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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' REPLY BRIEF

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PRELIMINARY STATEMENT[1]

In the Answering Brief ("AB"), HOL does not dispute that when it signed the SSAs and when it began performing under the agreements, it had actual knowledge of the inaccuracy of the two representations it now seeks to use to get out of the deal entirely. If the trial court's ruling on sandbagging is not reversed, parties like HOL with actual knowledge of an inaccurate representation will be given a free option to declare the contract illusory at any time—even after starting to perform. That outcome is fundamentally unfair, and is not Delaware law. HOL barely argues otherwise. HOL instead focuses on incorrect arguments that attempt to sidestep this novel sandbagging question.

Plaintiffs have presented the better interpretation of the SSAs consistent with the parties' intent, explained why the lower court's rulings are contrary to Delaware law and market practice, and demonstrated why public policy demands the lower court be reversed. This Court should reverse for at least three reasons.

First, the Court should hold that a party may not execute a binding contract with knowledge that a representation is false, start to close, and then back out from the deal under the pretense that it was never obligated to close in the first place. This would create an illusory contract, requiring only sellers to follow through with the

[1] Capitalized terms not defined herein take the meanings given in Appellants' Corrected Opening Brief ("Opening Brief" or "OB").

contract's covenants while buyers have the option to opt in or out. Even setting aside that Delaware should not render contracts meaningless when one side has actual knowledge of a technically inaccurate representation, pro-sandbagging principles encourage unfair negotiation tactics by buyers and limit the utility or attractiveness of representations.

Second, and regardless of sandbagging, the trial court erred in interpreting Sections 3.9, 3.13, and 3.29 of the SSAs. HOL was required to but did not show a material breach of Sections 3.9 or 3.13. HOL repeatedly conceded as much in the trial court. And Section 3.29 is a materiality qualifier. Because the trial court failed to find that Plaintiffs materially breached either Section 3.9 or 3.13, HOL is required to close.

Moreover, HOL failed to show any breach of Section 3.9 at all. Section 3.9 only contains a representation that each Seller was conveying its whole interest in Reby. The trial court wrongfully interpreted the SSAs' "overall scheme" to mean that all Reby stockholders were required to convey their interests to HOL. Rather, the SSAs focus only on the stockholders who signed an SSA. HOL did not agree to a contract that guaranteed it full ownership of Reby, and this Court must enforce the parties' bargain.

Finally, HOL repeats the same flawed arguments used below to argue that it was the prevailing party. HOL failed on every factual issue and almost every legal

issue. The trial involved a complex set of affirmative claims and counterclaims, with varying levels of success. Reviewing the result holistically, as Delaware law commands, it is clear that Plaintiffs prevailed overall, and under no circumstances is HOL the prevailing party.

ARGUMENT

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

HOL correctly states that sandbagging typically refers to post-closing damages actions. Brandon Cole, *Knowledge Is Not Necessarily Power: Sandbagging in New York M&A Transactions*, 42 J. CORP. L. 445, 446 (2016). HOL argues that definition is sufficient to affirm the lower court. AB at 21-23. That flawed argument fails to explain why sandbagging principles should not apply equally to pre-closing actions. HOL does not offer a single case that supports its proposition that, as here, a party may sign an agreement knowing representations are not completely accurate and the conditions are not and cannot be satisfied, begin to close nevertheless, and then weaponize those inaccuracies to walk from the transaction once it gets buyer's remorse. If this Court prefers to call sandbagging in the pre-closing context by a different name, Plaintiffs have no objection. A different name does not dictate a different result.

A. Scope of Review

As an initial matter, the proper standard of review is *de novo*. HOL claims there are "mixed questions of law and fact," but presents none. *See* AB at 18. The parties agree on the relevant facts: the SSAs existed, AB at 16-17, were executed, *id.*, HOL knew the representations in them were not fully accurate when they were executed, *id.* at 10, 16-17, and HOL began performing on the SSAs before initiating

litigation to avoid finishing closing, OB at 13-14. Thus, the trial court's legal analysis applying those facts is reviewed by this Court *de novo*. *See Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1158 (Del. 2010) (holding this Court "review[s] questions of law and interpret contracts *de novo*").

