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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BBP HOLDCO, INC., BBP INVESTMENT HOLDINGS LLC, BRUNSWICK BOWLING PRODUCTS, LLC, BRUNSWICK BOWLING MAGYARORSZAG KORKLATOLT FELELOSSEGU TARSASAG, and BBP REYNOSA S. DE R.I. DE C.V.,	§	No. 355, 2025
Plaintiffs Below, Appellants,	§	Court Below: Superior Court of the State of Delaware
v.	§	C.A. No. N20C-10-135 PRW CCLD
BRUNSWICK CORPORATION,	§	
Defendant Below, Appellee.	§	

APPELLANTS' OPENING BRIEF

Dated: September 30, 2025

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I. NATURE OF PROCEEDINGS

On October 14, 2020, Plaintiffs BBP Holdco, Inc. f/k/a BBP Holdco, LLC ("Buyer"), BBP Holdco, Inc. f/k/a BBP Holdco, LLC ("Buyer"), BBP Investment Holdings LLC, Brunswick Bowling Products, LLC ("BBP"), Brunswick Bowling Magyarorszag Korklatolt Felelossegu Tarsasag, and BBP Reynosa S. De R.I. De C.V. (collectively, "Plaintiffs") filed a Complaint against Defendant Brunswick Corporation ("Brunswick") for Brunswick's fraud and breach of contractual representations and warranties during its sale of its division, Brunswick Bowling and Billiards ("BBB").

On April 8, 2024, Judge Paul Wallace of the New Castle County Superior Court ("Trial Court") issued a bench ruling ("Order") dismissing Plaintiffs' claim for contractually-based attorneys' fees. Following a bench trial, the Trial Court issued a July 14, 2025 Decision ("Decision") finding in Brunswick's favor.[1]

This is Plaintiffs' Opening Brief on appeal.

[1] The Decision is attached hereto as Exhibit "A," the Order as Exhibit "B," and the April 8, 2025 Hearing Transcript as Exhibit "C."

II. SUMMARY OF ARGUMENT

1. The Trial Court erred as a matter of law in determining that Brunswick did not breach §3.22 of the April 13, 2015 Stock and Asset Purchase Agreement ("SAPA"). Brunswick represented and warranted in §3.22 that no products sold by BBB had been "subject to any recall" in the preceding three years except as identified in Section 3.22 of the accompanying Disclosure Schedule ("Schedule"). Schedule 3.22 contains one word: none. This was false because the Swedish Work Environment Authority ("SWEA") issued an August 30, 2013 decision ("SWEA Decision") imposing a recall of one of Brunswick's core products by January 1, 2014. In concluding that no products had been subject to "any recall" and therefore §3.22 had not been breached, the Trial Court impermissibly rewrote §3.22.

2. The Trial Court erred as a matter of law in determining that Brunswick did not breach SAPA §3.16's representation and warranty that neither BBB nor Brunswick had received any written notice identifying non-compliance with the law. In fact, Brunswick had received multiple written notices identifying non-compliance with the law, including the SWEA Decision, letters from the European Commission ("Commission"), and other written notifications from SWEA, but identified none of these documents. And with respect to the one document the Trial Court determined Brunswick had identified – the SWEA Decision – Brunswick failed to provide the

material facts of that Decision, which Brunswick described as a "notification" that conveyed SWEA's "belief."

3. The Trial Court erred as a matter of law in finding that Brunswick made no false representations and neither violated its duty to speak nor engaged in intentional concealment.

a. The misrepresentations in SAPA §3.16 and §3.22 constitute overtly false representations.

b. Brunswick violated its duty to speak by providing a single misleading and incomplete disclosure that omitted any reference to SWEA's sales prohibition and recall or the Commission's forthcoming decision determining whether SWEA's measures were justified, which, if deemed justified, would lead to bans and recalls across Europe. In contravention of Delaware's established precedent prohibiting "partial" disclosures, the Trial Court incorrectly determined that Brunswick needed only to provide enough information to allow Buyer to investigate the disclosure based on Buyer's "sophisticated" status. This heightened standard is contained nowhere in Delaware law.

c. Brunswick engaged in intentional concealment by allowing Buyer to conduct an investigation while withholding substantive details and documents requested by Buyer (and lying to Buyer about the

documents' existence) that would materially alter Buyer's understanding of the transaction. The Trial Court disregarded these facts and instead focused on whether Brunswick believed the optimistic statements contained in Schedule 3.16 – statements forming no part of Plaintiffs' intentional concealment claim.

4. The Trial Court erred as a matter of law in finding that Plaintiffs are not entitled to recover attorneys' fees incurred in enforcing their contractual indemnification rights. Brunswick agreed to indemnify Plaintiffs for breach of the SAPA's representations and warranties, Brunswick breached its representations and warranties, and the SAPA provides for recovery of Losses, which includes "attorneys' fees."

III. STATEMENT OF FACTS

A. The SAPA Provisions.

Through the SAPA, Buyer purchased BBB from Brunswick. (A7205-7669). BBB, now BBP, is a worldwide manufacturer and seller of bowling equipment, including pinsetters. (A6227). Pinsetters are large machines that reset bowling pins and return bowling balls. (A0967-0968). At the time of the transaction, BBB's "GSX Pinsetter" – represented to Buyer as "the most reliable and best-selling pinsetters available on the market" (A6187) – had been sold worldwide for decades (A6229; A0967-0968).

In SAPA §3.22, Brunswick represented and warranted that none of BBB's products had been subject to a recall over the preceding three years:

> Except as set forth on Section 3.22 of the Seller Disclosure Schedule, none of the products sold, provided, or delivered by [BBB] in connection with, or relating to, the Business, in each case during the immediately preceding three (3) years, has been subject to any recall.

A7246. Schedule 3.22 contains one word: "None." (A7660).

Brunswick also represented and warranted in SAPA §3.16 that it had not received a written notice from a "Governmental Authority" of material noncompliance with any "Law" since January 1, 2012:

> The Asset Sellers and [BBB], and the conduct of the Business by them, are and during the immediately preceding three (3) years have been, in material compliance with all Laws applicable to the conduct of the

> Business as presently conducted or the ownership or use of assets used in conduct of the Business. *None of the Seller (solely with respect to the Business), [BBB] or any Asset Seller (solely with respect to the Business) has received at any time since January 1, 2012, any written notice from any Governmental Authority to the effect that any such Person is not in material compliance with any applicable Law*.

A7245 (emphasis added).

Notably, SAPA §4.7 expressly relieved Buyer from any obligation to investigate the truth or accuracy of Brunswick's representations and warranties: Buyer "acknowledges that it has relied solely upon [its] investigation, review and analysis and not on any factual representations or opinions of the [Brunswick], [BBB] or any of their respective Representatives (***except the representations and warranties set forth in Article 3***)." A7249 (emphasis added).

B. SWEA Imposes a Recall and Sales Ban and Notifies the Commission.

On July 26, 2012, SWEA issued a written notice ("2012 SWEA Notification") identifying that BBB/Brunswick's GSX Pinsetter was non-compliant with the Swedish Work Environment Act ("Act") and warned of a future sales prohibition. (A4727-4738; Decision, p. 5). Resultingly, Brunswick's senior management approved a multi-million-dollar investment to develop a new pinsetter "justified based entirely upon the prevention of a potential market ban placed upon Brunswick pinsetters by European regulators." (A4740).

