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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMPSON STREET CAPITAL PARTNERS IV, L.P., IN ITS CAPACITY AS MEMBERS' REPRESENTATIVE, Plaintiff Below Appellant, v. SONOVA UNITED STATES HEARING INSTRUMENTS, LLC, Defendant Below, Appellee.	)	No. 166, 2024 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2023-0922-PRW

APPELLANT'S REPLY BRIEF ON APPEAL

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INTRODUCTION[1]

"*Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.*"

–John Adams

Unable to contend with the record facts as they actually exist, Sonova's answering brief ("AB") resorts to arguing about an alternative universe where Section 9.3.2 of the Merger Agreement never contained an express provision that Sonova **"*shall have no right to recover any amounts*"** unless its Claim Notice complied with Section 9.3.2's prerequisites. But, of course, Section 9.3.2 contains that exact provision, and it is fundamental to this appeal. So much so that it was the focus of Plaintiff's opening brief ("OB"), which quoted/cited that provision more than a dozen times. None of those facts would be apparent from reading Sonova's AB, however, which is long on rhetoric but devoid of even one sentence applying Section 9.3.2 as it actually exists. And that avoidance tactic is not the only way in which Sonova relies on misdirection.

[1] Unless noted, capitalized terms are defined in Plaintiff's OB and emphasis in quoted text has been added.

Indeed, Sonova transgresses into misstatement when proclaiming: (a) that "***nothing*** in [the] Merger Agreement" addressed the consequence of Sonova's non-compliance with 9.3.2's prerequisites; and (b) that Plaintiff has not cited "***any*** contractual language" dealing with the matter. AB at 29. But, of course, the Merger Agreement expressly confirms that consequence in Section 9.3.2 itself: Sonova "shall have no right to recover any amounts" on the related Claim. And Plaintiff quoted/cited that very contractual language throughout the OB, as noted above. Plaintiff also explained that Section 9.3.2's consequence provision more than met the plain-statement test for enforceability under Delaware law, noting (among other things) that:

> [i]t is therefore difficult to envision a plainer statement of the consequence for failing to comply with those requirements than having **"*no right*"** to such recovery. Moreover, the use of mandatory ***"shall"*** language leaves Sonova no wiggle room to now advocate for permissive or discretionary application of the consequence provision to which it agreed.

OB at 18-19.

Nor does Sonova's casual disregard for the facts end there. It also attempts to sidestep each of the concessions that are manifest from the record, including Sonova's admission that it declined to provide a single piece of supporting documentation with its Claim Notice despite Section 9.3.2's express Documentation Requirement that all material documents be provided with that Notice. OB at 7-8,

26-28; A244:2-11. As discussed in Plaintiff's OB, that breach of the Documentation Requirement is alone sufficient grounds for reversal – which is why Sonova's AB avoids it like the plague. *Id.* Sonova likewise ignores its written acknowledgement that Section 11.10 of the Merger Agreement expressly provides for the relief sought by the Complaint. OB at 41-46; A044, at § 11.10.

Sonova's approach strains credulity. It is also self-defeating; litigants have long been warned that neither evasions of the record nor perfunctory arguments are tolerated in this Court. *See, e.g.*, Supr. Ct. R. 14; *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived"); *Roca v. E.I. duPont de Nemours & Co.*, 842 A.2d 1238, 1243 n.12 (Del. 2004) ("[I]ssues adverted to in a perfunctory manner" are waived.).

Sonova fares no better in its distortion of relevant law – *i.e.*, the *Blue Cube* and *Nucor* decisions on which its Motion relied but, as explained at pages 18-24 of Plaintiff's OB, are fatal to Sonova's position. Because it cannot overcome the actual analyses in those cases, Sonova evades them and tries to muddy the waters by: (1) cherry-picking inapplicable and out-of-context quotes that ignore the plain language found in Section 9.3.2 of the Merger Agreement; and (2) invoking emotionally charged words (like "forfeiture" and "inequitable") to make policy arguments that likewise are inapposite here, as explained by the same analyses Sonova chose to avoid/distort. *See, e.g.*, AB at 4, 26.

