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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
	§	Court Below: Superior Court of the State of Delaware
Plaintiffs Below, Appellants,	§	C.A. No. N20C-10-135 PRW CCLD
v.	§	
BRUNSWICK CORPORATION,	§	
Defendant Below, Appellee.	§	

APPELLEE'S ANSWERING BRIEF

Dated: October 30, 2025

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I. NATURE OF PROCEEDINGS

In many ways, this case is a run-of-the-mill indemnification dispute. But in other ways, it is unique: the sophisticated private equity buyers here claim they were defrauded, not about a hidden issue, but about a regulatory inquiry that was *expressly disclosed* many months before closing and in the deal agreement itself.

After presiding over an 11-day trial, during which 12 witnesses testified live, 8 more testified by deposition, and approximately 500 exhibits were admitted, the Superior Court rejected BBP's novel effort to transform a disclosed, ongoing regulatory issue into a facially implausible fraud scheme. It explained:

> BBP's claims now hyperfixate on a particular issue in this deal that—for good reason given Brunswick's prior experience and [the buyers'] then-shifting focus on other aspects of the sale—seemed of little moment to either party at the time but—to all parties' surprise and dismay—simply went unexpectedly (and expensively) sideways.

Dec. 44-45.[1] BBP now uses this appeal to reargue the same factual narrative the Superior Court rejected.

First, BBP claims that Brunswick breached Sections 3.22 and 3.16 of the Stock and Asset Purchase Agreement ("SAPA") to sell Brunswick's bowling products division, BBB. In those provisions, Brunswick represented that none of

[1] The Superior Court's Decision ("Dec.") is appended to Appellant's Opening Brief ("Op. Br.") as Exhibit A and at A4618-63. All trial evidence cited by the Superior Court, but not included in Appellant's Appendix, and additional trial evidence is provided in Appellee's Appendix at B0299-621.

BBB's products had been subject to a recall and that BBB had not received "written notice" from a governmental authority that any of its products did not comply with applicable law, *except for* European regulatory inquiries concerning the compliance of BBB's pinsetters with the Machinery Directive, which were expressly disclosed in Schedule 3.16. The Superior Court found that those representations were true. Though BBP reargues its same myopic view of the evidence, the Superior Court's factual findings were well-supported and should not be disturbed.

Second, BBP claims that Brunswick committed fraud by not saying *enough* about the European pinsetter issue in Schedule 3.16 or purportedly lying about the existence of documents or the materiality of the issue to BBB. Again, the Superior Court rejected BBP's narrative, instead concluding that Brunswick's representations reflected its honest belief and provided sufficient information for Buyers to conduct their own investigation.

Finally, BBP argues it is entitled to recover attorneys' fees under the SAPA's indemnification clause. This is easily rejected under long-standing Delaware precedent. Even had BBP prevailed on any of its claims, it could not recover fees in this first-party litigation because the SAPA does not contain a clear and unequivocal statement of intent to displace the presumption against fee-shifting. A bare reference to attorneys' fees as an indemnifiable loss is not enough.

Ultimately, the trial evidence revealed a simple set of facts: These private equity buyers were represented by numerous sophisticated lawyers and diligence advisors. They knew about the European pinsetter regulatory issues. They also knew they had not received documents from Brunswick on those issues other than Brunswick's disclosure. And they chose to proceed with the purchase of Brunswick's bowling products business anyway. These facts are fatal to BBP's claims. Accordingly, this Court should affirm the Superior Court's judgment that BBP failed to prove any of its claims and is not entitled to damages.

II. SUMMARY OF ARGUMENT

1. **Denied.** The Superior Court correctly determined that Section 3.22 did not contain a misrepresentation. It properly construed the contractual language, and found that there had been no finalized government action and no request by BBB to its customers to return or repair the pinsetters. And it correctly found that any *potential future* recall of BBB's pinsetters remained "tentative" until after closing, such that Brunswick's representation that "none" of BBB's products had been subject to a recall was accurate.

2. **Denied.** The Superior Court correctly concluded that Section 3.16, as modified by Disclosure Schedule 3.16, did not contain a misrepresentation because the disclosure expressly identified that BBB had received "written notice" from SWEA that its pinsetters did not comply with the Machinery Directive.

3. **Denied.** The Superior Court correctly found that Brunswick did not defraud the buyers because it made no false contractual or extra-contractual representations. The Superior Court found that Brunswick did not make any overt misrepresentation; that Schedule 3.16 fully and fairly disclosed the European pinsetter issues and did not omit any material facts; and that Brunswick did not deliberately conceal any information but rather shared its honestly held views. In addition, the Superior Court's factual findings establish that Brunswick lacked

scienter, and that the sophisticated buyers did not justifiably rely solely on Brunswick's representations.

4. **Denied.** The Superior Court correctly determined that BBP cannot recover its attorneys' fees in this first-party litigation under the SAPA's standard indemnification clause.

III. STATEMENT OF FACTS

A. European Regulatory Inquiries Regarding Pinsetters

BBB, Brunswick's former bowling division, manufactured bowling equipment, including the GSX pinsetter, used in Europe and elsewhere. Dec. 4. In the late 2000s, several European countries began investigating whether BBB's pinsetters complied with the European Union's Machinery Directive. BBB negotiated resolutions to those inquiries by applying enhanced "guarding" to the pinsetters. A0970.

In July 2012, the Swedish Work Environment Authority ("SWEA") issued a regulatory notice to Brunswick's distributor, VBS, explaining that SWEA was considering imposing restrictions on BBB's pinsetters because of noncompliance with the Machinery Directive. Dec. 5; A4736.

A year later, on August 30, 2013, SWEA notified VBS of its decision (the "SWEA Decision") that the sale of pinsetters and guarding "with the deficiencies stated" was prohibited. Dec. 5-6. The SWEA Decision also stated that VBS "shall at the latest by 1 January 2014 recall the pinsetter Brunswick GSX with the deficiencies noted." *Id.* 6. Pursuant to Article 11 of the Machinery Directive, SWEA then notified the European Commission (the "Commission") of its Decision and identified the technical provisions of the Machinery Directive with which BBB's pinsetters did not comply. B0360-68.

In October 2013, after speaking with SWEA, a VBS employee wrote to David Sella (the BBB employee responsible for all European regulatory inquiries) that "the case is closed as long as we deliver equipment the way I have presented it to them. *There is no threat of equipment needing to be taken out.*" Dec. 7-8 (emphasis added). Sella forwarded this email to BBB's President, Brent Perrier, noting "that despite the 'recall language,' *there will be no recall* 'as long as we deliver fixes by end of year.'" *Id.* 8 (emphasis added). Afterwards, SWEA's field agents inspected certain of BBB's pinsetters in the Swedish market. *Id.* Some pinsetters passed inspections and, for others, SWEA requested modifications, which Brunswick implemented. *Id.* 6-7.

B. Meetings with SWEA and the European Commission

In July 2014, Brunswick announced it would sell BBB and later began negotiations with BlueArc Capital Management ("BlueArc")—who then partnered with Gladstone Investment Corporation to finance the potential purchase (collectively, the "Buyers").