On August 30, 2013, SWEA issued the "legally enforceable" (Decision, p. 6) SWEA Decision that determined the GSX Pinsetter did not comply with the Act and imposed a sales prohibition and product recall (A4748-4761). The SWEA Decision unequivocally states:

> [Brunswick's distributor] **shall at the latest by 1 January 2014 recall the pinsetter Brunswick GSX** with deficiencies…
>
> **The recall entails** that you offer the current possessors [of the product] that you either
>
> 1. **rectify the deficiencies** in the operator's work environment….
> 2. **take back** the Brunswick GSX pinsetter and replace it with another deficiency-free product of the same or a corresponding kind, or
> 3. **take back** the Brunswick GSX pinsetter and pay compensation for it….

A4748-4749 (emphasis added). In April 2014, Brunswick's Swedish attorney, Baker McKenzie's Stefan Bessman ("Bessman"), confirmed, "a formal prohibition and recall order has been issued" and advised Brunswick of "ongoing legal proceedings" in Sweden "asserting non-compliance with the order." (A4774).

On April 11, 2014, the Commission[2] sent Brunswick two letters ("Commission Letters") (i) informing Brunswick that SWEA had notified the

[2] The Commission is the governmental body that, *inter alia*, enforces product safety laws across Europe. (A4664-4674).

Commission of its "legally enforceable" (Decision, p. 6) prohibition and recall, and (ii) identifying the GSX Pinsetter's non-compliance with the Machinery Directive's ("MD")[3] Annex I. (A4762-4765). Brunswick quickly hired Baker McKenzie's Nina Niejahr ("Niejahr"), a Commission specialist, because its "largest concern" was the Commission's involvement "could trigger some type of ban throughout the EU." (A4766; A4771-4773).

On April 25, 2014, Niejahr advised Brunswick that if the Commission determined SWEA's measures were "justified," "the other Member States shall take the measures necessary to ensure the protection of the health and safety of persons with respect to the non-compliant machinery." (A4773).

On June 16, 2014, in preparing for a meeting with Brunswick's leaders, Brunswick in-house counsel, Kelly Kaiser ("Kaiser") emailed Niejahr and Bessman asking whether the European Union ("EU") has "any regulations that might trigger a formal recall if the Swedish ban is upheld" and inquiring about "the best and worst case scenarios." A4780. The next day, BBB informed Brunswick's leadership that "[d]ocumentation supporting Brunswick's position is ok at best" and the "[w]orst

[3] The MD is an European directive establishing essential health and safety requirements for machinery placed on the European market and related enforcement procedures. (A4664).

case scenario is that the EU upholds the ban resulting in a cascade of national bans and recalls of varying severity." (A4840).

On June 24, 2014, Brunswick responded to the Commission Letters advising, "Brunswick is investing several million US-dollars into developing a completely new pinsetter designed to resolve all remaining concerns." (A4876-4877; A4894).

In mid-July, Brunswick announced plans to sell BBB. (A4622).

C. Brunswick Knew the Pinsetter Safety Issues Could Significantly Impact BBB's Value and Kill BBB's Sale.

Ryan Gwillim ("Gwillim"), Brunswick's in-house international counsel (A2061), managed BBB's sale with Randy Altman, Brunswick's treasurer. (A2067-2069). On August 4, 2014, BBB's David Sella ("Sella")[4] advised Gwillim during a "Swedish and E.U. Ban" presentation that the "Commission could uphold [the] ban across Europe" and of the "[r]isk of recall" across Europe, which Gwillim noted (A2085) "includes pinsetters already installed" (A4911).

On August 5, 2014, Gwillim emailed Bessman: "You will not be surprised to hear that the pinsetter regulation compliance issues in Sweden and elsewhere have received a lot of initial attention from management here, as without proper framing, this issue could result in a significant value decrease for the Products business during the divestiture process." (A4912). Brunswick's Kaiser understood the "potential

[4] Sella was BBB's most knowledgeable individual on the SWEA matter/pinsetter issue. (A4277; A4365).

effect of the SWEA and EU issues on the sale of the business" could "kill[]… the deal." (A4308). Gwillim conceded the pinsetter issue was thereafter "framed" so it "would not result in significant value decrease during the divestiture process." (A2121-2122).

On August 20, 2024, Sella sent Gwillim material "to give [him] some idea as to [Brunswick's] arguments in this case." (A4916). After his review of this material (A4919-6140) that he found "extremely helpful" albeit "incredibly infuriating" (A4916), Gwillim placed it in a subfolder titled "Dataroom" within a folder titled "LawGwillimRiviera" (A2145-2146).

On August 27, 2014, Gwillim met with SWEA "given the (unreasonable?) sensitivity that [Brunswick's CEO] (and now Randy [Altman]) has on the pinsetter issue." (A4914).

On September 24, 2014, after meeting with the Commission, Gwillim documented in an email that the "ban is still in place" and could spread to other EU member states. (A6220). Later that day, Gwillim informed Brunswick's General Counsel, "[t]o be honest, and just between us, this will resolve itself one way or another long after we have sold the business." (A6219).

D. Brunswick Affirmatively Conceals the Truth About the SWEA Decision.

On November 10, 2014, Sella raised concerns about the deferral of "various liability issues" during management presentations to potential BBB bidders and

requested the opportunity to review "disclosures regarding pinsetters in the EU…" (A6286-6286). Gwillim provided Sella the then-existing transaction disclosures, which included disclosures on issues as minor as an "employee grievance about his termination." (A6289-6290). Sella noted the disclosures contained nothing about "pinsetters in the EU" and warned that "the absence of disclosure presents a series of potential hazards to Brunswick Corporation." (A6287). Gwillim then drafted a "statement re pinsetters" that Gwillim told Sella would be used "at this stage" – six months before the deal closed. (A6292).

On November 25, 2014, the draft SAPA and Schedule were placed in the transaction's data room ("Data Room"). (A6293-6347, A6348-6390). Schedule 3.16, using Gwillim's language, provided:

> Since 2006, [Brunswick] and other manufacturers of pinsetters have received challenges from European health and safety inspectors regarding compliance to the [MD]. Challenges from the United Kingdom, Finland and Germany were all resolved to the satisfaction of national authorities without notable business disruption. *In August 2013, [BBB's] Swedish distributor received notification from [SWEA] that SWEA believed that Brunswick's GSX pinsetter did not conform to certain provisions of Article 11 of the [MD]. SWEA in turn[] notified the European Commission of its belief.* As a result of the notification, [Brunswick] and [BBB] have continued to work with Swedish and EU authorities to ensure that pinsetters comply with such laws and regulations as applied and interpreted by these authorities, and, as [Brunswick] and [BBB] have done since 2006 in other jurisdictions, [BBB] believes it will come to an agreement with the authorities as to whether any additional guarding is necessary. [BBB]

> continues to believe that its GSX pinsetter complies with all applicable laws and regulations as currently in force, including the [MD].

(A6384) (emphasis added).

Other than telling Buyer the pinsetter issue was not material and that it possessed no documents concerning the issue (Decision, pp. 22-23), Schedule 3.16 was the only information Brunswick provided to Buyer concerning the issue before the transaction's closing, and Brunswick never updated, amended, or shared Schedule 3.16 with its European counsel to confirm its adequacy or accuracy (A4371; A4377-4378).

Critically, Schedule 3.16 (A7653) was materially false and misleading (A1764-1765) in numerous ways:

- It mischaracterized the SWEA Decision as a "notification" when, in fact, it was a legally enforceable "Decision";
- It omitted that the SWEA Decision imposed a sales prohibition and recall;
- It omitted that SWEA's prohibition and recall were based on violations of Swedish law (the Act) and focused instead on MD Article 11, a procedural regulation governing European regulatory authorities;
- It omitted that the Commission issued letters identifying the GSX Pinsetter's non-compliance with the MD's Annex I, which provides essential health and safety requirements for machinery;
- It omitted that the Commission would determine whether SWEA's legally enforceable prohibition and recall were justified;
- It omitted the risk of sales prohibitions and recalls across Europe if the Commission found SWEA's measures justified; and

- It obscured the severity of SWEA's actions by making subjective comments about Brunswick's "beliefs" and regulatory problems in other countries dating back to 2006 that were irrelevant to SWEA's non-compliance with the Act since 2012.

