NO. 128770

In the

Supreme Court of Illinois

PML DEVELOPMENT LLC, an Illinois limited liability company,

Plaintiff/Counter-Defendant/Appellant,

v.

VILLAGE OF HAWTHORN WOODS, a municipal corporation,

Defendant/Counter-Plaintiff/Appellee.

Petition for Leave to Appeal from the Appellate Court,
Second Judicial District, No. 2-20-0779.
There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, Illinois, No. 15 CH 848.
The Honorable Luis A. Berrones, Judge Presiding.

BRIEF AND SUPPLEMENTARY APPENDIX OF DEFENDANT/COUNTER-PLAINTIFF/APPELLEE VILLAGE OF HAWTHORN WOODS

Dated: January 6, 2023

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TABLE OF POINTS AND AUTHORITIES

NATURE OF THE CASE

This case involves claims and counterclaims that arise under a 2012 contract ("Agreement") between PML Development LLC ("PML") and the Village of Hawthorn Woods ("Village"). After a bench trial, the trial court found that both parties had materially breached the Agreement. (A.32 at ¶ 30A; A.37 at ¶ 45)[1] The trial court awarded relief to PML because it found the Village was the first party to breach the Agreement. (A.38)

The appellate court reversed the trial court's judgment in favor of PML. The appellate court agreed that both parties had materially breached the Agreement. (A.13 at ¶ 48; A.16 at ¶ 58) The appellate court held, however, that the first-to-breach rule did not apply because PML demanded to continue performance under the Agreement after the Village's breach. (A.14 at ¶ 50) Having found that both parties materially breached the Agreement, the appellate court held that neither was entitled to enforce the Agreement. This appeal does not involve questions on the pleadings, or any findings by a jury.

STATEMENT OF THE ISSUES

1. Whether the appellate court properly declined to apply the first-to-breach rule where PML had continuously demanded that the parties perform under the Agreement for years after the Village's alleged initial breach.

2. Whether the appellate court correctly found that the parties' breaches of the Agreement were material rather than partial, thus precluding either party from enforcing the Agreement.

[1] In this Brief, citations to PML's Appendix are "A.__." Citations to the attached Supplementary Appendix are "SA. __." Citations to the common law record are "C. __." Citations to reports of proceedings are "R. __." Citations to exhibits are "E __." Citations to supplements to the record on appeal are "SUP C. __," "SUP R. __," or "SUP2 E. __."

3. Whether PML, a start-up enterprise with no prior history of business operations and which presented no evidence regarding any substantially similar business, can recover lost profits in this case.

STATEMENT OF JURISDICTION

The Village concurs with the statement of jurisdiction provided by PML.

STATEMENT OF FACTS

The Village respectfully submits that the Statement of Facts provided by PML was incomplete. This is a fact-intensive case, and the lower courts' rulings (including their application of the first-to-breach rule) were based on the factual record before them. Accordingly, a more fulsome recitation of the facts is required to properly frame the legal issues before this Court.

Dan Powell Contemplates A Fill Project For The Property

Dan Powell is a business owner who does fill and grading projects. (R.2870) In 2012, Powell and Mitch Maneval were the owners of DA Development LLC ("DA Development"). At the time, DA Development had two active fill sites in Hawthorn Woods, both of which operated under written agreements with the Village. (R.652, 952, 1385) DA Development made money on those sites by: (1) removing topsoil and clay from those sites and selling those materials to developers; and (2) allowing third parties to deposit fill (in exchange for payment) at those sites. (R.288-90) DA Development paid the Village certain fees in connection with its operations at those sites. (R.1410)

While those sites were operating, Powell set his eyes on three adjoining parcels (the "Property" which totaled 62 acres) that were across Krueger Road from one of his existing sites. Powell wanted to use the Property as a new fill site. In mid-2012, he prepared an

estimated budget for this project. (R.598-99, 601; E.1090-92) That estimate painted a very rosy picture. Powell anticipated he could realize over $9 million in revenue by importing 1.2 million cubic yards of fill onto the Property, and also exporting topsoil and clay from the Property. (E.1090) He projected costs of just $3.29 million. If correct, that would mean profits of $5.77 million, a whopping 64% profit margin. (*Id.*)

In mid-2012, Powell began meeting with Pam Newton, the Village's Chief Operating Officer, to discuss the Property. (R.1388) Powell proposed that he would buy the Property, use it as a fill site, grade it for the Village's use, and turn it over to the Village for $1. (R.308, 439, 541, 841; C.435) In return for the Property being graded for municipal use and turned over to the Village, the Village would forego its customary fees for Powell's fill operations. (R.1410) Newton liked the idea, and they began discussing the terms of a written agreement. (R.1388, 1392, 1399, 1401, 1406)

The Agreement

The Agreement was approved by the Village Board on August 20, 2012, and signed by PML on October 11, 2012. (C.84, 86-92) The Agreement consisted of recitals, numbered paragraphs, and numbered sections. (A.42-48) Several aspects of the Agreement are pertinent here.

First, when the Village approved the Agreement in August 2012, PML did not yet exist. (R.657) PML was formed in September 2012, and acquired the Property shortly thereafter. (R.2149; E.1096-98)

Second, the Agreement does not contain any deadlines or timeframes for plan submission or approval, or for PML to begin fill or grading work. In fact, just the opposite. The Agreement states that PML's ability to fill and grade the Property was contingent

upon: (1) the Village's and Lake County Stormwater Management Commission's ("SMC") approval of a grading plan; and (2) PML's obtaining any required permits and approvals. (A.42 at Rec. B; A.46 at § 1.2) The parties understood that could require additional approvals from the Army Corps of Engineers, the Lake-McHenry Soil & Water Conservation District ("SWCD"), Illinois Department of Transportation, Illinois EPA ("IEPA"), and the Village. (A.46; R.893-94)

Third, the Agreement allowed PML to apply for, and obtain, two two-year permits (a total of four years) to conduct fill operations, which the parties estimated could result in PML importing up to 1.2 million cubic yards of fill onto the Property. (A.42 at Rec. B; A.44 at ¶ 8; A.46 at § 1.2)

Fourth, PML was required to transfer the Property to the Village "free and clear" for $1 by December 31, 2015. (A.43 at ¶ 3) That deadline was not tied to the completion of PML's work and could occur before the end of the potential four-year permit period.

Fifth, the Agreement required PML to maintain surrounding roadways and comply with "all environmental measures." (A.43-44 at ¶¶ 2-7,12-18) The Village had the right to inspect the Property (at PML's expense) and take appropriate action if it believed PML was not in compliance. (A.42-48 at Rec. C, ¶ 19, §§ 3, 5)

Sixth, PML was required to execute a draw down agreement and fund a draw down account to pay for various costs incurred by the Village. (A.42-48 at Rec. F, ¶ 1, § 3) PML did, in fact, enter into such an agreement. (R.732-33, 1729-30; 1747; E.315-18)

In Early 2013, PML Begins Work
On The Property Without An Approved Grading Plan

PML's work on the Property got off to a bad start. In December 2012, PML improperly brought equipment onto the Property and began grading, ostensibly to assist

the Lake County Sheriff evict a squatter. PML was wrong, and it knew it. After the Village issued a stop work order, Powell brought donuts to the Village staff to apologize. (R.719)

In January 2013, PML submitted grading plans. Under the Agreement, PML could not begin work until those plans were approved by both the Village and Lake County SMC. (A.42 at Rec. B) In addition, the Village did not yet have a concept plan for the municipal campus. It needed to complete one before approving a grading plan. None of that was going to happen overnight. But Powell did not want to wait. DA Development had begun marketing the Property as a fill location in summer 2012. (R.692-93) By early 2013, DA Development – *not PML* – had pent-up demand from customers who wanted to deposit fill on the Property.[2]

Powell urged the Village to let him deposit fill before the final grading plans were approved. In January 2013, the Village agreed to issue an "earth change permit" for part of the Property. (R.965; E.445, 453) PML's engineers (Pearson Brown) and the Village's engineer, Christopher Burke Engineering ("CBE"), worked on a plan which was approved on February 13, 2013. (E.135-137, 445; SUP2 E.20; R.2416-17) Under that earth change permit, PML began importing fill to the Property in February 2013. (R.396)

The parties' relationship took a backwards step in March 2013. By that time, numerous neighbors had begun complaining to the Village about trucks idling in the early morning hours and about congestion and mud on Krueger Road. (R.991, 1418-19, 1580-81, 1640, 1689-90) The neighbors were not the only ones complaining. An SWCD