The following month, on August 27, 2014, Ryan Gwillim (who led the transaction for Brunswick) and Sella met with SWEA officials for the first time to discuss the implications of the SWEA Decision. *Id.* 8. The meeting "went very well": the parties agreed that BBB would install a modified design for pinsetter guarding at a bowling center in Gustavsberg and, after inspecting that design,

SWEA would decide whether to "lift the ban in Sweden." *Id.* 8-9. If SWEA approved the modified guarding, the modifications would be "implemented at *future* installations" (*i.e.*, not on already-installed pinsetters). *Id.* 9 (quoting B0378 (emphasis added)). During this entire time period, BBB continued shipping new pinsetters into Sweden. *Id.* 7.

On September 24, 2014, Gwillim and Sella met with the European Commission. Afterwards, Gwillim noted three possible outcomes based on what the Commission had said. One, that the SWEA Decision was "upheld," was deemed "unlikely"; the other two, that the Commission determined that SWEA's Decision "was inappropriate" or made no decision at all, were considered "very possible." *Id.* 9-10 (parentheses omitted); *see also id.* 26-27, 41 (Brunswick "honestly believed [the issue] to be a normal regulatory matter that would be resolved with and by executive agencies without any more formal proceedings").

Sella met with SWEA again in October 2014, and SWEA agreed to review BBB's guarding proposal before a model was installed for inspection at Gustavsberg. *Id.* 10. Sella informed Gwillim that the meeting "went better than expected … and [he] felt we were nearing resolution on all issues." B0454.

C. Divestiture of BBB and Disclosure of the European Pinsetter Issues

As due diligence began, Brunswick shared a draft SAPA and corresponding Disclosure Schedule with potential buyers. Dec. 4-5. One of the disclosures stated, in full:

> Since 2006, Seller and other manufacturers of pinsetters have received challenges from European health and safety inspectors regarding compliance to the Machinery Directive. Challenges from the United Kingdom, Finland and Germany were all resolved to the satisfaction of national authorities without notable business disruption. *In August 2013, the Company's Swedish distributor received notification from the Swedish Work Environment Authority ("SWEA") that SWEA believed that Brunswick's GSX pinsetter did not conform to certain provisions of Article 11 of the Machinery Directive 2006/42/EC.* SWEA in turned notified the European Commission of its belief. As a result of the notification, Seller and the Company have continued to work with Swedish and EU authorities to ensure the pinsetters comply with such laws and regulations as applied and interpreted by these authorities, and, as Seller and the Company have done since 2006 in other jurisdictions, the Company believes it will come to an agreement with the authorities as to whether any additional guarding is necessary. The Company continues to believe that its GSX pinsetter complies with all applicable laws and regulations as currently in force, including the Machinery Directive.

Id. 12-13 (emphasis in original). Sella, the most knowledgeable person on this issue, helped draft and approved this disclosure, confirming that it "certainly seems adequate to me." A6291-92. Throughout the deal process, BBB executives reviewed the disclosure and did not raise concerns with its accuracy. *E.g.*, A3204.

In December 2014, in response to an Information Request about litigation or regulatory risks, Brunswick directed Buyers to review Schedule 3.16, which notified Buyers of the European pinsetter issues and provided the information needed to conduct their own investigation. Dec. 14, 23. When Buyers requested additional documents relating to Schedule 3.16, Gwillim truthfully responded that there were no documents compiled for their review at that time. *Id.* He also said that the SWEA inquiry was a common regulatory issue in the industry and Brunswick did not view it as a "material concern." *Id.* 14, 22-23.

Buyers performed a "significant amount of due diligence," including retaining nine third-party advisors on various topics. *Id.* 11. But they chose not to retain any experts to specifically diligence the European pinsetter issue—and they refused to grant permission to their own lead deal counsel to retain European counsel when he asked. *Id.* 11, 13. Nor did Buyers conduct their own research. They simply "chose not to investigate the implications of Article 11 of the Machinery Directive 2006/42/EC, even though this provision was explicitly mentioned in Disclosure Schedule 3.16." *Id.* 12. Had they done so, "a cursory glance of the text of Article 11 would have apprised a sophisticated reader of the possibility of a product recall and prohibition." *Id.* 24.

Ultimately, the pinsetter issues were "far outside the top ten" diligence issues, and Buyers chose to allocate their resources elsewhere. *Id.* 15, 24.

D. Finalization of the SAPA and Disclosure Schedules

Months after the December call, on March 5, 2015, Gwillim requested that Sella compile documents on the European pinsetter issues after further discussion with Buyers. *Id.* 14. Sella did not send those materials to Gwillim until March 18—"after some significant delay"—and Gwillim did not provide Sella's "tardy materials" to Buyers because he believed that, in the meantime, "the issue had already been put to bed by the parties by the time Mr. Sella handed them in." *Id.* 14-15.

In April 2015, just weeks before the deal closed, Sella again met with SWEA to discuss "the status of the proposal and subsequent inspections of upgraded equipment." *Id.* 10. He predicted that a "successful meeting … could be a precursor to resolving the issues in Europe." *Id.* Afterwards, Sella reported that SWEA officials told him that "we have found a solution," and that he "fe[lt] we are getting very close to putting this to bed." *Id*. (quoting B0456).

On April 13, 2015, knowing they had not received documents on the pinsetter issues, Buyers executed the SAPA. *Id.* 15. Buyers represented they had "conducted [their] own independent investigation, review, and analysis of the business" and had been "provided with adequate access to [BBB's] personnel, properties, premises and books and records." *Id.* 11. Buyers also acknowledged

that Brunswick had not made any representation as to the "accuracy or completeness" of the materials it provided. A6154.

The deal closed on May 22, 2015. Dec. 15. Between the SWEA Decision in August 2013 and closing, BBB never curtailed any shipment of pinsetters to Sweden and never removed any already-installed pinsetters. *Id.* 7. Nor did BBB take any preparatory steps for a recall or accrue for any recall-related costs, as it would have done if the pinsetters were subject to a recall. A1578; A3173.

E. Post-Closing European Regulatory Activity

Months after the deal closed, in November 2015, SWEA unexpectedly issued a "Formal Request" that required the modified guarding designed for Gustavsberg to be applied to all pre-existing pinsetters. Dec. 15. Rather than comply in Sweden and likely put the issue to rest, the new owners of the business (now called "BBP") contested SWEA's demand before the European Commission. *Id.* 16.

In December 2018, the Commission upheld SWEA's actions. *Id.* Following several unsuccessful appeals, BBP then "switched its stance from resistance to compliance," "contacted all EU nations where it sold the pinsetter products," and (despite mixed responses from each country) chose to implement "the strictest compliance measures available … across Europe." *Id.* 16-17.

IV. BRUNSWICK DID NOT BREACH SECTION 3.22, WHICH ACCURATELY REPRESENTED THAT BBB'S PINSETTERS HAD NOT BEEN SUBJECT TO A RECALL.

A. Question Presented

Whether the Superior Court correctly determined that Brunswick did not make a misrepresentation in Section 3.22 because BBB's pinsetters had not been "subject to a recall." This question was raised below, *see* B0239-41; B0290-91, and considered by the Superior Court, Dec. 31-34.

B. Scope of Review

This Court reviews post-trial factual findings under "the deferential 'clearly erroneous' standard," *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016), and upholds them unless "the record does not support them," *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 58-59 (Del. 2022). Contractual interpretation is a question of law that this Court reviews *de novo*. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

C. Merits of the Argument

In Section 3.22 of the SAPA, Brunswick represented that "none of the products sold, provided, or delivered by [BBB] … during the immediately preceding three (3) years, has been subject to any recall." A7246; A7660. The Superior Court correctly found that "Brunswick did not make a contractual misrepresentation about a 'recall'" because the evidence showed that "the earliest identifiable event when the pinsetter products might be said to have become

subject to a 'recall'" occurred months after closing, when SWEA issued its "Formal Request" in late 2015. Dec. 31-34.