Sonova also violates the very contract principles it then purports to follow, asking this Court to join in pretending that Section 9.3.2's explicit "shall have no right to recover any amounts" language doesn't exist or, as a fallback, to rewrite the Merger Agreement in a way that relieves Sonova from the bargain to which it agreed after extensive negotiations by sophisticated counsel. Neither outcome is permitted by Delaware precedent.

Our courts recognize that it is easier for an aggressive litigant to throw such arguments against the wall than it is for an opponent to clean up the resulting mess. *See, e.g.*, *In re TransPerfect Global, Inc.*, 2021 WL 1711797, at *1 (Del. Ch. Apr. 30, 2021). Space limitations prevent a full cleaning here, given the volume of facts, law and analysis that Sonova has ignored/distorted. Accordingly, applicable portions of Plaintiff's OB are cited herein and this Court is respectfully referred back to those pages for their complete contents.

That said, one red-herring to be kept in mind when considering Sonova's current advocacy is its newfound affection for the Letter Decision's theory that Plaintiff has no judicial recourse for Sonova's violation of Section 9.3.2 of the Merger Agreement. Plaintiff's OB explained how that theory disregarded both the Merger Agreement and Sonova's own admission that Section 9.3.2 in particular – not any clause from the Escrow Agreement – controls the outcome of this litigation.

See OB at 34-41; OB Ex. A, at 8; A200:17-21. Sonova's about-face on the matter is another example of its willingness to adopt positions that cannot be reconciled with the record.

As pled in the Complaint, discussed in the OB, and highlighted again *infra*, the Escrow Agent did exactly what Sonova knew it would do: withhold the Fund based on Sonova's say-so that it had complied with the Merger Agreement, "conclusively rely[ing]" upon that statement regardless of whether it was accurate. *See* OB at 35-36. Indeed, the Escrow Agent disclaimed any knowledge of the Merger Agreement's terms and any responsibility to assess whether Sonova had actually complied with those terms (including Section 9.3.2's Substantive Prerequisites). *See id*.

Which is precisely the point. Because the Merger Agreement itself makes clear that: (a) the Delaware judiciary has exclusive jurisdiction to make that assessment; and (b) Plaintiff is entitled to the relief sought by its Complaint if Sonova did not actually comply with Section 9.3.2's Substantive Prerequisites or Assertion Deadline. OB at 41-46.

This appeal still turns on Rule 12's lenient standard, regardless of Sonova's ongoing attempts to stray from that standard and evade the record. Reversal is therefore mandated if, given all Plaintiff-friendly inferences, it is reasonably conceivable that Sonova failed to comply with any aspect of Section 9.3.2. And nothing about the Letter Decision (which never addresses this determinative question) or Sonova's current advocacy can change the landscape of this appeal.

ARGUMENT ON REPLY

Plaintiff's OB: (a) focused on the Substantive Prerequisites of Section 9.3.2, including the Documentation Requirement that Sonova admittedly failed to meet; (b) detailed the "shall have no right to recover any amounts" language that plainly stated the consequence of Sonova's non-compliance (as well as Sonova's related non-compliance with the other Substantive Prerequisites and Assertion Deadline); and (c) noted the compulsory nature of that consequence under Delaware law, which enforces "shall" language as being mandatory and impervious to judicial discretion. OB at 5-12, 18-19.

It was incumbent upon Sonova's AB to meaningfully confront that law and those facts, all of which are central to this appeal. But Sonova chose to ignore them, thereby conceding each point for present purposes. *E.g.*, *Emerald P'rs*, 726 A.2d at 1215; *Roca*, 842 A.2d at 1243 n.12.

Moreover, Sonova's approach effectively voids the arguments it does advance because, by definition, that advocacy is not directed to the matters actually before this Court. The following discussion is nevertheless provided as context for the clean-up effort necessitated by Sonova's evasion/distortion of the record.

