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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' REPLY BRIEF

Dated: November 14, 2025

BLANK ROME LLP

David A. Dorey (No. 5283)
James G. Gorman III (No. 6284)
1201 N. Market Street, Suite 800
Wilmington, Delaware 19801
Telephone: (302) 425-6431
Facsimile: (302) 425-6464
David.Dorey@blankrome.com
James.Gorman@blankrome.com

Counsel for Appellants 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.

OF COUNSEL

James T. Smith (admitted pro hac vice)
Brian Paszamant (admitted pro hac vice)
D. Morgan Barry (admitted pro hac vice)
One Logan Square
130 North 18th Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 569-5500
Facsimile: (215) 569 5555
Jim.Smith@blankrome.com
Brian.Paszamant@blankrome.com
Morgan.Barry@blankrome.com

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PRELIMINARY STATEMENT[1]

1. The Trial Court erred as a matter of law in finding that Brunswick did not breach §§3.22 and 3.16 by its false and misleading disclosures. To reach this conclusion, the Trial Court impermissibly rewrote the SAPA, imposing qualifiers and limitations nonexistent in the SAPA. The Trial Court compounded this error by holding that sellers can be evasive and deceptive in contractual disclosures provided buyers are "sophisticated." (Dec., 21-22).

2. Brunswick's Answering Brief adopts and magnifies these errors by, *inter alia,* arguing that the terms "recall," "subject to," and "any" mean something other than their plain English meanings. But these are merely *post hoc* rationalizations nonexistent when the parties agreed upon the SAPA's representations.

3. The parties agree about one thing: This is, "[i]n many ways… a run-of-the mill indemnification dispute." (AB, 1). Brunswick lied and must indemnify Plaintiffs and answer for its fraud – a fraud that caused Plaintiffs to incur millions of dollars conducting recalls in 28 European countries, litigating in multiple European fora, and enforcing their SAPA-afforded indemnification rights.

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[1] Undefined terms have the meanings afforded in Appellants' Opening Brief ("OB") and Appellee's Answering Brief ("AB").

ARGUMENT

I. THE TRIAL COURT'S CONSTRUCTION OF §3.22 WAS ERRONEOUS.

SAPA §3.22 represents, except as set forth in Schedule 3.22, no products "during the immediately preceding three (3) years, has been subject to any recall." (A7246). Schedule 3.22 contains one word: "None." (A7660). Brunswick's failure to disclose SWEA's pinsetter recall breached §3.22, and the Trial Court's contrary finding constitutes legal error.

First, §3.22 is not ambiguous: It expressly requires disclosure of any product that was "subject to any recall" "during the immediate preceding three (3) years." (A7660, A7245). The "legally enforceable" (Dec., 6) SWEA Decision mandated:

> [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**…
>
> 2. **take back** the Brunswick GSX pinsetter and replace it…, or
>
> 3. **take back** the Brunswick GSX pinsetter and pay compensation….
>
> …the decision **shall apply immediately**.

A4748-4750 (emphasis added).

Brunswick ignores these facts (OB, 24) because any reasonable interpretation means the pinsetters were "subject to" recall within §3.22's three-year window,

mandating disclosure. The Trial Court erred when it ignored § 3.22's plain meaning and instead imposed a nonexistent requirement that the recall be underway, or fully implemented, by the SAPA's closing. (Dec., 33). But Brunswick's inability (or refusal) to implement the recall by the set date does not change that the pinsetters were subject to a recall between August 30, 2013 and January 1, 2014 (and thereafter), nor does it excuse its disclosure failure.

Second, the dictionary definitions offered by Brunswick to interpret any claimed ambiguity do not alter the outcome. Brunswick contends it did not breach §3.22 because for a product to be "subject to" a recall, Merriam-Webster purportedly requires that BBB have made a "request to customers for the physical removal, return, or access to defective products." (AB, 18-19). Incorrect. That very same "authority" defines §3.22's qualifying language "subject to" ("affected by or *possibly* affected by" or "*likely* to do, have, or suffer from") and "any" ("one or some indiscriminately of *whatever* kind" or "to *any* extent or degree"). (OB, 27-28). The SWEA Decision made the pinsetters "possibly affected by" or "likely to… suffer from" a recall – *because that is exactly what the Decision required.*[2] Brunswick cannot cherry-pick parts of Merriam-Webster's definitions.

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[2] Brunswick's argument that Merriam-Webster's definition of "subject to" leads to the absurd result that "every single product BBB manufactured would have been 'subject to' a recall…" (AB, 19) is pure hyperbole given the SWEA Decision's defined scope.