BBP claims the Superior Court erred in two ways. First, it disputes the Superior Court's factual finding that a potential recall remained "tentative" until after closing. Second, it faults the Superior Court's interpretation of the contractual language "subject to any recall." Neither argument has merit, and the Superior Court's judgment should be affirmed.

1. The Superior Court's Factual Finding That There Was No Pre-Closing Recall Was Well-Supported.

The Superior Court's conclusion that Section 3.22 was not breached rests on a core factual finding: that BBB's pinsetters did not become 'subject to a recall'" until SWEA's November 2015 "Formal Request" because, "[u]ntil that moment, a recall was merely tentative … and no products were being physically removed from the market." *Id.* 33-34. Though BBP frames its dispute as a legal issue, at heart BBP reargues the facts. *See Coster v. UIP Cos.*, 300 A.3d 656, 676 (Del. 2023) (rejecting "arguments on appeal [that] pick at the court's factual findings"); *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 656 (Del. 2008).

BBP's argument is simplistic: it insists that because the SWEA Decision contained the English-translated term "product recall," and was a "legally enforceable . . . [d]ecision," BBB's pinsetters were subject to a recall from that point forward. Op. Br. 23-25; *see also id.* 22 (referencing internal communications

using the term "recall" as shorthand to refer to the Decision). This superficial stance ignores the facts and the full trial record—including documents showing that SWEA reversed course and never actually required a recall until November 2015.

As the Superior Court found, despite its preliminary request, SWEA indicated only weeks later that it would *not* require a recall. Dec. 6-7. Indeed, in October 2013, BBB's distributor stated that SWEA had informed it that "*[t]here is no threat of equipment needing to be taken out*." *Id.* 7-8 (emphasis added); *see also id.* 8 (quoting Sella as saying that "despite the 'recall language,' there will be no recall"). Consistent with SWEA's instruction, Sella testified that BBB never, "in th[e] entire time period from the time of the SWEA letter all the way up through closing of the deal," did any of the "things that you would do if you were having a recall." A1578. And there was "[n]ever a physical removal of the preexisting pinsetter products." Dec. 7.

The Superior Court further explained that, in August 2014, when SWEA met with Brunswick and BBB "to discuss the implications of the Decision," SWEA agreed that BBB's modified guarding would only be "implemented at *future installations*." *Id.* 8-9 (emphasis added). There is no evidence that *already-installed* pinsetters (which were the only things that could be "recalled") were addressed. A1475-76 (Sella); A2504-05 (Gwillim). Then, in April 2015, just

weeks before the transaction closed, Sella again met with SWEA and reported that "we have found a solution" and he was "getting very close to putting this to bed."[2] Dec. 10 (quoting B0456).

The Superior Court also found that the situation shifted radically "[n]ear the end of November 2015"—*months* after closing—when SWEA "issued a Formal Request, which approved Brunswick's proposed modifications but also required BBB to apply these modifications to all pre-existing pinsetters." *Id.* 15. It was only then that "SWEA officially affirmed its intent to impose and enforce its 2013 Decision by requiring BBB to apply the proposed modifications to its pre-existing products to fix or replace them." *Id.* 33-34. This is consistent with Sella's testimony that SWEA never "mention[ed] a recall to [him] until late November 2015." A1581.

In sum, the Superior Court carefully weighed the trial evidence and credited documents and testimony showing that: (1) before closing, SWEA required BBB to develop guarding for future sales, not already-installed pinsetters; (2) BBB did not believe SWEA would require a recall and had taken no steps to prepare for one; and (3) in November 2015, SWEA changed course and formally required that BBB remove or modify (*i.e.*, recall) already-installed pinsetters. The Superior

[2] Consistent with this view, Corey Dykstra, then BBB's CFO and currently BBP's CEO, confirmed he had not "put anything on the books for a recall in Sweden at any time up through the closing because [a recall] was not probable." A3173.

Court correctly found that, at the time of closing, "a recall was merely tentative since SWEA was engaged in a dialogue with Brunswick and no products were being physically removed from the market." Dec. 34. This "logical factual finding … was supported by the evidence," and should not be disturbed. *Biolase, Inc. v. Oracle Partners, L.P.*, 97 A.3d 1029, 1036 (Del. 2014).

2. The Superior Court Properly Interpreted The Language Of Section 3.22.

In addition to disputing the Superior Court's factual conclusions, BBP also faults the Superior Court's interpretation of two parts of Section 3.22—the word "recall" and the phrase "subject to any"—as improperly "add[ing] a nonexistent caveat" and "strik[ing] out express language broadening [the provision's] scope." Op. Br. 22. Not so: the Superior Court interpreted Section 3.22 according to its plain meaning and properly determined that BBB's pinsetters had not been "subject to any recall" before closing.

First, BBP takes issue with the Superior Court's interpretation of the word "recall." *Id.* 26-27. Because the term "recall" is undefined, the Superior Court properly turned to the "plain and ordinary meaning" supplied by dictionary definitions. Dec. 32-33; *see Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006). Referencing both Black's Law Dictionary and Merriam-Webster, the Superior Court determined that "the most common understanding of 'recall' in American parlance" requires "a finalized government

action" and "a request to customers for the physical removal, return, or access to defective products with the intention of repairing their defects or replacing them." Dec. 33.

BBP argues this interpretation was incorrect because Merriam-Webster's definition of "recall" does not reference a "finalized government action." Op. Br. 26. But product recalls *are* commonly prompted by governmental action, and other dictionaries explicitly reference government orders. *See Recall*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/recall (defining "recall" with an example in which "[t]he government ordered a recall").

Moreover, even if government action is not integral to a recall, any error was harmless because the second element of the definition—"a request to customers for the physical removal, return, or access to defective products," Dec. 33—was not satisfied. BBP does not contest that this portion of the Superior Court's definition maps directly onto the Merriam-Webster definition—which requires a "public call" (*i.e.*, "a request to customers") for "the return of a product that may be defective" (*i.e.*, "the physical removal [or] return [of] defective products").[3] *See id.* & n.189. And the record is clear that BBB *never issued a request* "for the return" of

[3] Black's Law Dictionary is consistent: it requires a "manufacturer's *request to consumers* for the *return* of defective products." Dec. 33 (Superior Court noting BBP's reliance on this definition) (emphases added).

pinsetters—or even for access to install upgrades on-site—before closing. *See supra* § IV.C.1.

Second, BBP faults the Superior Court for not interpreting the phrase "subject to any" as expansively as BBP prefers. Op. Br. 27-28. BBP contends that this phrase should sweep in recalls "of whatever kind," including a "*possibl[e]*" recall that may occur "at some point *in the future*." *Id.* (emphases BBP's). Under that interpretation, *every single product* BBB manufactured would have been "subject to" a recall, since it was *possible* that BBB might recall *any* of its products one day. To construe this language so broadly would undermine BBP's own view of the "intent" of Section 3.22: to advise Buyers where there was a "risk" that a *particular product* "was unsafe or defective so as to call into question the economics of the transaction." *Id.* 23. This Court should reject BBP's interpretation that broadens Section 3.22 to the point that it loses all meaning. *See O'Brien*, 785 A.2d at 287-88 (rejecting interpretation that renders a contract provision "illusory and meaningless").