I. SONOVA CANNOT IGNORE-AWAY SECTION 9.3.2.

At bottom, Sonova attempts to have this Court re-write Section 9.3.2 by deleting the "shall have no right to recover any amounts" language it chooses to ignore. But that attempt would fail even if Sonova's chosen tactics had not effected a concession on the matter. Why? Because it is undisputed (and indisputable under Rule 12) that Sonova agreed to this very language as a material element of the Merger Agreement, following extensive negotiations between sophisticated parties. *See* A022, ¶ 25, OB at 31. Thus, Sonova's position fails as a matter of law for the reasons explained in the *L-5 Healthcare, Nemec* and *SeaWorld* cases cited by Plaintiff's OB – none of which are addressed by Sonova's AB. Among other things, those cases confirm that the contractarian backbone of our law means Delaware courts:

- will not "relieve sophisticated parties [like Sonova] of the contracts they willingly accepted"; and
- will not "appease a party who [like Sonova] later wishes to rewrite a contract he now believes to have been a bad deal."

See OB at 25-26; *accord Base Optics Inc. v. Liu*, 2015 WL 3491495, at *24 (Del. Ch. May 29, 2015) (Delaware courts must "enforce the contractual agreements of parties; good, indifferent or bad").

Strict adherence to those tenets is what makes Delaware the gold standard for contracting parties. *See, e.g.*, *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 676 (Del. 2024) ("The courts of this State hold freedom of contract in high—some might say, reverential—regard."); *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 565 (Del. Ch. 2023) ("To say that Delaware prides itself on the contractarian nature of its law risks understatement."). The heavily negotiated language of Section 9.3.2 must therefore be enforced as written.

Nor can Sonova escape application of that law by throwing "interpretation" arguments against the wall. *First*, those arguments are non-starters because they ignore the actual content of Section 9.3.2. *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 28 n.66 (Del. 2005). *Second*, there is nothing about Section 9.3.2's plain-English "shall have no right to recover any amounts" language that requires – or allows for – interpretation. *Third*, even when interpreting a vague provision, Delaware law prohibits the outcome that Sonova advocates for here: reading that provision out of existence or rendering it meaningless/illusory. *See Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023); *accord Archkey Intermediate Hldgs. Inc. v. Mona*, 302 A.3d 975, 988 (Del. Ch. 2023); *OrbiMed Advisors LLC v. Symbiomix Theraputics, LLC*, 2024 WL 747567, at *4 (Del. Ch. Feb. 23, 2024).

These are cardinal rules of Delaware contract law. So is the prohibition against any readings that are illogical or absurd under the circumstances. *Weinberg*, 294 A.3d at 1044, 1056-57. And it would be both to read Section 9.3.2 as saying that Sonova's failure to comply with the Substantive Prerequisites has no effect on its right to recovery when, in fact, Section 9.3.2 plainly states the exact opposite.

All of which brings us back to the determinative legal question that Sonova has tried so hard to obfuscate: whether, under Rule 12's lenient standard, it is reasonably conceivable that the Claim Notice failed to comply with Section 9.3.2's Substantive Prerequisites or the Assertion Deadline. As detailed by Plaintiff's OB, the Complaint established an affirmative answer in each instance and Sonova has admitted its non-compliance with the Documentation Requirement in any event – a record that is more than sufficient to require reversal. OB at 24-33.

So what did Sonova's AB have to say about those critical points? Nothing at all. They were added to the pile of inconvenient facts Sonova chose to ignore and, accordingly, conceded for present purposes. *E.g.*, *Emerald P'rs*, 726 A.2d at 1215; *Roca*, 842 A.2d at 1243 n.12.

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Since it cannot grapple with the well-pled facts and admissions that its Claim Notice failed to comply with Section 9.3.2, Sonova pivots to arguing that none of those things matter because the Escrow Agreement somehow overrides Section 9.3.2 and all of Sonova's related obligations under the Merger Agreement. In other words, Sonova now embraces the Letter Decision's strawman theory even though its infirmities were detailed in Plaintiff's OB and even though Sonova is on-record admitting there is no foundation for that theory. OB 34-41.