E. Buyer's Attempts to Diligence the Pinsetter Issue.

In early December 2014, Buyer requested, *inter alia*, "correspondence with, reports of or to, filings with, or other material information submitted to or received from any Governmental Body or regulatory body that regulates any significant portion" of BBB's business. (A6425). When Brunswick refused to provide documents on *other* diligence topics, it expressly stated that such documents were "not to be provided at this stage." (A6418; A6420; A6424; A6460). But, on *this* diligence request, Brunswick never disclosed that documents even existed and simply directed Buyer to Schedule 3.16. (A6425).

In mid-December, Brunswick, Buyer, and their respective counsel held a conference call (A1760-1765; A1213-1216), during which they discussed whether any documents related to the matters disclosed in Schedule 3.16 existed (A1762). J.J. Jaxon, who was responsible for Buyer's due diligence, explained, "I asked… Lou Barbieri[5] asked for the documents, for any documents related to [Schedule 3.16]… Gwillim told us there was nothing to review." (*Id.*). In fact, Gwillim had already compiled the documents in his own internal data room folder. (A4919-6140;

[5] Barbieri was Buyer's counsel. (A1209).

A2145-2149). Yet, as the Trial Court noted, "Gwillim responded that at that time there were no additional documents to review." (Decision, p. 23).

As of mid-December, SAPA §3.16 read as follows:

> The Asset Sellers and [BBB], and the conduct of the Business by them, are in compliance with all Laws applicable to the conduct of the Business as presently conducted or the ownership or use of assets used in conduct of the Business, except where the failure to so comply would not have a Material Adverse Effect.

(A6321). On December 19, 2014, Buyer supplemented §3.16, adding a second sentence representing that *neither* Brunswick *nor* BBB had received "any written notices from a governmental authority to the effect that any such Person is not in compliance with any applicable Law." (A6499; A1213-1217). This was done to confirm Gwillim's express statement "that there were *no* documents or written notices of *any* sort around *any* matters with laws in particular SWEA." (A1779) (emphasis added).

In a March 3, 2015 Schedule mark-up, Buyer requested "details, correspondence, and filings" regarding the matters in Schedules 3.16 and 3.17 (A6665) "to make it very clear that regarding SWEA, we wanted to see any and all pertinent documents, analysis[,] correspondence, filings, anything, that was available, so that we could make sure that we fully understood the issue. *We had been told there were no documents*. We wanted to make sure there was no misunderstanding." (A1810-1811) (emphasis added). During a March 5 call

(discussed below), Brunswick represented to Buyer that documents related to the matters in Schedule 3.16 and 3.17 would be provided *if* they existed. (A1228-1231).

Brunswick's internal communications reveal that it considered providing the documents (which it had denied existed) and information concerning the pinsetter issue to Buyer throughout the transaction.

- Gwillim placed Sella's August 20, 2014 "extremely helpful" (A4916) material related to the pinsetter issue in his internal "Dataroom" folder contained within a folder titled "Ryan Gwillim." (A4919-6140; A2145-2149). This material included, *inter alia*, the SWEA Decision (A5812-5824), 2012 SWEA Notification (A5801-5811), and Commission Letters (A6135-6140).

- A notation to a November 30, 2014 diligence list from another bidder identifies, "SWEA/EU pinsetter letters – discuss whether to provide." (A6401).

- On February 23, 2015, Kaiser sent Gwillim a January 12, 2015 SWEA Notification ("2015 SWEA Notification") "for the data room." (A6541). The 2015 SWEA Notification identified deficiencies with pinsetters "year of manufacture 2014." (A6530). Gwillim advised Kaiser he would place the Notification – i.e. a written noncompliance notice – in the Data Room, *but did not*. (A6541).

- On March 5, 2015, Gwillim emailed Sella it was "now time to put together a small package of documents on the pinsetter issue that [Buyer] can review" and told him to provide "anything else that you would deem critical to them getting an understanding of the issue." (A6678).

Brunswick never provided documents concerning the pinsetter issue, and Gwillim instead informed Buyer, in addition to stating that "no" documents existed, "that the SWEA issue was a common regulatory issue within the industry and that it was not a material concern." (Decision, pp. 22-23).

F. Brunswick Negotiates the Exclusion of Schedule §3.16 from the Specified Indemnities on March 5, 2015.

Buyer requested (A1806-1811) that the matters in Schedule 3.16 be included as specified indemnities[6] in March 3, 2015 SAPA and Schedule drafts (A6674; A6602-6605).

On the morning of March 5, 2015 – four days before Buyer's exclusivity expired (A6536) and the same day Gwillim instructed Sella to put together information that would help Buyer "get[] an understanding of the issue" (A6678) – Gwillim planned for Baker McKenzie's Michael DeFranco, Brunswick's lead SAPA attorney, to play "bad cop" during a call scheduled later that day to discuss Buyer's indemnity requests (A6679; A2414-2415). DeFranco was tasked with falsely telling Buyer that "there are no new significant matters that were not disclosed in December" warranting expansion of Buyer's indemnification rights. (A6679). During the call, DeFranco advised Buyer that inclusion of Schedule 3.16 as a specified indemnity was "inappropriate" because it was "immaterial" and disclosed prior to Buyer making its bid. (A1229-1230).

Like Buyer, the only information DeFranco possessed about the pinsetter issue was Schedule 3.16. (A4431-4434). Astonishingly, DeFranco had no idea

[6] The SAPA provides a $22,500,00 cap for "Specified Indemnities" while the general indemnity cap for breach of representations and warranties is $7,500,000. (A7266-7267).

(A4423-4424; A4466-4470; A4473-4475) his European Baker McKenzie colleagues (i) were representing Brunswick/BBB before SWEA and the Commission (P4897-A4906), (ii) cautioned Brunswick about the potential spread of SWEA's measures across Europe (A4768-4773), (iii) attended meetings with Gwillim in Europe with the Commission and SWEA (A4377-4379), (iv) possessed numerous documents responsive to Buyer's requests (A4768), (v) conducted research into recalls under European law (A4902-4903), or (vi) submitted a formal response to the Commission on Brunswick's behalf (A4875-4896).

Based on Brunswick's contractual representations (which included §3.22's no recall and §3.16's no written notices representations), selective disclosures, and deliberate concealment of SWEA's prohibition and recall and their potential spread across Europe, and having been told that the SWEA matter in Schedule 3.16 was "immaterial" and "ridiculous" to include as a specified indemnity, Buyer agreed on March 6, 2015 that Schedule 3.16 would not be included as a specified indemnity. (A1239-1240). Resultingly, absent fraud or intentional breach, the matters in Schedule 3.16 are subject to a $7,500,000 damages cap instead of a $22,500,000 cap. (A7266-7267).

G. Brunswick Sells BBB Without Disclosing the Details of the Pinsetter Issue or Providing Any Documents.

On March 18, 2015, Sella provided Gwillim additional materials for the Data Room containing comprehensive information about, *inter alia*, the (i) the SWEA-

imposed recall, ban, and fines for violation of the prohibition, (ii) potential exposure, including the Commission's possible determination to uphold the bans and recalls across Europe, and (iii) actions taken by Brunswick as of that time. (A6722-7203; A7204; A2434-2439). These materials – almost 500 pages – were largely duplicative of the material Sella provided on August 20, 2014 (A4919-6140) and responsive to Buyer's diligence requests (A1254-1256; A3339-3341; A3361-3365), which had never been withdrawn (A1226). Gwillim placed *none* of the material (or the earlier Sella-provided August 20, 2014 material) in the Data Room. (A2178-2179; A2614-2617).