[2] DA Development – not PML – was the entity that contracted with customers to deposit fill on the Property. (*See* E.1060-86) As a result, revenue from the Property went to DA Development, while liabilities under the Agreement (*e.g.*, to pay property taxes) stayed with PML. (*See* E.2818-2860)

employee (and IEPA enforcement officer) named Robert Oja inspected the Property in March 2013. He made a written report of "deficiencies" that needed to be "corrected and maintained as soon as practicable." (R.1354-58; E.254-63) Kurt Woolford, chief engineer of the Lake County SMC, also observed Watershed Development Ordinance violations "pretty much every time" he went to the Property. (R.1596-98) On the basis of such observations, the Village issued another stop work order in March 2013. (E.223, 266, 803-07, 1022-24; SUP2 E.31-33; R.2731, 2734-2737, 2743-2744) That stop work order was ultimately resolved, and PML resumed fill operations. In September 2013 (after exchanges of plans between the parties' engineers) the Village expanded the area in which PML could deposit fill under its earth change permit. (E.143, 154-58, 566-68; SUP2 E.34-38; R.390, 2431-34)

While PML's Work Is Ongoing, The Parties Work Toward A Final Grading Plan

While PML was working under earth change permits, PML and the Village moved forward with the prerequisites to a final grading plan. In February 2013, PML obtained its NPDES permit (*i.e.*, the permit Oja later said was being violated in March 2013). (R.1870; E.561) In August 2013, PML submitted an application to the Lake County SMC for base flood elevation ("BFE") approval.[3] In April 2014, Lake County SMC approved a final BFE of 820.46 feet. (R.2397; E.651-52) Up until then, PML had been working under a draft BFE (822.95 feet) which barred PML from working below that elevation. (R.1572) Once it obtained final BFE approval in April 2014, PML could prepare accurate calculations to fill the Property and determine the necessary compensatory storage to offset

[3] The BFE is the elevation below which any grading, fill or disturbance of soil may implicate Lake County's Watershed Development Ordinance. (R.456, 682, 1568)

its fill and grading. (R.2368-69) In May 2014, however, Lake County SMC imposed a significant limitation on PML: it barred PML from disturbing more than 12 acres of the Property at a time due to drainage concerns. (R.691-692, 1605, 1894; E.182, 453) In 2016, Lake County SMC increased that limitation to 16 acres. (R.692)

Meanwhile, the Village proceeded to develop its concept plan. In 2013, it retained Al Maiden of Rolf Campbell & Associates to prepare a concept for a municipal campus. (R.1301, 1414) Maiden presented options to the Village in September 2013. (E.736; R.1313) He made further revisions in 2014, resulting in a substantially final plan by September 2014. (R.1329-37)

The Village Issues A Final Grading Permit In December 2014

In mid-June 2014, PML submitted a full set of grading plans for the Property. (E.182; R.2436-38) The Village responded promptly. It sent a review letter noting deficiencies in the plans later that month. (E.185-88) In July 2014, PML submitted revised plans, and CBE responded with a new review letter. (E.574-75) The parties' progress was interrupted, however, by yet another PML misstep. In September 2014, the Village learned PML was bringing unauthorized fill materials onto the Property. On September 4, 2014, the Village issued yet another stop work order. (E.296-97; SUP2 E.41-43)

To resolve that standoff, the parties reached an agreement. On October 31, 2014, the Village agreed to lift the September 4, 2014 stop work order and approve a grading plan, provided PML re-committed to bring only conforming materials onto the Property, compacted the site to 90% standard proctor (and provided weekly reports to confirm as much) and accepted CBE's July 2014 comments to PML's grading plan. (E.550-54) PML accepted those terms. (R.666-668; C.362 at ¶ 5) Almost immediately, however, PML

breached that agreement by failing to provide compaction reports. Thus, another stop work order was issued on November 20, 2014. (E.305-08) In December 2014, CBE approved the final grading plans with conditions. On December 15, 2014, PML received its grading permit. (E.2690; R.484) The grading permit had an expiration date of September 15, 2015 because the Village's computer only allowed permits to issue for nine months. (R.1193)

PML Files Its Complaint And The Village Counterclaims

PML filed this lawsuit in May 2015. In its complaint, PML alleged that the Village was improperly interfering with PML's work and causing PML to incur additional costs. (C.47-245) In Count I, PML sought a declaration that the Village was required to issue a two-year permit. (C.73-74) In Count II, PML sought mandamus relief to compel the Village to rescind all stop work orders and issue a two-year permit. (C.77) In Count III, PML alleged that the Village was engaged in ongoing and continuing breaches of the Agreement. (C.78-79) PML sought damages and an injunction barring the Village from "interfering" with PML's future work.

On July 10, 2015, the Village filed a counterclaim, in which it alleged PML had breached the Agreement in numerous ways, including: (1) importing improper fill onto the Property; (2) failing to properly maintain tanks at the Property; (3) failing to comply with various ordinances; (4) failing to pay taxes for the Property; and (5) failing to fund the draw down account. (C. 315-27) The Village asked for money damages and a judicial foreclosure of PML's interest in the Property. (C.326-27)

PML Obtains Mandamus Relief – But Not Injunctive Relief

In November 2015, PML filed a mandamus petition. (C.383) Therein, PML asked the trial court to require the Village to issue a full two-year grading permit. PML also

asked the trial court to enjoin the Village from "interfering" with PML's future work at the Property. In response, the Village argued that PML was not entitled to any relief because PML was violating Village ordinances and local and state laws. (C.594-608) The Village also pointed out that PML was delinquent on the taxes for the Property, and was not prepared to tender title "free and clear" to the Village, which it was required to do shortly thereafter. (C.601-02)

On January 15, 2016, the trial court granted PML's mandamus petition and ordered the Village to issue a permit through December 31, 2016 (*i.e.*, two years after the Village issued the initial grading permit in December 2014). (C.821; R.42) The trial court did not grant PML's TRO request. PML withdrew its request for a TRO after the trial court voiced concerns about its ability to award that remedy.[4] (R.42-43)

The Trial Court Grants PML's Second Mandamus Petition

In October 2016, the Village tried to shut down PML's work on the Property. It filed motions: (1) to require PML to complete its work by December 31, 2016; (2) for summary judgment; and (3) to appoint a receiver for PML. (C.829-31, 839-45, 995-1001) Therein, the Village noted that PML had still not paid property taxes for the Property, and those taxes had been sold at a tax auction. Unless those taxes were redeemed, PML would be unable to convey the Property to the Village. (C.839-45) The Village asked the trial court to compel PML to vacate the Property and to appoint a receiver to manage PML's wind up at the Property and redeem the unpaid property taxes. (C.995-1001) PML cross-

[4] In its Opening Brief, PML asserts that the trial court granted injunctive relief to prevent the Village from interfering with the project. (Op. Br. at 10) That is not correct. PML was never awarded injunctive relief. The only relief awarded was mandamus. (R.42-43)

moved by filing a second mandamus petition, in which it asked the trial court to compel the Village to issue a permit through December 2018. (C.1095-1408)

On December 9, 2016, the trial court denied the Village's motions and granted PML's mandamus petition. It ordered the Village to issue a permit giving PML until December 31, 2018 to complete its work. (C.2034) During oral argument, PML pooh-poohed the Village's concerns about the then-$400,000 in delinquent taxes. PML argued that the Village faced no imminent danger because the redemption periods for the unpaid (and, by that time, sold) taxes had not yet expired. (R. 72, 77-78, 86) The trial court denied the Village's summary judgment motion. (R.87; C.2035)

The Trial Court Grants Partial Summary Judgment In Favor Of The Village

In August 2017, the Village again moved for summary judgment on PML's continued non-payment of property taxes and failure to convey the Property. (C.2320; R.122) In response, PML raised the same arguments it had raised the previous year. (C.2754-68) On October 13, 2017, the trial court partially granted the Village's summary judgment motion. The trial court found that PML had breached the Agreement by failing to convey the Property "free and clear." (R.180-81) However, the trial court did not award the remedy sought by the Village: specific performance. (R.123-24) The trial court found that an order compelling PML to pay the $436,021 necessary to redeem the unpaid taxes may not "have teeth" because PML asserted it lacked sufficient funds to pay that amount. (R.152-53)

Pre-Trial Proceedings

After several continuances, the trial court set this case for trial in June 2019. (C.3420-24) In May 2019, the parties briefed numerous motions *in limine*. (C.3502-29)

Among other things, the Village moved *in limine* to: (1) bar PML from recovering any damages based on costs or expenses incurred by DA Development; (2) bar or limit the testimony of PML's damages experts; and (3) bar PML from recovering lost profits. (C.3502-65) The trial court denied the vast majority of the parties' motions *in limine* (including those set forth above). (R.215, 227, 236, 244, 247, 251, 257, 268, 273, 276)

The Trial Court Conducts A Bench Trial Between June 2019 And January 2020

The case proceeded to a bench trial that occurred over the course of ten days in June 2019, November 2019, and January 2020. (C.5722) The trial court heard testimony from no fewer than 22 witnesses. (R.200-2870; SA.1-4) The record of proceedings from the bench trial was over 2,000 pages, and the parties introduced hundreds of exhibits into evidence. (A.73-86; SA.10-13)

At trial, PML's damages testimony came from three witnesses: Dan Powell, Will Burton and Charles Neser. Powell testified that, in 2012, he created an estimated budget for his work at the Property. Therein, he estimated that a fill operation at the Property could generate $9,055,500 in revenue, and that the cost of running that operation could be $3,285,000. Based on that, he estimated he could reap $5,770,500 in profits, for a profit margin of 64%. (E.1090-92; R.601, 615) Despite the fact that Powell had at least two other fill sites in the nearby vicinity of the Property, he did not offer any testimony about the profits, revenue or expenses of those projects. Nor did Powell offer any testimony regarding whether any of those projects had realized profit margins anywhere close to 64%.