Moreover, even adopting a definition of "subject to" as meaning "*likely* to do, have, or suffer from," Op. Br. 27 (emphasis added), does not save BBP. The trial evidence showed that a recall was *not* likely before closing—and was not even considered "probable" by Brunswick or BBB. *See supra* § IV.C.1 & n.2.

The Superior Court properly construed the phrase "subject to any recall" to encompass products for which BBB had *actually issued a request* that customers remove, return or allow access for repair. The Superior Court then weighed the trial evidence and correctly found that BBB's pinsetters were *not* subject to a recall before closing. The Superior Court's judgment that Brunswick did not breach Section 3.22 should be affirmed.

V. BRUNSWICK DID NOT BREACH SECTION 3.16, WHICH ACCURATELY DISCLOSED THE EUROPEAN PINSETTER ISSUES.

A. Question Presented

Whether the Superior Court correctly found that Brunswick did not make a misrepresentation in Section 3.16 because Schedule 3.16 disclosed that SWEA had provided "written notice" that BBB's pinsetters did not comply with law. This question was raised below, *see* B0241-44; B0288-90, and considered by the Superior Court, Dec. 29-31.

B. Scope of Review

This Court reviews post-trial factual findings under "the deferential 'clearly erroneous' standard," *CDX Holdings*, 141 A.3d at 1041, and contract interpretation *de novo*, *O'Brien*, 785 A.2d at 286.

C. Merits of the Argument

In Section 3.16, Brunswick represented that BBB had not received "any written notice from any Governmental Authority to the effect that [BBB] is not in material compliance with any applicable Law." A7245. Against that representation, Brunswick disclosed in Schedule 3.16 the very matters that BBP argues made the representation false, including a "notification" that SWEA did not believe BBB's pinsetters complied with the Machinery Directive. A7653; *see* Dec. 31.

Notwithstanding this disclosure, BBP argues that the Superior Court erred for two reasons. Op. Br. 31. First, because Brunswick had received other documents from SWEA and the Commission that were not listed in Schedule 3.16. Second, because Schedule 3.16 "was riddled with material misstatements and omissions." Both arguments fail; the Superior Court's judgment that the "relevant information" was adequately disclosed should be affirmed. Dec. 30.

1. The Superior Court Correctly Held That Schedule 3.16 Disclosed The Receipt Of "Written Notice."

The Superior Court concluded that Schedule 3.16 "adequately disclosed the relevant information" about written notices relating to the European pinsetter issues. *Id.* That finding was plainly correct: Schedule 3.16 stated that SWEA had issued a "notification" that "SWEA believed that Brunswick's GSX pinsetter did not conform to certain provisions of Article 11 of the Machinery Directive 2006/42/EC." *Id.* 12 (quoting A7653 (emphasis omitted)). It also stated that SWEA had "notified the European Commission of its belief." *Id.* Schedule 3.16 further disclosed that BBB "continued to work with [the] authorities to ensure the pinsetters comply with … laws and regulations." *Id*. As BBP concedes, this disclosure describes *written* documents from governmental authorities contesting the pinsetters' compliance with the Machinery Directive—including the SWEA Decision at the heart of BBP's claims. Op. Br. 31.

BBP nonetheless argues that Schedule 3.16 was deficient because it did not itemize each and every document from SWEA or the Commission—in particular, a 2012 notice that preceded the SWEA Decision; another 2015 notice relating to the Gustavsberg bowling center, where BBB was installing modified guarding; and letters from the Commission conveying that SWEA had notified it of the Decision. *Id.* But Section 3.16 did not require that Brunswick provide an exhaustive listing of *all* written communications; it merely required disclosure if BBB had received "any written notice" that one of its products did not comply with law. A7245.[4] By describing the SWEA Decision and related ongoing discussions with the authorities, Schedule 3.16 did just that.

Moreover, as BBP argues, this representation was intended to "allocate risk" by ensuring that Buyers were informed if any of BBB's "*products* were noncompliant with applicable law." Op. Br. 33 (emphasis added). Here, the specific documents that BBP highlights were all part of the *same inquiry* into the *same product's* possible noncompliance with the *same laws*. Therefore, even had Schedule 3.16 explicitly mentioned each document, it would not have identified any additional non-compliant products or risks.

[4] In comparison, SAPA Section 3.8 represents that the disclosure "contains a list of *all* parcels of Real Property." A7237 (emphasis added); *cf. Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 364 (Del. 2013) ("drafters knew how to [use specific language] when they so intended").

2. The Superior Court Correctly Determined That Schedule 3.16 Did Not Misrepresent The Facts.

BBP also argues that Schedule 3.16 was inadequate because it contained "material misstatements and omissions." Op. Br. 31. BBP's overly technical criticisms of the disclosure do not undermine the Superior Court's finding, based on its view of the trial record, that Schedule 3.16 "adequately disclosed the relevant information." Dec. 30.

First, BBP complains that Schedule 3.16 described the SWEA Decision as a "notification" that SWEA "belie[ved]" the pinsetters were legally noncompliant, rather than a "legally enforceable decision." Op. Br. 31. This semantic dispute is easily disposed of: BBP's own Swedish-law expert conceded that it was a "*notification* of decision." A3478 (emphasis added). More fundamentally, BBP's quibble does not change the sentence's meaning, which fairly disclosed that SWEA had issued a notice that BBB's pinsetters did not comply with the Machinery Directive and had informed the Commission.

Second, BBP argues the SWEA Decision was based on "violations of Swedish law" rather than the Machinery Directive. Op. Br. 32. This nit-pick again fails: SWEA itself mapped the technical issues identified in the Decision directly onto the Machinery Directive. B0363-68.

Third, BBP argues Schedule 3.16 did not explicitly state that "the SWEA Decision imposed a sales prohibition and recall" and "did not even hint that the

Commission would determine whether SWEA's measures were justified," which carried a "risk that those measures would spread across Europe." Op. Br. 32. But as BBP concedes, Schedule 3.16 *did* expressly refer to Article 11 of the Machinery Directive. A7653. As the Superior Court found, "[e]ven a cursory glance of the text of Article 11 would have apprised a sophisticated reader of the possibility of a product recall and prohibition." Dec. 24; *see also* A4670.

In addition, by referencing Article 11, Schedule 3.16 did far more than "hint" at a risk of broader regulatory action. Article 11 detailed the process that might lead to that result, including that the Commission could determine "whether or not the measures taken by [SWEA] are justified" and "communicate its decision to … the other Member States," which, in turn, might lead to similar actions in other European countries. A4670-71. Schedule 3.16's express reference to the Article 11 process supplied the very information BBP now claims Buyers lacked.

Finally, BBP complains that Schedule 3.16 contained *too much* information by referring to the resolution of other, similar inquiries dating back to 2006. Op. Br. 32. BBP does not argue that this information was inaccurate; merely that it "creat[ed] a misleading picture of the SWEA situation's severity." *Id.* Nonsense. That additional detail provided accurate historical context and was not misleading.

None of BBP's complaints about specific details that Schedule 3.16 either omitted or included undermines the Superior Court's well-reasoned conclusion that

the disclosure provided "correct and adequate information." Dec. 25.