This is not the only instance of Brunswick rewriting its own purported authority. It claims "recall" requires "government action" (AB, 18), but neither the SAPA nor Merriam-Webster imposes this condition. No such requirement appears in even the "example" cited by Brunswick, Cambridge Dictionary (*Id.*) – a definition Brunswick tellingly does not provide: "an order for the return of a product made by a company because of a fault in the product." *Recall*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/recall.

Third, the SWEA Decision meets Brunswick's and the Trial Court's preferred definition of (i) either a "request to customers" or "public call" and (ii) a "finalized governmental action." (A4748-4750). As to the first prong's alternatives of this "test," the SWEA Decision *required* Brunswick to "announce" – *i.e.,* make a "public call" – "that you are recalling the units of the product." (A4749). And Brunswick does not dispute that the SWEA Decision meets the second prong. (AB, 18). The SWEA Decision's recall fits squarely within the Cambridge and Merriam-Webster definitions, and, more importantly, the SAPA itself.

Fourth, this Court should not be distracted by Brunswick's mischaracterization of Plaintiffs' §3.22 appeal as no more than a factual dispute. (AB, 13-14). The Trial Court erred as matter of *law* because its application of an erroneous contractual interpretation to factual findings determined (wrongly) whether Brunswick breached §3.22. (OB, 21). This error is subject to *de novo*

review. *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 960 (Del. 2005). In any event, all of Brunswick's "facts" pertain to the timing for the recall's implementation, upon which Brunswick recasts the recall as "tentative." (AB, 14-17). But the implementation timing is irrelevant – what matters is that in the "immediate preceding three (3) years" the SWEA Decision *mandated a recall*.

Finally, Brunswick cannot rewrite the record: SWEA never "reversed" course, and Brunswick provides no support for its contrary claim. (AB, 15). In fact, SWEA *maintained course* by (i) notifying the Commission of its recall (B0360-B0368), (ii) imposing a fine for shipments made into Sweden "at risk" in violation of SWEA's sales prohibition (OB, 18; A6681-6721; A3430-3433; A6219), and (iii) reminding BBP, once BBP had a viable configuration in fall 2015, of its obligation to recall the pinsetters, including those shipped "at risk." (A3434-A3437). Nor did "SWEA indicate[]" to Brunswick that "it would *not* require a recall." (AB, 15, citing Dec., 7). The portion of the Decision Brunswick relies upon quotes a November 11, 2013 internal BBB draft presentation wherein BBB *acknowledged* its duty to *perform the recall* by January 1, 2014: "[W]e still believe we are in good shape, including recall language, *as long as we deliver fixes by end of year*." (B0324) (emphasis added).

Buyer secured a representation that *no* products had been subject to *any* recall "during the immediate preceding three (3) years." Section 3.22 required Brunswick

to disclose the SWEA-imposed recall so Buyer could evaluate the economics of the transaction and risks to the business it was acquiring. Brunswick did not disclose the recall. The Trial Court's conclusion to the contrary, based upon an erroneous SAPA interpretation, requires reversal.

II. THE TRIAL COURT ERRED IN CONSTRUING §3.16 TO FIND IT WAS NOT BREACHED.

1. The Trial Court Misinterpreted §3.16.

In §3.16, Brunswick represented that BBB had not received "any written notice from any Governmental Authority" since January 1, 2012 identifying non-compliance with applicable law. (A7245). This language was added to §3.16 after Buyer reviewed Schedule 3.16 and requested relevant documents (OB, 13-14) – facts Brunswick does not contest – only to be informed there were no documents to review. (Dec., 14). Other than a cryptic reference to a "notification" received by a "distributor," Schedule 3.16 omits the Noncompliance Notices. (A7653). Brunswick acknowledges its nondisclosure of these Notices, but claims, as the Trial Court concluded, that Schedule 3.16 "adequately disclosed the relevant information." (AB, 22-23). False.

The term "any" in §3.16 has a plain meaning. (OB, 26-27). §3.16 required Brunswick to disclose *each* of the Noncompliance Notices to render §3.16 arguably accurate. Brunswick argues, baselessly, that §3.16 did not require disclosure of *all* of the Noncompliance Notices, but rather only "any" one of them Brunswick chose to disclose. (AB, 23). Brunswick contends its disclosure was complete so long as it referred to a notice – *any* notice – on Schedule 3.16, no matter how selectively vague that disclosure was or how many other notices it concealed. In this, it brazenly asks for this Court's endorsement of lying by omission, a position more extreme than

the Trial Court's (equally erroneous) view that Brunswick only needed to disclose "relevant information." (OB, 30). Regardless, Brunswick waived this argument by never previously raising it. (B0241-44; B0288-90).

