Delaware corporation, Plaintiffs Below, Appellants, v. HOUSE OF LITHIUM, LTD., a foreign corporation, Defendant Below, Appellee.	No. 49, 2024 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0690-PAF

APPELLANTS' CORRECTED OPENING BRIEF

Raymond J. DiCamillo (#3188)
Matthew D. Perri (#6066)
Andrew L. Milam (#6564)
Nicholas F. Mastria (#7085)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Counsel for Plaintiffs Below, Appellants Restanca, LLC and Reby, Inc.

Dated: March 5, 2024

TABLE OF CONTENTS

Page

TABLE OF CITATIONS iv

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 6

A. The Parties 6

B. The Parties Agree on the Terms of the Acquisition and SSAs 6

C. Relevant SSA Terms 7

D. Reby's Stockholders Execute the SSAs 8

E. HOL Executes the SSAs 9

F. The Parties Begin Performing Under the SSAs 13

G. HOL's Leadership Begins an All-Out Campaign to Avoid the SSAs 14

1. HOL's Leadership Understood the Deal Was Signed 14

2. HOL Manufactures Pretextual Reasons for Its Failure to Perform Fully 15

H. HOL Repudiates its Obligations and Threatens Bad-Faith Actions to Prevent the Closing 16

I. Reby and Restanca Sue 17

ARGUMENT 20

I. HOL is Required to Finish Closing Because HOL Sandbagged Reby's Stockholders 20

A. Question Presented....................20

B. Scope of Review....................20

C. Merits of the Argument....................20

II. The Trial Court Applied the Wrong Legal Standard and Misinterpreted the SSAs....................34

A. Question Presented....................34

B. Scope of Review....................34

C. Merits of the Argument....................34

1. The Trial Court Failed to Require a Material Breach to Excuse HOL's Performance....................34

2. Section 3.9 Cannot Prevent a Closing....................35

a. The Trial Court Misconstrued Section 3.9....................35

b. Section 3.9 was Materially Accurate....................37

3. Section 3.13 was Materially Accurate....................37

III. HOL Is Not Entitled to Attorneys' Fees Because It Did Not Prevail....................40

A. Question Presented....................40

B. Scope of Review....................40

C. Merits of the Argument....................40

CONCLUSION....................46

Exhibit A: Memorandum Opinion, June 30, 2023

Exhibit B: Order Addressing Applications for Attorneys' Fees and Expenses, December 8, 2023

Exhibit C: Final Order and Judgment, January 8, 2024

TABLE OF CITATIONS

Page(s)

CASES

2009 Caiola Fam. Tr. v. PWA, LLC,
2015 WL 6007596 (Del. Ch. Oct. 14, 2015) 41

AFH Hldg. & Advisory, LLC v. Emmaus Life Scis., Inc.,
2014 WL 1760935 (Del. Super. Ct. Apr. 16, 2014) 41, 43

Akorn, Inc. v. Fresenius Kabi AG,
2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724
(Del. 2018) (TABLE) 25, 26, 37, 38

Am. Healthcare Admin. Servs., Inc. v. Aizen,
285 A.3d 461 (Del. Ch. 2022) 33

Arwood v. AW Site Servs., LLC,
2022 WL 705841 (Del. Ch. Mar. 9, 2022), *reargument granted*, 2022
WL 973441 (Del. Ch. Mar. 31, 2022) 22, 23, 24, 25

Assocs. of San Lazaro v. San Lazaro Park Props.,
864 P.2d 111 (Colo. 1993)....................23, 27, 28

Brandin v. Gottlieb,
2000 WL 1005954 (Del. Ch. July 13, 2000) 41

CBS Inc. v. Ziff-Davis Publ'g Co.,
75 N.Y.2d 496 (N.Y. 1990) 31

Cobalt Operating, LLC v. James Crystal Enters., LLC,
2007 WL 2142926 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594
(Del. 2008) (TABLE) 22, 26

Comrie v. Enterasys Networks, Inc.,
2004 WL 936505 (Del. Ch. Apr. 27, 2004)....................42

E.I. du Pont de Nemours & Co. v. Shell Oil Co.,
498 A.2d 1108 (Del. 1985) 36

Eagle Force Hldgs., LLC v. Campbell,
187 A.3d 1209 (Del. 2018) 21, 23

eCommerce Indus., Inc. v. MWA Intel., Inc.,
2013 WL 5621678 (Del. Ch. Sept. 30, 2013)..41

Galli v. Metz,
973 F.2d 145 (2d Cir. 1992) 22, 31

GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.,
36 A.3d 776 (Del. 2012)...34, 40

Gottlieb v. Heyden Chem. Corp.,
90 A.2d 660 (Del. 1952)...29

Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC,
2009 WL 1111179 (Del. Ch. Apr. 27, 2009)...41, 43

KT4 P'rs LLC v. Palantir Techs. Inc.,
203 A.3d 738 (Del. 2019)..20

Land v. Roper Corp.,
531 F.2d 445 (10th Cir. 1976) 23

Manti Hldgs., LLC v. Authentix Acq. Co.,
261 A.3d 1199 (Del. 2021)..36

Mrs. Fields Brand, Inc. v. Interbake Foods LLC,
2018 WL 300454 (Del. Ch. Jan. 5, 2018)..41

Osborn ex rel. Osborn v. Kemp,
991 A.2d 1153 (Del. 2010)..29

Rogath v. Siebenmann,
129 F.3d 261 (2d Cir. 1997) 31, 32

VH5 Cap., LLC v. Rabe,
2023 WL 4305827 (Del. Ch. June 30, 2023)..43

OTHER AUTHORITIES

Brandon Cole, *Knowledge Is Not Necessarily Power: Sandbagging in New York M&A Transactions* 21

Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*...23, 24, 27, 30

Jacek Jastrzebski, *"Sandbagging" and the Distinction Between Warranty Clauses and Contractual Indemnities*...21

NATURE OF PROCEEDINGS

Plaintiffs-Below/Appellants Restanca, LLC ("Restanca") and Reby, Inc. ("Reby," and with Restanca, "Plaintiffs") proved the existence of an enforceable contract between them and House of Lithium, Ltd. ("HOL") for HOL's acquisition of Reby. Plaintiffs also disproved HOL's fabricated story that Reby's Chairman, Josep "Pep" Gomez, promised that he would not enforce the agreement. HOL was lying, and after examining the evidence, the trial court saw through it.

The truth is indisputable: the parties agreed to a sale of Reby's shares to HOL, and HOL failed to perform.

The trial court declined, however, to provide any relief. The court found that two representations in the transaction agreement were inaccurate. The first representation concerned the Shares held by the selling stockholders and Reby's outstanding capital stock, A931, § 3.9 ("Other than the Shares, there are no issued, outstanding or authorized securities of the Company."), and the second stated that certain financial statements of Reby's operating subsidiary were audited in accordance with specific standards, A932, § 3.13.[1]

[1] The transaction was organized so that individual Reby stockholders would each sign a Secondary Sale Agreement ("SSA" or collectively, "SSAs"), which were bundled and signed by the sellers' representative, Restanca, and HOL as the buyer. A927-2923. While Section 1.2 of each SSA, which concerned consideration, was different among the SSAs, with Reby stockholders receiving cash, stock, or a combination of the two in varying amounts, each SSA was otherwise the same. Ex.

It was undisputed at the trial court that HOL knew about those precise inaccuracies when it signed the SSAs. The court found that HOL's knowledge was irrelevant and declared Delaware a "pro-sandbagging" jurisdiction—thus allowing a sophisticated buyer with actual knowledge, pre-signing, of an inaccurate representation to avoid performing an otherwise binding contract and avoid any remedy, including where (as here) the buyer had begun to perform. This is bad policy and has never been endorsed by this Court. Delaware should not permit a buyer to sign an agreement it knows only it can enforce and refuse to close (or finish closing) on a manufactured basis. This Court should reverse and adopt a rule to promote the risk-allocation role of contracts, prevent innocent counterparties from being saddled with free options and illusory contracts, and not reward bad-faith buyers.

