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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,	)	No. 49, 2024
Plaintiffs Below, Appellants,	)	Court Below: Court of Chancery of the State of Delaware
v.	)	
HOUSE OF LITHIUM, LTD., a foreign corporation,	)	C.A. No. 2022-0690-PAF
Defendant Below, Appellee.	)	

APPELLEE'S ANSWERING BRIEF

Date: April 9, 2024

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NATURE OF PROCEEDINGS

Plaintiffs-Below/Appellants Restanca, LLC ("Restanca") and Reby, Inc. ("Reby" and together with Restanca, "Plaintiffs") brought the action below to compel specific performance by Defendant-Below/Appellee House of Lithium Ltd. ("HOL") to close on transactions to purchase all the stock of Reby that HOL did not already own. Plaintiffs failed to prove entitlement to relief for their breach claim and obtained neither specific performance nor damages. The Court of Chancery's post-trial decision painstakingly examined the facts and relevant contract provisions and concluded that HOL was not contractually obligated to close. That decision was factually correct, legally sound, and does not deserve to be disturbed on appeal.

The trial court rightfully determined that HOL did not breach certain Secondary Sale Agreements (each an "SSA" and collectively, the "SSAs") by failing to close the transactions contemplated therein because HOL had no obligation to close. Section 5.1(b) of each SSA contained an unambiguous closing condition that required certain representations and warranties to be true and correct through closing. That condition was not met. The trial court properly found that representations and warranties contained in SSA Sections 3.9 and 3.13 were false and inaccurate. The trial court correctly held Plaintiffs to the unambiguous and, in this case, dispositive, closing condition in Section 5.1(b).

Unhappy with the result, yet unwilling and unable to confront the persuasive findings and reasoning of the trial court, Plaintiffs seek to divert this Court's attention from that failure by painting this dispute as something that it is not. Instead of grappling with the merits of the trial court's ruling about the dispositive effect of Section 5.1(b), Plaintiffs primarily recast the issue as one of "sandbagging." This is a transparent attempt to entice the Court into believing that this case presents an opportunity to resolve an open area of Delaware law. The Court need not accept Plaintiffs' invitation, as this appeal does not implicate any novel issue. Rather, the Court can, and should, affirm the trial court's ruling as consistent with settled Delaware law. Plaintiffs failed to satisfy Section 5.1(b), and therefore HOL was not obligated to close the transactions.

In affirming, this Court should also reject Plaintiffs additional misguided arguments that the trial court misinterpreted Section 3.9 of the SSAs and that the trial court erred in not reading into the representations and warranties in Sections 3.9 and 3.13 an alleged (and non-existent) materiality qualifier. Both arguments were considered and rejected by the trial court, yet Plaintiffs do not address the well-reasoned factual and legal bases for their rejection. The trial court's findings and interpretations in this respect also deserve this Court's affirmance.

Finally, under the typical standards applicable to appellate review of a fee award, the Court should affirm the trial court's award of costs, expenses, and

reasonable attorneys' fees to HOL under Section 7.13 of the SSAs. Indeed, HOL is the prevailing party in this litigation. Plaintiffs failed to demonstrate any right to the relief they were claiming under the SSAs—not the specific performance or alternative damages award that they sought in filing suit. HOL prevailed on the issue of breach—the determinative and chief issue in the case.

SUMMARY OF ARGUMENT

I. Denied. The trial court correctly determined that HOL had no obligation to close under the SSAs because certain representations and warranties therein were not true and accurate. There is no dispute that: (i) Section 5.1(b) of the SSAs is a "flat" bringdown condition (i.e., without any materiality qualifier) requiring that Restanca's representations and warranties on behalf of Reby be true and correct through closing; or (ii) that the representations in Sections 3.9 and 3.13 of the SSAs were untrue and inaccurate.

Rather than accept this straightforward analysis, Plaintiffs argue that this case presents unique issues of "sandbagging." This argument is misguided. Sandbagging is a seller's defense to a *buyer's post-closing claim for damages* based upon breaches of representations and warranties, which, as the trial court recognized, is distinguishable from a refusal to close because not all closing conditions are satisfied. Accordingly, the Court need not examine whether Delaware is, as a matter of public policy, pro-sandbagging to resolve this appeal.

But even if this Court were to reach the question of sandbagging, Delaware is, or should be, pro-sandbagging as it comports with Delaware's long-standing contractarian regime and commitment to private ordering among parties. And although Plaintiffs neglect to mention it, they tried and failed to secure an "anti-

sandbagging" provision in the SSAs, and must live with the agreement that was struck, consistent with Delaware practice of enforcing contractual bargains.

II. Denied. The trial court correctly construed Section 3.9 of the SSAs as an unambiguous and unqualified representation that the Reby stockholders who signed SSAs (the "Selling Stockholders") collectively owned all outstanding Reby shares not already owned by HOL. This interpretation fit the overall intent of the contemplated acquisition—for HOL to own 100% of Reby—as well as the mechanics of the deal given that each Selling Stockholder signed its own SSA.

Further, the trial court correctly determined that representations in Sections 3.9 and 3.13 were not subject to any materiality qualifier. The catch-all language in Section 3.29 should not be construed as a materiality qualifier. Plaintiffs' suggestion otherwise ignores the trial court's reasoning for rejecting this argument as well as Plaintiffs' own argument that specific provisions ordinarily qualify the meaning of general provisions and not the other way around. Plaintiffs' implied materiality qualifier argument also contravenes official commentary to the model stock purchase agreement upon which the SSAs were based.

III. Denied. The trial court correctly awarded HOL its costs and expenses, including reasonable attorneys' fees, based on an undisputed interpretation of the "prevailing party" fee-shifting provision in Section 7.13 of the SSAs. The trial court did not abuse its discretion in determining that HOL prevailed on the chief

issue in this litigation: whether HOL was obligated to close. Plaintiffs enforced no rights, as required to bring them within the scope of Section 7.13, and therefore cannot be deemed the prevailing party.

STATEMENT OF FACTS

A. The Parties.

Reby is a privately held Delaware corporation with its principal place of business in Barcelona, Spain. Mem. Op. at 2.[1] Josep "Pep" Gomez Torres is the chairman and sole member of Reby's board of directors. *Id.*

Restanca is Gomez's personal investment vehicle, through which Gomez owns approximately 20% of Reby's outstanding equity. *Id.* at 2-3. This makes Gomez, indirectly, through Restanca, Reby's largest equity holder.

HOL is a privately held Canadian investment company with a 16.67% ownership stake in Reby. *Id.* at 3. HOL was created in July 2021 by SOL Global Investments Corp. ("SOL"), a Canadian private equity firm. *Id.* SOL invested an initial $800,000 in Reby in July 2021 and, in November 2021, transferred its interest in Reby to HOL. *Id.* Contemporaneous with SOL's transfer of its interest, HOL invested an additional $5 million into Reby. *Id.*

B. The relevant terms of the SSAs.

Central to this appeal is the structure and terms of the SSAs. The relevant provisions of the SSAs are examined below. HOL thereafter provides additional

[1] Citations to "Mem. Op. at ___" refer to the trial court's Memorandum Opinion dated June 30, 2023, a copy of which was attached to Plaintiffs' Opening Brief as Exhibit A. Citations herein to Plaintiffs Opening Brief shall be denoted as "Plaintiffs' Br. at ___."

background summarizing the genesis of the proposed transactions between HOL and Reby's Selling Stockholders and the history of negotiations of the SSAs.