Brunswick's argument that it could vaguely "describe[e] the SWEA Decision" without disclosing the other Noncompliance Notices because they were allegedly part of "same inquiry" and "same laws" (AB, 23) finds no support in Delaware law. To be a viable "excepting disclosure," Schedule 3.16 must disclose *all* of the facts that render §3.16 false. *In re Dura Medic. Hldgs., Inc. Consol. Litig.*, 333 A.3d 227, 255 (Del. Ch. 2025) (disclosure of one of four audits evaluating Medicaid compliance constituted breach; buyers were entitled "to assess the risk[s] themselves"). For example, in *Anschutz Corp. v. Brown Robin Capital, LLC*, the Court of Chancery held that an excepting disclosure identifying a customer's ~$4,700 monthly revenue reduction but omitting its threatened cuts of ~$40,000 did not render accurate a representation that none of the seller's largest customers had "threatened in writing to cancel, terminate, adversely modify or decrease… its commercial relationship with the Company." 2020 WL 3096744, *10 (Del. Ch. 2020). The Court explained: "The clear language of Section 2.20 would require Sellers to disclose that [the customer] was threatening (in writing) substantial service reductions." *Id.*; *see also Labyrinth, Inc. v. Urich*, 2024 WL 295996, *10-11 (Del. Ch. 2024) (disclosure of revised collection practices in only one month but not others

deemed insufficient excepting disclosure to cure a representation that "the Company has not… accelerated or otherwise altered its collection practices"; observing that the disclosure itself was "misleadingly" because it "convey[ed] that the Company did not revise its collection practices in other months").

2. Schedule 3.16 Does Not "Fully and Fairly" Explain Its Qualification of §3.16.

When qualifying a contractual representation, a seller cannot omit material information or materially mislead a buyer. Rather, when it "travel[s] down the road of partial disclosure… and use[s] vague language," a seller 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); *e.g. O'Malley v. Boris*, 2002 WL 453928, *6 (Del. Ch. 2002) (disclosure of interest in joint venture without providing how it was acquired insufficient for a "full and fair disclosure"). Schedule 3.16's misstatements and omissions render the Trial Court's determination that it contained the "relevant information" legally erroneous. (OB, 31-33).

First, Schedule 3.16 does not properly identify the Noncompliance Notices, each of which contain material information that would indisputably have altered Buyer's perception of the pinsetter issue and the transaction (OB, 43) – information that cannot be gleaned from Schedule 3.16's reference to a vague "notification" about a "belief":

- The SWEA Decision (A4748-4749) ordered a sales prohibition and recall;

- The Commission Letters revealed that SWEA's measures could be implemented continent-wide (A4762-4765); and

- The 2012 and 2015 SWEA Notifications demonstrated that SWEA's "notification" was not an isolated conveyance of "belief," but rather an ongoing and remaining legally enforceable *finding* (A4727-4738; A6530-6535).

The 2015 SWEA Notification was (i) received while the SAPA's terms were being negotiated, (ii) repeatedly sent to Gwillim for the Data Room, and (iii) threatened to prohibit a bowling center from operating pinsetters shipped in violation of SWEA's ban. (A6541-6542; A7136-7146). Upon receipt, Brunswick should have, at a minimum, revisited Schedule 3.16's statement that BBB "believes that its GSX pinsetter complies with all applicable laws and regulations." (A7653).

Second, Schedule 3.16's reference to Article 11 does not remedy its material misstatements and omissions. *Ark's Tchr. Ret. Sys. v. Alon USA Energy, Inc.*, 2019 WL 2714331, *24 (Del. Ch. 2019) ("Disclosures are not supposed to take the form of a scavenger hunt."). Article 11 does not identify *either* that SWEA had already issued an enforceable recall and sales ban, *or* that the Commission's involvement could result in those measures spreading across Europe. Delaware law entitled Buyer to an "accurate, full and fair characterization" (OB, 33), not a puzzle to piece together from Schedule 3.16's reference to a foreign procedural regulation.

Correspondence involving Brunswick's in-house counsel – who had access to Article 11, all of the relevant documents, and had been contending with the pinsetter issue for years – demonstrates why the reference to Article 11 was inadequate. (A4780-4781). For example, after informing Brunswick's European attorneys that "several orders are on hold" (contradicting Brunswick's assertion, "BBB never curtailed any shipment of pinsetters to Sweden" (AB, 12)), Kaiser required assistance in understanding the implications of the Commission's involvement, asking, among other recall-related questions, whether there are "any regulations common across Europe concerning equipment recalls." (A4780-4781). Those European attorneys billed $61,505.89 in June 2014 alone (A4897-4906) advising on issues that Brunswick now proclaims could have been easily understood by reviewing Article 11 (AB, 25).