Powell testified that PML's actual costs had exceeded his $3,285,000 estimate, but did not offer any testimony regarding the amount by of that supposed cost overrun. Powell was presented with several packets of invoices, checks and ledgers, E.1139-2650, which

he testified were "samples" of the types of expenses PML incurred at the Property. He also authenticated a general ledger (E.2863-3139), and three sets of income statements. (E.1087-89, 2818-36, 2837-62; R.598-613) Notably, two of those income statements were for DA Development – not PML. (E.2818-2860)

Burton and Neser (both experts) testified that they believed Powell's 2012 $3,285,000 cost estimate was "reasonable." (R.2112, 2328) They made it clear, however, that they did not compare Powell's revenue, cost, or profit estimates to any real-world fill projects. Burton testified that he was "sure" he did not discuss the revenue for any of Powell's other fill projects and was "not 100% sure" he discussed the costs, either. (R.2191-95) Burton and Neser purported to verify the reasonableness of Powell's cost estimates against a national database compiled by Gleeds. (R.2318)

Having concluded (without any comparison to any other fill projects) that Powell's estimates were reasonable, PML's experts testified that the actual costs at the Property were $9,348,504. (R.2328) PML, however, never "showed its math" with respect to how that $9,348,504 figure was calculated. PML did not provide, for example, any type of listing or schedule of invoices or charges that added up to $9,348,504. Burton divided PML's costs into three categories:

Category	**Powell 2012 Estimate**	**Actual Cost (Per Burton)**	**Difference**
Land Purchase and design	$620,000	$803,293	$183,293
Site preparation, topsoil and clay work	$2,145,000	$7,043,161	$4,898,161
Overhead	$520,000	$1,502,050	$982,500
Total	$3,285,000	$9,348,504	$6,063,504

(R.2148-49) Burton opined that the entire $6,063,504 in costs over and above Powell's 2012 estimate were "damages" owed to PML. (R.2112-14, 2173-74, 2180-81) In addition, Burton testified that PML had lost an additional $268,223.70 because it received an average of only $7.32 per cubic yard of fill rather than Powell's 2012 "target price" of $7.55 per cubic yard. (R.2171-73; C.8504) Burton opined that PML also lost $253,757 because PML supposedly deposited only 1,166,190 cubic yards of fill on the Property rather than the 1.2 million cubic yard maximum allowed under the Agreement. (R.2162-65)

After Trial, The Village Seeks To Re-Open The Proofs

The bench trial concluded in January 2020. During trial, the Village sought specific performance – not money damages – with respect to PML's failure to convey the Property. (C.5382) The Village sought that remedy because such performance was still possible at the time of trial. However, the trial court did not issue a decision until ten months after the trial concluded. During that time, the situation changed. In September 2020, one of the parcels comprising the Property was conveyed to a third-party tax scavenger *via* a tax deed. Thus, the remedy sought by the Village at trial was rendered impossible. (C.8686) In October 2020, the Village sought to re-open the proofs on this issue. PML stipulated to this, and the trial court entered the stipulation. (C.8707)

The Trial Court Issues Its Judgment

On November 20, 2020, the trial court issued a memorandum order. (A.20-40) Therein, the trial court found the Village had materially breached the Agreement by: (1) failing to issue a grading permit in February 2013; (2) imposing extra-contractual requirements on PML; and (3) interfering with PML's "means and methods" of construction. (A.31 at ¶ 30A) The trial court found PML had materially breached the

Agreement by: (1) failing fund the draw down account; (2) failing to pay to repair Krueger Road; and (3) failing to convey the Property. (A.37 at ¶ 45)

In its order, the trial court noted that a party in material breach may not enforce a contract. (A.38 at ¶ 46) Under that proposition, neither PML nor the Village could prevail on their claims because the trial court found that both had materially breached the Agreement. The trial court avoided that result by excluding various recitals from the Agreement and by invoking the first-to-breach rule. (A.25-26 at ¶¶ 14-15; A.38 at ¶ 46A) It found the Village had been the "first to breach" when it failed to issue a full grading permit in early 2013. (A.38 at ¶ 46A) Based on that, the trial court found that: (1) PML (but not the Village) was excused from subsequent performance under the Agreement; and (2) PML (but not the Village) retained the right to enforce that Agreement. (A.38 at ¶ 46A) Thus, PML was awarded judgment, and the Village was not.

The trial court awarded $5,349,677.70 in damages to PML and nothing to the Village. The trial court awarded PML three categories of damages: (1) $268,223.70 based on PML's failure to achieve its target price; (2) $4,898,161 for overruns in site preparation, topsoil and clay work costs; and (3) $183,293 for overruns in land purchase and design costs. (A.38-39 at ¶¶ 49-50) The trial court declined to award the remaining damages requested by PML. (A.39 at ¶ 50) PML subsequently filed a fee petition seeking over $1.6 million in fees and $425,000 in costs. (C.9621-10460) On March 11, 2021, the trial court awarded PML $1,571,795.60 in fees and $2,654.74 in costs. (Sup C. 281)

Both Parties Appeal The Trial Court's Judgment

The Village filed a notice of appeal, and PML cross-appealed. (A.49-55) On appeal, the Village raised five general arguments: (1) the trial court erred in invoking the

first-to-breach rule; (2) the trial court erred in interpreting the Agreement to exclude certain recitals as operative terms; (3) the trial court erred in finding that the Village had breached the Agreement; (4) the trial court erred in awarding damages to PML because those damages were speculative and contrary to law; and (5) the trial court erred in awarding fees and costs to PML. (Village 8/9/21 2d Dist. Br; Village 2/16/22 2d Dist. Br. at 1-23) PML disputed those points, and argued on cross-appeal that the trial court erred by not awarding additional damages and litigation costs to PML. (PML 11/12/21 2d Dist. Br. at 49-72)

The Appellate Court Decision

The appellate court issued its decision on June 29, 2022. (A.1-19) The appellate court agreed with the trial court that PML had materially breached by failing to convey the Property, and the Village had materially breached by interfering with PML's "means and methods." (A.13 at ¶ 48; A.16-17 at ¶ 58) The appellate court held that one material breach by each party was "enough" and declined to offer any opinion regarding the other "material breaches" found by the trial court. (*Id.*)

The appellate court disagreed with the trial court, however, on the first-to-breach rule. The appellate court found that the first-to-breach rule did not apply because PML had not sought to terminate the Agreement after the Village's breach. (A.14 at ¶ 51) Rather, PML demanded (and received) continued performance under the Agreement and twice secured mandamus relief to compel such performance. (A.14-15 at ¶ 52) Having thus dispensed with the first-to-breach rule, the appellate court found that neither party could enforce the Agreement because both were in material breach. The appellate court reversed the trial court's judgment in favor of PML and declined to award relief to either party.

(A.18 at ¶ 64) The appellate court did not reach the other issues raised by the parties, including their damages arguments.[5]

ARGUMENT

This case raises the issue of what relief, if any, is available when both parties to a bilateral contract breach that contract, and then each seeks recovery against the other. The trial court awarded relief to one party (PML) under the theory that the other (the Village) had been the first to breach the Agreement. The trial court's ruling was manifestly inequitable. It resulted in PML getting everything it bargained for under the Agreement while the Village was utterly deprived of its bargained-for objective, *i.e.*, the Property.

The appellate court improved that inequitable situation by correctly holding that the first-to-breach rule does not apply in this case. Having insisted that the Village perform under the Agreement for nearly six years after the alleged initial breach (*i.e.*, February 2013-December 2018), PML was required to render its own counter-performance. The appellate court found that neither party could enforce the Agreement because both had materially breached it.

In this Court, PML contends that the correct result in this case is either: (1) following the trial court's ruling and awarding relief only to PML; or (2) allowing both parties to enforce the Agreement. In support of the former, PML argues that the trial court

[5] In its Opening Brief, PML contends the appellate court "did not take issue" with the trial court's finding that the Village was first to breach. PML also suggests that the appellate court's ruling "fully supports" the trial court's damages causation findings. (Op. Br. at 14) That is inaccurate, at best. The appellate court's failure to expressly rebut the trial court on those points does not imply approval or affirmance. In light of its finding that the first-to-breach rule did not apply, such determinations were unnecessary and the appellate court exercised its sound discretion by declining to make them. Thus, *qui tacet consentire videtur* does not apply here.

correctly applied the first-to-breach rule. In support of the latter, PML urges this Court to adopt the "partial breach rule," under which, PML argues, any material breaches by the parties must be treated as partial breaches. This Court should not embrace either result advocated by PML. Rather, this Court should: (1) affirm the entry of judgment against PML on PML's claims; (2) reverse the entry of judgment against the Village on its counterclaims; and (3) remand for further proceedings with respect to the Village's remedies on its counterclaims.