1. Section 1.4 – Closing

The SSAs did not set an outside closing date or a termination date. Instead, Section 1.4 provides,

> Subject to the terms and conditions of the Agreement, the closing of the transactions contemplated hereby and the effective transfer of the Shares to Buyer (the "**Closing**") shall take place on April __, 2022, or such other date as agreed to by the Sellers and the Buyer *and, in any event, after all the conditions hereunder have been satisfied or waived*.

A928-29 (Model SSA, § 1.4) (emphasis added).[2]

2. Article 5, Section 5.1 – Conditions to Closing

Article 5 of the SSAs contains various "Conditions to Closing" that are referenced in Section 1.4. Of particular relevance, Section 5.1 provides as follows:

> 5.1. Conditions to Obligations of Buyer. The obligation of Buyer to complete the transactions contemplated hereby are subject to the conditions that on or before Closing:
>
> (a) Each Seller shall deliver or cause to be delivered to Buyer an executed Stock Power.
>
> (b) *Each of the representations and warranties of Sellers and Company contained in Article 2 and Article 3, respectively, hereof shall be true and correct as through the date of this Agreement and as of the Closing*.

[2] The SSA bundle signed by Taylor is approximately 2000 pages long. *See* A927-2923. For ease of reference, the "Model SSA" refers to the first SSA in the bunch. *See* A927-47. The relevant SSA terms are the same in all SSAs.

> (c) There is no prohibition at law against the completion of the transactions contemplated in this Agreement.

A939-40 (Model SSA, § 5.1) (emphasis added).

3. Article 3, Sections 3.9 and 3.13 – Company Representations

Article 3 contains twenty-nine (29) representations and warranties made by Restanca in respect of Reby. A930-35 (Model SSA). The preamble to Article 3 states: "With respect to the Company, Restanca LLC hereby represents and warrants to the Buyer as follows that at the time of the execution of this Agreement and at the time of the Closing[.]" A930 (Model SSA). Particularly relevant to this appeal are the representations and warranties in Sections 3.9 and 3.13.

Section 3.9 states:

> 3.9. Authorized and Issued Capital. Other than the Shares, there are no issued, outstanding or authorized securities of the Company.

A931 (Model SSA, § 3.9). The trial court interpreted Section 3.9 as a representation that the referenced "Shares" constituted all of the outstanding shares of Reby stock not already owned by HOL. Mem. Op. at 73-81. Importantly, Plaintiffs concede the critical fact that the "Shares" held by Selling Stockholders did not (then or now) total all of the outstanding shares of Reby stock that was not already owned by HOL. *See* Plaintiffs' Br. at 3 (conceding that "two small Reby stockholders (amounting to approximately 1% of outstanding shares) had not signed an SSA"); *id.* 8 ("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 amount to ***approximately 99%*** of Reby's shares.") (emphasis added); *id.* at 36 (acknowledging "near-compliance" with the representation and warranty in Section 3.9 because not all of Reby's stockholders signed a SSA).

Section 3.13 states:

> 3.13. Financial Statements. Final audited financial statements for Reby Rides S.L., which for greater certainty is the main operating entity in the Company's structure, for the years ended December 31, 2019 and December 31, 2020, (collectively, the "Financial Statements") have been provided to the Buyer. The Financial Statements have been prepared in accordance with IFRS and present fairly:
>
> (a) the assets, liabilities (contingent or otherwise) and financial condition of the Company as at the respective dates of the Financial Statements; and
>
> (b) the sales, earnings and results of the operations of the Company during the periods covered by the Financial Statements.

A932 (Model SSA, § 3.13). Plaintiffs do not dispute the trial court's interpretation of Section 3.13. *See* Mem. Op. at 88-89. And Plaintiffs further concede that they never provided HOL with the IFRS audited financial statements specifically demanded by Section 3.13. *See* Plaintiffs' Br. at 3 (conceding the financial statements that HOL received "were not audited in accordance with the standards specified in the SSAs (IFRS) but instead were audited pursuant to a different standard (GAAP)"); *id.* at 36-37 (contending "near compliance" with Section 3.13

because HOL received GAAP-audited financial statements); *see also* Mem. Op. at 88 ("Plaintiffs do not dispute that these financial statements were never provided).

C. Months prior to signing the SSAs, HOL and Reby execute a term sheet outlining a potential acquisition.

On December 10, 2021, HOL and Reby entered into a non-binding term sheet (the "First Term Sheet") outlining general terms of a potential acquisition for "the remaining 84% of the issued and outstanding shares" of Reby that HOL did not own. B187. The First Term Sheet reflected that HOL intended to list on a recognized stock exchange and included several conditions precedent to closing, including "satisfactory completion of due diligence by HOL, its counsel and representatives on the business, assets, financial condition" of Reby as well as "all required regulatory and third-party consents and approvals. B188. Gomez executed the First Term Sheet on Reby's behalf, and Paul Kania, HOL's sole director at the time, executed on behalf of HOL. *See id.*

Shortly thereafter, at a meeting in Miami in mid-January 2022, HOL emphasized to Gomez the need for audited financial statements prepared in accordance with International Financial Reporting Standards ("IFRS"). A418 (Trial_Tr. 359:16-19).[3] IFRS audited financial statements would be required by Canadian securities regulators in connection with the anticipated public company

[3] Parenthetical citations to "Trial_Tr. XX:X-X" refer to the relevant trial transcript page and line.

transaction. A418 (Trial_Tr. 358:8-359:13). Gomez told HOL that he would incentivize Reby's CFO to have IFRS audited financial statements completed by April. A418 (Trial_Tr. 359:20-24); A426 (Trial_Tr 391:5-21).

D. HOL publicly announces a proposed public-company transaction.

On January 28, 2022, HOL announced that it had entered into an agreement to acquire Rio Verde Industries Inc. ("Rio Verde"), a publicly traded company, in a reverse takeover. Mem. Op. at 6. The press release specified that as a condition precedent to the transaction, Rio Verde would change its name to "HoLi Technologies Inc." *Id.* Moreover, because HoLi Technologies would be a newly amalgamated public entity, HOL submitted an application to the Canadian Stock Exchange ("CSE") to approve the listing of HoLi Technologies shares (the "Listing Statement"). *See* B509-83 (draft Listing Statement); B404-42 (emails with CSE concerning Listing Statement); *see also* B192 (SOL board materials discussing RTO and CSE comments to Listing Statement).

E. HOL and Reby execute a second term sheet.

On January 31, 2022, HOL and Reby entered into a second term sheet (the "Second Term Sheet"). Mem. Op. at 7. The Second Term Sheet amended certain provisions in the First Term Sheet, but it preserved the theme that HOL would purchase all outstanding equity in Reby that HOL did not already own. *Id.* The contemplated "transaction documents" were a single secondary sale agreement or

SSA to be signed by all Selling Stockholders and for Restanca to serve as their representative. Mem. Op. at 7.