Third, Schedule 3.16's description of the SWEA Decision as a "notification" is no mere "semantic dispute." (AB, 24). The Decision was legally enforceable (Dec., 7), but a "notification" is not (A3439-3440). And Brunswick wrongly proclaims that "[Plaintiffs'] own Swedish-law expert conceded that the 2013 SWEA document was a 'notification of a decision'" (AB, 24), as shown by the cited transcript:

> THE COURT: …So focusing down on that fourth line, received notification. In your view, the more accurate way of saying it would have been they received a notification of decision.

THE WITNESS: Yes. Or a decision…

THE COURT: And in this particular circumstance, ***in your view, what SWEA gave was a decision***, you're out of compliance here?

THE WITNESS: ***Yes.***

(A3478-3479, emphasis added). Plaintiffs' expert merely acknowledged that referring to the SWEA Decision as a "notification *of a decision*" is more accurate than just "notification."

Finally, Plaintiffs do not complain that Schedule 3.16 provided "too much information." (AB, 25). Rather, when Brunswick provided optimistic historical information while simultaneously mischaracterizing or omitting more-timely salient information, it painted a misleading picture of the pinsetter issue's severity (OB, 32). *Zirn v. VLI Corp.*, 681 A2d 1050, 1058 (Del. 1996) (disclosure of a "one-sided portion of patent counsel's advice" was materially misleading, although "not an untrue statement," where undisclosed advice painted a different picture); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 279 (Del. 1977) (disclosing one of two estimates – while not inaccurate – is not a "full and frank" disclosure). Nor does it matter that Brunswick may have thought it unlikely that SWEA's measures would be adopted across Europe (AB, 8). *Lynch*, 383 A.2d at 281 ("If management believed that one estimate was more accurate or realistic than another, it was free to endorse that estimate and to explain the reason for doing so; but full disclosure, in our view, was a prerequisite.").

A full and fair disclosure required Brunswick to disclose SWEA's recall and ban as well as the Commission's forthcoming determination so *Buyer* – not Brunswick – could assess the risk. *Dura Medic.*, 333 A.3d at 250. The failure to disclose (or provide) the Noncompliance Notices renders §3.16 partial, inaccurate, and misleading – and the Trial Court's finding to the contrary should be reversed.

III. THE TRIAL COURT APPLIED INCORRECT LEGAL STANDARDS TO PLAINTIFFS' FRAUD CLAIMS.

Plaintiffs explain in their Opening Brief (OB, 13-28) and herein (§§II-III) the multiple affirmative misrepresentations in SAPA §3.16 and §3.22, and rely upon those explanations.

1. Brunswick Violated Its Duty to Speak.

Plaintiffs and Brunswick agree that (i) Delaware law requires a "full and fair disclosure" once a party elects to speak, and (ii) the disclosure's adequacy is reviewed *de novo*. (OB, 34, 37; AB, 27). They disagree whether the Trial Court (i) found that Brunswick made a "full and fair disclosure," and (ii) imposed a novel standard permitting sellers to make less-complete, partial disclosures to "sophisticated" counterparties. (OB, 37-41; AB, 28-29).

On the first point, the Trial Court does not state that Schedule 3.16 gave "*full*" disclosure. (OB, 36-37). Instead, it found Schedule 3.16 was an "adequate," "reasonable," or "fair" disclosure. (*Id.*). Brunswick ignores this critical distinction and, instead, adds parenthetical non-existent language to the opinion: "The Superior Court then concluded that such a 'partial' disclosure (*i.e.*, full and fair, but without

every detail)[3] is permissible, so long as it discloses sufficient facts to allow the reader to pursue its own investigation." (AB, 29).

On the second point, the Trial Court blessed Brunswick's partial disclosure and imposed an investigation requirement on a "sophisticated buyer" unsupported by Delaware law. (OB, 39-40). Tellingly, Brunswick cites no "long-standing Delaware precedent" (AB, 29) supporting this proposition and does not defend the Trial Court's reliance on *In re JCC Holding Co., Inc.*, 843 A.2d 713 (Del. Ch. 2003). Instead, Brunswick points to two decisions for the notion that the "'full and fair' disclosure standard is itself contextual" and depends on a party's sophistication. (AB, 30-31). But neither *Arwood v. AW Site Services, LLC*, 2022 WL 705841 (Del. Ch. 2022) nor *DCV Hldgs., Inc. v. ConAgra, Inc*., 2005 WL 698133 (Del. Super. 2005), *aff'd*, 889 A2d 954 (Del. 2005) mentions "full and fair disclosure," and neither holds that a "partial" disclosure is "fair" provided the buyer is "sophisticated." (AB, 29).