The SAPA closed on May 22, 2015. (A4633). At that time, the GSX pinsetters were subject to a legally enforceable recall and prohibition (A3412-3413), and no solution had been developed, nor agreed upon, with SWEA that rectified the non-compliance (A1161-1162). In fact, Brunswick's shipping of defective pinsetters after the SWEA Decision violated SWEA's sales prohibition, as confirmed by the Swedish Administrative Court's imposition of a fine. (A6681-6721; A3430-3433).

H. Buyer Learns the Truth.

In January 2016, during a BBP board meeting, Buyer first learned of the magnitude of the problems that were not disclosed in Schedule 3.16 – including the potential recalls and prohibitions across Europe – when Sella conveyed (i) that

SWEA had "finally agreed that our latest guarding solution complies with EU regulations" and "requested we recall all previous GS-X models and upgrade them" and (ii) the risk that the recall could expand across Europe. (A7684-7685). Buyer, having relied on the SAPA's representations and warranties, was "stunned." (A1839-1840).

Plaintiffs submitted a Claim Notice under the SAPA's indemnity procedures. (A7715-7719; A7264). Brunswick denied indemnification. (A7720-7723; A1845).

I. Bans and Recalls Cascade Across Europe.

On December 10, 2018, the Commission issued a decision ("Implementing Decision") finding SWEA's measures justified. (A7729). Given the high stakes involved – potential losses spanning multiple jurisdictions and the specter of severe financial penalties – BBP pursued all available appeals. (A2817-19; A3153). The highest court in the EU ultimately upheld the Implementing Decision on April 27, 2023. (A7770-7792).

By then, France, Belgium, Ireland, Greece, Spain, and Sweden had required BBP to perform recalls of the GSX pinsetter. (A7730-7735; A7736-7741; A7742-7767; A7769; A7768). After the ruling, regulatory authorities across Europe required the same. A7793-7794 (Lithuania); A7795-7796 (Netherlands); A7797-7802 (Poland); A7803-7806 (Estonia); A7807-7810 (Latvia); A7811-7815 (Slovakia); A7816-7819 (Bulgaria); A7820-7821 (Czech Republic); A7822-7823

(Romania); A7824-7827 (Denmark); A7828-7831 (Germany); A7832-7833 (Norway); A7834-7835 (Hungary); A7836-7839 (Austria).

IV. ARGUMENT

A. The Trial Court Erred in Finding That SAPA §3.22 Was Not Breached.

1. Question Presented

Whether the Trial Court erred in interpreting SAPA §3.22 to conclude the GSX Pinsetters were not "subject to a recall" at any time within the representation's three-year span. (Decision, p. 31-34; A4605-4606; A4801-4802; A4551).

2. Scope of Review

This Court's review of the application of legal principles, questions of law, and contractual interpretation is *de novo* with no deference afforded to the Trial Court's findings. *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 266 (Del. 2022). The Court also reviews "the Superior Court's application of law to its factual and credibility determinations *de novo*." *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 960 (Del. 2005).

3. Merits of the Argument

Brunswick represented in SAPA §3.22:

> Except as set forth on Section 3.22 of the Seller Disclosure Schedule, none of the products sold, provided, or delivered by [BBB] in connection with, or relating to, the Business, in each case during the immediately preceding three (3) years, has been subject to any recall.

(A7246). Schedule 3.22 contains one word: "None." (A7660).

The Trial Court's determination that Brunswick did not breach §3.22 relies upon a contract interpretation that not only adds a nonexistent caveat to artificially narrow its scope, but also strikes out express language broadening its scope. Nothing in §3.22 limits the representation/warranty to "finalized governmental action" calling for "the physical removal, return, or access to defective products with the intention of repairing their defects or replacing them" as the Trial Court concluded. (Decision, p. 33). In fact, §3.22's explicit language requires only that products be "subject to any" recall – *i.e.*, the pinsetters were affected by or possibly affected by a recall at any time over the prior three years.

When construed as a whole, including crediting its "subject to" language – and without importing a restriction nonexistent in the representation – §3.22 was breached: The SWEA Decision uses the term "recall" nearly a dozen times (A4748-61). Contemporaneous evidence demonstrates Brunswick's outside attorneys repeatedly characterized the SWEA Decision as a "recall." *E.g.* A4774; A4769; A6150. The only Swedish expert to testify confirmed that in August 2013, SWEA "issued a *decision*, not a notification, *mandating a sales ban and a product recall*." (A3412) (emphasis added). Yet when asked to make a representation and warranty about whether any products were "subject to any recall" at any time in the preceding three years, Brunswick advised – without qualification – "None." (A7660).

SAPA §3.22 was intended to protect Buyer against the risk that a product was unsafe or defective so as to call into question the economics of the transaction and served as an essential safeguard that compelled Brunswick to identify any past or pending product recall – regardless of the status of any appeal or the timing of enforcement actions. If Brunswick had made an honest disclosure that the GSX pinsetter was subject to a recall at any time within the 3-year period, Buyer would have fully vetted the issue to ensure it was receiving what it was paying for. (A1832).

Given the very purpose of representations and warranties, the plain and expansive meaning of §3.22's terms, and the record evidence, the only reasonable conclusion is that the SWEA Decision made the GSX Pinsetters, at all relevant times, "subject to any recall." Brunswick's failure to disclose this fact constitutes a clear breach of §3.22, and the Trial Court's rewriting of §3.22 to find no breach constitutes error requiring reversal and remand to the Trial Court to determine whether this breach was intentional and to assess damages.

a. The SWEA Decision Imposed a Recall on the GSX Pinsetter.

The SWEA Decision was legally enforceable (Decision, p. 6), issued within the three-year scope of SAPA §3.22, and unequivocally contained mandates for a recall:

> [Brunswick's distributor] **shall at the latest by 1 January 2014 recall**[7] **the pinsetter Brunswick GSX** with deficiencies...
>
> **The recall entails** that you offer the current possessors [of the product] that you either
>
> 1. **rectify the deficiencies** in the operator's work environment….
> 2. **take back** the Brunswick GSX pinsetter and replace it with another deficiency-free product of the same or a corresponding kind, or
> 3. **take back** the Brunswick GSX pinsetter and pay compensation for it….

A4749-50 (emphasis added).

Contrary to the Trial Court's finding, the recall was not merely "tentative." (Decision, p. 34). Indeed, it expressly states "the decision ***shall apply immediately***. This also applies if the decisions are appealed against." (A4750) (emphasis added). And Brunswick's inability to complete a recall until an agreed-upon solution was achieved – which only occurred after the SAPA's closing (A1161-1162) – does not render the recall "tentative" or excuse Brunswick's disclosure failure.

Delaware recognizes the public policy behind enforcing representations and warranties such as §3.22: "Contracting parties allocate risk through representations and warranties." *Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610, *9 (Del.

[7] Although the Trial Court found that SWEA "arguably" issued a recall (Decision, pp. 5-6), the SWEA Decision makes plain a recall ***had been issued***.