F. Counsel for HOL and Reby negotiate a revised form of SSA.

On March 8, 2022, HOL's counsel circulated a revised form of SSA that added what HOL considered to be standard representations and warranties for a transaction of this type. B274. Among the new representations and warranties to be made by Restanca in respect of Reby, HOL added a representation that final IFRS audited financial statements had been provided for 2020 and 2021. *See* B306. Later that day, Gomez circulated a further revised SSA that limited the final audited financial statement representation and warranty to apply only to Reby Rides, S.L., Reby's main operating subsidiary, for 2019 and 2020. *See* B333.

Several days later, on March 14, 2022, Canadian securities counsel for Reby inserted an "anti-sandbagging" provision in further revised SSA draft. *See* B376, 390. HOL struck the anti-sandbagging provision, commenting that "[i]t would be inappropriate to include an anti-sandbagging provision given the lack of opportunity to complete any diligence, and in particular given the lack of rep[resentation]s." *See* B351, 367; B446, 484. The next day, March 15, Reby, HOL, and their respective counsel held a "town hall" meeting to discuss the transaction and changes to the draft SSA. Mem. Op. at 10. Among other items, the parties further discussed the need for IFRS audited financial statements, the

representations and warranties, and the removal of the proposed anti-sandbagging provision due to HOL's concerns about having not received basic due diligence materials from Reby and Gomez. A463 (Trial_Tr. 539:5-22); A464-466 (Trial_Tr. 538:23-539:13; 539:15-22, 543:8-549:2; 547:24-549:2).

G. HOL and Reby execute a third term sheet.

On March 16, 2022, the parties executed a third term sheet (the "Third Term Sheet"). A884. The Third Term Sheet described the transaction as an acquisition of "all of the outstanding shares of the capital stock of [Reby] not owned by" HOL. A884; Mem. Op. at 11. The form SSA attached to the Third Term Sheet left the dates of the agreement and of the closing intentionally blank. *Id.*

H. Reby's diligence failures and lack of historical tax filings cause the parties to consider alternative transaction structures.

Even after execution of the Third Term Sheet, Reby still did not provide HOL with IFRS audited financial statements. To make matters worse, Gomez disclosed that Reby had never filed any U.S. tax returns. A423 (Trial_Tr. 376:13-23). This complicated a direct acquisition of Reby's stock by HOL. *See* A341 (Trial_Tr. 50:8-16 (Gomez) ("[HOL] knew that at some point if they wanted to go public, they would need audited financials ….")); B1133-34 (Shumate_Dep. 81:24-82:5 (discussing potential for adverse tax consequences from an acquisition of Reby in light of Reby's tax noncompliance)). The parties thus began discussing potential alternative transaction structures, including an acquisition of Reby Global,

S.L., a Spanish subsidiary of Reby. A423 (Trial_Tr. 50:8-24); A467 (Trial_Tr. 552:12-24); B505 ("For Reby Inc we don't have [financial statements] since we never worked that out and we are in the process … that's the origin of us buying either Reby Global or a US holdco that owns Reby Global to not trigger any tax liability."); *see also* B503 (Gomez raising potential Reby reorganization structure).

I. Taylor assumes charge of HOL as HOL and Reby investigate alternative deal structures.

On April 25, 2022, in light of an investigation into DeFrancesco (unrelated to SOL or HOL), Kevin Taylor assumed the role of HOL's CEO. A493-94 (Trial_Tr. 658:22-660:2). Prior to his appointment, Taylor had not been "actively involved" in "day-to-day operations" of SOL or HOL. A494 (Trial_Tr. 661:21-24). Leading up to April 25, Taylor understood that Reby and HOL had been discussing a potential transaction but was unaware of where the parties stood with respect to finalizing a binding deal. A494 (Trial_Tr. 661:21-663:1).

On April 26, 2022, Gomez and Kania met with MNP LLP and the parties acknowledged there was still no clear path forward for a transaction. Mem. Op. at 17. Indeed, contemporary meeting notes indicate that Reby had never filed U.S. tax returns and cited that as a reason why HOL could not purchase Reby. *Id.*

J. Gomez bundles the SSAs for signature despite knowing the Selling Stockholders did not own all of the outstanding shares of Reby stock not already owned by HOL.

On April 29, 2022, Gomez messaged Taylor indicating that he was looking for the SSAs to be signed and that all but two of Reby's stockholders had signed SSAs. Mem. Op. at 17. Specifically, Gomez wrote:

> 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.

A925.[4] According to Gomez, Diaz, refused to sign an SSA transferring his Reby shares to HOL due to business issues with HOL. A342 (Trial_Tr. 55:15-56:3 (Gomez)).[5] This is belied by Diaz's written statement to HOL that he did not sign an SSA because the deal Gomez presented was with a contractual counterparty other than HOL and contemplated no cash consideration in exchange for Diaz's shares. *See* B1267-68.

[4] At some point before April 29, the plans changed and each selling stockholder executed and delivered an individual SSA. Mem. Op. at 74.

[5] Plaintiffs appear to quote from the Memorandum Opinion to suggest that the trial court found this as a matter of fact (*see* Plaintiffs' Br. at 9 (citing Mem. Op. at 17 n.86)). However, they leave out the trial court's introductory clause of "According to Gomez" (*see* Mem. Op. at 17 n.86) which clarifies the trial court was restating Gomez's position and not making a factual finding.

On April 30, 2022, after several discussions with Gomez, Taylor executed a signature page for the SSAs. Mem. Op. at 25. The trial court concluded, among other things, that Taylor's signature evinced an intent to bind HOL to the SSAs and that the SSAs were binding and enforceable contracts. Mem. Op. at 56.[6]

[6] HOL disagrees that Taylor intended to bind HOL by providing Gomez with a signature page; however, in view of the trial court's clear ruling that HOL would not be in breach of the SSAs because it had no obligation to close, HOL did not file a cross-appeal to challenge that particular aspect of the trial court's ruling.

ARGUMENT

I. HOL WAS NOT OBLIGATED TO COMPLETE THE TRANSACTIONS CONTEMPLATED BY THE SSAS BECAUSE PLAINTIFFS FAILED TO SATISFY AN UNAMBIGUOUS CLOSING CONDITION

A. Question Presented

Did the trial court correctly determine that HOL was not in breach of the SSAs because Plaintiffs failed to satisfy the closing condition in Section 5.1(b)? *See* B78; A604-07; B149.

B. Scope of Review

The mixed questions of law and fact here implicate both the clearly erroneous and *de novo* standards of review. "After a trial, findings of historical fact are subject to the deferential 'clearly erroneous' standard of review." *DV Realty Advisors LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101, 109-110 (Del. 2013) (quoting *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011)). "Once the historical facts are established, the issue becomes whether the trial court properly concluded that a rule of law is or is not violated. Appellate courts review a trial court's legal conclusions *de novo*." *Id.* at 110.