In Delaware, Buyer was "entitled to rely upon the accuracy of [Brunswick's] representation[s] irregardless of what [Buyer's] due diligence may have or should have revealed." *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A2d 513, 548 (Del.

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[3] Plaintiffs do not contend that a "full" disclosure requires provision of "every" detail, "speculative information," or an "overload of information" (AB, 29-32); rather, Delaware law obligated Brunswick to provide "an honest and unreserved accounting of *all* material facts…" – not just "sufficient facts" – to ensure that its sole disclosure (Schedule 3.16) was not misleading (OB, 37-38).

Super. 2005), *aff'd*, 886 A2d 1278 (Del. 2005); *Cobalt Operating, LLC v. James Crystal Ents., LLC*, 2007 WL 2142926, *28 (Del. Ch. 2007), *aff'd*, 945 A2d 594 (Del. 2008) ("[H]aving given the representations it gave, Crystal cannot now be heard to claim that it need not be held to them because Cobalt's due diligence did not uncover their falsity"). And, "[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); *c.f. Paragon Metal Hldgs., LLC v. Smith*, 2025 WL 2531610, *19-20 (Del. Super. 2025) (buyer who ignores disclosures, asks "zero substantive questions," and was provided with projections evidencing a decline in a customer's business – the "heart" of the buyer's claim – cannot establish justifiable reliance).

Here, Buyer sought to investigate by asking questions and requesting documents, only for Brunswick to stonewall through, *inter alia*, Gwillim's representation that there were "no documents to review." (Dec., 14).[4] Although Brunswick contends Buyer should have conducted different or additional investigations by, for example, conducting internet searches (AB, 38), Delaware

[4] Brunswick's assertion (AB, 3, 11) that Buyer knew it "had not received any documents" discounts that Buyer was under the false impression – fostered by Gwillim – *that no documents existed*.

imposes no such obligation. In fact, *Arwood* criticized the buyer for reviewing material "online" when the information "was but a request away" from the seller. 2022 WL 705841, *26-28, n.262.

Sellers bear the burden of candor once they choose to make representations, and buyers are entitled to trust those representations and need not embark on exhaustive investigations to confirm their accuracy. (OB, 40). The Trial Court's contrary holding constitutes legal error.

2. Brunswick Deliberately Concealed Requested Documents.

In Delaware, once Brunswick permitted Buyer to investigate, Brunswick could not conceal requested information. (OB, 41). Yet it did so. (*Id.*)

The Trial Court found that responsive documents existed at the time of Buyer's inquiries (Dec., 23), but when Buyer "requested additional documents related to Schedule 3.16, Mr. Gwillim replied 'there was nothing to review'" (*Id*., 14). In contrast, when Brunswick refused to provide documents concerning *other* diligence topics, it expressly stated that such documents were "not to be provided at this stage." (OB, 13). In a bit of strategic wordplay, Brunswick mischaracterizes Gwillim's response as stating "there were no documents ***compiled*** for review." (AB, 33-34, emphasis added) – i.e., that Gwillim indicated there *were* documents, he just had not gathered them together. But that is not what he *said*.

In any event, Gwillim *had* compiled the documents in August 2014 before Buyer even made its request. (OB, 10; A2145-2149). These compiled documents, produced with metadata confirming their placement in Gwillim's personal Project Riviera data room folder, include four of the five Noncompliance Notices: the 2012 SWEA Notification (A5801-5824), the SWEA Decision (A5825-5840), and the Commission Letters (A6135-6140).

Brunswick justifies concealing documents and its undeniably partial disclosure by asserting that it "truthfully" did not believe the pinsetter issue was a material concern (AB, 34-35). But Plaintiffs' fraud claims center on, *inter alia*, Brunswick's (i) knowledge that SWEA's ban and recall could spread across Europe, (ii) failure to disclose this key fact, (iii) failure to provide requested documents, and (iv) dishonesty about the documents' existence. These facts, paired with Brunswick's optimistic disclosure, show the "artifice to prevent knowledge of the facts" and "to exclude suspicion and prevent inquiry," sufficient for a finding of intentional concealment. *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 155 (Del. Ch. 2004).