The trial court also misinterpreted the SSAs and applied the wrong legal standard. For the representation concerning the selling stockholders' Shares, the court adopted an interpretation for which neither party advocated. And notwithstanding HOL's concession that it needed to prove a material breach to avoid closing, the court excused HOL from performing without finding a prior material breach.

A at 18. Capitalized terms not defined herein take the meaning given to them in the SSAs.

Adding insult to injury, the trial court shifted fees against Plaintiffs under a prevailing-party provision in the SSAs, even though HOL lost on essentially every issue that necessitated a trial. Specifically, HOL unsuccessfully asserted a fact-based fraud defense and counterclaim based on a fictitious narrative that Gomez fraudulently induced HOL to sign the SSAs. At great expense, Plaintiffs disproved HOL's lies, the main factual focus of the litigation, and proved the contract was valid, the main legal focus of the litigation. These were the chief issues in the parties' briefing and trial presentations. That HOL prevailed on two narrow issues which the court found precluded specific performance—while losing on nearly all its counterclaims and obtaining no remedy for itself—does not mean it prevailed. The fee order should be reversed.

SUMMARY OF ARGUMENT

I. HOL is required to close. HOL should not be permitted to sandbag Reby's stockholders and get out of the deal based on technical breaches of representations it knew were inaccurate when it signed. When it executed the contract and when it subsequently began to close, HOL knew that two small Reby stockholders (amounting to approximately 1% of outstanding shares) had not signed an SSA and that the financial statements it received were not audited in accordance with the standards specified in the SSAs (IFRS) but instead were audited pursuant to a different standard (GAAP). Despite these facts, the court found that HOL's actual knowledge was irrelevant and that HOL did not need to complete performance because Delaware is a pro-sandbagging jurisdiction. As far as Plaintiffs are aware, no United States court has allowed a contracting party to avoid its obligations in these circumstances. This result (a) undermines the risk-allocation function that warranties serve because sellers will be less willing to warrant facts that buyers could use to sandbag later, (b) promotes unfair negotiating tactics, (c) creates free options without consideration, and (d) renders enforceable contracts illusory.

II. The trial court should be reversed because it misinterpreted the SSAs and applied the wrong standard. The trial court misinterpreted the representation in Section 3.9 of the SSAs by adopting a construction for which neither party advocated. Moreover, Section 3.29 of the SSAs imposed a materiality qualifier on

all representations. And in its post-trial briefing, HOL conceded that it needed to show a material breach by Plaintiffs to excuse its performance. Instead of applying this agreed-upon standard, the court excused HOL's performance based on two technical breaches. Plaintiffs materially complied with Sections 3.9 and 3.13 of the SSAs, and the trial court never found otherwise. HOL's performance should not be excused on the basis of immaterial breaches.

III. Finally, the trial court erred by finding that HOL was the prevailing party and awarding HOL its attorneys' fees. Plaintiffs won on every factual issue at trial and proved that an enforceable contract exists. That HOL succeeded on two narrow legal issues post-trial does not render it the prevailing party.

STATEMENT OF FACTS

A. The Parties

Plaintiff Reby is a Delaware corporation with its principal place of business in Spain. Ex. A at 2. Through its European operating subsidiaries, Reby built a business that developed and deployed micromobility vehicles (electric scooters and bicycles) for travel around cities. *Id*.

SOL Global Investments Corp. ("SOL"), a Canadian private equity firm, first invested in Reby in early 2021. *Id.* at 3. SOL invested after Gomez met with SOL's then-CEO and Chairman and largest stockholder, Andy DeFrancesco. *Id.* at 4; A332, Tr. at 14; A507, Tr. at 712. SOL held its Reby investment through its subsidiary, HOL, and as of late 2021, HOL owned approximately 16.67% of Reby's shares. Ex. A at 3. HOL signed the SSAs. *Id.* at 61-62.

Plaintiff Restanca, another large minority stockholder (with Gomez as its principal), owned approximately 20% of Reby's shares. *Id.* at 2-3. Restanca is the designated "Sellers' Representative" in the SSAs and, together with Reby, brought the underlying action on behalf of themselves and all other Sellers. A928, § 1.3(a); A941, § 7.5; A2939; *see also* Ex. A at 36, 73.

B. The Parties Agree on the Terms of the Acquisition and SSAs

In the summer of 2021, SOL expressed interest in acquiring the outstanding Reby shares it did not own. Ex. A at 4. Negotiations over a potential acquisition continued over several months, primarily between Gomez and DeFrancesco, and

those negotiations intensified after SOL increased its equity stake in Reby in November 2021 and moved those assets to HOL. *Id.* at 4-15.

In December 2021, HOL and Reby entered into the first of three term sheets. This first term sheet outlined the process for HOL to acquire Reby. *Id.* at 5. The term sheets contemplated that HOL would eventually be listed on a stock exchange following a public offering. *See id.* at 5, 10-13. Ultimately, the transaction was never conditioned on HOL's listing as a public company, and no public offering occurred. *Id.* at 64-69.

In March 2022, HOL and Reby entered into the final term sheet. *Id.* at 10. That term sheet provided that the transaction would be consummated by executing "one or more stock purchase agreements with the stockholders of the Company in substantially the form attached hereto as Exhibit A." A884, § 2; *see also* Ex. A at 10. Exhibit A was the form of the SSA, which would be executed by Reby's selling stockholders and then bundled and executed in bulk by HOL, Reby, and Restanca. A887-909. The aggregate consideration was $40 million in cash plus $45 million in equity. Ex. A at 11.

C. Relevant SSA Terms

The SSAs contain two representations pertinent to this appeal. In Section 3.9, Restanca represented that "[o]ther than the Shares, there are no issued, outstanding or authorized securities of the Company." A931, § 3.9. "Shares" is defined in each

SSA as "all of Seller's shares of capital stock of the Company owned by such Seller," and "Seller" is defined by reference to "the undersigned persons." A927.

The second representation at issue is Section 3.13, in which Restanca represented that "[f]inal audited financial statements for Reby Rides S.L. … for the years ended December 31, 2019 and December 31, 2020, (collectively, the 'Financial Statements') have been provided to the Buyer." A932, § 3.13. The representation further specified that the Financial Statements "have been prepared in accordance with IFRS [International Financial Reporting Standards] and present fairly" certain financial information. *Id.*; *see also* Ex. A at 8.

All representations and warranties by Restanca were subject to a materiality qualifier stating that "[n]o representation or warranty" by Restanca "contains any untrue statement of material fact or omits to state a material fact necessary to make those statements, in light of the circumstances in which they were made, not misleading." A935, § 3.29. And under Section 5.1, the truth of these representations as of signing and closing were among the conditions to be satisfied on or before the closing. *See* A939-40, § 5.1(b).

D. Reby's Stockholders Execute the SSAs

After the final term sheet was signed, Gomez sent an email to HOL's counsel, copying HOL personnel, stating he would "start circulating and gathering signatures from [Reby's] shareholders" on the SSA. Ex. A at 14; *see also* A910. HOL did not

object; DeFrancesco and HOL's counsel believed gathering signatures at that point was prudent given the number of Reby stockholders. Ex. A at 14.

By the end of April, nearly all of Reby's stockholders had executed their respective SSAs; collectively, their shares combined with HOL's existing interest amounted to approximately 99% of Reby's shares. A3094.