C. Merits of the Argument

The trial court refused to grant Plaintiffs any relief on their breach of contract claim because HOL was not obligated to complete the transactions contemplated by the SSAs. The reason was straightforward: Plaintiffs failed to

satisfy an unambiguous closing condition contained in Section 5.1(b), which required that all representations and warranties be true and correct through closing. The trial court's holding and supporting factual determinations should be affirmed.

1. Plaintiffs concede that Section 5.1(b) is a "flat" bringdown provision that required representations and warranties be true and correct through the date of closing.

Section 5.1 provides, in relevant part, that HOL's obligation to complete the transactions contemplated by the SSAs is "subject to the conditions that … (b) [e]ach of the representations and warranties of Sellers and Company contained in Article 2 and 3, respectively, hereof shall be true and correct as through the date of this Agreement and as of the Closing." A939-40 (Model SSA, § 5.1). Section 5.1 has no materiality qualifier; it is, therefore, to be regarded as a "flat" bringdown provision. Mem. Op. at 72 (quoting *HControl Holds. LLC v. Antin Infrastructure Partners S.A.S.*, 2023 WL 3698535, at *5 (Del. Ch. May 29, 2023)); *see also Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *63 (Del. Ch. Oct. 1, 2018) ("In a public-company acquisition, it is standard practice to require that the seller's representations be true at signing and to condition the buyer's obligation to close on the seller's representations also being true at closing."), *aff'd en banc*, 198 A.3d 724 (Del. 2018). "From a business point of view, the condition that the other party's representations and warranties be true and correct at closing is generally the most significant condition for Buyers." *Akorn*, 2018 WL 4719347, at *63 (quoting

Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 14.02[1], at 14-9 (2018 ed.) ("Kling & Nugent")) (internal quotes omitted).[7] The trial court correctly held that if any of Plaintiffs' representations and warranties were not true and correct, HOL would have no obligation to close on the contemplated transactions. *See* Mem. Op. at 73 (citing *Akorn*, 2018 WL 4719347, at *45 n.512 and Kling & Nugent § 1.05[4], at 1-41); *id.* at 81 n.283 ("Section 5.1 enumerates a condition precedent to closing and will be enforced by its terms") (citing 1 Williston on Contracts § 38:6 4th ed. 2023).

Plaintiffs do not challenge the trial court's interpretation of Section 5.1. In fact, Plaintiffs have always conceded that "Section 5.1 clearly sets out the conditions which, if not satisfied, relieve HOL of its obligation to complete the transaction[.]" A815; *see also* Plaintiffs' Br. at 7 ("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."); A637 (acknowledging closing conditions under Section 5.1). And, notably, Plaintiffs also do not dispute that Section 5.1 is a "flat" bringdown provision that does not impose a materiality qualifier.

[7] "Delaware courts regularly rely on the Kling & Nugent treatise as 'an authoritative source on M & A practice.'" Mem. Op. at 73 n.267 (citing *Akorn*, 2018 WL 4719347, at *53 n.58 (collecting cases)).

As the trial court's ruling reflects, the pivotal question is this: were the representations and warranties in Sections 3.9 and 3.13 true and correct? For the reasons discussed *infra* (at § II), they were not.

2. The Court need not reach the issue of sandbagging.

Appellate review of this matter involves consideration of undisputed facts and a straightforward analysis of settled Delaware law. The undisputed facts (presented *supra* at SOF, § B.3), coupled with the plain terms of Sections 3.9 and 3.13 and 5.1(b) support the trial court's conclusion that HOL was not obligated to complete the transactions contemplated by the SSAs. As noted, Plaintiffs do not tackle Section 5.1(b) head on; indeed, other than a passing reference in their factual background, Plaintiffs do not mention Section 5.1(b) or the conditions to closing at all in their brief. This is both telling and fatal to their appeal.

Plaintiffs instead attempt to recast the trial court's decision as implicating the doctrine of "sandbagging," raising a public policy discussion (Plaintiffs. Br. at 19-31) that is unnecessary to the resolution of this straightforward appeal.

The trial court did not rely on the sandbagging doctrine in finding that HOL was under no obligation to complete the transactions contemplated by the SSAs. Rather, the trial court mentioned sandbagging in its decision because Plaintiffs wrongly suggested, in passing, that the doctrine was pertinent. *See* A682.

Even then, the trial court distinguished this case from the typical "sandbagging" scenario on grounds that HOL, the buyer, had refused to close on the contemplated SSA transactions due to false representations and warranties in Sections 3.9 and 3.13. *See* Mem. Op. at 85 n.289. Indeed, the trial court, HOL, and Plaintiffs are aligned that "sandbagging" refers to a scenario, not present here, in which a ***buyer*** seeks ***post-closing*** indemnification for a seller's breach of representations and warranties where the buyer knew they were untrue before signing the agreement or before closing. *See id.* (citing *Arwood v. AW Site Servs., LLC*, 2022 WL 705841, at *28-32 (Del. Ch. Mar. 9, 2022)); *see also* Plaintiffs' Br. at 20-21. The secondary authorities that Plaintiffs cite are also aligned on this point.[8] Despite their hyperbole regarding the purported novelty of the trial court's

[8] *See* Brandon Cole, *Knowledge Is Not Necessarily Power: Sandbagging in New York M&A Transactions*, 42 J. CORP. L. 445, 446 (2016) ("Sandbagging is a practice in the mergers and acquisitions (M&A) context that involves 'one party to an acquisition agreement (most often a buyer) seeking post-closing indemnification for breaches of representations and warranties, which breaches that party was aware of prior to signing the acquisition agreement or, in some cases, closing the transaction.'"); Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 36 Del. J. Corp. L. 1081, 1083 (2011) ("Transactional lawyers often refer to this practice-knowing of the breach, closing, and then asserting a post-closing claim-as 'sandbagging.' Buyer, in this case, chose to close its purchase of Target rather than renegotiate the deal's terms or walk away (and then, perhaps, sue Seller). The question is whether Buyer has a post-closing claim under the Seller's indemnity."); Jacek Jastrzebski, *"Sandbagging" and the Distinction Between Warranty Clauses and Contractual Indemnities*, 19 U.C. Davis Bus. L.J. 207, 208-09 (2019) ("This issue has become known in the United States as 'sandbagging:' a warrantee 'sandbags' the warrantor if he enters into an agreement knowing that a warranty clause is incorrect and subsequently brings a

decision (Plaintiffs' Br. at 19), Plaintiffs present no authority supporting that a buyer's refusal to close is "sandbagging," and certainly none where the contract at issue includes a closing condition that requires all representations and warranties be true and correct through closing. To the contrary, one of Plaintiffs' secondary authorities distinguishes sandbagging from a situation where a buyer chooses not to close. *See* Whitehead, *Sandbagging: Default Rules and Acquisition Agreements* at 1083 ("Buyer, in this case, chose to close its purchase of Target *rather than renegotiate the deal's terms or walk away*…") (emphasis added).