B. Merits of the Argument

1. HOL Fails to Address Reby's Key Arguments.

HOL fails to discuss the numerous reasons Plaintiffs set forth regarding why this Court should allow specific performance when a buyer has actual knowledge of the falsities of certain contractual representations at signing, especially when the buyer begins to perform. HOL does not dispute that it signed the SSAs, began accepting Reby stock pursuant to the SSAs, and even paid an initial $1 million installment to Restanca—all with the knowledge that Sections 3.9 and 3.13 in the SSAs were inaccurate.[2] Ex. A at 25-27, 31.

HOL overlooks that, assuming it is right, Plaintiffs would have executed an illusory contract binding only Plaintiffs, which is forbidden under Delaware law. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.'"). This is because "[a]ny other approach would deprive the parties of

[2] In the Answering Brief, HOL did not dispute, or even address, that it began performance. *Emerald P'rs v. Berlin,* 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

the four corners of their deal." *SLMSoft.Com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *11 (Del. Super. Ct. Apr. 2, 2003). Under HOL's interpretation, it could always simply walk away.

In the commercial world, parties reasonably expect that their contracts are binding and not illusory, and the parties here certainly believed the contract was not optional. For example, following the signing of the SSAs, HOL wired $1 million to Plaintiffs pursuant to the SSAs, Ex. A at 26-27, promised Plaintiffs additional payments were forthcoming, *id.* at 33, executed a corrected SSA, *id.* at 27-28, collaborated on a press release for the deal, *id.* at 28-30, and manually accepted 119 separate stock certificates, giving it majority control, *id.* at 3, 30-31; OB at 14. Two months later, HOL changed its mind, became desperate to get out of the deal and, as HOL's CEO Taylor messaged a HOL senior associate, "[n]eed[ed] a kill shot" to avoid closing. Ex. A at 35-36. HOL went as far as retaining a transactional advisory firm to scour Reby's financials to invent a reason to refuse to complete closing. *Id.* at 36. HOL does not—because it cannot—respond to the conflict between illusory contracts and its argument to allow pre-closing sandbagging when a party has actual knowledge of the false representation.

HOL also does not address why its conduct is not a waiver of the representations in the SSAs. *See Galli v. Metz*, 973 F.2d 145, 151 (2d Cir. 1992). A buyer who signs a contract with a representation that it knows is inaccurate and then

begins to perform disclaims the importance of the representation. *Assocs. of San Lazaro v. San Lazaro Park Props.*, 864 P.2d 111, 114-15 (Colo. 1993). The buyer should not be able later to resist specific performance under the theory that the representation was inaccurate.

Nor does HOL account for the fact that a pro-sandbagging rule creates an unfair advantage that favors buyers in negotiations. *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."). It is difficult for sellers to negotiate an anti-sandbagging provision because it raises questions about the sellers' credibility. *See* OB at 26. HOL is silent on this commercial reality.

Instead, HOL recycles case law such as *Arwood* and *Akorn* and puts sole emphasis on the cost-allocation function of representations. AB at 23-25. As discussed in the Opening Brief, that case law is not on point because neither case considered a situation where a buyer had *actual knowledge* of inaccurate representations, and neither case occurred after a buyer started to close on a transaction. OB at 23-26. Therefore, this case is unlike a scenario where a buyer

may have had constructive knowledge of a potential breach of a representation and nevertheless sought damages for that breach after closing.

Adopting a pro-sandbagging default rule would signal to sellers that they should agree to *fewer* representations than they otherwise would, decreasing the utility of representations. The more representations to which a seller agrees, the more likely a buyer could tactically structure the agreement to give it an out if it later regrets the transaction.

Delaware would not be alone in rejecting this pro-sandbagging approach. As discussed in the Opening Brief, the Second Circuit in *Galli v. Metz* interpreted New York law to hold "[w]here 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.