II. SONOVA WARPS REALITY WHEN ARGUING THAT THE ESCROW AGREEMENT OVERRIDES THE MERGER AGREEMENT.

Pages 34-40 of Plaintiff's OB explained the factual, legal and logical fallacy of that theory, including ample quotes/cites to the governing contract language and applicable law. Plaintiff's analysis also included Sonova's repeated admissions that Section 9.3.2 is, in fact, the determinative provision when examining the Complaint under Rule 12. Unable to justify its about-face on this fundamental point, Sonova brushes past it and again relies upon non-responsive advocacy that seeks to muddy the waters rather than addressing the actual matter on which this appeal turns. Such tactics are unavailing, as previously discussed. OB at 26-28.

It is also notable that Sonova's retrograde argument seeks deference to the Letter Decision in a vacuum, as if this Court was not undertaking a *de novo* review of the entire record and granting Plaintiff all available inferences (which the Letter Decision did not do). Sonova then uses that approach as an excuse to ignore the facts discussed in Plaintiff's OB – including those manifest from the faces of the Complaint and Merger Agreement, as well as Sonova's admissions that Section 9.3.2 is controlling in this case because it "take[s] primacy" over the Escrow Agreement's internal notice clause. *See* A200:10-19; OB 14, 35-36.[2]

[2] Sonova's AB misattributes that statement to Plaintiff.

As previously discussed, the Letter Decision bypassed the Merger Agreement and related record, including Sonova's repeated confirmation that: (a) the Fund was established under Section 9.2 of the Merger Agreement; (b) Sonova's ability to claim any recovery from the Fund was governed by Section 9.3.2 of the Merger Agreement, which plainly states that Sonova "shall have no right to recover any amounts" unless its Claim Notice complied with Section 9.3.2's Substantive Prerequisites and Assertion Deadline; and (c) Sonova's responsibility to advise the Escrow Agent that it had asserted a claim against Plaintiff was separate from Sonova's obligations to Plaintiff under the Merger Agreement and separately covered by the Escrow Agreement's internal notice clause. OB at 34-37.

Sonova distorts the record by pretending otherwise now. Sonova then wanders even farther afield by arguing about whether the Escrow Agent was permitted to withhold the Fund based on Sonova's generic notice under the Escrow Agreement. But there has never been a dispute on that front. It is another red-herring that Sonova throws against the wall in an attempt to avoid discussion about – or enforcement of – its contractual obligations under the Merger Agreement. As detailed in Plaintiff's OB, the Complaint, and the proceedings below:

- the Escrow Agreement left no doubt that the Escrow Agent would halt release of the Fund by "conclusively rely[ing]" on Sonova's bald statement that it had met its obligations to Plaintiff under Section 9.3.2 of the Merger Agreement, without assessing the truth of that statement or ever reading the Merger Agreement;
- Sonova counted on that fact when making its bald statement to the Escrow Agent at the 11th hour, immediately before the mandatory "shall release" date on which Sonova had agreed the Fund would otherwise be released to Plaintiff; and
- Plaintiff therefore brought this litigation to determine whether the Claim Notice that Sonova delivered to Plaintiff under the Merger Agreement actually complied with Section 9.3.2's Substantive Prerequisites and Assertion Deadline – a determination that Sonova agreed could only be rendered in Chancery, which is also the only venue that can provide the order of specific performance to which Sonova agreed in Section 11.10 of the Merger Agreement.

OB at 35-36, 39-46.

Said differently, Sonova's current argument gets things completely backwards. If Sonova had actually complied with Section 9.3.2's Substantive Prerequisites and Assertion Deadline rather than merely telling the Escrow Agent that it did so, there would have been no need for litigation. But Sonova did not comply with Section 9.3.2, as the record more than demonstrates for Rule 12 purposes, and that is the only matter at issue here.

Sonova tries to distract from this reality by ignoring critical parts of the record and almost all of the analysis presented by Plaintiff's OB. Because that analysis is already before this Court, however, the following discussion highlights the main flaws with Sonova's current arguments – advocacy that disregards the record, Sonova's prior positions, and bedrock Delaware law.