3. Even if sandbagging is relevant, Delaware is, or should be, pro-sandbagging.

Even if the Court views this case as implicating a type of sandbagging, the result should be the same. Delaware law is, or should be, pro-sandbagging. *See Arwood*, 2022 WL 705841, at *3; *see also Akorn*, 2018 WL 4719347, at *77 n.756 (asking "whether the risk allocation in the contract controls, or whether a more amorphous and tort-like concept of assumption of risk applies" and acknowledging that the "former seems more in keeping with Delaware's contractarian regime…"). Based on the *Arwood* and *Akorn* decisions, as well as Chancellor McCormick's decision in *HControl*, the trial court determined that "[h]olding Plaintiffs to their unqualified representations does not create an unjust result." Mem. Op. at 86. The

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claim against the warrantor for the breach of warranty that was known to the warrantee on the execution date.").

trial court conversely found that requiring HOL to close would render the unqualified representations and warranties in Sections 3.9 and 3.13, and the specific closing condition in Section 5.1(b), meaningless. *Id.* at 87-88 (citing *HControl*, 2023 WL 3698535, at *38).[9]

Plaintiffs do not challenge the pro-sandbagging holdings of *Arwood* and *Akorn*; they agree those decisions "properly focused on allocation of risk" (*see* Plaintiffs' Br. at 25). Plaintiffs instead, in their policy-making quest, seek an exception that would prohibit a different type of behavior which they erroneously contend is also a type of sandbagging (*i.e.*, where a buyer knows of an inaccuracy pre-signing and refuses to close rather than seek post-closing damages). *See id.* As to this case, Plaintiffs ask the Court to rewrite the SSAs to eliminate the closing condition in Section 5.1(b) or imply an anti-sandbagging provision. Neither request comports with Delaware law. HOL addresses each assertion in turn.

"First, it is axiomatic that courts cannot rewrite contracts or supply omitted provisions. Doing so does not respect the parties' freedom of contract." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020). Second, and relatedly, "Delaware is more contractarian than most states, and our law respects contracting parties' right to enter into good and bad contracts. Our courts enforce both."

[9] If Plaintiffs are correct in their "sandbagging" argument, HOL would be forced to close and would have no basis to seek post-closing damages for the inaccurate representations in Sections 3.9 and 3.13. This argument is an unreasonable *post-hoc* justification to excuse Plaintiffs' contract failures.

Arwood, 2022 WL 705841, at *29 (internal quotes and citations omitted); *see Glaxo Group Limited v. DRIT LP*, 248 A.3d 911, 919 (Del. 2021) ("Under Delaware law, sophisticated parties are bound by the terms of their agreement. Even if the bargain they strike ends up a bad deal for one or both parties, the court's role is enforce the agreement as written. … Holding sophisticated contracting parties to their agreement promotes certainty and predictability in commercial transactions.") (cleaned up).

Plaintiffs' argument in favor of an exception also makes little sense where, like here, a contract includes a closing condition that requires all representations and warranties be true and accurate through closing ***and*** contemplates the signing of that contract and an eventual closing to be staggered and not simultaneous. The Court endorsed HOL's position in *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1236 n.185 (Del. 2018). In the face of a closing condition that required all representations and warranties to be true through closing and a staggered signing and closing, the Court suggested that "even though the parties apparently appreciated that the 'reality' of not having signed releases in hand did not comport with certain representations at the time of execution, it appears the parties were willing to overlook any problem at signing and allow Campbell to strive to obtain any necessary releases by Closing." *Id.* The same rationale proves true in this case.

Plaintiffs could have provided HOL with the promised IFRS financial statements for Reby Rides, S.L. post-signing. Yet, they never did. Plaintiffs also could have resolved the outstanding issues with the two Reby stockholders who did not sign or provide an SSA. Yet, they did not. Indeed, Plaintiffs' ability to cure the untrue and incorrect representations and warranties in Sections 3.9 and 3.13 in the time between signing and closing is the "recourse" that Plaintiffs claim is missing in this situation. *See* Plaintiffs' Br. at 28. It also is entirely consistent with Delaware's existing risk allocation scheme, which need not be disturbed.

Plaintiffs' reliance on the Second Circuit's decision in *Galli v. Metz*, 973 F.2d 145 (2d Cir. 1992) (Plaintiffs' Br. at 30-31) provides illusory support for their purported sandbagging exception. As Plaintiffs' concede (*id.* at 31 n.6), *Galli* is facially distinguishable because the contract at issue was signed and closed simultaneously. *See* 973 F.2d at 147. The *Galli* decision also is at odds with settled Delaware law that holds "reliance is not an element of a claim … for breach of any of the representations or warranties in the agreement." *Arwood*, 2022 WL 705841, at *30 (citing *Gloucester Hldg. Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 127–28 (Del. Ch. 2003) and *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. Ct. 2005), *aff'd*, 886 A.2d 1278 (Del. 2005)). Moreover, although *Galli* is a Second Circuit decision, its holding does

not appear to have been adopted by the Court of Appeals of New York, the ultimate authority on New York contract law, in the thirty years since the decision.

Finally, unlike the scenarios hypothesized by Plaintiffs (*see* Plaintiffs' Br. at 26), HOL's intentional rejection of an anti-sandbagging clause demonstrates that it was purchasing the truth of representations and warranties in the SSAs, including those in Sections 3.9 and 3.13. Indeed, HOL rejected Plaintiffs' proposed anti-sandbagging provision due to concerns that Plaintiffs and Gomez had not provided basic due diligence. *See* B367; B484; A465-66 (Trial_Tr. 547:24-549:2). The trial court noted these highly relevant and undisputed facts when discussing Plaintiffs' anti-sandbagging argument (*see* Mem. Op. at 87 n.291), and Plaintiffs' omission of them in this appeal leads to the presupposition that they have no defense. These undisputed facts further demonstrate that HOL's refusal to close is consistent with Delaware's existing risk allocation scheme and the trial court should be affirmed.

II. THE TRIAL COURT CORRECTLY INTERPRETED SECTION 3.9 AND PROPERLY FOUND THAT THE REPRESENTATIONS AND WARRANTIES IN SECTIONS 3.9 OR 3.13 WERE UNTRUE AND INACCURATE

A. Questions Presented

Did the trial court correctly determine that Restanca's representations and warranties in Sections 3.9 and 3.13, made on Reby's behalf, were unqualified, untrue, and inaccurate? A605; A607; B150-52.

B. Scope of Review

Questions of contract interpretation are reviewed *de novo*. *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014). To the extent a trial court's interpretation of a contact "rests upon findings extrinsic to the contract, or upon inferences drawn from those findings," the Court must "defer to the trial court's findings, unless the findings are not supported by the record or unless the inference drawn from those findings are not the product of an orderly or logical deductive reasoning process." *AT&T Corp. v. Lillis*, 953 A.2d 241, 251-52 (Del. 2008).

C. Merits of the Argument

1. The trial court correctly interpreted Section 3.9.

The trial court interpreted Section 3.9 as a representation that the Selling Stockholders collectively owned all outstanding shares of Reby stock that HOL did not already own. Mem. Op. at 73-81. This interpretation should be affirmed.