HOL misleadingly suggests that the New York has not adopted the ruling in *Galli* because the New York Court of Appeals has not ruled on the issue. However, at least three New York trial court opinions have cited *Galli* with approval. *See Platinum Equity Advisors, LLC v. SDI, Inc.*, 41 N.Y.S.3d 721, 2016 WL 3221580, at *5 (N.Y. Sup. Ct. June 7, 2016) (TABLE) ("There is an exception to [the *Ziff-Davis*] rule where a 'buyer closes on a contract in full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty.'");

Siemens Solar Indus. v. Atl. Richfield Co., 673 N.Y.S.2d 674, 674 (N.Y. App. Div. 1998) ("Moreover, it would be inequitable to permit plaintiff to recover under such warranty in view of its knowledge of facts that would otherwise constitute a breach thereof."); *Pramco III, LLC v. P'rs Tr. Bank*, 842 N.Y.S.2d 174, 184 n.1 (N.Y. Sup. Ct. 2007), *aff'd*, 860 N.Y.S.2d 775 (N.Y. App. Div. 2008). Therefore, Delaware law would be consistent with New York law if it adopted an anti-sandbagging framework when a buyer learns of inaccurate representations from the seller, especially when the buyer decides to begin performance afterwards. Indeed, *Arwood* cites *Ziff-Davis* in explaining that representations are an important risk-allocation instrument, so it is reasonable to accept the *Galli* exception alongside the *Ziff-Davis* rule. *See Arwood v. AW Site Servs., LLC*, 2022 WL 705841, at *31 nn.293-96 & 298 (Del. Ch. Mar. 9, 2022) (subsequent history omitted).

2. HOL's Remaining Arguments Fail.

HOL makes several arguments to avoid analyzing the merits of HOL's sandbagging. HOL first argues that the Court should not consider its sandbagging because the Court did not rely on sandbagging, and Section 5.1 of the SSA "support[s] the trial court's conclusion that HOL was not obligated to complete the transactions contemplated by the SSAs." AB at 21. HOL's reasoning is flawed for numerous reasons.

First, the trial court's analysis of sandbagging and proclamation that Delaware is a pro-sandbagging jurisdiction is not mere dicta. Ex. A at 85. The trial court did rule on the sandbagging issue, *id.* at 84-88; *see also* A319-20; A682; A684-85; A809; A811, and thus this Court should consider it on appeal, *see N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014); *Mundy v. Holden,* 204 A.2d 83, 88 (Del. 1964).

Second, HOL misunderstands the sandbagging argument. Plaintiffs *do* dispute that Section 5.1 empowered HOL to refuse to close after executing the SSAs, which included representations HOL knew were inaccurate. Plaintiffs reject that Section 5.1 permits HOL to walk away even after starting to perform. Rather, anti-sandbagging and waiver principles should preclude enforcement of Section 5.1 insofar as it applies to representations that HOL knew were false at signing and when it started performing.

Plaintiffs are also not asking this Court to rewrite the SSAs. Rather, Plaintiffs are proposing this Court adopt the only rule that would not render the SSAs illusory.[3] *O'Brien*, 785 A.2d at 287.

[3] For this and the other reasons detailed herein, HOL's argument that an anti-sandbagging rule would render Sections 3.9, 3.13, and 5.1 meaningless, AB at 23-24, misses the point. If HOL's position is accepted, *the entire contract is rendered meaningless*.

Further, HOL attempts to conjure up factual disputes to deflect that it knew that Sections 3.9 and 3.13 were not accurate at signing. HOL disputes *why* Diaz, a stockholder, refused to sign an SSA. *See* AB at 16. But that point is irrelevant. HOL does not dispute that it had actual knowledge when it signed that Diaz had not signed and thus Section 3.9 (as HOL interprets it) could not be accurate. *See* Ex. A at 17-18; *Emerald P'rs,* 726 A.2d at 1224 ("Issues not briefed are deemed waived."). That is what is relevant here.