E. HOL Executes the SSAs

While Gomez was working on obtaining signatures, SOL and HOL were forced to make a leadership change. On April 25, 2022, DeFrancesco was removed from his positions at SOL and HOL because he was being investigated for federal securities laws violations, though he remained SOL's largest stockholder.[2] Ex. A at 4, 15; *see also* A507, Tr. at 712.

Kevin Taylor immediately replaced DeFrancesco as SOL's CEO and Chairman. Ex. A at 15-16. DeFrancesco agreed to serve as an advisor to Taylor, and DeFrancesco continued to advise Taylor regarding Reby at least through trial. *Id.* at 16; A507, Tr. at 711.

During this same time period, "HOL and its counsel were concerned that Reby had not yet provided IFRS audited financial statements for Reby," thus showing they knew the representation in Section 3.13 of the SSAs was inaccurate. Ex. A at 13.

---

[2] In January 2023, the SEC filed a complaint against DeFrancesco for violations of securities laws. Ex. A at 15 n.75.

"On April 29, 2022, Gomez informed Taylor that all but two of Reby's stockholders had signed SSAs." *Id.* at 17. In his message, Gomez explained the process for signing the SSAs:

> KT, for signing the Reby deal we will create a single bundle with all the SPAs (100 SPAs approx) and one signature page at the end that we will use. That way, since its all bundled you don't have to sign 100 times.
>
> We are only missing Mauricio [Diaz's] signature (trying to figure out with Andy and you what we do, let's chat when you can) and then one ex-employee with like 50 shares that we're not able to track her down. Rest is finished on the signed and agreed SPA.

Id. at 17-18. "Mauricio Diaz, the individual who connected Reby with HOL, refused to sign an SSA transferring his Reby shares to HOL due to business issues with HOL." *Id.* at 17 n.86. Diaz was "among those accused of securities fraud in January 2023 along with DeFrancesco." *Id.* at 18 n.87.

The following day, Gomez informed Taylor that the bundle of SSAs had been sent, and he asked Taylor to sign. *Id.* at 19. HOL requested last-minute changes. *See id.* at 20-22. One such request would have given HOL the right to walk away from the deal in certain circumstances. *Id.* at 20-22, 52. Gomez declined and insisted that the parties sign the SSAs as-is. *Id.*

Following these last-minute negotiations, Taylor thoroughly consulted with counsel, HOL's Chief Financial Officer, and DeFrancesco and had a conversation with Gomez. *Id.* at 22-25, 52. After those discussions, and aware that not all Reby

stockholders had signed SSAs and that Reby had provided GAAP-audited (not IFRS-audited) financial statements, Taylor executed the SSAs on HOL's behalf the evening of April 30. *Id.* at 25.

Later, Taylor claimed that he agreed to sign the SSAs only after receiving assurances from Gomez that Gomez would not seek to enforce the SSAs as drafted; Taylor claimed that Gomez told him the signature was only to pacify Reby's investors. *Id.* at 25, 54-56. Gomez, truthfully, denied that he ever said he would not enforce the SSAs. *Id.*

Having observed Gomez's and Taylor's credibility at trial, the trial court found Taylor's testimony on these points was not credible and rejected HOL's fraudulent-inducement claim. The court found that "Taylor's testimony was at times internally inconsistent and is contradicted by his later actions" and that his "initial recollection of the circumstances surrounding his April 30 calls with Gomez was admittedly faulty." *Id.* at 54. Indeed, Taylor testified at his deposition that he had those conversations with Gomez while he was in Florida, that they occurred around midnight when he was "obviously in bed," and that he signed the SSAs around midnight Eastern Time. A47, Taylor Dep. at 171; A3000; *see also* Ex. A at 54-55. Taylor even suggested he was roused from sleep when the phone began to "ring profusely." A47, Taylor Dep. at 171. Taylor was later forced to recant his false testimony because "evidence showed that he was in Oregon on that day," Ex. A at

54, and in fact signed the SSAs just before 9:14 p.m. Pacific Time, *id.* at 25. Taylor thus did not sign the SSAs late at night in bed when he was tired. The evidence also showed that he had been on multiple calls beforehand, including a 40-minute call with HOL's counsel about the SSAs. *Id.* at 22-25, 52. In addition to discrediting his testimony, the court found that "Taylor was an experienced and informed participant, having done many M&A transactions over the course of his career" and "was aware of the force of his actions—that signing a contract would make its terms binding." *Id.* at 52-53.

HOL's contemporaneous actions also show that Taylor's testimony and HOL's fraud claim were fabricated. *See id.* at 56. Early on May 1, the day after Taylor signed the SSAs, Gomez sent the signed SSAs with Taylor's signature to the SOL team. *Id.* at 26. Gomez's email with the signed SSAs was then forwarded internally to HOL's in-house counsel. *Id.* at 26 n.135. No one mentioned that anyone considered the signed agreement to be non-binding or unenforceable. *Id.*

The court ultimately concluded that "Gomez's version of events, where he reassured Taylor that the parties would work together but did not go as far as to promise that the agreement would not be enforced, is more credible." *Id.* at 55. These factual findings are amply supported by the record.

F. The Parties Begin Performing Under the SSAs

Following HOL's execution of the SSAs, the parties began performing their agreement. On May 4, HOL wired $1 million pursuant to the SSAs. *Id.* at 26-27. HOL's deal counsel understood this to be a partial payment under the SSAs. *Id.* at 27. Weeks later, Taylor promised additional payments were forthcoming. *Id.* at 33.

About one week later, Gomez sent Taylor a corrected SSA for Restanca because the original SSA Restanca signed inaccurately reflected the consideration to be paid to Restanca. *Id.* at 27. Taylor signed the revised SSA later that day without suggesting the deal was unenforceable. *Id.* at 28.

During this same period, Gomez, HOL, and SOL's public-relations consultant cooperated to issue a press release. *Id.* at 28-30. Taylor and HOL's CFO were copied on the relevant communications; neither objected to its publication. *Id.* The release was published on May 10. *Id.* at 29. Taylor shared the link to the article internally at HOL. *Id.* at 30. As of post-trial argument, the article was still available online without correction. *Id.*

Two days after the press release, the formal transfer of stock certificates to HOL was underway. Stock certificates representing the Reby shares being purchased in the transaction were loaded onto an online share-management system called "Carta." *Id.* Reby then directed Carta to send emails to SOL's CFO, reflecting the transfer of shares to HOL. *Id.* To effectuate transfer in Carta, the

recipient must manually click "accept" and type in his or her name and e-signature for each certificate being transferred. *Id.* SOL's CFO forwarded the Carta emails to a senior associate at SOL, Richard Waxman, and directed him to accept them. *Id.* at 30-31. Waxman, who "heard" that the deal had "closed," complied. *Id.* at 31 & n.167.

Waxman logged in, accepted, and **manually signed** on HOL's behalf **119** individual Reby stock certificates sent through Carta, amounting to approximately 45% of the selling stockholders' total shares. *Id.* at 31. With its existing interest, the transfer of these shares gave HOL majority control and ownership over Reby. *See id.* at 3, 31; A451-52, at Tr. 491-92; A3012-73; A3094.

G. HOL's Leadership Begins an All-Out Campaign to Avoid the SSAs

1. HOL's Leadership Understood the Deal Was Signed

While DeFrancesco was adamant he wanted to pursue the Reby transaction, some HOL personnel harbored questions about HOL's financial capacity to do so. *See, e.g.*, A3075-77. Taylor texted SOL's CFO hours before Taylor signed the SSAs: "F*** me. What the hell did I/we get myself/ourselves into." Ex. A at 23. At that time, Taylor understood that HOL would "need to put a plan in place to raise additional funds or liquidate assets to meet [its] payment obligations … to Reby." A509-10.