The trial court's interpretation is consistent with HOL's intention to purchase all outstanding Reby stock that it did not already own. *See Weinberg v. Waystar*, 294 A.3d 1039, 1044 (Del. 2023) ("In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract.") (quoting *Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Co. LLC*, 166 A.3d 912, 913-14 (Del. 2017)); *Lorillard Tobacco v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) ("A court must accept and apply the plain meaning of an unambiguous term in the context of the contract language and circumstances, insofar as the parties themselves would have agreed ex ante.").

The trial court's interpretation also gave effect to the definition of "Shares" and harmonized Section 3.9 against Section 3.10. *See* Mem. Op. at 78; *see also Manti Holdings, LLC v. Authentix Acquisition Co.*, Inc., 261 A.3d 1199, 1208 (Del. 2021) (noting that contracts should be read as whole to "enforce the plain meaning of clear and unambiguous language" and, in doing so, the Court should strive to "give each provision and term effect" and not render any terms "meaningless or illusory"). Although each SSA is written to apply to an individual Selling Stockholder, each SSA must be read in conjunction with all of the other signed SSAs. Mem. Op. at 78-79. The SSAs define "the undersigned persons" as "each, a 'Seller' and collectively, the 'Sellers.'" *Id.* at 79. And In defining "Shares," the SSAs note that "each Seller desires to sell to the Buyer . . . all of Seller's shares of

capital stock of the Company owned by such Seller (collectively, the 'Shares')." *Id.* As the trial court correctly reasoned, the inclusion of the word "collectively," in elaborating the scope of the defined term "Shares," would make no sense here unless it was meant to include the total of all shares that each seller were to convey to the buyer. *Id.* Relatedly, Section 3.10 further represents and warrants that there would be no other Reby securities, or rights to acquire Reby securities, outstanding at closing. *Id.* at 78.

Contrary to the plain language of Section 3.9, Plaintiffs contend the provision represents and warrants that "each seller did not own any 'issued, outstanding or authorized securities of the Company' apart from those that each was conveying to HOL." Plaintiffs' Br. at 35. The trial court rejected this exact argument (*see* Mem. Op. at 75-80), and Plaintiffs once again fail even to address, let alone present, compelling argument against the trial court's reasoning.

For instance, Plaintiffs cannot and do not dispute that their interpretation of Section 3.9 runs counter to the overall purpose of the SSA transactions in that it would require HOL to close irrespective of the total percentage of shares that HOL was purchasing so long as each Reby stockholder who signed an SSA was conveying all of their respective Reby stock. *See id.* at 77. Indeed, Plaintiffs' cited authorities concede that such an interpretation is impermissible under Delaware law. *See* Plaintiffs' Br. at 35 (citing *E.I. du Pont de Nemours & Co v. Shell Oil Co.*,

498 A.2d 1108, 1113 (Del. 1985) to support that "'a particular portion of an agreement' cannot be construed in a manner that 'runs counter to the agreement's overall scheme or plan.'"). Plaintiffs further ignore that Section 3.9 is a representation by *Restanca on behalf of Reby*—not a representation by an individual Selling Stockholder—and that the SSAs were bundled together and sent to Taylor as a whole for a single signature. *See* Mem. Op. at 78-79. These unassailable facts provide the necessary context to interpret Section 3.9, yet Plaintiffs ignore them. Plaintiffs also make no attempt to justify their interpretation of Section 3.9 in light of the representation in Section 3.10, presumably because their interpretation of Section 3.9 would render Section 3.10 meaningless. *See Manti Holdings,* 261 A.3d at 1208.[10]

[10] Plaintiffs did not brief an alternative argument based on ambiguity. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."). Even if they had raised this argument, it would fail. Although the trial court found that Section 3.9 was unambiguous, it explained that if Section 3.9 were deemed to be ambiguous, extrinsic evidence would confirm its interpretation. *See* Mem. Op. at 80-81. Thus, to the extent the Court believes that Section 3.9 could be ambiguous, HOL respectfully submits that, for the reasons noted by the trial court, extrinsic evidence supports and confirms that trial court's interpretation of Section 3.9. *See id.* Even in this alternative context, the trial court's interpretation of Section 3.9 should be affirmed.

2. The representations and warranties in Sections 3.9 and 3.13 were untrue and incorrect at all relevant times.[11]

Plaintiffs concede that, as of the alleged time for closing, the Selling Stockholders did not collectively own all outstanding shares of Reby stock that HOL did not already own, as represented and warranted in Section 3.9. *See* Plaintiffs' Br. at 3 (conceding that "two small Reby stockholders (amounting to approximately 1% of outstanding shares) had not signed an SSA"); *id.* 8 ("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 amount to *approximately 99%* of Reby's shares.") (emphasis added); *id.* at 36 (acknowledging "near-compliance" with the representation and warranty in Section 3.9 because not all of Reby's stockholders signed a SSA).

Likewise, Plaintiffs concede that they never provided HOL with IFRS audited financial statements for Reby Rides for the years ended December 31, 2019 and December 31, 2020, as represented and warranted in Section 3.13. *See* Plaintiffs' Br. at 3 (conceding that the financial statements HOL received "were not audited in accordance with the standards specified in the SSAs (IFRS) but instead were audited pursuant to a different standard (GAAP)); *id.* at 36-37 (contending "near compliance" with Section 3.13 because HOL received GAAP-

[11] Plaintiffs did not challenge the trial court's interpretation of Section 3.13. *See Emerald Partners*, 726 A.2d at 1224 ("Issues not briefed are deemed waived.").

audited financial statements and not IFRS-audited financial statements). HOL was under no obligation to find a work-around for Plaintiffs' unexcused failures.[12]

The foregoing undisputed facts are dispositive. Because the representations and warranties in Sections 3.9 and 3.13 were untrue and incorrect at all relevant times, HOL had no obligation to perform. The trial court's ruling should be affirmed and Plaintiffs' appeal should be denied.

3. The representations and warranties in Sections 3.9 and 3.13 were completely unqualified.

Rather than accept fault for failing to satisfy the closing condition in Section 5.1(b), Plaintiffs contend that Sections 3.9 and 3.13 are subject to an implied materiality qualifier. *See* Plaintiffs' Br. at 4, 7, 34. The trial court considered Plaintiffs' argument and rejected it, and this Court should do the same.

As an initial matter, Plaintiffs again cannot and do not contend that the plain terms of Sections 3.9 and 3.13 contain an express materiality qualifier. Nor do Plaintiffs dispute that the parties could have included a materiality qualifier in Sections 3.9 and 3.13, as they knew how to and did in other places in the SSAs, had they intended one to apply. *See, e.g.*, A931 (Model SSA, § 3.5, representing that Reby does not require consent, approval, or waiver "under any material contract" to complete the SSAs transaction); A933 (Model SSA, § 3.17,

[12] As discussed *infra*, HOL does not agree that Plaintiffs' conduct constituted "near compliance" with Sections 3.9 or 3.13.

representing that Reby is in "material compliance" with each lease it has for property and assets); A934 (Model SSA, § 3.21, representing that Reby is in "material compliance" with laws and obligations relating to privacy and security of the software systems that is uses); A935 (Model SSA, § 3.26, representing that Reby is not in default of "any material term or condition" of any insurance policy).