The Superior Court's judgment that Brunswick did not breach Section 3.16 should be affirmed.

VI. BRUNSWICK DID NOT COMMIT FRAUD.

A. Question Presented

Whether the Superior Court correctly held that Brunswick did not engage in fraud where Brunswick did not make any false statement, whether contractual or extra-contractual, or act with the requisite scienter, and Buyers did not justifiably rely solely on Brunswick's representations. This question was raised below, *see* B0226-39; B0276-87, and considered by the Superior Court, Dec. 19-28.

B. Scope of Review

This Court reviews post-trial factual findings, including as to whether Brunswick's statements were true and reflected its honestly held beliefs, with deference and will not disturb them unless "the record does not support them." *Geronta Funding*, 284 A.3d at 58-59. The legal standard for evaluating whether a disclosure was full and fair, and the application of that standard to the facts, are reviewed *de novo*. *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 957-58, 960 (Del. 2005).

C. Merits of the Argument

The Superior Court found that BBP failed to prove fraud because Brunswick properly disclosed the European pinsetter issues in Schedule 3.16 and during due diligence discussions and did not deliberately conceal any information it was obligated to disclose. BBP argues that the Superior Court erred for three reasons. Op. Br. 35. First, because the SAPA itself contained false representations in

Sections 3.16 and 3.22. Second, because Schedule 3.16 did not provide a "'full and fair' disclosure of the material facts." Third, because Brunswick intentionally concealed information during due diligence. The Superior Court properly applied the relevant legal standard to the voluminous trial evidence and correctly rejected each of BBP's arguments. Its judgment that Brunswick did not commit fraud should be affirmed.

1. The Superior Court Correctly Held That Brunswick Did Not Make Any Contractual Misrepresentations.

The Superior Court correctly held that Sections 3.16 and 3.22 and the associated disclosure schedules did not contain any misrepresentations. BBP's first argument that the SAPA contained overtly false representations fails for a simple reason: as detailed *supra* §§ IV-V, Sections 3.16 and 3.22 of the SAPA were accurate and Schedule 3.16 appropriately disclosed the European pinsetter issues.

BBP also argues that Brunswick "violated its duty to speak" because Schedule 3.16 did not provide "a 'full and fair' disclosure of the material facts." *Id.* This argument, rehashing the claim that Brunswick breached Section 3.16 because the accompanying Disclosure Schedule did not contain enough detail, should fail for the same reason. As the Superior Court explained, Schedule 3.16 provided full and fair disclosure because it did not omit "additional or qualifying matter" that would render it misleading. Dec. 20.

BBP tries to twist what is fundamentally a factual dispute into a legal issue by claiming that the Superior Court imposed "new law" for evaluating a disclosure in an arms'-length transaction with sophisticated buyers. Op. Br. 37; *id.* 35, 39-41. Specifically, BBP claims that the Superior Court found only that Schedule 3.16 was "adequate" or "reasonable," rather than "full and fair" as required under Delaware law, and it then concluded that this "less exacting" standard is sufficient for sophisticated parties. *Id.* 37. BBP mischaracterizes the Superior Court's decision.

The Superior Court correctly stated that Brunswick was required to make "a *full and fair disclosure* as to the matters about which [it] assume[d] to speak," Dec. 20 (emphasis Superior Court's), and that disclosures can be full and fair without including "*every* single detail" about the disclosed issue, *id.* 21. *See DCV Holdings, Inc. v. ConAgra, Inc.*, 2005 WL 698133, at *7-8 (Del. Super. Ct. Mar. 24, 2005), *aff'd*, 889 A.2d 954 (Del. 2005); *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 66-67 (Del. 1995) (rejecting fraud claim because disclosure "sufficiently apprised … of the risk[s]" without additional detail). The Superior Court then concluded that such a "partial" disclosure (*i.e.*, full and fair, but without every detail) is permissible, so long as it discloses sufficient facts to allow the reader to pursue its own investigation. Dec. 21. None of that analysis created new law; instead, it faithfully applied long-standing Delaware precedent.

BBP claims three features of the Superior Court's analysis introduced error. First, BBP juxtaposes the Superior Court's explanation about a "partial" disclosure with the comment in another opinion that "once [a] party speaks, it … cannot do so partially." Op. Br. 37 (quoting *Prairie Cap. III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015)) (emphasis omitted). BBP's fixation on the word "partial" ignores that the substance of the Superior Court's decision and the *Prairie Capital* opinion are in harmony: they require that, if a seller speaks on a topic, it must provide enough information that its statement does not "become[] misleading," but not necessarily every detail known to it. *Prairie Cap.*, 132 A.3d at 52. Schedule 3.16 did just that.

Second, BBP faults the Superior Court for observing that BBP was a sophisticated party. But the Superior Court did not do so to "heighten" the standard or "shift the burden of uncovering hidden truths." Op. Br. 39-40. Rather, the "full and fair" disclosure standard is itself contextual: the level of detail that is "fair" to disclose an issue to a sophisticated party with experience evaluating regulatory risk, like Buyers here, may be different than for a comparatively inexperienced audience. *See Arwood v. AW Site Servs., LLC*, 2022 WL 705841, at *23 (Del. Ch. Mar. 9, 2022) ("a plaintiff's sophistication may affect a court's judgments about what dangers were *fairly* considered obvious" (emphasis added)); *DCV Holdings*, 2005 WL 698133, at *7 (no obligation to add detail to a disclosure

because buyers "were experienced professionals who understood the ramifications"). The Superior Court did not err by recognizing this nuance.

Finally, BBP simply disagrees with the Superior Court's factual finding that Schedule 3.16 fully disclosed the European pinsetter issues. BBP complains that Schedule 3.16 "omitt[ed] the critical information" because it did not contain all the detail that BBB conveyed internally to Brunswick—including speculative predictions about how those issues might unfold. Op. Br. 38 (emphasis omitted). But, as the Superior Court noted, Brunswick had no obligation to share "speculative information which would tend to … inundate [the listener] with an overload of information."[5] *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994); *see also Sofregen Med. Inc. v. Allergan Sales, LLC*, 2024 WL 4297665, at *19 (Del. Super. Ct. Sept. 26, 2024) (no requirement to disclose details from internal meetings), *aff'd*, -- A.3d --, 2025 WL 2643790 (Del. Sept. 15, 2025). And BBP cannot identify any information known to Brunswick that actually "contradict[ed]" its disclosures, *cf. CP Kelco U.S., Inc. v. Pharmacia Corp.*, 2002 WL 31230816, at *10 (D. Del. Oct. 2, 2002) (cited Op. Br. 40); to the contrary, the

[5] In addition, as the Superior Court explained, the information in these internal presentations no longer accurately reflected the status at the time of closing. *See* Dec. 8-10 (describing positive meetings with SWEA and the Commission, after which BBB concluded the inquiries likely would be resolved).

Superior Court found that Schedule 3.16 was *consistent* with "BBB's internal assessment … shared with Brunswick's representatives." Dec. 27.