A. Sonova's Position Relies on False Equivalence.

As discussed *supra*, Sonova's arguments read Section 9.3.2 out of existence. And Sonova's attempt to spin that impermissible result as being "harmonious" with the Escrow Agreement's internal notice clause cannot withstand even minimal scrutiny.

For example, Sonova again resorts to distortion when proclaiming that its generic responsibility to the Escrow Agent under the Escrow Agreement is ***"exactly the same"*** as its specific obligations to Plaintiff under Section 9.3.2 of the Merger Agreement. AB at 22. But, as detailed in Plaintiff's OB, the fallacy of Sonova's

proclamation is apparent from a facial comparison of those two provisions – which confirms that Section 9.3.2's Substantive Prerequisites and Assertion Deadline are far more exacting and serve a much different purpose than the generic heads-up the Escrow Agent was to receive under the Escrow Agreement. OB at 34-36.

Sonova's position thus relies on false equivalence, which cannot provide a foundation for any credible argument. Nor can Sonova be permitted to further confuse the record with semantic gamesmanship, as it tries to do when contending that it complied with Section 9.3.2 of the Merger Agreement because the Escrow Agreement "do[es] not impose any ***additional*** notice requirements" beyond those found in Section 9.3.2. A108. While clever, that wrong-end-of-the-telescope argument does nothing to alter the actual content of either contract or the indisputable fact that Sonova's Claim Notice to Plaintiff was subject to the far more exacting set of requirements found in Section 9.3.2 – requirements whose existence must be recognized as a matter of law.

Sonova likewise overreaches with its contention that applying Section 9.3.2 as actually written would somehow render the Escrow Agreement's internal notice clause "meaningless." AB at 20. It is another false-equivalence argument and fails for the reasons already discussed, including that the Escrow Agreement's internal notice clause and Section 9.3.2 of the Merger Agreement:

- served entirely different purposes;
- were directed to completely different recipients; and
- imposed vastly different requirements on Sonova.

OB at 35-41. They were also treated in far different ways, with Sonova's generic notification to the Escrow Agent deemed "conclusively" valid upon receipt, but Sonova's separate Claim Notice to Plaintiff being expressly subject to judicial determination of whether Sonova complied with Section 9.3.2 of the Merger Agreement. *See* OB at 35-37.

In short, Sonova could easily satisfy the Escrow Agreement's internal notice clause – thereby causing the Fund to be withheld – but come nowhere close to compliance with the far more exacting obligations that Sonova owed Plaintiff under Section 9.3.2. And thus Sonova is the only party before this Court who seeks to render either provision meaningless.

Sonova follows a similar playbook when trying to posture this appeal as a fight over the "priority" of conflicting provisions in a "unitary contractual scheme." AB at 19-20. As previously discussed, there is no conflict between Section 9.3.2's actual language (or purpose) and the Escrow Agreement's internal notice clause. Indeed, it was Sonova who repeatedly admitted to the lower court that "***Merger Agreement*** Section 9.3.2(a) governs the process by which Sonova notifies Plaintiff of any indemnification claims" and, accordingly, that it "takes primacy" when

analyzing the Complaint. OB at 35-36. Those facts remain true, even though they are no longer convenient for Sonova. And Plaintiff's OB explained that their truth is further confirmed by the Escrow Agreement's own text, even though Sonova now chooses to ignore it. *Id.*

In short, none of Sonova's contentions can be squared with the facts as they actually exist. There is no "conflict" between Section 9.3.2 and the Escrow Agreement, and no amount of citation to inapposite cases like *Fortis Advisors* can transform this appeal into something it is not.

B. Sonova Cannot Erase Its Record Admissions.

It is also instructive to consider how Sonova seeks to erase the factual concessions/admissions that belie its current position. Two examples suffice: (i) the fact that Sonova did not provide any supporting documentation with the Claim Notice it delivered to Plaintiff; and (ii) the fact that Sonova's Claim Notice obligations to Plaintiff – including the Documentation Requirement – are set forth in the Merger Agreement. The former is conspicuously omitted from Sonova's AB and is fatal under the Rule 12 analysis this Court is undertaking; the latter is referenced in passing but never actually addressed, other than as part of Sonova's false-equivalence argument.