First, the appellate court correctly applied the first to breach rule. It is well-settled that the first-to-breach rule does not apply when the party seeking to invoke that rule (in this case, PML) elects to continue performance under a contract. That makes eminent sense. It would be the height of inequity if the Village was required to spend nearly six years performing under the Agreement, without any corresponding counter-obligations on the part of PML. This issue is addressed in Part I below.

Second, PML cannot salvage its claims by invoking the "partial breach rule" articulated in *Dustman v. Aurora Advocate Health, Inc.*, 2021 IL App (4th) 210157. Even if this Court were to adopt the reasoning in *Dustman* (and the Village believes it should), that will not help PML. PML's failure to convey the Property in January 2016 was not a partial breach; it was a material breach, pure and simple. And PML has no credible argument that the Village elected to continue under the Agreement after that breach. On the contrary, the Village tried to remove PML from the Property and have a receiver appointed for PML. (C.829-45, 995-1001) Thus, the Village did not "elect" to continue under the Agreement, it was compelled to do so when the trial court granted PML's mandamus petitions. As a result, PML's breaches continue to be material – not partial.

And, as a party in material breach, PML remains unable to enforce the Agreement. This is addressed in Section II.A-B below.

Third, under the rule set forth in *Dustman*, this Court should reverse the lower courts' entry of judgment against the Village on its counterclaims. Even if the Village's breaches were material at the time they occurred, they were rendered partial by virtue of PML's election to continue under the Agreement. Unlike the Village (which was compelled to proceed under the Agreement), PML voluntarily elected to proceed under the Agreement. Having done so, PML cannot now assert that the Village is barred from enforcing the Agreement due to a "prior material breach." Because the Village is not in material breach, it may enforce the Agreement. Therefore, this Court should reverse the entry of judgment against the Village on its counterclaims and remand for further proceedings regarding the remedies available to the Village on its counterclaims. This issue is addressed in Part II.A, C-D below.

Fourth, if the Court determines that PML is entitled to enforce the Agreement, this Court should address an issue of law that is potentially dispositive with respect to PML's damages claims, *i.e.*, whether PML's damages are barred under the new business rule, a doctrine recently reaffirmed by this Court in *Ivey v. Transunion Rental Screening Sol., Inc.*, 2022 IL 127903, ¶ 28 (pet. for rehearing filed Jan. 3, 2023). This issue is addressed in Part III below.

I. This Court Should Affirm The First-To-Breach Rule As Applied By The Appellate Court.

The appellate court's application of the first-to-breach rule presents an issue of law that is reviewed *de novo*. *In re A.H.*, 207 Ill. 2d 590, 593 (2003). The appellate court's factual findings on issues such as whether PML elected to proceed under the Agreement

are reviewed under the manifest weight of the evidence standard. Under that standard, reversal is appropriate if the opposite conclusion is evident, or if the lower court's findings appear to be unreasonable, arbitrary or not based on the evidence. *Camelot, Inc. v. Burke Burns & Pinelli, Ltd.*, 2021 IL App (2d) 200208, ¶ 50.

A. The Appellate Court Correctly Applied The First To Breach Rule.

This Court should adopt and affirm the appellate court's formulation of the first-to-breach rule. Illinois has long recognized the first-to-breach rule, under which "a party to a contract who commits the first breach of its terms cannot maintain an action for a subsequent breach by the other party." *Daniggelis v. Pivan*, 159 Ill. App. 3d 1097, 1103 (1st Dist. 1987) (citation and internal quotes omitted). The purpose behind the first-to-breach rule is simple: it is designed to protect a non-breaching party from the burden of continued performance under a contract that has already been materially breached by another party.

Illinois has also long recognized an exception to the first-to-breach rule. The first-to-breach rule does not apply if the non-breaching party elects to continue performance under a contract after a breach. In other words, if the non-breaching party elects to continue under the contract, then ***all*** parties to the contract must continue performance. The purpose behind that exception is also simple: it is designed to avoid an inequitable situation in which one party to a contract (*i.e.*, the allegedly breaching party) is required to continue performance without any hope or expectation of counter-performance by the other party.

The law on this issue has been established for over 100 years. In 1917, this Court found that

> If appellant deemed the contract still valid and binding, it then had the right to treat the contract as terminated for all purposes and bring an action for its

> breach, and for the damages which it had sustained by reason of nonperformance, or being prevented from performing the contract, or it had a right to treat the contract as subsisting and to keep it alive for the benefit of both parties, keeping itself at all times ready, able, and willing to perform its part of the contract, and at the expiration of the term of the contract sue for its damages sustained by reason of the wrongful nonperformance by appellees; but it could not do both. If it elected to keep the contract alive and in force for the purpose of recovering damages for future profits it must do so for the benefit of both parties.

Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623, 626-27 (1917) (internal citation omitted). That has remained the law in Illinois to this day. The appellate court has consistently recognized both the first-to-breach rule and its exception. *See Printpack, Inc. v. Container Tech., Inc.*, 124 Ill. App. 3d 568, 573 (2d Dist. 1984); *S. Beloit Elec. Co. v. Lar Gar Enterprises, Inc.*, 80 Ill. App. 2d 367, 374 (2d Dist. 1967).[6] In *Dustman v. Advocate Aurora Health, Inc.*, 2021 IL (4th) 210157, a decision cited by PML, the Fourth Appellate District recently summarized the rule as follows:

> Thus, if the injured party becomes aware of a material, uncured breach by the other party, the injured party must make up its mind which direction to go – and then the injured party must abide by that decision. If the injured party chooses to keep the contract alive by treating the breach as "partial," to use Farnsworth's terminology the injured party has to stick to that choice and act accordingly. Where a contract is breached in the course of its performance, the injured party has a choice presented to him of continuing the contract or refusing to go on. If he chooses to continue performance, he has doubtless lost his right to stop performance. To be sure, the injured party may sue for any damages caused by the partial breach, but having elected to keep the contract in force, the inured party must continue to perform the contract on pain of likewise incurring liability for a breach.

Id. at ¶ 38 (internal quotes and citations omitted).

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[6] The decisions cited by PML, Op. Br. at 14, do not hold otherwise. Those decisions do not discuss the impact of an election to continue performance or foreclose the above-stated exception to the first-to-breach rule. *See, e.g., Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 71 (2006) ("Under general contract principles, a material breach of a contract provision by one party ***may*** be grounds for releasing the other party from his contractual obligations.") (emphasis added).

Federal courts applying Illinois law have also followed suit. In *Emerald Investments Limited Partnership v. Allmerica Financial Life Insurance and Annuities Co.*, 516 F.3d 612, 618 (7th Cir. 2008), the Seventh Circuit held as follows:

> If a party to a contract breaks it, the other party can abandon the contract (unless the breach is very minor, *Circle Security Agency, Inc. v. Ross*, 107 Ill.App.3d 195, 63 Ill.Dec. 18, 437 N.E.2d 667, 672 (1982); *Sahadi v. Continental Illinois National Bank & Trust Co.*, 706 F.2d 193, 196–97 (7th Cir.1983) (Illinois law)) and sue for damages, or it can continue with the contract and sue for damages. *William W. Bierce, Ltd. v. Hutchins*, 205 U.S. 340, 346, 27 S.Ct. 524, 51 L.Ed. 828 (1907) (Holmes, J.); *South Beloit Electric Co. v. Lar Gar Enterprises, Inc.*, 80 Ill.App.2d 367, 224 N.E.2d 306, 310–11 (1967). But if it makes the latter election, it is bound to the obligations that the contract imposes on it. *Wollenberger v. Hoover*, 346 Ill. 511, 179 N.E. 42, 57 (Ill.1931); *Newton v. Aitken*, 260 Ill.App.3d 717, 198 Ill.Dec. 751, 633 N.E.2d 213, 216–17 (1994); *Continental Sand & Gravel, Inc. v. K & K Sand & Gravel, Inc.*, 755 F.2d 87, 93 (7th Cir.1985) (Illinois law). When Allmerica in December 2001 broke its contract with Emerald by refusing to permit it more than one transfer a month, Emerald could have terminated the contract. But it did not, and so Allmerica was entitled to enforce the obligations that the contract put on Emerald.

Emerald Inv. Ltd. Part., 516 F.3d at 618. While *Emerald Investments* hails from the federal judiciary, it applied Illinois law, and its reasoning is well-rooted in Illinois decisions. *See also All Ems, Inc. v. 7-Eleven, Inc.*, 181 Fed.Appx. 551, 557-58 (7th Cir. May 9, 2006).