3. The Record Clearly Shows Scienter.[5]

On numerous occasions, Gwillim contemplated providing Buyer with documents related to the pinsetter issues in Europe, including documents he had compiled. (OB, 15). Yet, "when BBP requested additional documents related to Schedule 3.16, Mr. Gwillim replied 'there was nothing to review.'" (Dec., 14). Strikingly, these documents concerned the one issue Gwillim was worried could result in a "significant value decrease."[6] (A4912-4913). Brunswick hid this issue; in contrast, it disclosed documents and information about an insignificant "employee grievance about his termination." (A6289-6290).

The pinsetter issue was undoubtedly a material concern for Brunswick. (OB, 9-10). Gwillim attended the meeting in Sweden because of Brunswick's CEO's "sensitivity" to the issue. (A4914). Sella warned Brunswick that "the absence of disclosure presents a series of potential hazards to Brunswick Corporation." (A6287). Kaiser understood the "potential effect of the SWEA and EU issues on the sale of the business" could "kill[]… the deal." (A4308).

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[5] Although the Trial Court did not expressly comment upon Brunswick's scienter or Plaintiffs' justifiable reliance, the record clearly manifests both.

[6] Without citation, Brunswick claims the Trial Court "rejected any inference of 'materiality'" from this email. (AB, 34). Not so.

Additionally, Brunswick maneuvering to have Schedule 3.16 subject to a $7,500,000 damages cap – hours after Gwillim informed Sella "it's now time to put together a small package of documents on the pinsetter issue," including those "critical to [Buyer] getting an understanding of the issue" (A6678) – provides perhaps the best evidence of scienter. (OB, 16-17).

Brunswick asserts that it did not act with scienter because "the facts known to Brunswick affirmatively supported its expectation that the pinsetter inquiries would be resolved." (AB, 35-36). But documents show otherwise: After the September 2014 meeting with the Commission, Gwillim advised Brunswick's General Counsel: "To be honest, and just between us, this will resolve itself one way or another ***long after we have sold the business***." (A6219) (emphasis added).

4. Buyer Justifiably Relied on Brunswick's False Statements.

BBP's reliance on the SAPA's representations/warranties – not "extracontractual representations" (AB, 37) – is presumed. *Interim Healthcare*, 884 A2d at 548. An anti-reliance clause, such as SAPA §4.7, is no bar to fraud where, as here, Buyer's "claims are based on what [they were] permitted to rely on[,]" i.e. Buyer's investigation and Brunswick's representations. *Cablemaster LLC v. Magnuson Grp. Corp.*, 2023 WL 8678043, *7 (Del. Super. 2023).

Additionally, Plaintiffs are entitled to identify facts outside the SAPA's representations because Brunswick chose to speak (Dec., 22). *Ashland LLC v. Samuel*

J. Heyman 1981 Continuing Tr. for Heyman, 2018 WL 3084975, *13 (Del. Super. 2018) (reliance on material outside contractual representations permissible for fraud premised on duty to speak despite anti-reliance clause). Moreover, Brunswick purported to allow Buyer to investigate (A7249), permitting Buyer to assume Brunswick was not concealing anything requested by Buyer. *Prairie Cap. III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015); *Transdigm Inc. v. Alcoa Glob. Fasteners, Inc.*, 2013 WL 2326881, *9 (Del. Ch. 2013).

Curiously, Brunswick ignores these basic principles by pointing to a pre-SAPA statement in a confidentiality agreement, in which Buyer allegedly acknowledged Brunswick had not made "'any representation or warranty as to the accuracy or completeness' of diligence material." (AB, 37, citing B0384). This argument is baseless: Buyer did not sign the confidentiality agreement, that language appears nowhere in the SAPA, and the confidentiality agreement was not incorporated into the SAPA. (B0384; A7281). Moreover, the confidentiality agreement remained "in effect" only until the SAPA's closing. (A7281).

Brunswick also argues that Buyer did not do enough of its own diligence (AB, 38-39), even though Buyer asked questions and requested documents related to Schedule 3.16 (Dec., 14). The proffered authority does not hold that buyers should independently verify the accuracy of seller disclosures. Rather, it chides the buyers for not requesting information from the sellers. *Arwood*, 2022 WL 705841, *26

("Mahon did not ask for access to any customers or customer contracts even though this information was but a request away."); *Sofregen Med. Inc. v. Allergan Sales, LLC*, 2024 WL 4297665, *18 (Del. Super. 2024) (Buyer "elected not to request the data" from seller). Buyer indisputably did exactly what those courts wanted, and Brunswick indisputably said there were "no documents" to review and that the issue was not "of material concern." (Dec., 14).