BBP also makes a last-ditch argument that Section 3.16 was not "full and fair" because, had it been, Buyers would not have needed to complete their own independent investigation. Op. Br. 40. This absurd position would mean buyers would never have to perform due diligence—which runs headlong into the testimony of BBP's own expert that "it is industry custom for a buyer to conduct due diligence by independently searching publicly available information" relating to disclosed issues. Dec. 24; *see Paragon Metal Holdings, LLC v. Smith*, 2025 WL 2531610, at *1, *18-19 (Del. Super. Ct. Aug. 13, 2025) (rejecting fraud claim because "Buyers did not conduct sufficient due diligence and ignored Sellers[']repeated … disclosure of the information at the heart of their claim").

The Superior Court's findings demonstrate that Schedule 3.16 fully and fairly described the European pinsetter issues, regardless of the reader's level of sophistication. As the Superior Court explained, Schedule 3.16 expressly referenced Article 11, and "it is possible to find Article 11 of the Machinery Directive on the internet within a few clicks." Dec. 24. Far from assessing Schedule 3.16 through the lens of sophistication, the Superior Court assumed a basic ability to review a plainly-disclosed issue—hardly a heightened threshold.

In short, the Superior Court applied the correct "full and fair" disclosure standard, *id.* 20, and factually concluded that Schedule 3.16 satisfied that standard, *id.* at 21-26, 29-31. That decision is entitled to deference. *See In re Oracle Corp. Derivative Litig.*, 339 A.3d 1, 20 (Del. 2025) (rejecting arguments on appeal that "were fully vetted during a ten-day trial," because the Court "do[es] not weigh evidence on appeal").

2. The Superior Court Correctly Held that Brunswick Did Not Make Any Extra-Contractual Misstatements.

BBP also attacks the Superior Court's finding that Brunswick did not make any extra-contractual misrepresentations. BBP relies on a deliberate concealment theory: that Brunswick "intentionally conceal[ed] information and documents Buyer repeatedly requested during diligence" when it purportedly "lied" about the existence of documents and advised BBP that the SWEA issue was not material. Op. Br. 34-35. This simply rehashes the same factual narrative BBP advanced at trial, which the Superior Court rejected.

First, BBP disputes the Superior Court's factual finding that, after requests for documents about the SWEA matter, Brunswick truthfully responded that there were no documents compiled for review. Dec. 23. BBP's primary move is to mischaracterize the record as establishing that Brunswick "told Buyer ***no documents existed***." Op. Br. 43 (emphasis in original). That view cannot be reconciled with the Superior Court's discussion of the evidence, including that

Schedule 3.16 itself revealed that documents existed because it directly references a "notification" from SWEA.[6] Dec. 30; *see also* A1323 (Buyers' own deal counsel admitting that "written notice [was] disclosed" through Schedule 3.16). Consistent with that disclosure, the Superior Court found that Buyers were not told that no documents *existed*, but rather that "there were no additional documents to review" at the time of the requests. Dec. 23. As the Superior Court explained, that statement was true "at the time and in context of then existing events" because no documents had yet been compiled for Buyers to review. *Id.* Later during the diligence period, BBB assembled such documents only after a "significant delay," and by then the parties had moved on to other diligence issues. *Id.* 14-15.

Second, BBP disputes the Superior Court's finding that Brunswick's stated belief that "the issue was not a material concern" was true. *Id.* 26; *see also id.* 22-23. BBP relies on a single email from August 2014 in which Gwillim commented that the pinsetter issue could result in a "significant value decrease" if not appropriately disclosed. Op. Br. 41-43 (quoting A4912). The Superior Court rejected any inference of "materiality" from that email. It explained that, in the period between that email and Brunswick's representations, BBB had "positive

[6] During trial, the Superior Court also cautioned BBP's due diligence expert that he was "losing a great deal of credibility" to the extent he was "trying to sell to this Court" the idea that Buyers were told that the "notification" in Schedule 3.16 was not in writing. A3388.

engagement with the Swedish and the European authorities," during which they agreed on a path to resolution. Dec. 26-27; *see also id.* 8-10.

Thus, the facts known to Brunswick affirmatively supported its expectation that the pinsetter inquiries would be resolved. *Cf. Fortis Advisors LLC v. J&J*, 2024 WL 4048060, at *49 (Del. Ch. Sept. 4, 2024) (cited Op. Br. 42; deliberate concealment only where company knew facts that *undermined* its representation that there was a "high certainty" of an outcome). BBP's single outdated email cannot disturb the Superior Court's well-supported factual finding that Brunswick truthfully "disclosed the pinsetter issue and its honest belief that the issue was not a material concern." Dec. 26.

3. The Superior Court's Factual Findings Preclude Proof of Scienter and Justifiable Reliance.

In addition to the absence of any misrepresentation, the Superior Court's factual findings demonstrate that BBP also failed to prove two additional elements of fraud: scienter and justifiable reliance. This Court may affirm the Superior Court's judgement on these independent grounds as well. *See Winshall v. Viacom Int'l, Inc.*, 2020 WL 3722401, at *2 n.2 (Del. July 6, 2020) (TABLE) ("[T]his Court may affirm on the basis of a different rationale than that which was articulated by the trial court.").

Scienter. A fraud claim cannot rest on falsity alone; rather, BBP must also prove that Brunswick knew its statements were false or was recklessly indifferent

to the truth. *See DCV Holdings*, 889 A.2d at 958. Thus, it *does* "matter what Brunswick *believed*" when it made representations about the pinsetter issues. Op. Br. 43 (emphasis BBP's). The Superior Court found that Brunswick acted with the *opposite* of fraudulent intent: Brunswick's disclosures reflected its "honest belief" about the European pinsetter issues, which "was based on Brunswick's positive engagement with the Swedish and the European authorities to address the issue." Dec. 26-27. The Superior Court also found that the "optimistic outlook" conveyed to Buyers matched "internal assessment[s]" of the issue that were "shared with Brunswick's representatives. *Id.* 27; *see also id.* 27-28 ("expressions of 'belief' or opinion" in Schedule 3.16 aligned with "internal comments"). These factual findings that Brunswick was "honest" and that Schedule 3.16 accurately reflected its "hope-filled beliefs," *id.* at 28, preclude any finding of scienter.

Justifiable Reliance. BBP also failed to prove justifiable reliance because Buyers (1) disclaimed reliance on extra-contractual representations and (2) failed to perform *any* investigation of their own to understand the European pinsetter issues.

First, as to extra-contractual representations, the SAPA's anti-reliance clause precludes justifiable reliance as a matter of law. Delaware courts bar parties from agreeing that they "will not rely on promises and representations outside of the agreement and then shirk[ing] [their] own bargain in favor of a 'but we did rely on

those other representations'" claim. *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1057 (Del. Ch. 2006). That is precisely what BBP does here.

In Section 4.7, Buyers represented that they had "relied *solely* upon" their own investigation and Brunswick's "representations and warranties set forth in Article 3," and "*not* on any [other] factual representations or opinions" from Brunswick. A7249 (emphases added). In addition, Sections 5.6 and 11.4 expressly incorporated Buyers' acknowledgement that Brunswick had not made "any representation or warranty as to the *accuracy or completeness*" of diligence material, and Section 11.4 also confirmed that the SAPA superseded any prior representations. A7255; A7281; B0384 (emphasis added).

These provisions "add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners." *ChyronHego Corp. v. Wight*, 2018 WL 3642132, at *4 (Del. Ch. July 31, 2018); *see also Prairie Cap.*, 132 A.3d at 50-55 ("If a party represents that it only relied on particular information, then that statement establishes the universe of information on which that party relied."); *Collab9, LLC v. En Pointe Techs. Sales, LLC*, 2019 WL 4454412, at *4 (Del. Super. Ct. Sept. 17, 2019). Therefore, Buyers are contractually barred from relying on any extra-contractual representations.