Those court decisions are consistent with the views of commentators on the law of contracts.

> [T]he general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party, with knowledge of the facts, either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render future performance.

14 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts 43:15 (4th ed. 2000). *See also* Corbin on Contracts, § 946 at 926; Farnsworth on Contracts § 8.15, at 634-35 (2d ed. 1990).

Those authorities are all in complete accord. All of them agree that the first-to-breach rule does not apply if the non-breaching party elects to continue performance under a contract. Notably, PML does not cite any contrary authority. Not even one. In the face of such uniformity and in the absence of any compelling reason to deviate from this well-established rule, this Court should find that the appellate court correctly articulated the first-to-breach rule, including the exception thereto.

This Court should also find that the appellate court correctly applied the first-to-breach rule. As the appellate court found, PML clearly and repeatedly elected to proceed under the Agreement despite any breaches by the Village. (A.13-15) In its Opening Brief, PML challenges the appellate court's finding on this point (a challenge reviewed under the "manifest weight of the evidence" standard). *See Camelot, Inc.*, 2021 IL App (2d) 200208 at ¶ 50. PML argues that it filed this lawsuit solely "to be excused from further contractual obligations," and goes so far as to claim that its multiple mandamus petitions were merely defensive measures designed to mitigate its damages. (Op. Br. at 14, 17-18)

PML arguments do not withstand any level of scrutiny. For starters, PML's election to continue under the Agreement was made long before it filed this lawsuit. Back in 2013, PML did not assert that the Agreement had terminated. If PML had done so, it could have stopped performance and have brought a suit for damages. Presumably, PML's damages at the time would have been the costs it had incurred to date (*e.g.*, land acquisition, engineering, unfilled orders, etc.). But PML did not do that. It chose to proceed. Presumably, PML did so because it calculated that continuing with the project could be far

more profitable than simply abandoning it.[7] In early 2013, PML began operations at the Property. It removed topsoil from the Property and sold it to third parties, and PML (and/or DA Development) began receiving payment from third parties who imported fill to the Property. (E.1087-89, 2818-62) PML's commercial activity at the Property began in 2013 and continued through 2018.

PML did not file this lawsuit until two years later (in mid-2015). Nothing in PML's initial complaint, or its subsequent submissions in the trial court reflect any effort by PML to terminate the Agreement. Quite the opposite. In its May 2015 complaint, PML alleged that the Agreement remained "legal valid, binding and enforceable," that PML had "a right to proceed to complete the Project," and that PML had a "clear right to complete its work on the Project and develop the Property." (C.71 at ¶ 123; C.74 at ¶ 144; C.76 at ¶ 160) Similarly, in 2015 and 2016, PML twice petitioned the trial court for mandamus relief to compel the Village to issue or extend permits.

PML's filings in the trial court went far beyond an attempt to mitigate its damages. PML did not simply ask the trial court to allow it to honor already-executed fill orders. On the contrary, PML's mandamus petitions asked the trial court for several years of future operations. (C.383-590, 1095-1408) As a result of PML's actions, it reaped significant benefits: it got 5+ years to work on the Property and imported nearly 1.2 million cubic yards of fill. PML and/or DA Development realized millions in revenue they would *not* have realized if PML had terminated in February 2013. (E.1087-89, 2818-62)

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[7] PML has admitted as much. In October 2017, the trial court questioned how PML could raise a first-to-breach argument when it was continuing to operate at the Property. PML's response was "well, isn't that to our benefit?" (R.143) In the trial court, PML repeatedly emphasized its desire to reap financial benefit from continued operation at the Property. (C.47 at ¶ 2; C.48 at ¶ 3; C.51 at ¶ 15; C.388, 393, 1106-08)

The claims and evidence presented by PML at trial are further evidence of its election to continue the Agreement after February 2013. Virtually all of PML's evidence at trial related to the parties' post-February 2013 actions, and PML asserted that the Village breached the Agreement numerous times between 2013 and 2018. Such claims necessarily suppose that the Agreement remained in effect after February 2013. Similarly, PML's damages claims were not limited to its pre-February 2013 damages. Rather, PML asked for millions in damages based on its supposedly diminished profitability between 2013 and 2018. (R.2148-49; E.1090-92; E.1087-89, 2818-62; A.38-39)

Given all of that, it would be the height of inequity if the first-to-breach rule were applied in this case. That would transform the Agreement into an incredibly one-sided arrangement, under which the Village was required to fully perform its obligations for 5+ years, but PML had no corresponding contractual obligations. None at all. That does not make sense. Taken to its logical extreme, that would mean the Village's February 2013 "breach" essentially gave PML a six-year free pass to import *any* volume of fill (including amounts over 1.2 million cubic yards) and *any* type of fill (including non-conforming materials) and deposit that fill *anywhere* on the Property (with no grading, landscaping, or compaction) and then either keep the Property for itself or sell it to a third party. In PML's version of the first-to-breach rule, PML could do all of that without any consequences from, or consideration to, the Village. Nothing in the long history of Illinois contract law supports such a result.

B. The Election Of Remedies Doctrine Did Not (And Should Not) Provide The Rule Of Decision In This Case.

As set forth above, it is well-settled that the first-to-breach rule does not apply where – as here – a nonbreaching party elects to continue performance under a contract.

PML does not provide any compelling reason for the Court to deviate from that rule. PML's inability to do so is hardly surprising. Because the appellate court's ruling is in full harmony with existing first-to-breach jurisprudence, there is little PML can do to mount an attack from that direction.

Instead, like Monty Python, PML tries something completely different: PML tries to change the rule of decision. In its Opening Brief, PML cuts a wide berth around the first-to-breach rule, and instead steers this Court toward an entirely different legal doctrine: the election of remedies doctrine. PML claims that the appellate court is to blame for this change in direction. According to PML, the appellate court decided this case below under "an election of remedies theory." (Op. Br. at 12) Having declared that the appellate did so, PML then devotes much of its brief to attacking the appellate court's supposed application of that theory. (Op. at 15-21) PML's argument on this point is a strawman argument, from start to finish. The simple truth is that PML cannot prevail under first-to-breach jurisprudence. Therefore, PML is trying to change the rule of decision to a different doctrine (election of remedies) under which PML hopes it can fare better. The Court should reject PML's argument on this point.

For starters, the appellate court did not decide this case under an election of remedies theory. The appellate court never uttered the words "election of remedies." Nor did it cite any election of remedies authorities in its opinion. (A.1-19) The appellate court did not decide this case based on election-of-remedies jurisprudence, it decided it under first-to-breach jurisprudence. To be sure, the appellate court found that PML had made an "election." (A.14 at ¶¶ 50-51) But not every "election" is an "election of remedies" and

the appellate court did not view PML's election as such. Thus, it is PML – not the appellate court – that is wrongly seeking to inject the election of remedies doctrine into this case.

Indeed, PML is seeking to conflate two distinct legal doctrines: (1) the first-to-breach rule; and (2) the election of remedies doctrine. Illinois has long recognized both, and each has its own line of authorities. While both doctrines involve a party making an election, there are separate and distinct rules of application for each. The first-to-breach rule is narrowly-tailored to a specific circumstance, *i.e.*, where one party to a contract asserts that the other party has materially breached the contract. *See Dustman*, 2021 IL App (4th) 210157 at ¶¶ 38-39. By contrast, the election of remedies is a doctrine of more general application. It is not unique to contract cases, but rather may arise in a host of different factual and procedural circumstances. The election of remedies doctrine broadly dictates that a plaintiff may not pursue two inconsistent, mutually-exclusive remedies. *See Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 596-97 (1st Dist. 2008); *Anekom, Inc. v. Estate of Demith*, 2018 IL App (3d) 160554, ¶ 35.

For the past 100 years, Illinois courts have not had a problem keeping these two doctrines straight. Courts applying the first-to-breach rule have not needed to resort to election of remedies decisions for guidance. Nor have courts applying the election of remedies doctrine relied on first-to-breach decisions. Indeed, it is telling that none of the first-to-breach decisions cited by the Village in this brief, *supra*, discuss the election of remedies. Similarly, none of the election of remedies decisions cited in PML's Opening Brief arose in a first-to-breach context. (*See* Op. Br. at 15-21 and decisions cited therein) PML does not provide any reasoned analysis to explain why this Court should deviate from well-established jurisprudence and conflate these two independent doctrines.

Finally, even if this case were governed by the election of remedies doctrine (and it is not), the appellate court's decision would still survive scrutiny.[8] An election of remedies occurs when "double compensation is threatened" or where "a defendant has been actually misled by the plaintiff's conduct." *Kel-Keef Enter., Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1008-09 (1st Dist. 2000) (A defendant is misled when it "materially changes his position in reliance" on plaintiff's actions). Under those standards, PML clearly elected its remedy, *i.e.*, continued performance. PML repeatedly insisted that the Village perform under the Agreement and filed suit to compel such performance. PML's litigation conduct materially impacted the course of the parties' dealings. By 2016, the Village wanted to be done with PML and asked the trial court to appoint a receiver to wind up PML's affairs. (C.829-1001) That did not happen. Instead, as a result of PML's actions, the Village was compelled to suffer PML's presence at the Property through December 2018. (C.2304) Thus, PML caused the Village to materially change its position. Moreover, double compensation (in the form of excused performance and damages) was not only threatened, but erroneously awarded by the trial court.