2. HOL Manufactures Pretextual Reasons for Its Failure to Perform Fully

Within weeks of signing the SSAs, Taylor and HOL began to raise pretextual due-diligence concerns and pressed Gomez for information about Reby in an attempt to manufacture a basis to avoid its binding obligation. Ex. A at 31-36.

For example, in a May 18 text thread, an SOL representative asked Taylor if HOL was "now actively trying to get out of the deal." A2925. The next day, Taylor messaged SOL's CFO, confirming that he planned to withhold further payments to Reby. A2927. The SSAs did not include any closing condition contingent on further diligence. Indeed, HOL represented that it had received satisfactory diligence on "all matters" and satisfactory answers to "all … questions" that HOL deemed "material to its investment decision." A935, § 4.3.

On May 18, after HOL delivered its diligence questions, Gomez responded to confirm that the requested materials were in aid of HOL's go-public plan, not a precondition of closing the transaction. Ex. A at 31-32. Taylor assured Gomez the information was "required in order for [HOL] to immediately begin engaging the lawyers and regulators as it relates to the pending RTO." *Id.* at 32. This statement was false. Shortly thereafter, HOL repudiated its obligation to pay the remainder of the consideration, informing Reby in late May that it would not make further payments. *Id.* at 34 & n.185.

In the meantime, HOL executives continued privately to acknowledge that they had a deal but "HOL was desperate to find any excuse to get out of the deal." *Id.* at 35. On June 12, DeFrancesco laid HOL's intentions bare: "[Gomez] … will re-trade the deal or we will bury him—I don't care." *Id.* at 47 n.217.

HOL retained a forensic accounting firm to scour Reby's financials. *Id.* at 36. On July 10, after receiving Reby's latest financials, Taylor forwarded them to Waxman and wrote: "Latest financials from [Gomez]. … Need a kill shot or I may kill him … ." *Id.* at 35. The next day, Taylor wrote to the accounting firm: "The goal is to negotiate our way out of this transaction so anything will help." A2928; *see also* Ex. A at 36.

H. HOL Repudiates its Obligations and Threatens Bad-Faith Actions to Prevent the Closing

HOL has paid only $3 million of the total $40 million cash consideration it promised to the selling stockholders: $2 million paid pursuant to the March 2022 term sheet and the $1 million Taylor instructed HOL's counsel to wire on May 4, 2022. Ex. A at 12, 26.

To avoid paying what it owes, HOL concocted a story that Gomez promised not to enforce the SSAs. *Id.* at 54-56. HOL first lied about this non-existent promise on August 26, 2022, in its counterclaims, four months after Taylor signed the SSAs. *See* A2994-96; A3003-06. Then, Taylor went so far as to testify falsely at trial by

stating that Gomez made such a promise. Ex. A at 54-55. The court correctly saw through these fabrications.

But Reby—a vulnerable start-up company—has suffered severe, existential harm from HOL's continuing breaches, which have pushed Reby to the brink of bankruptcy. Reby had no ability to raise capital and lost key personnel in the wake of HOL's refusal to perform. *See, e.g.*, A347, Tr. at 75-76; A355-56, Tr. at 107-112; A400, Tr. at 285-286; A3128-32.

HOL's refusal to close also deprived the selling stockholders of the consideration to which they are entitled and has exposed them to investment risks that they believed they had already transferred to HOL under the SSAs. A3091.

I. Reby and Restanca Sue

Plaintiffs initiated this action in August 2022 for breach of contract, specific performance of the SSAs, and related claims. Ex. A at 36. The parties agreed to expedite the proceedings and set trial for early December 2022. *Id.* HOL asserted counterclaims for fraudulent inducement against Plaintiffs and Gomez individually, unjust enrichment against Reby, and breach of contract and declaratory judgment against Plaintiffs. *Id.*

A three-day trial occurred in December 2022. Plaintiffs argued that the SSAs were enforceable contracts and that HOL should be forced to close or, alternatively, pay damages. *See id.* at 38. HOL's primary argument was that the SSAs were not

enforceable contracts because HOL did not intend to be bound and the terms of the SSAs were not sufficiently definite. *See id.* at 48-49. HOL also contended that the SSAs were voidable on the basis that Plaintiffs (and Gomez) fraudulently induced HOL to sign the SSAs with a promise that they would not enforce the agreement. *Id.* at 69. Alternatively, HOL argued that it should not be required to perform the SSAs because Plaintiffs allegedly materially breached them. A604-07; A740-46.

The trial court issued its Memorandum Opinion on June 30, 2023. *See* Ex. A. The court rejected HOL's main arguments, determining that "the parties formed an enforceable contract." *Id.* at 38. The court further rejected HOL's fraud claim and its defense of unclean hands, finding that Taylor's testimony was not credible, was internally inconsistent, and was contradicted by his actions. *Id.* at 54-56, 69-70.

The trial court held, however, that a closing condition was not satisfied—notably not based on a material breach as HOL had conceded was necessary—and thus refused to require HOL to finish performing the SSAs. While it found that the parties had an enforceable contract, the court held that two representations—Sections 3.9 and 3.13—were not perfectly accurate. *Id.* at 71-89.[3]

By ruling in this manner, the court excused HOL from performing on the basis of representations that HOL knew were immaterially inaccurate at the time it entered

[3] HOL asserted that numerous other representations were also inaccurate. The court rejected these arguments. *Id.* at 89-92.

into the deal, effectively giving HOL (and only HOL) a free option, exercisable at any time, to decide whether to continue with the deal. *Id.* at 84-88. The court's decision rewarded HOL—a sandbagging buyer—for its bad conduct and punished Reby's innocent stockholders. *Id.* It relied upon Delaware being a pro-sandbagging jurisdiction. *Id.*

The parties subsequently submitted competing applications for attorneys' fees under the SSAs' prevailing-party provision, which specifies that "the non-prevailing party or parties named in such legal proceedings [to enforce rights under the SSAs] shall pay all costs and expenses incurred by the prevailing party or parties, including … all reasonable attorneys' fees." A942, § 7.13; *see also* A827-55. Plaintiffs contended they prevailed because HOL's baseless allegations of fraud proved false and, except for two out of the five contested representations, they won on every issue at trial—including every factual dispute. A847-52. Despite these facts, the court found that the "chief issue was whether Plaintiffs were entitled to an order for specific performance or damages" and because HOL won on that single issue, despite losing on everything else, HOL prevailed. Ex. B at 7. The trial court thus awarded HOL over $2.7 million in attorneys' fees and expenses.

The court entered a Final Order and Judgment on January 8, 2024. Ex. C. Plaintiffs timely appealed.

ARGUMENT

I. HOL IS REQUIRED TO FINISH CLOSING BECAUSE HOL SANDBAGGED REBY'S STOCKHOLDERS

A. Question Presented

Whether the trial court erred by holding that a buyer may avoid its obligations to finish closing under a contract due to immaterial inaccuracies in representations or warranties that the buyer knew were inaccurate when it executed the contract. This issue was preserved at: A319-20; A682; A684-85; A809; A811; *see also* Ex. A at 84-89.

B. Scope of Review

Questions of law are reviewed *de novo*. *KT4 P'rs LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 748-49 (Del. 2019).

C. Merits of the Argument

The trial court's opinion is the first opinion in Delaware—and appears to be the first in any jurisdiction—determining that the doctrine of sandbagging could allow a buyer with actual pre-signing knowledge that certain representations and warranties in the contract were immaterially inaccurate at the time of signing partially to perform and then walk away from the deal. No one, including HOL before the litigation efforts, believed the SSAs were unenforceable because of the representations. The trial court erred by leaving Reby's stockholders with an "enforceable" but illusory contract.