Moreover, the Superior Court's factual findings demonstrate that BBP failed to prove justifiable reliance because Buyers chose not to conduct even rudimentary due diligence. Whether reliance is justified is measured through "a contextual inquiry [that] is judged by reference to the plaintiff's knowledge and experience and the relationship between the parties." *Arwood*, 2022 WL 705841, at *23 (cleaned up); *see also Sofregen*, 2024 WL 4297665, at *22 ("claims of reliance must include recognition that [plaintiff's] due diligence team was sophisticated").

The Superior Court noted that Buyers were "sophisticated" and experienced parties, for whom conducting an independent investigation—including "relatively simple internet searches"—would have been "industry custom." Dec. 23-25. However, Buyers did not take even basic steps to research the issues disclosed in Schedule 3.16: they did not retain advisors with relevant expertise and did not even search the internet for the Machinery Directive—which would have alerted them to "the possibility of a product recall and prohibition." *Id.* 24-25. Thus, Buyers *chose* to rely on any unjustified assumptions they made about this issue.

BBP argues that Buyers did not need to conduct an investigation because they were "entitled to trust contractual representations and need not embark on exhaustive investigations to confirm the accuracy of such representations."[7] Op.

[7] BBP's reliance on *Aveanna* is puzzling. 2021 WL 3235739, at *24 (Del. Super. Ct. July 29, 2021). There, the court made a plaintiff-friendly inference *at the pleadings stage*. *Id.* The decades-old *Craft* also is inapposite because the fact

Br. 40. BBP's concession that it retained advisors to conduct due diligence on *other* disclosed issues and *would have deployed advisors* to investigate Schedule 3.16 had it somehow been written slightly differently, demonstrates the absurdity of that position. *Id.* 43. BBP also ignores that its own lead counsel requested authority to retain a European legal expert to diligence Schedule 3.16, but Buyers denied him permission. Dec. 13, 25.

As the Superior Court concluded: "[W]hat was … disclosed sufficiently put [Buyers] on notice of the SWEA issue and gave [them] all the information required to conduct [their] own investigation, as consistent with industry custom. … Despite the notice provided in the Disclosure Schedule, BBP chose not to independently investigate the implications of Article 11." *Id.* 23-24; *see also id.* 25 ("BBP was alerted to but consciously and deliberately chose not to further investigate the SWEA pinsetter issue, and instead relied exclusively on the materials Brunswick had provided.").

* * *

The Superior Court correctly found that BBP failed to prove Brunswick made any misrepresentation because Schedule 3.16 fully and fairly disclosed the European pinsetter issues. The Superior Court's factual findings also demonstrate

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allegedly concealed—the amount of time the prior owner spent managing a business—could not have been discovered through independent investigation. 1984 WL 8207, at *10 (Del. Ch. Mar. 1, 1984).

that Brunswick lacked any fraudulent intent and that the sophisticated Buyers did not justifiably rely solely on Brunswick's representations. This Court should affirm the Superior Court's judgment on any one of these three independent grounds.

VII. BBP IS NOT ENTITLED TO ITS ATTORNEYS' FEES UNDER THE PLAIN LANGUAGE OF THE SAPA.

A. Question Presented

Whether the Superior Court correctly found that the SAPA's indemnification provision forecloses BBP from recovering attorneys' fees because it lacks explicit language articulating an intent to shift fees in first-party litigation. This question was raised below, *see* B0019-25; B0087-90; B0104-10, and considered by the Superior Court, *see* A0829; A0848-51.

B. Scope of Review

The Court reviews *de novo* issues of contract interpretation, including the interpretation of indemnification provisions. *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1252-53 (Del. 2004).

C. Merits of the Argument

This Court need not reach the issue of BBP's claim to recover its attorneys' fees if it affirms the Superior Court's judgment that BBP failed to prove any of its claims. Regardless, under the plain language and structure of the SAPA, BBP is not entitled to fee-shifting in this first-party litigation.

1. Section 8.1 Does Not Clearly and Unequivocally Shift Attorneys' Fees in First-Party Litigation.

BBP's claim to recover its attorneys' fees rests on SAPA Section 8.1, which provides that "[t]he Seller will indemnify and hold harmless the Purchaser … from and against any and all Losses … arising or resulting from [] any breach of any

representation or warranty set forth in Article 3." A7264. "Loss," in turn, is defined as "any Liabilities, losses, damages, Judgments, fines, penalties, costs or expenses (including reasonable attorney's or other professional fees and expenses)." A7217. On that standard language, BBP seeks to recover all fees it incurred in litigating this action against Brunswick.

Delaware applies the "American Rule," under which "litigants are responsible for the costs of their own representation, absent statutory or contractual fee-shifting provisions." *Newport Disc, Inc. v. Newport Elecs., Inc.*, 2013 WL 5797350, at *9 (Del. Super. Ct. Oct. 7, 2013). Consistent with this default rule, indemnification "provisions 'are presumed *not* to require reimbursement for attorneys' fees incurred as a result of substantive litigation between the parties to the agreement absent a clear and unequivocal articulation of that intent.'" *Paul Elton, LLC v. Rommel Del., LLC*, 2022 WL 793126, at *1 (Del. Ch. Mar. 16, 2022). To overcome the presumption, an "indemnification provision must *unequivocally state*" with "*explicit language* that [it] applies to the reimbursement of attorneys' fees and expenses on first-party claims between the parties." *Winshall v. Viacom Int'l Inc.*, 2019 WL 5787989, at *4-5 (Del. Super. Ct. Nov. 6, 2019) (emphases added), *aff'd*, 237 A.3d 67 (Del. 2020) (TABLE); *see also Four Cents Holdings, LLC v. M&E Printing, Inc.*, 2025 WL 2366460, at *7 (Del. Super. Ct. Aug. 12, 2025) ("This presumption may only be rebutted by a 'clear and

unequivocal articulation' that the parties intended to shift attorneys' fees in first-party suits.").

As this Court affirmed in *Great Hill*, a general reference to attorneys' fees as indemnifiable losses "does not provide the 'clear and unequivocal articulation' required to apply an indemnification provision to first-party litigation." *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 7861336, at *6 (Del. Ch. Dec. 31, 2020), *aff'd sub nom. Herzog v. Great Hill Equity Partners IV, LP*, 269 A.3d 983 (Del. 2021). Indeed, Delaware courts uniformly reject fee-shifting in litigation between contractual counterparties based on only a bare reference to attorneys' fees. *See, e.g.*, *Movora LLC v. Gendreau*, -- A.3d --, 2025 WL 2502457, at *24 (Del. Super. Ct. Aug. 29, 2025) (no fee-shifting where indemnifiable damages included "fees and disbursement of counsel"); *Four Cents*, 2025 WL 2366460, at *8 (same; indemnifiable losses "include[ed] reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder").[8]

[8] *See also, e.g.*, *Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr.*, 2020 WL 6582958, at *6-7 (Del. Super. Ct. Nov. 10, 2020); *NASDI Holdings, LLC v. N. Am. Leasing, Inc.*, 2020 WL 1865747, at *6 (Del. Ch. Apr. 13, 2020); *In re Bracket Holding Corp. Litig.*, 2020 WL 764148, at *16 (Del. Super. Ct. Feb. 7, 2020); *Winshall*, 2019 WL 5787989, at *4-5; *SARN Energy LLC v. Tatra Defence Vehicle A.S.*, 2019 WL 6525256, at *1-2 (Del. Super. Ct. Oct. 31, 2019); *Deere & Co. v. Exelon Generation Acquisition, LLC*, 2016 WL 6879525, at *1-2 (Del. Super. Ct. Nov. 22, 2016); *Data Ctrs., LLC v. 1743 Holdings LLC*, 2015 WL 9464503, at *6 (Del. Super. Ct. Nov. 20, 2015); *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *44-45 (Del. Ch. May 13, 2013).