II. Under The Partial Breach Rule Advocated By PML, The Village – But Not PML – Is Entitled To Enforce The Agreement.

In Part II of its Opening Brief, PML argues that the appellate court erred in holding that ***neither*** party was entitled to enforce the Agreement. PML contends that the correct result in this case is that ***both*** parties should be permitted to enforce the Agreement. In an effort to obtain that result, PML asks this Court to adopt the "partial breach rule" as recently

[8] In the appellate court, PML took the exact opposite position that it is now taking. PML asserted that its pursuit of damages from the Village did, in fact, amount to an election of remedies. (PML 11/12/21 2d Dist. Br. at 31)

formulated by the Fourth Appellate District in *Dustman*, 2021 IL App (4th) 2100157. In *Dustman*, the Fourth District found that even a "material" breach of contract (*i.e.*, a breach so severe that it could justify termination of a contract) will be deemed to be a "partial" breach if the nonbreaching party elects to continue performance under the contract following that breach. *Id.* at ¶¶ 38-39. PML contends that the outcome in this case would be different if this Court were to adopt the partial breach rule set forth in *Dustman*. PML reasons that both parties in this case "elected" to continue under the Agreement after the other party's breaches.[9] Therefore, any breaches by the parties must be deemed to be partial breaches. And, in the absence of any material breaches, both parties retain the right to enforce the Agreement. That, in essence, is the argument mounted by PML. (Op. Br. at 22-27)

PML correctly articulates the rule of law set forth in *Dustman* (although PML exaggerates the number of decisions that have embraced that rule). However, PML is badly mistaken about the impact of that rule in this case. Put simply, if this Court were to apply the reasoning in *Dustman* to the facts of this case, PML would still lose on its claims, but the Village would win on its counterclaims. Thus, the Village would be entitled to relief, and PML would not.

On this issue, PML is challenging the lower courts' factual determination that the parties' breaches were material. A finding that a party materially breached an agreement

[9] PML's argument in Section II is precisely the opposite of what it argues in Section I of its Opening Brief. In Section I, PML contends that a nonbreaching party's election to continue performance under a contract is of little import and does not require the nonbreaching party to render future performance under the contract. (Op. Br. at 13-21) In Section II, PML argues the opposite, *i.e.*, the nonbreaching party's election to proceed in the wake of a breach is all-important. PML correctly states the law (but not the application of the law) in Section II of its Opening Brief, and incorrectly states it in Section I.

is reviewed under the manifest weight of the evidence standard. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 72 (2006).

A. This Court Should Adopt The Reasoning In *Dustman* With Respect To Material And Partial Breaches.

It has long been the law in Illinois that a party cannot enforce a contract unless it first shows that it substantially performed its own obligations under the contract. *Talbot v. Home Savings of Am., F.A.*, 265 Ill. App. 3d 376, 379 (1st Dist. 1994). A party that materially breaches a contract forfeits its right to subsequently enforce that contract. *Id.* "The test of whether a breach is material is whether it is so substantial and fundamental as to defeat the objects of the parties in making the agreement, or whether the failure to perform renders performance of the rest of the contract different in substance from the original agreement." *InsureOne Independent Ins. Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385, ¶ 43 (internal citations and quotations omitted). By contrast, a partial breach is a breach that is less serious and "does not justify the other party's subsequent failure to perform." *Israel v. Nat'l Canada Corp.*, 276 Ill. App. 3d 454, 460 (1st Dist. 1995) (citing *Devon Bank v. Schlinder*, 72 Ill. App. 3d 147, 154 (1st Dist. 1979)). Thus, by definition, a breach may either be material or partial. It may not be both.

In its Opening Brief, PML argues that Illinois law permits a non-breaching party to convert a material breach into a partial breach simply by electing to continue performance under a contract. (Op. Br. at 22-27) According to PML, even if a breach is severe enough to qualify as material, it may be effectively downgraded to a partial breach if the non-breaching party chooses to treat it as such and elects to continue under the contract. This Court has not previously addressed this issue. Neither have most of the appellate districts. The vast majority of Illinois decisions that discuss partial and material breaches are silent

on this point. The First Appellate District, for example, has repeatedly distinguished material and partial breaches by reference to the severity of the breach, without any discussion about what impact, if any, subsequent decision-making by the non-breaching party might have on that distinction.[10]

PML's principal support for this proposition comes from *Dustman*, 2021 IL (4th) 210157, in which the Fourth Appellate District emphasized that a nonbreaching party can elect to treat a material breach as a partial breach:

> Thus, if the injured party becomes aware of a material, uncured breach by the other party, the injured party must make up its mind which direction to go – and then the injured party must abide by that decision. If the injured party chooses to keep the contract alive by treating the breach as "partial," to use Farnsworth's terminology the injured party has to stick to that choice and act accordingly. Where a contract is breached in the course of its performance, the injured party has a choice presented to him of continuing the contract or refusing to go on. If he chooses to continue performance, he has doubtless lost his right to stop performance. To be sure, the injured party may sue for any damages caused by the partial breach, ***but having elected to keep the contract in force, the injured party must continue to perform the contract on pain of likewise incurring liability for a breach.***

Id. at ¶ 38 (internal quotes and citations omitted; emphasis added). Thus, *Dustman* allows a nonbreaching party to treat a material breach as a partial breach. As the highlighted language demonstrates, however, a nonbreaching party cannot have it both ways. A party that elects to continue under a contract must render its own subsequent performance and will face potential liability if it subsequently breaches the contract.

The reasoning in *Dustman* is fully consistent with the reasoning behind the first-to-breach rule and its exception. And it places the contracting parties on an equal footing with respect to future, post-breach performance under a contract. Under the rule articulated in

[10] *See InsureOne*, 2012 IL (1st) 092385, ¶ 33; *Israel*, 276 Ill. App. 3d at 260; *Devon Bank*, 72 Ill. App. 3d at 154 (distinguishing between "total" breaches and "partial" breaches).

Dustman, a party that elects to treat a material breach as a partial breach must do so for all purposes. A party that elects to proceed under a contract cannot insist on continued performance while disclaiming its own obligation to perform. Similarly, a party that elects to treat a material breach as a partial breach cannot later reverse course and claim the other party's prior breach was actually "material." That makes sense, and that reasoning should be adopted by this Court.

B. PML Cannot Prevail Even Under The Rule Set Forth In *Dustman*.

With respect to PML's claims, any discussion regarding *Dustman* is purely an academic exercise. Regardless of the standard employed, PML cannot escape the fact that its breaches of the Agreement were material rather than partial. Thus, PML cannot enforce the Agreement, and the appellate court's ruling against PML on its claims, A.18, should be affirmed. The trial court found that PML materially breached the Agreement by: (1) failing to fund the draw down account; (2) failing to fund the Krueger Road repairs; and (3) failing to convey the Property to the Village. (A.37 at ¶ 45) The appellate court agreed that PML's failure to convey to the Property was a material breach, but declined to consider whether the other failures were material breaches as well. (A.16-17 at ¶ 58)

PML's breaches were unquestionably severe enough to qualify as material. Obtaining the Property was the Village's primary bargained-for objective under the Agreement, and PML's failure to convey that Property completely deprived the Village of that benefit.[11] Similarly, PML's refusal to make its required contributions to the draw-down account and Krueger Road repair fundamentally changed the parties' deal by placing

[11] PML's own principal, Dan Powell, described the Agreement's key terms as "PML agreed to donate the Property to the Village in exchange for the Village authorizing PML to import 1.2 million cubic yards of fill to grade the Property …." (C.435)

financial burdens on the Village and its taxpayers that PML had agreed to bear *ex ante*. Thus, the lower courts' rulings that PML's breaches were material were not against the manifest weight of the evidence.