Ch. 2019), *aff'd*, 241 A.3d 220 (Del. 2020); *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824, 830 (Del. 2021). Moreover, "[a] buyer justifiably may rely on contractual representations," (*Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, *24 (Del. Super. Ct. 2021), and "the purchaser of a business is under no duty to investigate the accuracy of representations made by the seller… ***even when there is an opportunity to do so***" (*Craft v. Bariglio*, 1984 WL 8207, *10 (Del. Ch. 1984)) (emphasis added). In short, a representation and warranty (like SAPA §3.22) is a guarantee that certain facts are true – and that if *untrue*,[8] any losses will be borne by the party making the representation and warranty.

Because the GSX Pinsetters were subject to the "legally enforceable" (Decision, p. 6) SWEA Decision that expressly imposed a recall by a date certain (A4748) within the three-year scope of §3.22, Brunswick had a choice: make an honest disclosure about the recall (which it did not do) or accept the risk of indemnifying Buyer for resulting harm.

b. The Trial Court Erred as a Matter of Law in Interpretating §3.22.

"Delaware is a contractarian state that holds parties' freedom of contract in high regard." *Sunder Energy, LLC v. Jackson,* 332 A.3d 472, 487 (Del. 2024). Absent grounds for reformation, "it is not the proper role of a court to rewrite or

[8] Brunswick's purported "hope-filled beliefs" about the status of SWEA's recall (Decision, p. 28) are irrelevant to whether it breached §3.22.

supply omitted provisions to a written agreement." *Cincinnati SMSA Ltd. Partnership v. Cincinnati Bell Cellular Systems Co*., 708 A.2d 989, 992 (Del. 1998). Further,

> When interpreting a contract, Delaware courts read the agreement as a whole and enforce the plain meaning of clear and unambiguous language. Delaware law adheres to the objective theory of contracts, *i.e.,* a contract's construction should be that which would be understood by an objective, reasonable third party. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

BitGo Holdings, Inc. v. Galaxy Digital Holdings, Ltd., 319 A.3d 310, 322 (Del. 2024) (internal quotations and citations omitted). A court "must construe the agreement as a whole, giving effect to *all* provisions therein," nullifying none. *E.I. du Pont de Nemours & Co. v. Shell Oil Co*., 498 A.2d 1108, 1113 (Del. 1985).

But instead of interpreting §3.22 in keeping with its express language ("subject to any recall"), the Trial Court rewrote it to require "a finalized governmental action" and "the physical removal, return, or access to defective products with the intention of repairing their defects or replacing them." (Decision, p. 31-34). This interpretation purportedly rests upon a Merriam Webster definition of "recall." (Decision, p. 33, n.189).

Merriam-Webster defines "recall" as "a public call by a manufacturer for the return of a product that may be defective or contaminated." *Recall (noun)*,

MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/recall. *It does not* define "recall" as requiring a "finalized governmental action." Despite acknowledging that the SWEA Decision was "legally enforceable" (Decision, p. 6), the Trial Court simply imported a "finalized governmental action" mandating the "removal, return or repair" requirement into the dictionary's definition and *then* imported that new definition into §3.22.

Setting aside whether the SWEA Decision was a "finalized governmental action" (*it was*), the Trial Court compounded its error by omitting "subject to" and "any" from its construction of §3.22, both of which on their face *expanded* its scope. "Any" means "one or some indiscriminately *of whatever kind*," "unlimited in… extent," or "to any extent or degree." *Any (adjective, adverb)*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/any.

Use of "subject to" also reflects an intention to greatly expand §3.22. "Subject to" means "affected by *or possibly* affected by," or "likely to do, have, or suffer from" something, and is not relegated to scenarios where a recall has been commenced. *Subject to*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/subject%20to (emphasis added). The dictionary's examples clarify that "subject to" does not require *current and active effect*: a "schedule" may be "'subject to' change" *even if* it is currently static, a "cousin" is "'subject to' panic attacks" even if she is not *currently* experiencing such an event, and a speaker would

"rather not live in an area that is 'subject to' flooding" at some point *in the future* even if it is experiencing sunny and dry weather *now*. *Id.*

The proper construction of §3.22 mandates recognition that the representation and warranty was intended to be expansive, encompassing "any" recall that had been executed, but also those where a product was "affected by or *possibly* affected by," or *"likely* to do, have or suffer from" *any* recall – whether or not a recall was actively enforced or on-going, or uncertain to actually be carried out. SAPA §3.22 was an essential safeguard that required Brunswick to bear the risk posed by the SWEA Decision – risk that Brunswick itself acknowledged would result in a "significant value decrease" if disclosed to bidders "without proper framing" (A4912).

Brunswick guaranteed that no products had been "subject to *any* recall" at any time in the "immediate preceding three years"[9] and contractually bound itself to assume the risk of non-disclosure that products were "subject to any recall." This language was purposefully broad and freely assented to, and the Trial Court's interpretation wrongfully narrows the scope of that agreed-upon language, forcing back onto Buyer the risk that *both sides* agreed would be allocated *to Brunswick*. By rewriting §3.22 to sanction Brunswick's breach, the Trial Court was not

[9] The three-year look-back requiring disclosure of recalls *even if the underlying issue had been rectified* reinforces §3.22's expansive breadth.

"contractarian" – it undermined both the letter and the spirit of §3.22. The Trial Court's overly-narrow interpretation of §3.22 cannot stand and requires reversal.

B. The Trial Court Erred in Finding that SAPA §3.16 Was Not Breached.

1. Question Presented

Whether the Trial Court erred as a matter of law in finding that Brunswick did not breach §3.16's representation that Brunswick had not received any written notices of noncompliance because Brunswick "adequately disclosed the relevant information" in Schedule 3.16. (Decision, pp. 29-30; A4530-4531, A4548-4550; A4609-4610).

2. Scope of Review

This Court's review of the application of legal principles, questions of law, contractual interpretation, and the application of law to factual determinations is *de novo*. *Bako*, 288 A.3d at 266; *DCV*, 889 A.2d at 960.

3. Merits of the Argument

Brunswick represented in §3.16 that since January 1, 2012, it had not received "any written notice from any Governmental Authority" that BBB was "not in material compliance with any applicable Law":

> None of the Seller (solely with respect to the Business), [BBB] or any Asset Seller (solely with respect to the Business) has received at any time since January 1, 2012, **any written notice** from any Governmental Authority to the effect that any such Person is not in material compliance with any applicable Law.

(A7245) (emphasis added). This was false. Brunswick had received several such written notices: (i) the 2012 SWEA Notification, (ii) the SWEA Decision, (iii) the

Commission Letters, and (iv) the 2015 SWEA Notification (collectively, "Noncompliance Notices"), which have resulted in bans and recalls across Europe. Yet Schedule 3.16 mentioned *only a single item* – a "notification" – which, it turns out, was a mischaracterized portrayal of the SWEA Decision intended to depict the situation as a relatively minor issue about a "belief" rather than a legally enforceable decision finding that the pinsetters were "not in material compliance with… applicable Law."

Contrary to the Trial Court's conclusion that Brunswick "adequately disclosed" the relevant information in Schedule 3.16 (Decision, p. 30), Schedule 3.16 was riddled with material misstatements and omissions.

First, Schedule 3.16 unequivocally failed to disclose (or even hint at the existence of) the 2012 SWEA Notification, 2015 SWEA Notification, or Commission Letters – all three of which were *indisputably* received by Brunswick. These documents are written notices "to the effect" that BBB "is not in material compliance with… applicable Law." Indeed, in the written response to the Commission Letters, *Brunswick itself* explicitly acknowledged "the alleged issues of *non-compliance*… that were listed" in those Letters. (A4887) (emphasis added).

Second, Schedule 3.16 mischaracterized the SWEA Decision as a "notification" conveying a "belief" rather than the "legally enforceable" decision that it was.

Third, Schedule 3.16 omitted that the SWEA Decision imposed a sales prohibition and recall.