Thus, it is not surprising Buyer did not hire Swedish counsel, which Brunswick claims was a fatal error (AB, 38). "Due diligence is expensive," and therefore parties "often negotiate for contractual representations that minimize a buyer's need to verify every minute aspect of a seller's business." *Cobalt*, 2007 WL 2142926, *28. As Jaxon testified, "[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." (A2018). *Brunswick* deliberately prevented Buyer from realizing the true state of affairs. Justifiable reliance has thus been established.

IV. THE SAPA INCLUDES ATTORNEYS' FEES AS INDEMNIFIABLE LOSSES.

1. This Court's Precedent Supports Plaintiffs' Potential Fee Recovery

In *Pike Creek Chiropractic Center, P.A. v. Robinson*, 637 A.2d 418 (Del. 1994) and *Delle Donne & Associates, LLP v. Millar Elevator Service Co.,* 840 A.2d 1244 (Del. 2004), this Court recognized 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" against the indemnitor (*Id.* at 1256). Brunswick asserts these decisions do not involve "a first-party dispute between the contracting counterparties." (AB, 44). Incorrect. This Court in *Donne Delle* awarded indemnification for attorneys' fees incurred in pursuing first-party contractual indemnification rights. 840 A.2d at 1255. *Pike Creek* awarded attorneys' fees incurred in, *inter alia*, pursuing indemnification from the contractual counterparty. 637 A.2d at 418.

Next, Brunswick relies on two summary affirmances, neither of which foreclose fees for first-party actions. (AB, 42-43). In *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, the Court of Chancery found that allowing fee-shifting under an indemnification provision would improperly render a separate prevailing party clause "surplusage." 2020 WL 7861336, *6 (Del. Ch 2020), *aff'd sub nom. Herzog v. Great Hill Equity P'rs IV, LP*, 269 A.3d 983 (Del. 2021). The SAPA contains no prevailing party clause. Further, the indemnification

provision did not "provide the 'clear and unequivocal articulation' required to apply an indemnification provision to first-party litigation." *Id*. If an indemnification provision provides a remedy only for third-party actions, a party necessarily cannot rely upon it for fee-shifting in a first-party action. (OB, 48).

In *Winshall v. Viacom International, Inc.*, the Superior Court similarly found that the indemnity provision only applied to third-party claims, precluding any indemnification recovery in a first-party action. 237 A3d 67 (Del. 2020). This Court affirmed "on the basis of a different rationale," *i.e.,* that claims under the indemnity clause were barred because the merger consideration was paid in full. *Id.*, at *2, n.2. This Court expressly stated it was "not necessary for us to address" how the indemnification provision might have applied before that expiration. *Id.* at 3.

Winshall and *Great Hill* simply do not apply.

2. The Trial Court Deviated from the Basic Principle that the SAPA Should Be Interpreted to Effectuate the Parties' Intent as Guided by the Contract's Unambiguous Language.

The SAPA expressly obligates Brunswick to "indemnify and hold harmless" Buyer "from and against any and all Losses… arising or resulting from… any breach of any representation or warranty…" and defines "Losses" to include, *inter alia*, reasonable attorneys' fees, with *no* distinction between "Losses" incurred in first- versus third-party actions. (OB, 45). Conversely, SAPA §8.5(e)(ii) limits the availability of other categories of damages, e.g., indirect damages, to *only* third-party

claims. (*Id.*, 50). Thus, when the parties wanted to exclude *some* types of damages from first-party claims, *they expressly did so*. But they did *not* make that distinction for attorneys' fees. Accordingly, the plain language supports one conclusion – the indemnification provision encompasses attorneys' fees incurred in a first-party action. The Trial Court's contrary finding impermissibly rewrites the SAPA. *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co*., 708 A.2d 989, 992 (Del. 1998).

Rather than providing a cogent rationale for the result below, Brunswick identifies lower court decisions it contends establish a presumption that indemnification "provisions [do] not… 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." (AB, 42-43 (internal quotations omitted)). The majority of these decisions arise in situations where the courts determined either that relevant indemnification provision did not encompass first-party claims **at all**, *see, e.g.*, *Winshall*, 237 A3d 67; *Great Hill*, 2020 WL 7861336, or that the contract contained a prevailing party provision that would be rendered superfluous, *see, e.g.*, *Great Hill,* 2020 WL 7861336; *Paul Elton, LLC v. Rommel Del., LLC*, 2022 WL 793126, *1 (Del. Ch. 2022). They are thus inapposite. The others are of no moment as this Court has not yet addressed the salient issue raised in *this* appeal: Whether an indemnification provision must separately and

"unequivocally state with explicit language that it applies to the reimbursement of attorneys' fees and expenses on first-party claims," as the Trial Court concluded (A0850).