Plaintiffs assert instead that Section 3.29 superimposes a materiality qualifier on all representations and warranties in the SSAs, including those set forth in Sections 3.9 and 3.13. *See* Plaintiffs' Br. at 4, 34. They are wrong, as the trial court correctly explained. *See* Mem. Op. at 82-84.

Section 3.29 provides:

> Disclosure. No representation or warranty or other statement made by Restanca LLC respecting the Company in this Agreement or otherwise in connection with the transactions contemplated by this Agreement 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 (Model SSA, § 3.29). Section 3.29 is a general representation and warranty that addresses broader circumstances than the tailored representations and warranties set forth in Sections 3.9 and 3.13. *Id.* It specifically references any "representation or warranty *or other statement*" made "in this Agreement *or otherwise in connection with the transactions contemplated by this Agreement*"

and thus, by its plain language, has application beyond the specific representations and warranties contained in Article 3. *Id.* (emphasis added).

The trial court further recognized that SSA Section 3.29 is modeled after Section 3.29 of the ABA Mergers & Acquisitions Committee's Model Stock Purchase Agreement, and appropriately consulted the relevant commentary to that model agreement to understand the purpose of Section 3.29. *See* Mem. Op. at 83-84 (citing to *HControl*, 2023 WL 3698535, at *24 as support for consideration of custom and practice to evaluate the plain language of a stock purchase agreement). According to the ABA's commentary, Section 3.29 is intended to "fill any disclosure gaps" and "cover a fact or circumstance that might have fallen outside the scope of other Article 3 representations." *See id.* In other words, Section 3.29 is intended to complement the preceding, more specific, Article 3 representations and warranties like Sections 3.9 and 3.13. It does not qualify them.

Under settled Delaware contract interpretation principles, specific language in a contract controls over general language, so the plain text of Sections 3.9 and 3.13 must control. *See AM Gen. Hlds. LLC v. Renco Group, Inc.*, 2020 WL 3484069, at *4 (Del. Ch. June 26, 2020) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."). Indeed, as the trial court noted, Plaintiffs made this precise "specific over general"

argument in defense of arguments made by HOL relating to the truth and correctness of other representations and warranties in the SSAs. Mem. Op. at 83 n.284. Plaintiffs cannot have it both ways. The reasonable and reasoned interpretation of the trial court should not be disturbed on appeal.

While Plaintiffs contend that the trial court misinterpreted Section 3.29 (Plaintiffs' Br. at 34), they never address the trial court's well-reasoned interpretation—they simply offer a conclusory opinion that the trial court got it wrong. Properly construed in the context of the SSAs, Section 3.29 does not modify or disturb any other representation or warranty contained in Article 3; it provides HOL with an additional representation and warranty. Plaintiffs have no credible argument otherwise.

4. HOL's post-trial arguments below did not impart a materiality qualifier into Sections 3.9 or 3.13.

As discussed *supra*, Section 5.1 is a "flat" bring down provision, i.e., it does not contain a materiality qualifier, and Section 3.29 does not impart a materiality qualification on any representation or warranty specifically made in Article 3. Plaintiffs nevertheless assert that HOL somehow conceded a materiality qualifier. *See* Plaintiffs Br. at 36-37. This argument fails.

HOL argued that Plaintiffs "materially breached" the SSAs by virtue of, among other things, making untrue and incorrect representations and warranties in

Sections 3.9 and 3.13.[13] HOL's argument was premised on the centrality of the breached representations to the overall purpose of the transaction and was one and the same as arguing that Plaintiffs failed to satisfy the closing condition in Section 5.1(b). That is precisely how the trial court understood it. *See* Mem. Op. at 71 ("HOL argues that it is not required to close the transaction because Plaintiffs have breached their representations and warranties under the SSAs.").

While HOL believed, and continues to believe, that Plaintiffs' breaches of the representations and warranties in Sections 3.9 and 3.13 were material breaches of the SSAs, that is not ultimately at issue in this appeal. This appeal can, and should, be resolved on grounds that the untruth and inaccuracy of Sections 3.9 and 3.13 left the closing condition in Section 5.1(b) unsatisfied.

Even assuming *arguendo* that HOL needed show material breaches of Sections 3.9 or 3.13 to succeed on this appeal, HOL can easily do so. The representation and warranty in Section 3.9—that the Selling Stockholders owned *all* of the outstanding stock of Reby that was not already owned by HOL—was indisputably untrue. *Supra* at § II.C.2. Representations and warranties regarding a company's capital structure are, as the trial court recognized, fundamental in a

[13] This "legal effect" argument does not equate to the entirely different argument about "factual materiality" proffered by Plaintiffs. Plaintiffs assert that to qualify as a breach of the SSAs, the actual existing facts pertaining to the representations and warranties must be "materially" different from the representations and warranties expressed as set forth in Sections 3.9 and 3.13.

proposed stock purchase transaction. *See* Mem. Op. at 81 n.283 ("Requiring full compliance with the capitalization requirement serves to avoid the "highly undesirable" situation of acquiring a target that "has even one minority shareholder, no matter how insignificant the percentage interest represented by those shares."). That was especially true here, where HOL's intention to own 100% of Reby's stock—hence the corresponding representation and warranty in Section 3.9—was *the* material component of any contemplated transaction among HOL and Reby's other stockholders. To that point, all three term sheets confirm that HOL intended to own 100% of Reby's stock post-transaction. *See* B187 (First Term Sheet); Mem. Op. at 7 (discussing Second Term Sheet); A884 (Third Term Sheet).

In Section 3.13, HOL specifically bargained for the right to receive IFRS audited financial statements as an independent and verifiable assurance regarding the financial status of the company it intended to own 100% of post-transaction. This was necessary given the lack of meaningful and basic diligence materials being provided by Reby and Gomez to HOL. *See, e.g.,* A438 (Trial_Tr. (437:19-439:17); A440 (Trial_Tr. 445:20-446:13); A462 (Trial_Tr. 534:7-14); A464 (Trial_Tr. 548:19-549:2). Although Plaintiffs suggest a similarity between IFRS and "GAAP" financial statements, it is pure conjecture. They never presented any evidence to support that proposition. In fact, it would have required an international accounting expert opinion given that the financial statements for

Reby Rides, S.L. at issue were prepared under Spanish GAAP principles, a critical fact that Plaintiffs failed to disclose to the Court.

Moreover, equally important and expressly made known, IFRS audited financial statements also were necessary to complete a public company transaction irrespective of whether that transaction occurred before or after an acquisition of Reby. HOL presented a wealth of evidence to support this. *See, e.g.,* A418 (Trial_Tr. 359:9-13); A426 (Trial_Tr. 390:17-391:18); A430 (Trial_Tr. 405:18-406:9); A438 (Trial_Tr. 437:15-22); A458 (Trial_Tr. 524:18-526:20 (discussing B264); A460-61 (Trial_Tr. 527:22-528:18) (explaining written comments to Reby on B237); A463 (Trial_Tr. 537:8-538:6); A465 (Trial_Tr. 544:20-546:13); A466 (Trial_Tr. 561:7-22); A467 (Trial_Tr. 554:3-21). Plaintiffs further suggest that Spanish GAAP financial statements could have been used in place of IFRS financial statements for a public company transaction (Plaintiffs' Br. at 37), but they again failed to present evidence—which would have had to come in the form of expert testimony from a Canadian securities law expert—to support that position.