Sonova cannot feign ignorance about the significance of those record facts, which were repeatedly discussed in Plaintiff's OB, facially established by the Claim

Notice, and expressly confirmed by Sonova in direct response to questioning by the lower court. OB at 7-8, 26-28. Plaintiff further explained that, even if the Complaint had not pled a reasonably conceivable failure to comply with the Documentation Requirement (which it did), Sonova's admission would alone be enough to require reversal as a matter of law. *Id.* And thus Sonova's tactical decision to avoid any discussion of that fact or its effect under Rule 12 is doubly dispositive here. *E.g.*, *Emerald P'rs*, 726 A.2d at 1215; *Roca*, 842 A.2d at 1243 n.12.

Sonova takes a somewhat different tack when trying to evade multiple admissions that its Claim Notice obligations are found in Section 9.3.2 of the Merger Agreement, not any part of the Escrow Agreement. Sonova could not completely ignore reality (as it did with other parts of the record) because this point had become central to the strawman argument Sonova decided to adopt on appeal – *i.e.*, that compliance with the Escrow Agreement's internal notice provision somehow overrode all obligations Sonova owed to Plaintiff under the Merger Agreement. But Sonova did not want to draw any attention to the substance of its admissions, either. So its AB barely acknowledges them, relying on a one-sentence argument that they should not be viewed as binding because they did not involve a statement of fact and thus do not "constitute a judicial admission." AB at 22. That is the only argument Sonova could come up with, and a closer read of the AB demonstrates that not even Sonova really believes it.

Indeed, this Court need not look further than the "***Factual Background***" section of Sonova's current brief, presented as part of the "***COUNTERSTATEMENT OF FACTS***" that Sonova deemed particularly important in this appeal, to find the following statement: "Merger Agreement Section 9.3.2(a) governs the process by which Sonova notifies [Plaintiff] of any indemnification claims[.]" AB at 9. It is the same admission discussed in Plaintiff's OB, right alongside Sonova's related answer to the lower court's "basic" factual question about what "notice procedures" were at issue in the Complaint and Motion. OB at 35.

Sonova's attempt at revisionist history is further belied by the Claim Notice itself, which stated the obvious when confirming that it was being delivered to Plaintiff "in accordance with the terms of the Merger Agreement, including Section 9.3.2," whereas Sonova was separately sending it to the Escrow Agent "in accordance with the terms of the Escrow Agreement, including Section 3(a)(ii)." A093. The record therefore confirms that Sonova's acknowledgement of this distinction was not limited to a lawyer's statements in judicial proceedings. But one would never know it from the way Sonova now block-quotes the Claim Notice, conveniently omitting this key text for tactical reasons. AB at 12-13.

In any event, Sonova misses the point when arguing about whether its admissions are "binding." There is no question that Sonova's current position contradicts what it repeatedly stated in its Claim Notice and the proceedings below. Thus, characterizations aside, Sonova's statements speak volumes about how far it has now stretched in an attempt to stave-off reversal.

These same record facts also debunk Sonova's current assertion that this case "must be about whether Sonova gave appropriate notice of its claim ***to the Escrow Agent***" when, in reality, Sonova has repeatedly acknowledged the opposite is true. AB at 20-21. This case has always been about whether the Claim Notice complied with Sonova's obligations to Plaintiff under Section 9.3.2 of the Merger Agreement. OB at 39; A141-42. No amount of rhetoric can change that fact. Nor can Sonova escape the record of its non-compliance with Section 9.3.2 by ignoring it.

III. SONOVA IGNORES ITS NON-COMPLIANCE WITH SECTION 9.3.2.

A. Documentation Requirement.

As previously discussed, it is indisputable that Sonova failed to comply with the Documentation Requirement and Plaintiff's OB explained how that fact, standing alone, requires reversal. *See* A023, ¶ 29; A024-25, ¶¶ 31- 32; A092-94; OB at 27. Sonova's AB ignored the matter entirely. Thus, Sonova has conceded the point in this appeal. *Emerald P'rs*, 726 A.2d at 1215; *Roca*, 842 A.2d at 1243 n.12.