PML has no credible argument that the Village "elected" to continue under the Agreement, thus reducing PML's breaches to partial breaches. The Village did no such thing, and any argument to the contrary is revisionist history. It is important to note that PML's material breaches did not come until later in the parties' relationship. PML's failure to convey the Property, for example, did not occur until January 2016, and its failure to contribute to the Krueger Road repair did not occur until December 2018. (A.43 at ¶ 3; C.602; A.44 at ¶ 7) By that time, PML had filed this lawsuit and secured mandamus relief (over the Village's objection) compelling the Village to issue a permits, initially through December 2016 and then through December 2018. In October 2016, the Village asked the trial court to terminate PML's access to the Property and appoint a receiver for PML. (C.829-1001) The trial court denied those motions and instead compelled the Village to perform for another two years through December 2018. (C.2034) Thus, the Village did not "elect" to continue under the Agreement, it was compelled to do so.[12]

[12] PML does not cite any part of the trial court record to support its argument that the Village "elected" to continue under the Agreement. PML's sole support on this point comes from a single sentence in the Village's appellate court brief in which the Village erroneously stated that "both parties" elected to continue under the Agreement. (Op. Br. at 22-23) PML correctly quotes from the Village's brief. However, that single sentence (which was in error) is at odds with the entirety of the trial court record in this case. That sentence cannot be credited unless one disregards the Village's repeated efforts in the trial to terminate performance under the Agreement. (C.829-1001) Moreover, the appellate court did not cite or rely on that single sentence. Thus, nothing therein rises to the level of a judicial admission or estoppel.

In its Opening Brief, PML cites several decisions for the proposition that a nonbreaching party may elect to continue performance under a contract (and thus compel the breaching party to also continue performance). (Op. Br. at 22-27) In citing those decisions, however, PML overlooks a critical point, *i.e.*, if the nonbreaching party subsequently commits a material breach, it may find itself liable for breach of contract, and may yet lose its ability to enforce the contract. That is precisely the point emphasized by the Fourth District (in the language highlighted above) in *Dustman*. *Id.* at ¶¶ 38-39.

C. If This Court Adopts The Reasoning In *Dustman*, It Should Reverse The Judgment Against The Village On Its Counterclaims.

The trial and appellate courts both found that PML materially breached the Agreement. (A.16-17 at ¶ 58; A.37-38 at ¶ 45) However, the lower courts found that the Village could not prevail on its counterclaims against PML because the Village had itself materially breached the Agreement. (A.13 at ¶ 48; A.38 at ¶ 46A) That result would change if this Court were to adopt the partial breach rule set forth in *Dustman*. Under *Dustman*, PML's election to continue under the Agreement would render the Village's breaches partial rather than material; thus removing the sole roadblock to the Village's effort to enforce the Agreement.

The trial court found the Village materially breached the Agreement by: (1) failing to issue a permit in February 2013; (2) imposing extra-contractual obligations on PML; and (3) interfering with PML's means and methods under the Agreement. (A.31 at ¶ 30A) The appellate court agreed that the third was a material breach, and declined to make any findings with respect to the other two. (A.13 at ¶ 48) The Village's alleged breaches occurred early in the parties' relationship. Indeed, PML complained about all three in its May 2015 complaint and its 2015 and 2016 mandamus petitions. (C.78-79, 387, 1104-08)

PML did not seek to terminate the Agreement after any of those breaches. On the contrary, PML elected to continue under the Agreement at every turn. *See supra*, at 8-10, 27. And unlike the Village (which was *compelled* to continue under the Agreement), PML's actions were entirely voluntary. Moreover, none of the Village's alleged breaches deprived PML of the benefit of its bargain. For example, PML was able to secure a full four years of operations at the Property through its mandamus petitions. Thus, under the *Dustman* rule – as advocated by PML – the Village's breaches must be viewed as partial.

Indeed, as *Dustman*, 2021 IL App (4th) 210157, ¶¶ 38-39, makes clear, PML's election to continue under the Agreement had consequences. By electing to continue under the Agreement, PML secured the benefits of future performance. However, PML also exposed itself to liability if it subsequently breached the Agreement. And if PML subsequently breached the Agreement (which the lower courts correctly found that it did), PML could not insulate itself from the impact of those future breaches by claiming a "prior material breach" on the part of the Village. PML lost its ability to raise that defense when it elected to treat the Village's prior breach(es) as partial. As *Dustman* correctly holds:

> Unless the injured party decided to end the contract by treating the other party's breach as total, both parties, including the injured party, must continue to perform their contractual promises. If the contract is to stay alive, it shall stay alive as to both parties.

Id. at ¶ 38. *Dustman* aptly captures the central tenant of both the first-to-breach rule and the partial breach doctrine: a nonbreaching party that elects to continue under a contract cannot have it both ways. A nonbreaching party cannot claim that another party's breach is partial for some purposes but material for others. And a nonbreaching party cannot compel other parties to perform under a contract while simultaneously asserting that its own performance is excused. Under the facts of this case, PML's election to continue

under the Agreement means that any breaches by the Village were, by definition, partial breaches. Because the Village was not in material breach, it retained the right to enforce the Agreement. The appellate court's finding to the contrary must be reversed. Judgment should be entered in favor of the Village on its counterclaims, and this case should be remanded for proceedings regarding the remedies available to the Village on those counterclaims.

D. On Remand, The Village Should Be Permitted To Present New Evidence On Damages Caused By PML's Failure To Convey The Property.

In the trial court, PML presented evidence regarding the damages it incurred due to PML's failures to fund the draw down account and pay for repairs to Krueger Road. However, PML did not present evidence of damages caused by PML's third breach of the Agreement (*i.e.*, its failure to convey the Property to the Village). When the case was tried in 2019 and early 2020, the Village was not seeking money damages for that breach. Rather, the Village was seeking the remedy of specific performance. (C.5382) At the time, specific performance was possible because the parcels that comprise the Property had not been irrevocably lost. That has now changed, and specific performance is no longer viable. (C.8686) Accordingly, if this Court determines that the Village has a right to relief for PML's breaches, the Village respectfully asks the Court to remand with instructions that the Village be permitted to present evidence regarding damages incurred as a result of PML's failure to convey the Property.

III. This Court Should Find That PML Is Barred From Recovering Lost Profits Damages Under The New Business Rule.

In Part II of its Opening Brief, PML argues that there is a disparity between the parties' respective damages, and that disparity shows the appellate court's ruling is

inequitable. (Op. Br. at 28) On this point, PML is simply wrong. The truth is that PML was not entitled to any damages in this case. As the Village argued below, it was error for the trial court to award any damages to PML. Below, the Village raised numerous arguments on this point, including the following.

First, the Village argued that the damages awarded to PML violated the new business rule. In 2012, PML was a start-up company with no prior history of operations. At trial, PML did not present any evidence relating to the profitability of any similar businesses. Despite that fact, the trial court awarded PML millions in lost profits damages.

Second, the trial court awarded PML money damages based on evidence of costs incurred by separate company: DA Development. At trial, PML supported its damages claims with financial statements, invoices, checks and other documents that related to Powell's other company: DA Development. (*See* Village 2/16/22 2d Dist. Br. at SA.1-40) PML claimed that the "DA Development" heading on those documents was simply due to a mix-up in corporate stationary. (PML 11/12/21 2d Dist. Br. at 44) That is a "trespass on credulity"[13] that easily clears even the deferential "manifest weight of the evidence" hurdle. The record in this case is replete with documents produced by numerous parties (including banks, trucking companies, vendors and PML's own counsel) that reflect their dealings with DA Development – not PML. (*See id.*)

Third, PML never revealed how it calculated its damages. PML provided the trial court with very large (and very specific) cost figures (*e.g.*, $7,043,161). (R.2148-49) But PML never showed how it arrived at those numbers. PML simply provided the trial court with "samples" of invoices. But those samples were riddled with errors, and, in any event,

[13] Adlai Stevenson, 25 October 1962.

accounted for only a fraction of the claimed cost overruns. (*See*, *e.g.*, E.1377, 1380-82, 1384, 1387-91, 1448, 1451-52, 1455-60) As if that were not enough, it was mathematically impossible for PML to have incurred the costs it claimed to have incurred. PML's experts claimed that they based their damages analysis on PML's general ledger. (R.2147-48, 2153-58; E.2863-3139) But PML's general ledger shows only $5.9 million in *total* costs – well below the $9.34 million claimed by PML. PML's claimed damages also exceeded the amounts on its income statements. (E.1087-89, 2818-62)

All of those arguments were briefed extensively below. (*See*, *e.g.*, Village 8/9/21 2d Dist. Br. at 35-47; Village 2/16/22 2d Dist. Br. at 1-3, 8-19 and SA 1-40) In light of its ruling that neither party was entitled to relief, however, the appellate court did not reach any of those arguments. If this Court finds that PML is entitled to any relief on its claims, those arguments will need to be addressed, either in this Court or in the lower courts. The Village acknowledges that many of its damages-related arguments are fact-intensive and are likely better addressed in the lower courts on remand. However, the Village's argument under the new business rule is not fact intensive. Moreover, it is potentially dispositive with respect to all damages claimed by PML. Thus, if the Court were to find that PML is entitled to enforce the Agreement, it would significantly conserve judicial resources if the Court were to decide this issue rather than remand for further briefing and further proceedings in the lower courts.