The trial court concluded two representations, Sections 3.9 and 3.13, were not perfectly accurate at signing. HOL has never disputed that it knew when it executed the SSAs that two Reby stockholders had not signed SSAs (contrary to Section 3.9, as interpreted by the trial court). Ex. A at 17-25; A741. HOL likewise has never disputed that it knew at signing that Reby provided GAAP-audited financial statements (not IFRS-audited statements, contrary to Section 3.13). A742; *see also* Ex. A at 13. Rather than order specific performance consistent with the parties' understanding, the trial court declared Delaware a "pro-sandbagging jurisdiction" and decided that HOL's pre-signing actual knowledge was irrelevant to whether HOL is obligated to finish closing.

Sandbagging is the practice in which a buyer seeks *post-closing damages* for breaches of a representation and warranty it knew or should have known was false. Brandon Cole, *Knowledge Is Not Necessarily Power: Sandbagging in New York M&A Transactions*, 42 J. CORP. L. 445, 446 (2016). In that situation, courts are divided regarding what default rule most appropriately reflects the commercial risk-allocation function of contracting. Delaware is not or should not be a "pro-sandbagging jurisdiction," but sweeping proclamations are unnecessary here.[4]

[4] Delaware law on sandbagging is unresolved by this Court. *See Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1236 n.185 (Del. 2018). Were this Court to determine that Delaware is anti-sandbagging, it would join several other states and jurisdictions (including Canada and most of Europe) that recognize the unfairness of sandbagging. Jacek Jastrzebski, *"Sandbagging" and the Distinction*

Plaintiffs have not identified any case, and neither the trial court nor HOL cited any case below, applying sandbagging to allow a buyer to avoid closing when it had pre-signing knowledge that a representation was false. All sandbagging cases to date address post-closing damages claims and many involve uncertainty regarding whether the buyer had actual knowledge or when it obtained such knowledge (*i.e.*, post-signing). None of those issues are present here. A buyer with actual pre-signing knowledge that a representation is inaccurate should not be able later to use that inaccurate representation as a pretext to avoid its obligations.

Of course, the reasoning of post-closing sandbagging cases may be informative even in this as-yet-unaddressed situation. Courts attempting to grapple with default rules on sandbagging focus primarily on three issues. First, some courts focus on allocating risk among the contractual counterparties. *See Arwood v. AW Site Servs., LLC*, 2022 WL 705841, at *30 (Del. Ch. Mar. 9, 2022), *reargument granted*, 2022 WL 973441 (Del. Ch. Mar. 31, 2022); *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *28 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE). Second, some jurisdictions hold that a buyer waives any claims for breach when that party has actual knowledge that a warranty or condition is false but chooses to sign or close nevertheless. *See Galli v.*

Between Warranty Clauses and Contractual Indemnities, 19 U.C. DAVIS BUS. L.J. 207, 213, 218 (2019).

Metz, 973 F.2d 145, 151 (2d Cir. 1992). Third, at common law, to prove a breach of contract a party must show reliance, and a buyer cannot reasonably rely on a warranty that it knew was false at signing. Thus, sandbagging cases in certain jurisdictions turn on reliance. *See Land v. Roper Corp.*, 531 F.2d 445, 448-49 (10th Cir. 1976); *Assocs. of San Lazaro v. San Lazaro Park Props.*, 864 P.2d 111, 114-15 (Colo. 1993); *see also Eagle Force*, 187 A.3d at 1247 & n.39 (Strine, C.J., concurring in part, dissenting in part) ("[A] party who signs a contract with knowledge that a representation is false may not later claim reliance on it [and sue for damages]." (citing *Clough v. Cook*, 87 A. 1017, 1018 (Del. Ch. 1913))); Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 36 DEL. J. CORP. L. 1081, 1108-14 (2011) (citing cases). Each rationale supports a rule in Delaware that requires HOL to finish closing under the SSAs.

The risk allocation rationale is the primary rationale discussed in prior Delaware cases. In endorsing sandbagging, the court below relied on two trial court opinions that approved sandbagging in Delaware. *See* Ex. A at 85-86. But these cases are inapposite or incorrect to the extent they condone sandbagging as permissible in all circumstances. Neither case addresses a situation in which the parties knew the representation was false at signing.

The first, *Arwood v. AW Site Services, LLC*, declared that "Delaware is, or should be, a pro-sandbagging jurisdiction." 2022 WL 705841, at *3. There, plaintiff

sellers brought post-closing claims against defendant purchasers for, among other things, failing to release escrowed consideration for a purchase of waste disposal businesses; the purchasers asserted counterclaims for fraud and breach of contract for damages. *Id.* at *1-2. The purchasers refused to release the consideration because the sellers allegedly engaged in misleading pricing practices before closing and failed to produce accurate financial records, which purportedly violated the purchase agreement's warranties. *Id.* at *12-13. The sellers attempted to demonstrate that the purchasers should have known of the falsity of the warranties pre-closing through the documents produced in due diligence. The court rejected these arguments and held "representations and warranties serve an important risk allocation function." *Id.* at *29-30; *see also id.* at *31 (reasoning "[w]hen parties choose not to (or fail to) allocate the risk of sandbagging in their contract, the buyer may rest on its reasonable belief that it has acquired as part of the transaction the seller's implicit promise to be truthful in its representations").[5]

Arwood, however, is distinguishable, and its determination regarding sandbagging is dicta. First, the court found that the purchasers did not have actual

[5] The court's comment that parties may bargain around this default rule by negotiating for an anti-sandbagging provision is impractical. *See* Whitehead, *supra*, at 1088 ("For the buyer, it may be difficult to correlate an increase in value with an agreement to waive a sandbagging right. For the seller, urging buyers to contract around a pro-sandbagging rule is contrary to its goal of demonstrating that buyers can credibly rely on the contract's warranties. The compromise, therefore, is often silence ....").

knowledge of the falsity of the warranties at issue. *Arwood* therefore merely found that anything less than actual knowledge is insufficient to trigger sandbagging. *Id.* at *31-32. Second, the purchase agreement in *Arwood* contained a pro-sandbagging clause. *Id.* at *29. The court unnecessarily went on to find that Delaware's common law would yield the same result as the contract. Thus, in *Arwood*, unlike here, (1) the claims were for post-closing damages, not for specific performance; (2) the buyer did not have actual knowledge that the representations were inaccurate; and (3) the contract expressly permitted sandbagging.

Both the trial court here and *Arwood* relied on a second case, *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (TABLE). In *Akorn*, the plaintiff seller sought specific performance to close a merger after the defendant purchasers terminated the merger agreement for various purportedly unsatisfied closing conditions and warranties. *Id.* at *2-3. One of the unsatisfied conditions was a failure to comply with all regulatory rules due to the target company's data integrity issues. The seller argued that the buyer could not rely on this representation because the buyer knew about the potential issues when signing the contract. *Id.* at *76. The court found that the buyers properly terminated the merger agreement despite potentially having knowledge of possible regulatory issues. *Id.* at *80-81. Ultimately, the court found that—unlike HOL

here—the buyer did not have actual knowledge and did not need to prove reliance to refuse to close. *Id.* at *81.

Plaintiffs do not disagree that the Court of Chancery in *Arwood* and *Akorn* properly focused on allocation of risk. A pro-sandbagging rule, however, undermines the risk-allocation policy when a buyer actually knows of the inaccuracy in the representations but signs anyway. The purpose of contractual representations and warranties is to allocate risks relating to due diligence; their purpose is not to give one party the ability to avoid *all* risk. *See Cobalt Operating*, 2007 WL 2142926, at *28 ("[R]epresentations like the ones made in the Asset Purchase Agreement serve an important risk allocation function…. [The buyers'] need then, as a practical business matter, *to independently verify those things was lessened* because it had the assurance of legal recourse against Crystal in the event the representations turned out to be false." (emphasis added)); *Akorn*, 2018 WL 4719347, at *76 (same). By agreeing to a warranty or condition, a buyer has purchased the ability not to conduct due diligence into a particular topic. If a buyer knows that a warranty is false prior to signing, the allocation-of-risk policy is advanced because the buyer learned the relevant information without needing to perform due diligence. And because the buyer already knows about the inaccuracy, that risk has not been allocated to the seller. Therefore, what a buyer purchases is limiting due diligence, not the ability to sandbag. By contrast, sellers will be less likely to warrant facts if a buyer can

sandbag, lest those facts be later found to be less than 100% accurate. This situation will lead to less contractual risk allocation generally.