To hold otherwise would allow a typical indemnification clause to "swallow the American Rule." *Deere*, 2016 WL 6879525, at *1 (citation omitted).

BBP ignores this decade-long line of controlling authority—affirmed more than once by this Court—and instead relies on a superficial reading of three easily distinguishable decades-old cases: *Pike Creek*, *Delle Donne*, and *Chamison*. *See* Op. Br. 46-47. All three addressed indemnification disputes stemming from a *third-party claim*—not a first-party dispute between the contractual counterparties. In any event, this Court has more recently affirmed that an indemnification provision must "*explicitly* state that th[e] provision was meant to shift fees in disputes *between the parties*." *Great Hill*, 2020 WL 7861336, at *6 (emphases added).[9]

BBP cites only five other cases, all of which are plainly inapplicable. *Schneider* is the *only* Delaware case BBP has identified that permitted fee-shifting in first-party litigation. But *Schneider* expressly upheld the "binding precedent" that first-party fee-shifting "requires a 'clear and unequivocal articulation of … intent.'" 2022 WL 1222738, at *30 (Del. Super. Ct. Apr. 25, 2022). The court

[9] BBP complains that such a result would not "hold Buyer harmless" because it would leave BBP unable to recoup "*all* Losses … sustained in enforcing [its] rights." Op. Br. 47. But this Court recently affirmed the rejection of fee-shifting under a contract containing nearly identical "hold harmless" language. *See Winshall*, 2019 WL 5787989, at *3.

merely determined that, on the features of *that contract*—not present here—there was such a clear articulation. First, *Schneider*'s indemnification provision referred to contractually required payments between the parties which *could not arise* from a third-party claim. *Id.* Not so for SAPA Section 8.1, which lacks any reference to analogous first-party payments and could apply to either first- or third-party claims. A7264. Second, the definition of "Losses" in *Schneider* contained an "express distinction between indemnifiable damages arising from third-party claims and non-third-party claims." 2022 WL 1222738, at *30. The SAPA's definition of "Loss" contains no such distinction. A7217. Finally, *Schneider* did "not provide for fee shifting elsewhere in the agreement." 2022 WL 1222738, at *31. As discussed *infra* at § VII.C.2, the SAPA does. A7229. *See Four Cents*, 2025 WL 2366460, at *9 (distinguishing *Schneider* on these bases).

The remaining four cases do nothing to support BBP's claim. *Tipsy Spritzers* and *Gemini* (an out-of-circuit federal case) address the scope of indemnification *claims* but say nothing about whether first-party fees are indemnifiable *losses*—and *Tipsy Spritzers* ultimately *did not permit indemnification* in the first-party dispute. *See* 2024 WL 4441565, at *2 (Del. Ct. C.P. Oct. 7, 2024); 2023 WL 5207360, at *4-5 (D. Idaho Aug. 14, 2023). In *Menzies*, the court considered a trust agreement's broader indemnity obligations "derived from clear statutory authority," which it expressly differentiated from

"indemnity clauses in 'arm's length, bilateral, commercial contracts,'" like the SAPA. 2024 WL 2804813, at *3 (D. Del. May 31, 2024). Finally, in *Innovate 2*, a federal court permitted fee-shifting—but on the basis of a superficial three-sentence discussion that failed to address the controlling Delaware authority. 2025 WL 624651, at *5 (D. Del. Feb. 26, 2025).

As the Superior Court concluded, the indemnification clause at issue here "simply does not include the sort of necessary unequivocal and explicit language that would allow the sort of fee-shifting that BBP seeks here." A0850. Despite BBP's claim, Op. Br. 45, there is no explicit reference to first-party claims. Nor, as BBP concedes, *id.* at 50, does it include "any reference to 'prevailing parties,' which is a hallmark term of fee-shifting provisions." *Four Cents*, 2025 WL 2366460, at *7. This "general indemnification language" that merely references "attorneys' fees" cannot be read as "shifting fees in litigation between the parties to the SAPA." A0850.

2. Additional SAPA Provisions Confirm That Section 8.1 Does Not Shift Fees In First-Party Litigation.

While the plain language of Section 8.1 alone forecloses BBP's claim, other provisions of the SAPA confirm that conclusion.

First, in Section 2.4, the parties explicitly agreed to fee-shifting for a specific type of first-party dispute: claims for purchase price adjustments submitted to an independent accounting firm for resolution. A7229-30. Multiple Delaware courts

have relied on closely analogous provisions to reject first-party fee-shifting under general indemnification clauses. For example, in *Four Cents*, a nearly identical provision governing "the allocation of fees in a case where the parties engage an independent professional to resolve a dispute on post-closing price adjustment" precluded fee-shifting under the more general indemnification provision. *Four Cents*, 2025 WL 2366460, at *7-8; *see also Deere*, 2016 WL 6879525, at *2 (provision requiring that the "fees, costs, and expenses" of an "Independent Engineer … shall be borne by the party which … is not the prevailing party," showed "a lack of intent to … shift fees in first-party actions").

As the *Four Cents* court observed, "the parties knew how to formulate clear and specific fee-allocation language"; that they did not use that language in the indemnification provision shows "that the parties did not intend the use of general indemnity clauses to shift fees in first-party actions." 2025 WL 2366460, at *8; *see also Clean Harbors, Inc. v. Union Pac. Corp.*, 2017 WL 5606953, at *7-8 (Del. Super. Ct. Nov. 15, 2017), *aff'd*, 201 A.3d 1161 (Del. 2019); *Great Hill*, 2020 WL 7861336, at *6.

Second, BBP selectively quotes from additional indemnification-related provisions for the point that indemnification *claims* in this case may arise from both first- and third-party claims. Op. Br. 50; *id.* 49 (arguing the indemnification provision manifests the intent to "cover *first*-party *claims*") (second emphasis

added). BBP's argument conflates the *scope of claims* that may be indemnified with the *scope of Losses* available for indemnifiable claims. Each of the provisions BBP points to addresses only the former: Section 8.1 identifies the contractual representations for which a breach is indemnifiable, A7264; Section 8.3(a) describes the procedure for asserting an indemnification claim, A7264-65; Section 8.3(b) addresses participation in the defense of indemnifiable third-party claims, A7265; and Section 8.5(e)(ii) eliminates certain damages for indemnifiable claims, A7272. None of these provisions alters the definition of "Losses" that may be recovered. Moreover, by explicitly addressing both first- and third-party claims, those provisions *confirm* that first-party fee-shifting is not permitted.

Accordingly, the Superior Court's denial of BBP's request to recover its attorneys' fees should be affirmed.

VIII. CONCLUSION

For the foregoing reasons, the Superior Court's judgment should be affirmed.

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