A court's award of damages is typically reviewed under the manifest weight of the evidence standard. *B&Y Heavy Movers, Inc. v. Fluor Constructors, Inc.*, 211 Ill. App. 3d 975, 984 (1st Dist. 1991). However, courts examining the application of the new business rule have viewed it as a question of law. *See Ivey v. Transunion Rental Screening Sol.*,

Inc., 2022 IL 127903, ¶ 31 (applying *de novo* standard in reviewing lower courts' application of the new business rule on a summary judgment ruling); *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶ 23 (reviewing a trial court's granting of a motion *in limine* excluding evidence of lost profits); *see also SK Hand Tool Corp. v. Dresser Indus., Inc.*, 284 Ill. App. 3d 417, 426 (1st Dist. 1996) (a "speculative award may be considered erroneous as a matter of law.") Thus, the Village submits that this Court should examine the application of the new business rule *de novo.*

In *Ivey*, 2022 IL 127903 (pet. for rehearing filed Jan. 3, 2023), this Court recently reaffirmed the new business rule. Under that rule, newly-formed businesses are generally barred from recovering lost profits because "a new business has yet to show what its profits actually are" and "evidence of lost profits in a new business is too speculative to sustain the burden of proof." *See Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 249 (2006); *Meriturn Partners, LLC*, 2015 IL App. (1st) 131883 at ¶¶ 18, 23. As this Court noted in *Ivey*, there is a narrow exception to the new business rule. Courts have permitted new businesses to recover lost profits in situations where a plaintiff is able to present evidence of actual profits from another business that is substantially similar to the plaintiff. *Ivey*, 2022 IL 127903, at ¶¶ 31-34. Typically, the proxy business is one that operates on the same (or nearby) location and/or sells the same (or very similar) products or services. The new business rule is rooted in the notion that "recovery of lost profits cannot be based on conjecture or speculation." *Meriturn Partners, LLC*, 2015 IL App. (1st) 131883 at ¶ 18.

Against that legal backdrop, the trial court should have outrightly rejected PML's damages claims *in toto*. PML was a newly-formed start up business in 2012. It had no

prior operating history. And yet the trial court awarded PML over $5 million in lost profits damages. Those damages were based entirely on Powell's 2012 estimated budget, which set forth his estimates for PML's costs and revenues, and predicted a 64% profit margin. (E.1090-92) But Powell's 2012 estimate was just that: an estimate. Powell prepared that estimate before he owned the Property, before he formed PML, before he entered into the Agreement, and before he knew how work at the Property would unfold. (R.654-57) In short, Powell's estimate was sheer speculation.

PML made no effort to substantiate Powell's 2012 estimate with evidence of actual costs, revenues, or profits from any similar business. This should have been easy for PML to do. Its principals (Powell and Maneval) had other fill projects in the Village. (R.652, 952, 1385) However, PML avoided introducing any such evidence. PML's experts did not examine the revenue from DA Development's other projects, and were not certain whether they looked at the costs for those projects, either. (R.2191-95) That is fatal to PML's damages claim, because it means that Powell's 2012 estimate stands alone – without any real-world basis of comparison. As this Court emphasized in *Ivey*, new businesses are only permitted to recover lost profits if they present evidence of actual results from a similar business. No such evidence was presented in this case.

PML cannot salvage its damages claim by arguing that Burton and Neser thought Powell's 2012 numbers were "reasonable." (R.2112, 2328) That is precisely the type of speculative expert testimony the new business rule is intended to prevent. Neither of them compared Powell's 2012 estimate to actual results from similar businesses engaged in similar projects. Instead, they did something completely different: they tried to substantiate Powell's 2012 estimate by using national market data (*e.g.*, cost data from Gleeds' 130-

year history, a national database, discussions with contractors, and published labor rates). (R.2194, 2317-18) Such market data is not a proper substitute for presenting actual results from a similar project. Moreover, surveys of data obtained from multiple unidentified businesses are not a substitute for real-world results from a single substantially-similar business. *See Trig-G, Inc.*, 222 Ill. 2d at 250; *Milex Prod., Inc v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177, 191 (2d Dist. 1992). While PML's experts supposedly considered numerous different datapoints (of which some may have been local, but many were unquestionably national, *see* R. 2194, 2317-18), PML never identified any of those datapoints with any specificity. Thus, there is no way to know if any involved projects or businesses similar to the one at issue here. Under *Ivey*, if a plaintiff seeks to establish lost profits by comparison to a proxy business, the proxy must bear a strong resemblance to the plaintiff. Here, PML did not meet that standard.

CONCLUSION

For the reasons set forth herein, the Village respectfully asks this Court to: (1) affirm the appellate court's ruling with respect to PML's claims (*i.e.* affirm entry of judgment against PML on its claims); and (2) reverse the appellate court's ruling with respect to the Village's counterclaims (*i.e.*, reverse the entry of judgment in favor of PML); and (3) remand this case for further proceedings with respect to the remedies available to the Village on its counterclaims.

Dated: January 6, 2023

Respectfully submitted,

VILLAGE OF HAWTHORN WOODS,
an Illinois municipal corporation

By: /s/ Timothy D. Elliott

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) Table of Contents and Statement of Points and Authorities, the Rule 341(c) Certificate of Compliance, the Certificate of Service, and those matters to be appended to the brief under Rule 342(a), is 41 pages.

Dated: January 6, 2023

/s/ *Timothy D. Elliott*
Timothy D. Elliott

CERTIFICATE OF SERVICE

You are hereby notified that on January 6, 2023, I, Timothy D. Elliott, an attorney, caused to electronically filed with the Clerk of the Illinois Supreme Court through the Odyssey/eFileIL system, the *Brief and Supplementary Appendix Of Defendant/Counter-Plaintiff/Appellee Village Of Hawthorn Woods*. On January 6, 2023 a copy of the foregoing will also be electronically mailed to the following counsel:

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Within five days of acceptance, by the Court, the undersigned certifies that 13 paper copies of the foregoing will be sent to the above court.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct

Dated: January 6, 2023

/s/ *Timothy D. Elliott*
Timothy D. Elliott

NO. 128770

In the

Supreme Court of Illinois

PML DEVELOPMENT LLC, an Illinois limited liability company,

Plaintiff/Counter-Defendant/Appellant,

v.

VILLAGE OF HAWTHORN WOODS, a municipal corporation,

Defendant/Counter-Plaintiff/Appellee.

Petition for Leave to Appeal from the Appellate Court,
Second Judicial District, No. 2-20-0779.
There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, Illinois, No. 15 CH 848.
The Honorable Luis A. Berrones, Judge Presiding.

SUPPLEMENTARY APPENDIX

Dated: January 6, 2023

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NO. 2-20-0779

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PML DEVELOPMENT LLC, Plaintiff/Appellee/Cross-Appellant, v. VILLAGE OF HAWTHORN WOODS, Defendant/Appellant/Cross-Appellee.	)	Appeal from the Circuit Court of the 19th Judicial Circuit, Lake County, IL Case No. 15 CH 848 Trial Judge: Hon. Luis A. Berrones Date of Notice of Appeal: December 21, 2020
VILLAGE OF HAWTHORN WOODS, Counter-Plaintiff/Appellant/ Cross-Appellee, v. PML DEVELOPMENT LLC, *et al.*, Counter-Defendants/Appellees/ Cross-Appellants.	)	Date of Judgment: November 20, 2020 Rule conferring appellate jurisdiction: Ill. S. Ct. R. 301

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

PML DEVELOPMENT LLC, AN ILLINOIS
LIMITED LIABILITY COMPANY
Plaintiff/Petitioner

v.

VILLAGE OF HAWTHORN WOODS, A
MUNICIPAL CORPORATION
Defendant/Respondent

Reviewing Court No: 2-20-0779
Circuit Court/Agency No: 2015CH000848
Trial Judge/Hearing Officer: LUIS A. BERRONES

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CERTIFICATION OF SUPPLEMENT TO THE RECORD

The supplement to the record has been prepared and certified in the form required for transmission to the reviewing court. It consists of:

1 Volume(s) of the Supplement to the Common Law Record Section, containing 320 pages
1 Volume(s) of the Supplement to the Report of Proceedings Section, containing 28 pages
1 Volume(s) of the Supplement to the Exhibits Section, containing 0 pages

I hereby certify this record pursuant to Supreme Court Rule 324, this 19 DAY OF APRIL, 2021

Erin Cartwright Weinstein

(Clerk of the Circuit Court or Administrative Agency)

ERIN CARTWRIGHT WEINSTEIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

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SECOND JUDICIAL DISTRICT
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1 Volume(s) of the Supplement to the Common Law Record Section, containing 0 pages
1 Volume(s) of the Supplement to the Report of Proceedings Section, containing 0 pages
1 Volume(s) of the Supplement to the Exhibits Section, containing 52 pages

I hereby certify this record pursuant to Supreme Court Rule 324, this 3 DAY OF AUGUST, 2021

Erin Cartwright Weinstein

(Clerk of the Circuit Court or Administrative Agency)

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DEFENDANT	114	VHW BUILDING DEPT STOP WORK ORDER_0005	SUP2 E 52-SUP2 E 54

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