Fourth, Schedule 3.16 omitted that SWEA's prohibition and recall were based on violations of Swedish law rather than MD Article 11. The *Act* is the Law with which the pinsetters were *found to be non-compliant* by SWEA. (A4748). Article 11 is not a law *Brunswick* or its products had to comply with – it is a procedural provision governing *European regulators*. (A4670-4671). Brunswick and its products could not be either "in" or "out" of compliance with a procedure *inapplicable to them*.

Fifth, Schedule 3.16 did not even hint that the Commission would determine whether SWEA's measures were justified and the material risk that those measures would spread across Europe, which Brunswick knew at the time. (A4773; A6220).

Sixth, Schedule 3.16 included irrelevant information about resolving past compliance on *other* issues dating back to 2006 – many years before the operative time period for the representative's three-year span – creating a misleading picture of the SWEA situation's severity.

The Trial Court's sanction of these calculated material omissions and mischaracterizations undermines the very purposes of representations and warranties as mechanisms for transparency and risk allocation. Delaware law requires more: A seller cannot omit material information or materially mislead a

buyer – when it "travel[s] down the road of partial disclosure… and use[s] vague language," it has an obligation to provide an "accurate, full and fair characterization." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).

Brunswick made an affirmative representation and warranty – and agreed to allocate risk *to itself* – that it had received no written notices that its products were noncompliant with applicable law. Brunswick breached §3.16, and the Trial Court's finding to the contrary requires reversal, and remand to the Trial Court to determine whether this breach was intentional and to assess damages.

C. The Trial Court Applied Incorrect Legal Standards and Erred in Finding that Brunswick Did Not Commit Fraud.

1. Question Presented

Whether the Trial Court erred in applying incorrect legal standards to Plaintiffs' fraud claim and in finding that Brunswick did not commit fraud (i) in connection with the materially false and misleading representations it made in SAPA §§3.16 and 3.22, (ii) by making a voluntary disclosure in Schedule 3.16 that was materially false and misleading, and (iii) by intentionally concealing information and documents Buyer repeatedly requested during diligence. (4552-4565; Decision, pp. 19-44).

2. Scope of Review

Legal principles, questions of law, and the application of law to factual determinations are reviewed *de novo*. *Bako*, 288 A.3d at 266; *DCV*, 889 A.2d at 960.

3. Merits of the Argument

Fraud involves:

> 1) a false representation…; 2) [] knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) [] action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.

Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983). A false representation can occur in three ways: "overt misrepresentations… deliberate concealment of material facts, [or] silence in the face of a duty to speak.'" *Id.*

Brunswick (i) made materially false and misleading representations in SAPA §§3.16 and 3.22, (ii) violated its duty to speak by including Schedule 3.16 without providing a "full and fair" disclosure of the material facts concerning the GSX Pinsetter's problems, and (iii) engaged in intentional concealment by withholding substantive details and documents requested by Buyer concerning the purported SWEA "notification," while simultaneously lying that no relevant documents existed. Each of these constitute a false representation sufficient for the first element of fraud.

By treating Schedule 3.16's indisputably incomplete information as "adequate" and endorsing Brunswick's dishonesty in hiding requested documents, the Trial Court improperly lowered the standard for transparency and candor in contractual negotiations in favor of a new standard, unsupported by the law relied upon, for "sophisticated" buyers. In so doing, the Trial Court undermines the protections meant to ensure that parties can rely on representations and incentivizes tactical obfuscation and outright lies.

Because the Trial Court incorrectly found that Brunswick did not make a false statement, the Trial Court's Decision requires reversal and remand to the Trial Court for determination of damages.

a. Brunswick Made Overtly False Representations.

As detailed in Sections IVA-IVB above, Brunswick made multiple affirmative misrepresentations in the SAPA, satisfying the "false representation" element of fraud.

b. Brunswick Violated Its Duty to Speak by Making Materially False and Misleading Statements and Omitting Material Information in Schedule 3.16.

The Trial Court acknowledged Delaware's well-established duty to speak:

> [I]f a party to an arm's length transaction *does* choose to speak, then the speaker may not lie or speak "partially or obliquely such that what the party conveys becomes misleading." The speaker is thereby bound by a duty to disclose because "the choice to speak exposes the speaker to liability if his words are materially misleading."
>
> A statement can be materially misleading "because of [the speaker's] failure to state additional or qualifying matter[s]," and this duty to disclose can be epitomized as a "duty to make a full and fair disclosure as to the matters about which [one] assumes to speak."

Decision, p. 20 (quoting *Corp. Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, 2008 WL 963048, *6 (Del. Ch. 2008) and *Prairie Cap. III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015)). The Trial Court also found that Brunswick chose to speak about the pinsetter issue, "expos[ing] Brunswick to potential liability

for fraud." (*Id.*, p. 21). But while the Trial Court acknowledged the "full and fair disclosure" required by the duty to speak and Brunswick's decision to speak, it misapplied the test by creating new law that excuses partial disclosures if the defrauded party is "sophisticated." Correctly applied, Brunswick violated the duty to speak, separately satisfying the "false representation" element of fraud.

i. Schedule 3.16 Was Not a "Full and Fair" Disclosure.

"Full and fair" means just that – an honest and unreserved recounting of all material facts, without artifice or evasion. Strikingly, the Trial Court did not find that Brunswick made a "full and fair disclosure." Rather, it describes Schedule 3.16 in less exacting terms – "adequate" and "reasonable." (Decision, pp. 22, 26). Thus, the Trial Court concedes that at best Schedule 3.16 is "partial," and necessarily so given everything *not* stated about:

- The legally enforceable SWEA Decision and its mandated recall and prohibition on GSX Pinsetter sales;
- The 2012 and 2015 SWEA Notifications;
- The Commission Letters and response thereto; and
- The potential for European-wide bans and recalls.

To justify Schedule 3.16's partial nature, and without citing any authority, the Trial Court held that "[a] partial disclosure is permissible so long as it is considered 'fair.'" (Decision, p. 21). But the law is well-established that "once the party speaks, it also ***cannot do so partially***." *Prairie*, 132 A.3d at 52 (emphasis added); *Arnold*,

650 A.2d at 1280. Once Brunswick "undertook to communicate" with Buyer about the SWEA issues, "[it was] under a duty to disclose all facts within [its] knowledge necessary to prevent" its disclosures "from being misleading." *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc*., 854 A.2d 121, 155 (Del. Ch. 2004) (Strine, V.C.).

Disclosing a "belief" supported by "optimistic outlooks" (Decision, pp. 27-28) – regardless of whether the belief was honest or not – while *omitting* the critical information is impermissible. *Arnold*, 650 A.2d at 1280. Perhaps the best test of Schedule 3.16's incomplete and misleading nature is revealed by comparing it to what (i) BBB advised Brunswick's senior management about the pinsetter issues via the June 17, 2014 presentation (A4838-4840) and (ii) Sella told Gwillim during the August 4, 2014 "Swedish and E.U. Ban" presentation (A4907-4911). These presentations – both of which pre-date Gwillim's drafting of Schedule 3.16 – called out SWEA's sales prohibition and recall, SWEA's formal notification to the Commission, the Commission's notification to Brunswick of its intention to act, and prohibitions and recalls across Europe if the Commission found SWEA's actions "justified." (A4838-4840; A4907-4911). Indeed, "ban" and "recall" each appear four times in the final slide of the "Swedish and E.U. Ban" presentation. (A4911). Surely if Brunswick's senior management and Gwillim needed to know about these important facts, *then Buyer did too*.