A pro-sandbagging rule in this context also fails to reflect commercial reality. Bargaining for a warranty, without also obtaining a pro-sandbagging provision, does not necessarily indicate the buyer was attempting to purchase the right to sandbag. Whitehead, *supra*, at 1088 ("[A] pro-sandbagging default rule [does not] reflect a buyer's interest in, or negotiation for, a sandbagging right."). Good-faith buyers are unlikely to value a pro-sandbagging provision, and sellers cannot easily negotiate for an anti-sandbagging provision because it may signal that the seller is not credible. *Id.* "The compromise, therefore, is often silence—with the right to sandbag set by the default rule rather than by express agreement." *Id.* And silence, paired with a default pro-sandbagging rule, may increase the costs of acquisitions because sellers cannot know which buyers will sandbag and which will not. *Id.* at 1103-04. Consequently, a seller may refuse to make as many representations, undermining the risk-allocation function. *Id.*

Thus, allowing sandbagging in this context merely creates an unfair advantage, tipping the playing field towards the buyer. *Assocs. of San Lazaro*, 864 P.2d at 115 ("Sellers are encouraged to warrant only that which they know they can fulfill, while buyers who in fact rely on express warranties may anticipate judicial enforcement thereof. The rule and its policies are not furthered, however, in

circumstances wherein a buyer does not rely on warranties made by the seller."). If "the transaction proves economically sound for the buyer, the buyer will affirm the agreement. If the transaction proves unprofitable, the buyer may seek remedies, including damages, from the seller even though the buyer knew from the outset that the seller could not fully perform the agreement," *id.*—or, like here, a buyer with buyer's remorse will do everything in its power to resist closing, even by relying on purported breaches of representations it knew were not perfectly accurate when it entered into the deal.

Allowing a buyer to avoid closing based on actual knowledge of a false representation at the time of signing is similarly impossible to square with any waiver rationale. To avoid providing unscrupulous buyers with a free option, any pro-sandbagging rule needs to be appropriately paired with an acknowledgment that the act of signing is itself a waiver. Indeed, in this case, the buyer was permitted to exercise its purported free option to exit the deal after it had **begun to close** by making payments and accepting the transfer of stock certificates under the SSAs through Carta. Ex. A at 26, 30. An HOL representative manually clicked on emails sent by Carta transmitting the shares and then certified acceptance via e-signature on the stock certificates, repeating this process 119 times. *Id.* at 30-31. When accepting the shares, HOL knew that Plaintiffs were not in strict compliance with Sections 3.9 or 3.13, at least as the trial court interpreted those provisions. These

actions and HOL's arguments to the trial court—that it had to prove a material breach by Plaintiffs to excuse its performance, *infra* Part II.C.1—show that HOL never thought it could get out of the deal based on known immaterial inaccuracies in representations. But under the pro-sandbagging rule adopted below, the seller has no recourse. This outcome is contrary to Delaware law. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("[This court] will not read a contract to render a provision or term 'meaningless or illusory.'"); *Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660, 664 (Del. 1952) ("There must be a consideration for the granting of an option.").

A pro-sandbagging rule, particularly on the facts of this case, encourages unfair tactics and gives a buyer a free option, exercisable in its sole discretion, to decide whether or not to perform on a contract. This unfairness manifested here: HOL (a sophisticated buyer) used every possible method, including raising technical, immaterial breaches of representations it knew were inaccurate before signing, to avoid having to perform the SSAs, to the detriment of an entrepreneur and the stockholders of a start-up business. While the trial court rejected many of HOL's arguments and found that the SSAs were valid contracts, it ultimately permitted HOL to avoid its obligations—effectively rendering the SSAs illusory. This should not be Delaware law.

Finally, a buyer cannot reasonably rely on a warranty it knew was false at signing, and that principle suffices to prevent the buyer from using that false warranty to avoid specific performance. Indeed, *Arwood*, *Akorn*, and the other cases not requiring reliance are inapposite where—as here—the buyer has *actual* pre-signing knowledge of the inaccuracy of the warranties. Whitehead, *supra*, at 1083 n.5 ("Sandbagging based on pre-signing knowledge may be a particularly difficult claim. States adopting a traditional analysis will require the buyer to have relied on the warranty. A contract-based analysis is also likely to require the warranty to be part of the 'basis of the bargain,' a difficult assertion to make if the buyer was already aware of the breach when it signed the contract." (citations omitted)). Even if there is a presumption that a contractual party relies on affirmative representations by a counterparty in a contract, that presumption can be rebutted by evidence of actual knowledge that a representation was inaccurate when made. *See* D.R.E. 301(a). Here, HOL did not contest that it knew before signing that not all Reby stockholders had signed SSAs and that Reby provided financial statements audited in accordance with GAAP (and not IFRS). *See* Ex. A at 13, 17; A342-43, Tr. at 55-57; A435, Tr. at 424; A491, Tr. at 650; A741-42; A925. Both issues were openly discussed prior to the execution of SSAs. Ex. A at 13, 17; A342-43, Tr. at 55-57; A435, Tr. at 424; A491, Tr. at 650; A925.

Delaware would not be the first jurisdiction to prohibit sandbagging in cases of actual knowledge while holding that justifiable reliance generally is not required for breach-of-contract claims. For example, New York is generally a pro-sandbagging jurisdiction and does not require a showing of reliance in breach-of-contract claims beyond proving that "the express warranty [was] part of the bargain between the parties." *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 503 (N.Y. 1990). But courts applying New York law have held that buyers are precluded from enforcing a condition or representation when the seller is the party that informs the buyer that the condition or representation is not satisfied, and the buyer chooses to sign or close anyway:

> While *Ziff-Davis* does curtail the role of reliance in breach of warranty actions, the case is of limited value to Metz. In *Ziff-Davis,* there was a dispute at the time of closing as to the accuracy of particular warranties. *Ziff-Davis* has far less force where the parties agree at [signing or] closing that certain warranties are not accurate. Where a buyer [signs or] closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract, the buyer should be foreclosed from later asserting the breach.

Galli, 973 F.2d at 151;[6] *see also Rogath v. Siebenmann*, 129 F.3d 261, 264-65 (2d Cir. 1997) ("The buyer may preserve his rights by expressly stating that disputes regarding the accuracy of the seller's warranties are unresolved, and that by signing

---

[6] The contract at issue in *Galli* was signed and closed simultaneously. *Id.* at 147.

the agreement the buyer does not waive any rights to enforce the terms of the agreement."). That is, a representation cannot be "part of the bargain" when the seller tells the buyer pre-signing that it is inaccurate. Such a rule encourages parties to be forthright during negotiations. Therefore, even if this Court finds that Delaware law does not require reliance for a breach-of-contract claim, this Court should endorse *Galli*'s exception to any pro-sandbagging rule. *See Rogath*, 129 F.3d at 265 ("[I]f the seller is not the source of the buyer's knowledge, e.g., if it is merely 'common knowledge' that the facts warranted are false, or the buyer has been informed of the falsity of the facts by some third party, the buyer may prevail in his claim for breach of warranty.").