HOL also claims that in term sheet negotiations, Reby's counsel proposed an anti-sandbagging provision that was rejected by HOL. HOL suggests the parties thus intended a pro-sandbagging rule apply to the SSAs. This argument is flawed for two reasons. First, Reby's counsel did not propose an anti-sandbagging provision, regardless of whether an HOL representative referred to it as such. The struck provision provided:

> 4.11 Independent Investigation. Buyer has conducted its own independent investigation, review and analysis of the business, results of operations, prospects, condition (financial or otherwise) or assets of the Company, and acknowledges that it has been provided adequate access to the personnel, properties, assets, promises, books and records, and other documents and data of Seller and the Company for such purpose. Buyer acknowledges and agrees that: (a) in making its decision to enter into this Agreement and to consummate the transactions contemplated hereby, Buyer has relied solely upon its own investigation, and (b) none of Seller, the Company or any other person has made any representation or warranty as to Seller, Company or this Agreement, except as expressly set forth in this Agreement.

B367. This clause neither refers to sandbagging nor the consequences of a buyer having actual notice of any representation's inaccuracy. It is nothing like a typical anti-sandbagging clause.

The ABA Model SPA, which HOL concedes is informative, *see* AB at 35, provides that the following language is a standard sandbagging clause:

> [Except as set forth in a Certificate to be delivered by Buyer at the Closing,] Buyer has no knowledge of any facts or circumstances that would serve as a basis for a claim by Buyer against Sellers based upon a breach of any of the representations and warranties of Sellers contained in this Agreement [or breach of any Sellers' covenants or agreements to be performed by any of them at or prior to Closing]. Buyer shall be deemed to have waived in full any breach of any of Sellers' representations and warranties [and any such covenants and agreements] of which Buyer has knowledge at Closing.

Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 36 DEL. J. CORP. L. 1081, 1087 n.20 (2011) (quoting 1 ABA MERGERS & ACQUISITIONS COMM., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 301 (2d ed. 2010)).

At trial, HOL's deal counsel suggested that the clause Reby proposed and HOL rejected was "in effect, an anti-sandbagging clause and creates a representation that we had adequate access to all of the information we needed, and we weren't relying on any other external representations." A466, Tr. 548. That does not describe an anti-sandbagging provision.

But even if the provision was an anti-sandbagging provision, the parties removed it from the SSAs, opting for silence. The parties did not assert a pro-sandbagging clause. Contrary to HOL's claims, this is simply an indication that the parties did not think the provision was necessary because they assumed the default rule in Delaware was anti-sandbagging. It was not a concession that the parties understood the SSAs to be pro-sandbagging. This Court should not draw inferences from silence.

Finally, there is also no evidence, as HOL suggests, that the parties expected Reby to remedy the inaccurate representations before closing. AB at 26-27. Such an interpretation is illogical. The SSAs provided that "[e]ach of the representations and warranties of Sellers and Company … shall be true and correct *as through the date of this Agreement* and as of the Closing." A939-40, § 5.1(b) (emphasis added). Regardless of whether the representations were remedied at or prior to closing, the representations could never be true and correct "as through the date of" the SSAs (at least not as they are interpreted by HOL). *Id.*

Therefore, HOL fails meaningfully to engage with Plaintiffs' anti-sandbagging arguments, recycles misguided or inapplicable case law, and presents a volley of weak ancillary arguments. The proper holding is that a party may not refuse to finish closing after executing an agreement that it knew contained inaccurate representations and nevertheless began performing.

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

HOL's main argument in its Answering Brief is that Reby's arguments are inconsistent with the lower court's reasoning. However, as stated above, this Court is reviewing the trial court's legal conclusions *de novo*. HOL's arguments are as flawed as the trial court's conclusions.

A. Section 3.29 Is a Materiality Qualifier.

Section 3.29 is a materiality qualifier. HOL may only refuse to close due to material breaches of the SSAs. HOL argues in the Answering Brief that "[p]roperly 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." AB at 36.

If Section 3.29 is clear and unambiguous as HOL claims, HOL does not explain why HOL failed to advance that interpretation in the proceedings below. In fact, HOL *conceded* that the trial court needed to find a material breach to excuse HOL's failure to close. *See* OB 33-34. HOL did not voluntarily raise its burden of proof, and HOL is bound by its arguments below. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 257 (Del. 2017) ("Brinckerhoff conceded below that Section 5.2(c) does not apply to the Alberta Clipper transaction…. Thus, Brinckerhoff has waived the argument that EEP GP breached Section 5.2(c) of the LPA."); *In re Columbia Pipeline Grp., Merger Litig.*, 299 A.3d 393, 409 (Del. Ch.