Schedule 3.16 fell far short of the comprehensive disclosure required by Delaware law once a party begins to speak. The "partial" nature of Schedule 3.16 is itself fraudulent, particularly when coupled with the overtly false misrepresentations of §3.16 and §3.22.

ii. The Trial Court Committed Error by Applying a Wrong (and New) Duty to Speak Standard.

Despite the clear and long-standing principles governing the duty to speak, the Trial Court concluded Brunswick was relieved of its obligation to provide a "full and fair" disclosure because it provided enough information to alert the "sophisticated" Buyer of a need to investigate. (Decision, pp. 21, 25). This is unsupported and unprecedented. Once a counterparty affirmatively choses to speak, Delaware law does not reward strategic opacity, nor does it shift the burden of uncovering hidden truths onto a buyer because of its experience or "sophistication."

The Trial Court relies on one case, *In re JCC Holding Co., Inc.*, 843 A.2d 713, 721 (Del. Ch. 2003) (Strine, V.C.), to grant Brunswick leeway to shirk its obligation to make a "full and fair" disclosure because Buyer was "sophisticated." But neither *JCC* nor other Delaware precedent supports that outcome. *JCC* involved a board's disclosure duty in the context of seeking stockholder approval of a merger. 843 A.2d at 722. *JCC* does not suggest that individual stockholders (sophisticated or not) must conduct their own investigations; it does not even mention the term "investigation."

Under its new "sophisticated" party standard, the Trial Court concluded that

Schedule 3.16 satisfied Brunswick's duty to speak because Buyer failed to (i) "conduct adequate due diligence to the scope of Brunswick's disclosure," (ii) conduct "internet searches," or (iii) hire foreign counsel "to further investigate the issue." (Decision, pp. 24-25). To state the obvious, a "full and fair" disclosure would not necessitate Buyer hiring foreign counsel to learn the facts Brunswick concealed – rather, Brunswick *would have disclosed those facts*. *Metro*, 854 A.2d at 155.

This heightened sophisticated party standard disregards the fundamental principle that sellers bear the burden of candor once they choose to make representations. *Id*. As Delaware law confirms, buyers are entitled to trust contractual representations and need not embark on exhaustive investigations to confirm the accuracy of such representations. *Aveanna*, 2021 WL 3235739, *24; *Craft*, 1984 WL 8207, *10. But Buyer did not rely exclusively on the SAPA's representations and Schedule 3.16. As detailed herein, it *did* try to conduct an investigation: It asked in writing and orally for documents and asked salient diligence questions. (A6425; A6665; A4919-6140; A1228-1231). Critically, "[a]sserting that an entity conducted inadequate due diligence is not a defense if the party making that assertion is able to conceal information required for adequate due diligence." *CP Kelco U.S., Inc. v. Pharmacia Corp*, 2002 WL 31230816, *10 (D. Del. 2002) ("Reasonable commercial expectations do not include one party to a

transaction concealing [] information contradicting its disclos[ures]").

The Trial Court's misapplication of the law requires reversal.

c. Brunswick Frustrated Buyer's Ability to Conduct Due Diligence by Deliberately Concealing Material Information.

"[O]nce a [seller] allows the [buyer] to conduct additional investigation, then the [seller] 'cannot conceal information [...] because permitting the investigation operates as the functional equivalent of providing information.'" Decision, p. 21 (quoting *Prairie*, 132 A.3d at 52). Further, "[a] court may find fraud by deliberate concealment where a 'defendant took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.'" *Id.*, p. 26 (quoting *Metro*, 854 A.2d at 150). Brunswick permitted Buyer to conduct an investigation (*id.*, p. 22) and therefore ***could not conceal information from Buyer that was relevant to that investigation***.

Buyer, indisputably, requested documents about the issues identified in Schedule 3.16 – and Brunswick, indisputably, possessed such documents, had compiled them, *and then told Buyer no such documents existed.* (Decision, p. 23; A4919-6140). Moreover, Brunswick repeatedly advised Buyer the issue was "not material" (while internally acknowledging it could result in a "significant value

decrease"). A4912; A1927 (Jaxon) ("there were multiple documents that were concealed from us and we were misled into believing that this SWEA issue was not something that we should be concerned about."). This is the very type of "artifice to prevent knowledge of the facts" and "to exclude suspicion and prevent inquiry" sufficient to find intentional concealment. *Metro*, 854 A.2d at 150; *e.g. Fortis Advisors LLC v. J&J*, 2024 WL 4048060, *49 (Del. Ch. 2024) (optimistic representation regarding a "high certainty" that a clinical study milestone would be met constituted deliberate concealment where the speaker knew that an "on-site investigation had been launched by the FDA" even though publicly available information about the investigation existed on the FDA's website).

The Trial Court excuses Brunswick's lies about documents' *existence* based on Brunswick's purported "belief" that the pinsetter issue was "not a material concern" because Brunswick anticipated a positive conclusion to its discussions with SWEA and/or the Commission. (Decision, pp. 8-9, 26-27). But, contrary to the Trial Court's mischaracterization, Plaintiffs do not assert Brunswick engaged in deliberate concealment by sharing "[e]rrors in prediction" or alleged "honest beliefs[10] supported by "optimistic outlooks." (*Id.*, pp. 17-18, 21, 27-28). Thus it

[10] The facts identified in Section III.C contradicts the Trial Court's conclusion that Brunswick held the "honest belief that the issue was not a material concern." (Decision, p. 26).

does not matter what Brunswick *believed* – what mattered was Brunswick (i) did not provide any of the Noncompliance Notices that were directly responsive to Buyer's requests, (ii) told Buyer ***no documents existed***, and (iii) actively, affirmatively, and *falsely* misled Buyer on ***the*** specific issue Brunswick feared might cause a "significant value decrease." (A4912).

These actions misled Buyer into believing that the issues in Schedule 3.16 were insignificant. As Jaxon explained, "we were having to determine which issues we should spend more time and resources on. And with [the Schedule 3.16] description to us and no documents, it seemed reasonable that their description to us was accurate and we believed them." (A1765). Conversely, Buyer conducted extensive diligence into every area of perceived risk. As Jaxon explained, Buyer hired "a big team" and was "not afraid to bring the experts in. I brought in experts everywhere we felt like there was a potential risk that we needed to understand." (A1750-1751). For example, Buyer hired foreign law firms and others to assist: Womble Carlyle, Grant Thornton, Stax Consulting, Ironwood Insurance, Premier Logic, Basham, Ringe y Correa, Nagy and Troscanyi, Hart & Hickman, and Private Law Group. (A1746-1751; A1931-1932). Jaxon further explained, "[h]ad I known a fraction of what I know now… early in the deal I would have hired expert counsel that could give us expert guidance on what this was all about. ***Or if I had learned about it later, I would not have done the transaction***." (A2018) (emphasis added).

Brunswick affirmatively lied to Buyer and concealed information in an effort to thwart Buyer's investigation, an effort that successfully prevented Buyer's discovery of the concealed facts. *That* is fraudulent concealment.

D. The Trial Court Erred in Finding that the SAPA Does Not Permit Recovery of Attorneys' Fees as Indemnifiable Losses.

1. Question Presented

Whether the Trial Court erred in finding that the SAPA's unambiguous provisions do not permit recovery of attorneys' fees as indemnifiable losses. (A0712-014; A0769-0773; A0824-026).

2. Scope of Review

This Court's review of the application of legal principles, questions of law, contractual interpretation, and application of law to factual determinations is *de novo*. *Bako*, 288 A.3d at 266; *DCV*, 889 A.2d at 960.