Even if this Court were to recognize such a presumption, the SAPA meets this test. Brunswick acknowledges the SAPA's indemnification provisions cover both first- and third-party claims (AB, 47-48), which should end the analysis. But beyond the SAPA's failure to distinguish between attorneys' fees for first- versus third-party actions, indemnification is Plaintiffs' exclusive remedy for breaches of the SAPA's representations and encompasses various SAPA provisions that could only arise in a first-party context. (OB, 49). Indeed, §8.1 affords Plaintiffs indemnity for Brunswick's breach of the SAPA's covenants (A7264), many if not all of which could only be first-party claims. *See, e.g.,* A7250 §5.2(b) (Brunswick's covenant not to adopt a liquidation plan between the SAPA's signing and closing).

Critically, the SAPA explicitly expands other categories of recoverable Losses specifically for third-party claims (A7272 §8.5(e)(ii) (availability of "consequential, incidental, indirect, special or punitive damages")), belying Brunswick's contention that the SAPA does not distinguish "between indemnifiable damages arising from third-party claims and non-third-party claims." (AB, 45). If the parties had intended that attorneys' fees indemnification would *also* be limited to third-party situations, they also would have specified that in §8.5(e)(ii). *See*

Bobcat N. Am., LLC v. Inland Waste Hldgs., 2020 WL 4757042, *5 (Del. Super. Aug. 17, 2020) (where parties expressly carved out certain categories, failure to expressly exclude one category meant that it was included).

Further, Brunswick purports to distinguish *Schneider Nat'l Carriers, Inc. v. Kuntz*, 2022 WL 1222738 (Del. Super. Ct. 2022), which held that fees incurred in first-party actions were included in the scope of an indemnity provision (AB, 44-45). The four *Schneider* factors support Plaintiffs. First, as in *Schneider*, the SAPA's indemnification provision encompasses many claims that could *only* arise in the first-party context, despite Brunswick's argument to the contrary (*id.*). Second, the SAPA *does* expressly "distin[guish]" (*id.*) between recoverable damages for first- and third-party actions, discussed above. Third, the SAPA requires notice for both first- and third-party claims (a key *Schneider* element Brunswick omits). (OB, 50). Fourth, the SAPA does not include a prevailing party clause.[7] (*Id.*).

Thus, if a "clear articulation" is required, it has been met.

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[7] Brunswick points to SAPA §2.4(d)(ii), relating to allocation of an *Accounting Firm's* fees for post-closing adjustments, as evidence that the parties did not intend to provide *attorneys' fees* indemnification for first-party claims. (AB, 46). The limited scope of §2.4(d)(ii) provides no insight into the parties' intent about the meaning of the SAPA's specific provisions governing indemnification and Losses.

CONCLUSION

For the reasons set forth above, the Decision and Order should be reversed.

Dated: November 14, 2025 **BLANK ROME LLP**

/s/ David A. Dorey
David A. Dorey (No. 5283)
James G. Gorman III (No. 6284)
1201 N. Market Street, Suite 800
Wilmington, Delaware 19801
Telephone: (302) 425-6431
Facsimile: (302) 425-6464
David.Dorey@blankrome.com
James.Gorman@blankrome.com

OF COUNSEL:
James T. Smith (admitted pro hac vice)
Brian S. Paszamant (admitted pro hac vice)
D. Morgan Barry (admitted pro hac vice)
One Logan Square
130 North 18th Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 569-5500
Facsimile: (215) 569 5555
Jim.Smith@blankrome.com
Brian.Paszamant@blankrome.com
Morgan.Barry@blankrome.com

Attorneys for Plaintiffs below/Appellants

CERTIFICATE OF SERVICE

I, David A. Dorey, Esquire, hereby certify that on November 14, 2025, a true and correct copy of the foregoing document was filed and Servia via *File & ServeXpress* upon the following counsel of record:

Kevin R. Shannon
Christopher N. Kelly
Callan R. Jackson
Emma K. Diver
POTTER ANDERSON & CORROON LLP
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Thomas A. Uebler
MCCOLLOM D'EMILIO SMITH UEBLER LLC
2751 Centerville Road, Suite 401
Wilmington, DE 19808
(302) 468-5960

Joseph B. Cicero
Greg Stuhlman
CHIPMAN BROWN CICERO & COLE
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, DE 19801
(302) 295-0191

/s/ David A. Dorey
David A. Dorey (No. 5283)