2023) ("[T]his case was litigated on the premise that the plaintiffs bore the burden of proving reliance. It would be unfair to TransCanada to introduce the presumption after trial, when TransCanada no longer had the opportunity to prove the nonexistence of presumed facts.").

At all relevant times, both sides interpreted Section 3.29 as being a materiality qualifier. This provision provides that

> 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. HOL and the trial court interpret this provision ostensibly to fill gaps in disclosures. *See* AB at 35. But Section 3.29 by its very terms applies to "representation[s and] warrant[ies]" as well as "other statement[s]." A935 § 3.29. HOL's reading would only give meaning to the term "other statement" and "render portions of [Section 3.29] meaningless." *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P.*, 2011 WL 549163, at *5 (Del. Ch. Feb. 16, 2011). It would make little sense to include the language "representation or warranty" in Section 3.29 if a non-material breach of the same was sufficient to refuse to close. If this provision was solely intended to fill gaps that the representations did not cover, HOL fails to explain why it is not limited to those statements. Indeed, HOL knows that Section

3.29 applies to Sections 3.9 and 3.13, which is presumably why it argued below that it needed to prove a material breach. *See* OB 33-34.

B. Section 3.9 Cannot Preclude Closing

1. HOL's Interpretation of Section 3.9 is Incorrect.

The trial court's interpretation of Section 3.9 was also erroneous and must be reversed. OB at 34-46. The parties agree that the language is not ambiguous. *See* AB at 31 n.10.[4] "Shares" under the SSAs mean "all of Seller's shares of capital stock of the Company owned by such Seller." A927. The terms "Seller" and "Sellers" were limited to "the undersigned persons"; no one else. *Id.* (referencing "the undersigned persons (each, a 'Seller' and collectively, the 'Sellers')"). Therefore, the provision applies only to all shares owned by Sellers who sign the SSAs.

Despite that clear language, HOL, like the trial court, argues "[a]lthough 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." AB at 29. This statement contradicts itself. The plain language of the SSAs does not refer to any other SSA. *See generally* A927-947. Each SSA was focused only on the Seller who executed

[4] Ironically, while HOL argues that this interpretation is unambiguous, Plaintiffs have consistently argued for the same interpretation of Section 3.9 while HOL has abandoned its previous argument to the trial court and adopted the trial court's interpretation for purposes of this appeal.

it. While the SSAs do refer to other "Sellers," this phrase means every stockholder who signed an SSA.

The "overall scheme" of each SSA is to convey all Shares that a Seller has, not to ensure that HOL received every single outstanding Share. *E.I. du Pont de Nemours & Co v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). Whatever purpose can be extracted from the Term Sheet is subsidiary to the plain text of the separate SSAs. *See* AB at 38; *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) ("To determine what contractual parties intended, Delaware courts start with the text."). HOL cannot and does not explain why it is problematic that it only bargained to obtain 99% of Reby, rather than full control. A3094.

Nor is it convincing that the SSAs refer to Shares held by non-signatory stockholders merely because Restanca on behalf of Reby made the representations. Restanca is making a representation as to *the Sellers' Shares*, which is defined in the SSAs. Shares not owned by "Sellers" (as the term is defined in the SSAs) are not included in the definition of Shares.

Lastly, Plaintiffs' interpretation of Section 3.9 is consistent with Section 3.10 of the SSAs, which states "[n]o person has any written or oral agreement or option or any right or privilege . . . capable of becoming an agreement or option, including securities, warrants or other convertible obligations of any kind, for . . . the purchase

of any securities of the Company." A932. Section 3.10 simply guarantees HOL that the Shares it was purchasing were not subject to unknown claims. It does not preclude the possibility that some Shares would not be conveyed to HOL.

2. Even if Plaintiffs Violated Section 3.9, the Breach Was Immaterial.

HOL argues that if *any* outstanding stock not owned by HOL was not subject to an SSA, Plaintiffs materially breached the SSAs. AB at 37-38. That interpretation embeds the assumption that an immaterial breach is sufficient.