Accordingly, this Court should adopt a rule prohibiting purchasers from using inaccuracies in representations, warranties, or conditions that the purchaser knew were false pre-signing to later avoid closing. Adopting a rule that prevents a sandbagging party from avoiding specific performance would still serve policy functions of even an anti-sandbagging rule—(1) upholding the allocation-of-risk function of warranties; (2) precluding unfair, illusory contracts or free options extracted by buyers with actual knowledge that a representation is inaccurate; and (3) encouraging sellers to agree to more warranties, lowering overall costs—even if the Court (in a future case) determines buyers should be permitted to recover, post-closing, whatever actual damages they can prove they suffered as a result of the

purported breach. Of course, specific performance is an equitable remedy, and the Court of Chancery's and this Court's analyses shift when evaluating equitable rather than legal remedies. *Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461 (Del. Ch. 2022). In the case of sandbagging where, like here, the buyer has actual knowledge of a technical inaccuracy of a warranty before signing and later uses that technical inaccuracy to avoid performance, the buyer is a bad actor, and should not obtain the benefit of an illusory contract or a free option by avoiding an equitable remedy.

II. THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD AND MISINTERPRETED THE SSAS

A. Question Presented

Did the trial court err by excusing HOL's performance under the SSAs notwithstanding no finding of prior material breach? This issue was preserved at: A678-85; A807-15.

B. Scope of Review

This Court reviews questions of contractual interpretation *de novo*. *GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of the Argument

The trial court applied the wrong legal standard and misinterpreted the SSAs.

1. The Trial Court Failed to Require a Material Breach to Excuse HOL's Performance

The parties argued their cases with the understanding that HOL was required to prove material breach. HOL repeatedly conceded it was required to prove a material breach to excuse its performance under the SSAs. A247 (argument heading IC.2: "If The SSAs Are Valid, They are Void for Plaintiffs' Material Breaches."); A604-607 (stating "a party is excused from performance under a contract where the other party materially breaches that contract" (quoting *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc.*, 2013 WL 3934992, at *11 (Del. Ch. July 24, 2013)) and arguing each representation must be material); A604 (argument heading III.C: "Plaintiffs Have Materially Breached the SSAs."); A740 (argument heading II: "If

the SSAs are valid, HOL has proven material breach." (all caps omitted)). Notwithstanding HOL's own proposed standard, the trial court did not determine whether Plaintiffs' purported breaches of Sections 3.9 and 3.13 were material. That alone requires reversal.

The trial court also misinterpreted Section 3.29 which states that Restanca's representations did not contain "any untrue statement of material fact or omit[] to state a material fact necessary to make those statements, in light of the circumstances in which they were made, not misleading." A935, § 3.29. Under Section 3.29, Restanca's representations in the SSAs are not breached by an immaterial purported inaccuracy, but only by an untrue statement of *material* fact. The representations were materially accurate, and the inaccuracies were immaterial to the transaction.

2. Section 3.9 Cannot Prevent a Closing

Section 3.9 of the SSAs cannot prevent a closing here. First, the trial court incorrectly found that this representation covered all Reby shares not held by HOL. Second, even under the court's interpretation, Plaintiffs did not materially breach Section 3.9, and thus, HOL was not excused from closing.

a. The Trial Court Misconstrued Section 3.9

In Section 3.9 of the SSAs, Restanca represented that "[o]ther than the Shares, there are no issued, outstanding or authorized securities of the Company." A931, § 3.9. Because "Shares" is defined in each SSA as "all of Seller's shares of capital

stock of the Company owned by such Seller," and because "Seller" and the "Sellers" are defined by reference to "the undersigned persons," *id.*, this provision requires that each selling stockholder sell all its Reby shares. The trial court nonetheless determined that Section 3.9 "requires all Sellers, collectively, to own all outstanding shares of Reby that HOL does not already own," Ex. A at 80—an interpretation endorsed by neither party.[7]

Delaware courts interpret contracts to avoid "absurd result[s]" and "to give each provision and term effect and not render any terms meaningless or illusory." *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1208 (Del. 2021) (internal quotation marks omitted). Moreover, "a particular portion of an agreement" cannot be construed in a manner that "runs counter to the agreement's overall scheme or plan." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). To harmonize the provisions of the SSAs, Section 3.9 must mean that each seller did not own any "issued, outstanding or authorized securities of the Company" apart from those that each was conveying to HOL. That representation was accurate.

---

[7] HOL contended that Section 3.9 was necessarily untrue in every SSA because no single seller owned all of Reby's outstanding stock. *Id.* at 74-75. HOL's construction fits its playbook of seeking absurd results. The existence of even one other SSA (let alone nearly 100 other SSAs) would mean that there is at least one "Share" not governed by the particular SSA in question, but also because HOL itself held Reby shares. Yet again, HOL advocated for a position that would give itself a unilateral option to close.

Following the proper interpretation of Section 3.9, it is not disputed that Plaintiffs were not in breach of this representation.

b. Section 3.9 was Materially Accurate

Regardless of how Section 3.9 is interpreted, Plaintiffs were not in material breach of this representation. Everyone knew that none of the selling stockholders under the nearly 100 separate SSAs owned all Reby's shares. Moreover, nearly all of Reby's stockholders (other than HOL) signed SSAs, thereby agreeing to transfer all their Reby shares to HOL. Collectively, the shares held by stockholders who signed SSAs plus HOL's existing interest amounted to approximately 99% of Reby. A3094. HOL's actions show that Reby's near-compliance with this representation was not a material breach—HOL signed the SSAs knowing it was not perfectly accurate and thereafter began closing. *Akorn*, 2018 WL 4719347, at *84-85 ("Nonperformance will attain this level of materiality when the covenant not performed is of such importance that the contract would not have been made without it." (alterations omitted)); *see also* A682. The inaccuracy was immaterial.

3. Section 3.13 was Materially Accurate

In Section 3.13 of the SSAs, Restanca represented that the Financial Statements had been provided to HOL and that they had "been prepared in accordance with IFRS." A932, § 3.13. Plaintiffs materially complied with Section

3.13. As detailed above, HOL conceded that it needed to prove a material breach to excuse performance; it failed to do so.

First, the record shows that the parties agreed to a private-company acquisition such that it was immaterial that Reby provided GAAP-audited financials, as opposed to IFRS-audited financials. A476, Tr. at 589. And even if the goal was for HOL to become a listed company post-acquisition, HOL presented no evidence that IFRS-audited financials were required to do so. To the contrary, HOL had not attempted to investigate whether any purported requirement for IFRS-audited financials could be waived or whether GAAP-audited financials might suffice. A430-31, Tr. at 407-08. HOL's claim that this purported breach would have a material effect is thus unfounded.

Second, HOL concededly knew at the time Taylor executed the SSAs that Reby had provided HOL with GAAP-compliant (not IFRS-compliant) audited financial statements. A435, Tr. at 424; A809; *see also* Ex. A at 13 (finding that "HOL and its counsel"—pre-signing—"were concerned that Reby had not yet provided IFRS audited financial statements"). HOL's actions show that Reby's near compliance with Section 3.13 was not a material breach—HOL signed the SSAs knowing the exact truth about this representation and thereafter began closing notwithstanding that the representation remained not perfectly accurate. *Akorn*, 2018 WL 4719347, at *84-85; *see also* A811.

Because HOL failed to prove a material breach, and the trial court found no such breach, the decision below should be reversed.

III. HOL IS NOT ENTITLED TO ATTORNEYS' FEES BECAUSE IT DID NOT PREVAIL

A. Question Presented

Whether the trial court erred in shifting attorneys' fees to HOL under a prevailing-party clause despite HOL prevailing on only two legal issues and no factual issues, while Plaintiffs prevailed on all other issues. This issue was preserved at: A841-54; A858-70.