* * * * * *

For all of the foregoing reasons, Plaintiffs' arguments fail and the trial court's interpretation of Section 3.9 and legal holding and factual findings regarding Sections 3.9 and 3.3 should be affirmed.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT HOL WAS THE PREVAILING PARTY AND THEREFORE ENTITLED TO CONTRACTUAL FEE SHIFTING

A. Question Presented

Did the trial court correctly determine that HOL was entitled to fee-shifting as the prevailing party under Section 7.13 of the SSAs? B95; A827-37; B167.

B. Scope of Review

The Court reviews the interpretation of a contractual fee-shifting provision *de novo*, but it reviews a decision to award attorneys' fees and costs for an abuse of discretion. *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 280-81 (Del. 2022).

C. Merits of the Argument

The trial court properly determined that HOL was entitled to its costs, expenses, and attorneys' fees (which were a mere fraction of those incurred by Plaintiffs), under Section 7.13 of the SSAs because HOL prevailed on this case's chief issue: whether HOL was obligated to complete the acquisition contemplated by the SSAs. Accordingly, the trial court's reasonable award should be upheld.

Section 7.13 of the SSAs unambiguously calls for the "non-prevailing party" in any action by either party to enforce rights under the SSAs to pay the fees and expenses, including reasonable attorneys' fees, incurred by the "prevailing party." Plaintiffs do not dispute the trial court's interpretation of the Section 7.13 or the settled legal standard that governs prevailing party fee-shifting provisions. Rather, they dispute HOL's status as the prevailing party on the chief legal issue.

"Having chosen the common term 'prevailing party,' the parties can be presumed to have intended that that term would be applied by the court as it has traditionally do so." *Bako Pathology*, 288 A.3d at 281 (internal quotes omitted). The "traditional application" of a "prevailing party" provision calls for "an all-or nothing approach involving an inquiry into which party predominated the litigation, as opposed to a claim-by-claim or other partial basis approach." *Id.*; *see also W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009) ("Absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual [fee-shifting] provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner."). "Predominance" means success on the "chief issue" in the case, the determination for which should be guided by the "substantive issues" at play. *See 2009 Caiola Family Trust v. PWA, LLC*, 2015 WL 6007596, at *33 (Del. Ch. Oct. 14, 2015); *W. Willow-Bay*, 2009 WL 458779, at *9.

In this case, the trial court determined that there was a single chief issue: whether Plaintiffs were entitled to specific performance, i.e., whether HOL was obligated to close. On this chief issue, HOL indisputably prevailed. As addressed *supra*, the trial court correctly determined that HOL was not obligated to close the transactions contemplated by the SSAs because Plaintiffs failed to satisfy the closing condition in Section 5.1(b).

Although Plaintiffs suggest that the Court should review the trial court's determination, and corresponding award to HOL, under a *de novo* standard of review (*see* Plaintiffs' Brief at 39), the Court has explained that a trial court's decision to award attorneys' fees and costs, including under a contractual prevailing-party, fee-shifting provision, should only be overturned for an abuse of discretion. *See, e.g., Bako Pathology*, 288 A.3d at 280-82 ("The trial court's focus on the overall dispute and its conclusion that there was no prevailing party in the overall dispute here is not an abuse of discretion. Thus, we find no error in the trial court's decision to not award attorneys' fees under the Partnership Agreement.").

The trial court's determination that HOL predominated on the chief issue in this case was not remotely close to an abuse of discretion. All three claims in Plaintiffs' Verified Complaint requested a determination that HOL was obligated to close on the contemplated transactions (*see* B18-24, ¶¶ 39-62); and the main remedy sought by Plaintiffs was an order for specific performance based on HOL's purported breach of its obligation to close. Plaintiffs even conceded that they "brought this action because [HOL] agreed to an enforceable contract and then declined to honor it." A842, ¶ 2.

Plaintiffs assert the "chief legal issue" was whether the SSAs were valid and enforceable contracts and the "chief factual issues" were the circumstances surrounding the SSA's execution and HOL's fraud counterclaim. *See* Plaintiffs'

Br. at 41. This is primarily based on Plaintiffs' belief that "the trial—and most of the work—was necessitated exclusively by HOL's factual defenses and counterclaims." *Id.* But as the trial court correctly held, "in the context of a contractual fee-shifting provision, the failure of a litigant to establish fraud as a defense to avoid a contract does not mean that party cannot recover its fees if it prevails in the litigation on other grounds." Fee Order at 6 (citing *AFH Hldg. & Advisory, LLC v. Emmaus Life Scis., Inc.*, 2014 WL 1760935, at *3 (Del. Super. Ct. Apr. 16, 2014) and *Greenstar, LLC v. Heller*, 934 F. Supp. 2d 672, 697 (D. Del. 2013)).[14] Although HOL may have advanced certain defenses and counterclaims, each one of them flowed from and was necessitated by Plaintiffs' primary argument that HOL was obligated to close on the SSAs. And perhaps most importantly, although the SSAs were recognized to be valid contracts, Plaintiffs failed to enforce any rights under the SSAs, as Section 7.13 requires. *See id.* at 6-7.

Finally, while Plaintiffs pay lip service to Delaware's "all-or-nothing" approach for determining a prevailing party, the thrust of their argument on appeal, as it was before the trial court, is that HOL did not "prevail" for purposes of Section 7.13 because HOL did not achieve a full victory on all of the discrete

[14] "Fee Order" refers to the trial court's Order Addressing Applications for Attorneys' Fees and Expenses, a copy of which is attached to Plaintiffs' Opening Brief as Exhibit B.

claims and issues in the litigation.[15] That scorekeeping approach is legally irrelevant under controlling Delaware law. *See Bako Pathology*, 282 A.3d at 281; *W. Willow-Bay*, 2009 WL 458779, at *8; *see also Brandin v. Gottlieb*, 2000 WL 1005954, at *28 (Del. Ch. July 13, 2000) ("That is, the parties eschewed a claim-by-claim approach by failing to insert any language in the contract that would authorize the court to exercise discretion to award less than 'all' the prevailing party's fees in a case where the prevailing party had achieved less than full victory."). Accordingly, the trial court's Fee Order should be affirmed.

[15] *See, e.g.*, Plaintiffs' Br. at 40-41 ("This litigation involved many disputes … Plaintiffs prevailed on all but one of these disputes. Thus, Plaintiffs and not HOL prevailed."); *id.* at 42 ("… 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.") (emphasis omitted); *id.* at 43 ("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. … Even under this narrow framework, HOL lost most of the issues.").

CONCLUSION

For the reasons addressed herein, and those in the Memorandum Opinion and Fee Order, the trial court's Final Order and Judgment should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2024, a copy of the foregoing **Appellee's Answering Brief** was served via File & Serve*Xpress* on the following counsel of record:

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