Instead of explaining why complete ownership was integral to the transaction, HOL merely provides the generalized, conclusory statement that "representations and warranties regarding a company's capital structure are…fundamental in a proposed stock purchase transaction." AB at 37-38. HOL quibbles over approximately 1% of Reby's outstanding stock. AB at 32. But considering just the portion of the shares for which HOL signed and accepted transfer, HOL gained majority control and ownership over Reby. OB at 14. Had HOL finished closing, it would have wielded overwhelming control. HOL fails to explain what was problematic under the SSAs about not receiving the remaining 1%.

That HOL wanted 100% ownership of Reby through the SSAs is not sufficient to prove a material breach. For example, HOL could have simply conducted a short-form merger to take complete ownership of Reby. *See* 8 *Del. C.* § 253. Rather,

because HOL received near-complete control of Reby, Plaintiffs materially performed under the SSAs.

C. Neither Can Section 3.13 Preclude Closing.

Plaintiffs also did not materially breach Section 3.13. Plaintiffs provided HOL financial statements that were audited consistent with Spanish GAAP standards. A476, Tr. 589. HOL has not explained why these financial statements needed to be audited consistent with IFRS standards or taken the position that anything in these financial statements was false.

The similarities and differences between IFRS and GAAP are irrelevant, and HOL has not provided any reason why IFRS-audited financial statements were material. Indeed, HOL concedes that it originally wanted this information to go public. AB at 39. At trial, HOL admitted that it had made no attempt to investigate whether the purported IFRS requirement could be waived or whether Spanish GAAP standards could suffice. A430-31, Tr. 407-08. Moreover, that go-public transaction was never a condition to HOL's deal with Reby (as the trial court found) and in any event has long been abandoned. Ex. A at 64-69. Even HOL's deal counsel has admitted that IFRS-audited financial statements were not necessary for the private acquisition of Reby. A476, Tr. 589.

D. Alternatively, this Court Should Remand to Determine Whether the Breaches Were Material.

The court below did not opine on whether the delivery of only approximately 99% of Reby's Shares was material or whether the provision of Spanish GAAP financials was a material breach. If this Court determines that (i) sandbagging is allowed, (ii) a material breach is required to excuse HOL's performance, (iii) the representations were breached, and (iv) there is a question of fact regarding the materiality of the breaches, this action should be remanded so that the trial court can make the necessary factual determinations in the first instance. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1078 (Del. 1983).

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

The trial court erred when it held that HOL was the prevailing party under Section 7.13 of the SSAs, and this Court should reverse because Plaintiffs prevailed on every factual issue and most legal issues. HOL continues to press this Court to defer to the lower court, but that is inappropriate for contractual interpretation. Rather, HOL must face that it lost on every factual issue, and almost every one of its claims. The prevailing party analysis should not turn solely on remedy. This Court should hold that Plaintiffs were the prevailing party.

A. Scope of Review

HOL continues its misguided campaign to shift the standard of review to abuse of discretion. AB at 40. This is clearly wrong. HOL mistakes the holding of *Bako Pathology LP v. Bakotic*, which holds that "[w]hile we review an award of attorneys' fees for abuse of discretion, we review the *trial court's interpretation* of a contractual fee-shifting provision *de novo*." 288 A.3d 252, 266-67 (Del. 2022) (emphasis added) (alterations omitted). Once the Court determines "an award for attorneys' fees is legally permissible, the determination of the appropriate amount is a classic matter for the trial court's discretion." *Id.* at 279 (alterations omitted).

Therefore, the threshold issue of whether HOL or Plaintiffs are prevailing parties under the SSA and applicable Delaware law (*i.e.*, if an award of attorneys' fees is legally permissible) is a legal question subject to *de novo* review. *Id.* Because

no challenge has been made to the reasonableness of the fees and the outcome of the action in the trial court is not in dispute, there is no exercise of discretion for this Court to review. *Id.*

B. Merits of the Argument

As discussed in the Opening Brief, there were two chief issues in this litigation. *See Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454, at *3 (Del. Ch. Jan. 5, 2018). The appropriate inquiry is to analyze the success of the parties "holistic[ally]." *See id*. With that framework, Plaintiffs are the prevailing parties because they won on the chief issue of both the complaint and counterclaims, won every factual issue, and almost every legal issue. *See* OB at 42-43.