B. Specificity and Calculation Requirements.

As previously discussed, Sonova's omission of the supporting documentation required by Section 9.3.2 was echoed in its failure to comply with the Specificity and Calculation Requirements, which obligated Sonova to do more than: (a) vaguely assert its unsubstantiated "belief" that some unspecified "items and/or services" were supposedly "billed under the names and billing numbers of clinicians who did not personally provide the items and/or services to those patients"; or (b) argumentatively assert that it did not yet know the "aggregate" Damages that might ultimately be asserted. OB at 28-29. Plaintiff's Complaint and OB also explained the minimum categories of information that Sonova was required to provide with its

Claim Notice under Section 9.3.2, including: (a) the actual amount of Damages that "ha[d] been incurred" as of that time; (b) the specific providers, contracts, and/or third-party payors supposedly at issue; and (c) the basis for Sonova's assertion that improper conduct had supposedly occurred. OB at 9, 29; A022-23, ¶¶ 27-29.

Sonova has now conceded each of those points by choosing to ignore them. *E.g.*, *Emerald P'rs*, 726 A.2d at 1215; *Roca*, 842 A.2d at 1243 n.12. Thus, especially when combined with the inferences granted by Rule 12, reversal is independently required on those grounds as well because Sonova's breach of the Specificity and Calculation Requirements is more than reasonably conceivable on the record before this Court.

C. Assertion Deadline.

As previously discussed, Sonova missed the Assertion Deadline if it had awareness of its Claim at any time before July 26, 2023. OB at 6-7, 30. The Complaint and Plaintiff's OB also explained that because Sonova representatives were aware of its Claim as far back as February 2022, Sonova's Claim Notice had in fact missed the Assertion Deadline. *See id.* Sonova has now conceded each of those points by choosing to ignore them. *E.g.*, *Emerald P'rs*, 726 A.2d at 1215; *Roca*, 842 A.2d at 1243 n.12.

To the limited extent Sonova's AB addresses this breach of Section 9.3.2 at all, it only does so by quoting the Letter Decision's one-sentence ruling that the Complaint's allegations of related prejudice were not detailed enough. AB at 25. That erroneous ruling was made without further analysis (OB at 33) and Sonova added none in its AB.

More importantly, however, Sonova completely ignored the four pages of analysis that Plaintiff's OB did provide on this topic – including authority which holds that the Complaint's allegations of prejudice are entitled to greater leeway because Plaintiff cannot conjure the documents/details that Sonova controlled and decided to withhold from Plaintiff, despite being obligated to provide them with the Claim Notice. *See* OB 30-34 (collecting cases).

Moreover, as further explained by the analysis Sonova ignored, the record confirms Sonova's acknowledgement that prejudice definitionally resulted from its failure to comply with the Assertion Deadline because of the significant civil and criminal penalties that are tied to delay under applicable healthcare statutes/regulations – including treble damages, jail time, and exclusion from Medicare/Medicaid. OB at 31-32.

Sonova has thus conceded its breach of the Assertion Deadline for purposes of this appeal. *E.g.*, *Emerald P'rs*, 726 A.2d at 1215; *Roca*, 842 A.2d at 1243 n.12. And given that the Complaint is entitled to all favorable inferences available under Rule 12 – a determination which must account for the information deficit that Sonova engineered – Plaintiff respectfully submits that its allegations of prejudice meet the reasonable conceivability standard as applied to this case and serve as additional grounds for reversal.

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Having addressed the main ways in which Sonova's presentation tried to obscure the record of its non-compliance with Section 9.3.2, we turn to Sonova's related attempt to obscure Delaware precedent on the determinative legal issue in this appeal: whether Section 9.3.2 contains an enforceable consequence provision.

IV. SONOVA MISREADS/MISSTATES THE LAW.

All of Sonova's enforceability arguments are inapposite because they depend on the pretention that Section 9.3.2 is silent about the consequence of non-compliance when, in reality, its states that Sonova "shall have no right to recover any amounts." This fact is fatal to Sonova's arguments, which only warrant further attention to highlight the main ways they misread/misstate Delaware law.