B. Scope of Review

This Court reviews questions of contractual interpretation *de novo*. *GMG Cap.*, 36 A.3d at 779.

C. Merits of the Argument

The trial court's award of fees and expenses of over $2.7 million to HOL should be reversed. First, the trial court's judgment on the merits should be reversed; a decree of specific performance should be entered against HOL; or, at minimum, this action should be remanded for further findings on damages. In any of those scenarios, HOL is not the prevailing party. Second, even if the trial court's merits determinations are not reversed, HOL was not the prevailing party; Plaintiffs were. HOL lied when it claimed that Gomez said he would not enforce the SSAs, HOL brought counterclaims based on those lies, HOL made Plaintiffs try an entire case based on those lies, and then it convinced the trial court that the contract required Plaintiffs to pay for those lies.

Where, like here, parties agree to shift fees to the "prevailing party" in litigation brought to enforce a contract, they "can be presumed to have intended that that term would be applied by the court as it has traditionally done so." *Brandin v. Gottlieb*, 2000 WL 1005954, at *28 (Del. Ch. July 13, 2000). To be the prevailing party, a party must "predomina[te] in the litigation." *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454, at *2 (Del. Ch. Jan. 5, 2018). To predominate, a party "should prevail on the case's 'chief issue.'" *2009 Caiola Fam. Tr. v. PWA, LLC*, 2015 WL 6007596, at *33 (Del. Ch. Oct. 14, 2015). The Court should examine "the outcome of the substantive issues" to determine the prevailing party. *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 WL 1111179, at *14 (Del. Ch. Apr. 27, 2009) (considering several different legal and factual findings).

The term "chief issue" is not well-defined, especially where the parties have asserted claims and counterclaims with mixed levels of success. *Compare AFH Hldg. & Advisory, LLC v. Emmaus Life Scis., Inc.*, 2014 WL 1760935, at *3 (Del. Super. Ct. Apr. 16, 2014), *with eCommerce Indus., Inc. v. MWA Intel., Inc.*, 2013 WL 5621678, at *51 (Del. Ch. Sept. 30, 2013), *and Mrs. Fields Brand*, 2018 WL 300454, at *3-4.

This litigation involved many disputes, including whether the SSAs are valid contracts, whether HOL intended to be bound by the SSAs, whether the terms of the

SSAs were sufficiently definite, whether the confidentiality provision precluded the closing of the transaction, whether Plaintiffs fraudulently induced HOL into signing the SSAs, whether Plaintiffs had unclean hands, and whether Plaintiffs were unjustly enriched in connection with the transaction. Indeed, the trial—and most of the work—was necessitated exclusively by HOL's factual defenses and counterclaims. Plaintiffs prevailed on all but one of these disputes. Thus, Plaintiffs and not HOL prevailed.

At trial, the chief legal issue was whether the SSAs were valid, enforceable contracts. Plaintiffs prevailed on this issue. Ex. A at 38 ("[T]he parties formed an enforceable contract …."). The chief factual issues—which underpinned the validity issue—were the circumstances surrounding entry into the SSAs and HOL's claim of fraud. The court determined these issues in Plaintiffs' favor: Gomez never told Taylor that he would not enforce the agreement. *See id.* at 54-56. Moreover, Plaintiffs demonstrated that HOL's post-closing conduct—wiring funds to Reby, signing a new set of SSAs, not objecting to publicizing the deal, and accepting the transfer of and signing Reby stock certificates—further proved that HOL intended to be bound by the contract. *See id.* at 57-59. The court also rejected HOL's argument that the terms of the SSAs were insufficiently definite and held Plaintiffs were correct on all disputed factual issues underlying that issue. *Id.* at 60-69. Plaintiffs thus succeeded on the chief issues. *See Comrie v. Enterasys Networks,*

Inc., 2004 WL 936505, at *3 (Del. Ch. Apr. 27, 2004) (holding "that the plaintiffs were predominate in the main issue in the case—the interpretation of the Agreement"). The trial court seemingly ignored this success.

In addition to ignoring that Plaintiffs prevailed on the chief issue from the complaint, the court did not address the fact that HOL *lost* on all of its counterclaims, except Counterclaim IV which sought, in the alternative, a declaration that some closing conditions were not satisfied. *See* Ex. A at 69-70, 96; Ex. C. The court also held that HOL failed to prove any damages. And HOL's defeats mean that Plaintiffs prevailed on the chief issue in HOL's counterclaims and affirmative defenses—fraud, a "serious allegation," *VH5 Cap., LLC v. Rabe*, 2023 WL 4305827, at *12 (Del. Ch. June 30, 2023), concocted by HOL—and that HOL failed to obtain any remedy. Thus, HOL failed on all factual issues, almost every legal issue, and the chief issues presented by the complaint and counterclaims.

The mere fact that Plaintiffs did not receive their requested remedy, Ex. A at 73-89, does not render HOL the prevailing party. "Delaware law is clear that in the usual case, and absent contractual language to the contrary, whether a party has prevailed is determined by looking at the outcome of the substantive issues, [and] not damages." *Compex Litig. Support*, 2009 WL 1111179, at *14 (awarding fees to plaintiff where it proved material breach of contract but not damages); *AFH Hldg. & Advisory*, 2014 WL 1760935, at *3 (holding that a counterclaim-plaintiff was the

prevailing party even though the court dismissed its fraud counterclaims at summary judgment because it succeeded on its breach of contract claims, which were "the substantive crux of this litigation").

If the chief issue in this litigation was whether immaterial inaccuracies in two representations that HOL knew were inaccurate at signing excused HOL's performance—an issue that could have been resolved on a pleadings-stage motion—then a three-day trial, eight witnesses, 60-page pre-trial briefs, and two sets of 60-page post-trial briefs were unnecessary. That range of issues is demonstrated by the countless factual findings the court made in its 96-page opinion that have nothing to do with these representations.

Even if this Court focuses entirely on the trial court's narrow scope of choice—purported breaches that could potentially prevent closing—HOL lost on three of the five disputes. The court found that Restanca properly represented that Reby did "not have any outstanding indebtedness" and that it had "conducted and is continuing to conduct the business of the Company in compliance with all applicable laws." Ex. A at 89, 89-92. The court also found that HOL was incorrect that it was not required to close because Plaintiffs purportedly violated the SSAs' confidentiality provision. *Id.* at 93. As the court found, the confidentiality provision was not a closing condition that could prevent closing. *Id.* Even under this narrow framework, HOL lost most of the issues.

Ultimately, HOL lost on the chief issues—whether there was an enforceable contract and whether the contract was voidable for fraud—and almost every other issue. The failure of Plaintiffs to obtain a remedy does not render HOL the prevailing party. The fee-and-expense award should be reversed, and Plaintiffs should be awarded their fees.

CONCLUSION

For the foregoing reasons, the trial court should be reversed, and judgment should be entered in Plaintiffs' favor.

/s/ Raymond J. DiCamillo
Raymond J. DiCamillo (#3188)
Matthew D. Perri (#6066)
Andrew L. Milam (#6564)
Nicholas F. Mastria (#7085)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Counsel for Plaintiffs Below, Appellants Restanca, LLC and Reby, Inc.

Dated: March 5, 2024

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5, 2024, true and correct copies of the foregoing *Appellants' Corrected Opening Brief* were caused to be served by File & Serve*Xpress* on the following counsel of record:

Daniel M. Silver
Sarah E. Delia
Travis J. Ferguson
Shannon D. Humiston
MCCARTER & ENGLISH, LLP
Renaissance Centre
405 N. King St., 8th Floor
Wilmington, Delaware 19801

<u>/s/ Andrew L. Milam</u>
Andrew L. Milam (#6564)