Plaintiffs succeeded on the chief issue of the Complaint, which was whether the SSAs were enforceable contracts. The trial court found that the SSAs were enforceable because they were a product of mutual assent and possessed sufficiently definite terms. Ex. A at 38, 54-56. Moreover, the Answering Brief is noticeably devoid of any significant discussion of the counterclaims. Plaintiffs succeeded on the chief issue of the counterclaims, which was whether Gomez fraudulently induced Taylor into executing the SSAs through a promise that Reby would not enforce the contracts. The trial court rejected HOL's fabricated narrative. Ex. A at 56. The Court further held that HOL failed to prove any damages for any claim on which it succeeded. *Id.* at 96.

HOL does not challenge that these issues were the primary, if not critical, disputes for the lower court. The parties dedicated most of their time and resources, and the Court allocated most of its analysis, to such issues.

The lower court erred when it narrowed its focus for the fee question to whether Plaintiffs obtained their preferred remedy. HOL argues the same point in the Answering Brief, namely, by claiming "there was a single chief issue: whether Plaintiffs were entitled to specific performance, i.e., whether HOL was obligated to close." AB at 41.

HOL wrongly limits the chief issue analysis to the scope of relief. This litigation was multi-faceted, and the trial court decided this case on grounds for which neither party advocated. The trial court found in favor of Plaintiffs on the fraud and enforceability issues. Indeed, HOL lost on almost every counterclaim, with the exception of the counterclaim seeking a mirror-image finding that the SSAs representations were not accurate at signing.

HOL's response to the parties' focus is merely to point to the Fee Order and to argue that the counterclaims "flowed from and [were] necessitated by Plaintiffs' primary argument that HOL was obligated to close on the SSAs." AB at 42-43. As to the former, HOL's redirection to the trial court is not sufficient under a *de novo* standard. *See Bako Pathology LP*, 288 A.3d at 266-67. As to the latter, HOL overlooks that the counterclaims were affirmative claims that challenged the validity

of the SSAs and requested damages independent of Plaintiffs' claims. A3005-3010. HOL cannot simultaneously argue that its claims were entirely dependent on Plaintiffs' claims and at the same time bring independent counterclaims seeking monetary relief from Plaintiffs on separate grounds (*i.e.*, fraud). HOL unequivocally lost on these independent counterclaims.

Furthermore, HOL does not dispute that the parties' trial would have been significantly narrowed or perhaps even obviated if HOL did not fabricate a narrative alleging fraud or challenge the SSAs' enforceability. HOL significantly expanded the scope of this litigation, and lost on every one of those fact issues. This Court should not reward HOL for such behavior. Doing so would only encourage defendants to assert meritless counterclaims to increase costs on plaintiffs and leave Delaware courts with no recourse for the plaintiff even if the plaintiff has negotiated for a prevailing parties provision. HOL did not win on the chief issues on which the trial court and the parties focused, and thus did not prevail in this litigation.

HOL's argument amounts to a rule that a party cannot be a prevailing party if it does not obtain its requested remedy on one claim, even in complex litigation where there are number of affirmative claims and counterclaims on which its litigation opponent similarly fails to obtain its requested remedies (or succeed at all). That is not Delaware law, and this Court should reject such an interpretation of prevailing party clauses. *Ivize of Milwaukee, LLC v. Compex Litig. Suppor*t, 2009

WL 1111179, at *14 (Del. Ch. Apr. 27, 2009); *AFH Hldg. & Advisory, LLC v. Emmaus Life Scis., Inc.*, 2014 WL 1760935, at *3 (Del. Super. Ct. Apr. 16, 2014).

CONCLUSION

For these reasons and those set forth in Plaintiffs' Opening Brief, the trial court should be reversed, and judgment should be entered in Plaintiffs' favor.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2024, true and correct copies of the foregoing *Appellants' Reply Brief* were caused to be served by File & Serve*Xpress* on the following counsel of record:

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