Sonova takes the biggest liberties with *Blue Cube* and *Nucor*, relying on cherry-picked snippets that have no application here. Recognizing that the Court will be reviewing those cases, Plaintiff respectfully refers to pages 18-24 of its OB for a detailed analysis of their teachings – including that Section 9.3.2 is enforceable and surmounts as a matter of law the policy concerns now relied upon by Sonova, which Delaware courts only apply to contracts that are truly silent about the consequence of non-compliance. Sonova's AB ignores that entire analysis, as well as the color-coded comparison chart that demonstrates Section 9.3.2's enforceability under *Nucor*. OB at 22-24; A193.

Sonova also ignores that *Nucor* dealt with multiple subparts of the contract at issue there, finding that Section 9.01(g)'s plain-language consequence statement was:

- enforceable with regard to the notice prerequisite set forth in subpart (a) of Section 9.07 because that prerequisite was expressly reflected in Section 9.01(g); but
- not enforceable with regard to the matters set forth in subparts (b) or (c) of Section 9.07 because they were not in reflected Section 9.01(g), therefore subjecting them to the policy rationale discussed in *Blue Cube*.

Nucor Coatings Corp. v. Precoat Metals Corp., 2023 WL 6368316, at *12-13 (Del. Ch. Aug. 31, 2023). In other words, the *Nucor* contract was silent about the consequence of non-compliance with subparts (b) or (c). And Judge Adams explained how that distinction drove her dismissal ruling because the ultimate dispute there was only over those subparts about which the contract was silent. *Id.*

None of this is news to Sonova; Plaintiff made these very points below. A228-236. Yet Sonova persists in selecting inapposite quotes/cites from *Nucor's* discussion about the silent subparts, ignoring the reality of Section 9.3.2's express language. And nothing about Sonova's references to *Blue Cube*, *QC Holdings* or *Larian* alters the irrelevance of its current advocacy because none of those decisions involved a plain-language consequence statement like the one found in Section 9.3.2.

These same facts also defeat Sonova's arguments about boilerplate "no waiver" clauses because, as previously explained and made clear by *Blue Cube/Nucor*, Delaware courts only resort to such boilerplate in the absence of a plain-language consequence statement. OB 20-21. Nor could our law hold otherwise, since specific contractual provisions prevail over general ones. *E.g.*, *In re Shorenstein*, 213 A.3d 39, 62 (Del. 2019).

Sonova's attempted invocation of "forfeiture" arguments from decisions that pre-date *Blue Cube/Nucor's* teachings is equally unavailing, because none of those decisions (*Jefferson, Eisenmann, Wilkins*) involved an indemnification provision with a plain-language consequence statement – let alone one that was a material term of the parties' deal, was pled as such (A022, ¶ 25), and is manifest from the "shall have no right to any recovery" consequence language that all of Sonova's arguments ignore. Moreover, as discussed above, the record establishes for Rule 12 purposes that: (a) the prejudice resulting from Sonova's non-compliance with Section 9.3.2 was definitionally material in nature; and (b) Section 11.10 of the Merger Agreement contains Sonova's stipulation that Plaintiff is entitled to equitable relief. *See* OB 41-46; A044, at § 11.10.

Finally, no decision cited by Sonova provides a basis for its hyperbolic assertions that it would be unfairly subjected to an "array of . . . liabilities" on mere "technical grounds" if held to the contract it willingly entered. The record confirms that: (a) Section 9.3.2 imposed substantive requirements, not "technical" ones; and (b) Sonova agreed to those requirements with full knowledge that the consequence of its non-compliance – which Sonova alone controlled – was "no right to recover any amounts" from the Fund. Delaware's contractarian mandate requires that Sonova be held to its agreement, just as that mandate enforces far more significant allocations of commercial risk between sophisticated parties. *E.g., Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347 at *58 (Del. Ch. Oct. 1, 2018).

CONCLUSION

Plaintiff respectfully submits that, for the reasons discussed above and in Plaintiff's OB, reversal is required as a matter of law.

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