3. Merits of the Argument

In SAPA §8.1, Brunswick promised to "indemnify and hold harmless" the Buyer "from and against any and all Losses… arising or resulting from… any breach of any representation or warranty set forth in Article 3." (A7264). "Losses" include "***any*** Liabilities, losses, damages, Judgments, fines, penalties, costs or expenses (**including reasonable attorney's or other professional fees and expenses**)." (A7217) (emphasis added). Section 8.1 thus explicitly provides for the payment of attorneys' fees incurred in connection with pursuing indemnity between contracting parties, which are frequently referred to as "first-party claims."

In a brief bench ruling, the Trial Court held that Buyer is not entitled to recover its attorneys' fees even if it prevails on its claims for breach of representations and

warranties at trial, reasoning that the SAPA does not "unequivocally state with explicit language that [the indemnification provision] applies to the reimbursement of attorneys' fees and expenses on first-party claims between the parties." (A0850). This ruling is erroneous for two reasons. First, it is inconsistent with this Court's precedent. Second, even the lower court precedent that the Trial Court applied demonstrates that the SAPA explicitly provides for the recovery of attorneys' fees for first-party claims.

a. Delaware Law Recognizes Recovery of Fees and Costs as Part of "Hold Harmless" Obligations in Indemnity Provisions.

This Court has confirmed the entitlement to recover contractually-afforded attorneys' fees and costs incurred for enforcing indemnification rights. For example, in *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, this Court held that a clause requiring a party "to hold harmless and indemnify [plaintiff] against 'any liabilities and expenses, including attorney's fees'" encompasses "attorneys' fees and expenses incurred" by the indemnitee "in enforcing the provision" against the indemnitor. 637 A.2d 418, 422 (Del. 1994). This Court explained that the indemnitor "could have avoided this result" by "paying the amount due without forcing [indemnitee] to bring suit." *Id.* at 423. Similarly, in *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, this Court held that where a party "is contractually entitled to be held harmless, that party is entitled to its costs and attorneys' fees

incurred to enforce the contractual indemnity provision." 840 A.2d 1244, 1256 (Del. 2004).

"Any other outcome would not result in [indemnitee] being held harmless" (*id.*) and would "create perverse economic incentives for indemnitors, and potentially vitiate the value of indemnification agreements to indemnitees" (*Chamison v. HealthTrust-Hosp. Co.*, 735 A.2d 912, 927, n.57 (Del. Ch. 1999).

Here, Brunswick expressly agreed to hold Buyer harmless for breaches of representations and warranties, and that agreement includes responsibility for paying "attorneys' fees" as part of Buyer's recoverable "Losses." (A7217, A7264). Plaintiffs provided notice of their indemnification demand (A7715-7719), but Brunswick denied the claim (A7720-7723). Plaintiffs were thus forced to incur fees and costs to hold Brunswick to the bargain the parties struck.

Accordingly, Plaintiffs have met all procedural and substantive requirements for indemnification under the SAPA and are entitled to recoup *all* Losses, *including attorneys' fees*, sustained in enforcing those rights. Any other result would not result in Buyer being "held harmless," frustrates the parties' express agreement, and diminishes the reliability of contractual rights and remedies. The Trial Court's refusal to honor these terms constitutes legal error requiring reversal.

b. The SAPA Rebuts Any Presumption That Brunswick's Indemnity Obligations Are Limited to Third-Party Claims.

Recently, parties have attempted to expand *Pike Creek* and *Delle Donne* to recover attorneys' fees in first-party actions through indemnification provisions that allow for recovery in only the *third-party* context. *See TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466 (Del. Super. Ct. 2012). Understandably, the lower courts have found that if the indemnification provision only provides a remedy for *third*-party actions, a party *cannot* point to that provision for recovery of its attorneys' fees in a *first*-party action. *Id.* at *3 ("TranSched and Versyss' indemnity clause plainly applies to third-party actions but does not unequivocally indicate an intent to apply to *inter se* litigation. Therefore, TranSched's request for attorneys' fees—or any other costs—pursuant to Section 7(a)(i) of the APA is denied."); *c.f. Gemini Techs., Inc. v. Smith & Wesson Corp.*, 2023 WL 5207360, *5 (D. Idaho 2023) (finding attorneys' fees recoverable in a first-party dispute and clarifying that *TranSched* "held that an indemnity provision specifically designed to protect from third-party lawsuits did not allow for the prevailing party to recover attorney fees in litigation between the two contracting parties.").

Conversely, the Superior Court recently held that a contract providing for indemnification of *first*-party claims included attorneys' fees and explained:

> The indemnification provision in the SPA does not expressly state that it covers first-party claims. But *TranSched* and its progeny do not require that an indemnity clause expressly state that it covers first-party claims. They create a presumption that an indemnity clause does not apply to first-party claims. ***The presumption is rebutted if the language of the agreement reveals a "clear and unequivocal articulation" of the parties' intent that it applies to first-party claims***.

Schneider Nat'l Carriers, Inc. v. Kuntz, 2022 WL 1222738, *31 (Del. Super. Ct. 2022) (emphasis added); *see Tipsy Spritzers, LLC v. Ninth Planet Sols., LLC*, 2024 WL 4441565, *2 (Del. Com. 2024) (same); *Menzies v. Seyfarth Shaw LLP*, 2024 WL 2804813, *4 (D. Del. 2024) (attorneys' fees recoverable for pursuing first-party claims"); *Innovate 2 Corp. v. Motorsport Games Inc.*, 2025 WL 624651, *5 (D. Del. 2025) (distinguishing *TranSched* and finding attorneys' fees recoverable in "first-party" action); *Gemini*, 2023 WL 5207360, *5.

The SAPA's indemnification provision *unquestionably* manifests the parties' explicit intent to cover *first*-party claims for breaches of representations and warranties. First, indemnification is Plaintiffs' *exclusive* remedy for breaches of the representations and warranties. (A7272). This, alone, "manifest[s] the intent to indemnify claims brought by and between the contracting parties." *Schneider*, 2022 WL 1222738, *31. Hence, if the SAPA's indemnification provisions were designed to protect from Losses arising out of only third-party claims, Plaintiffs could be left remediless.

Further, the SAPA's indemnity regime explicitly refers to first-party claims in numerous places: It (i) provides indemnity for breaches that could *only* arise between Brunswick and Plaintiffs, such as breaches of covenants and representations and warranties (A7272 §8.1), (ii) requires a claim notice for *both* first-and third-party claims (A2764 §8.3(a)), and (iii) repeatedly distinguishes between third- and first-party situations (A7265-67 §§8.1, 8.3, 8.4, 8.5), including the availability of "consequential, incidental, indirect, special or punitive damages" for only third-party actions (A7272 §8.5(e)(ii)) and specific obligations associated with a "Third Party Claim" (A7265 §8.3(b)) – *in contrast to* the definition of "Losses" which are defined identically for *all* indemnification claims. Each of these distinguishing characteristics was present in *Schneider*, entitling the indemnitee "to recover his 'reasonable fees and disbursements of legal counsel' for prevailing on his claim for breach." 2022 WL 1222738, *30-31. In addition, the SAPA does not contain a "prevailing party" provision, which *Schneider* found distinguished the governing contract "from several of the [*TranSched*] precedents, which concluded that the existence of a fee-shifting clause elsewhere in the contract, 'further demonstrate[d] that the parties did not intend for Losses to encompass fee-shifting on first-party claims.'" *Id.* (citations omitted).

This case is not *TranSched*, and the Trial Court's misapplication of governing Delaware law constitutes legal error warranting reversal.

V. CONCLUSION

The Trial Court's Decision and Order should be reversed, and the matter remanded for consideration of damages.

Dated: September 30, 2025 **BLANK ROME LLP**

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