No. 127177

IN THE
SUPREME COURT OF ILLINOIS

WALWORTH INVESTMENTS-LG, LLC,	) Appeal from the Illinois) Appellate Court,) First District, No. 1-19-1937
Plaintiff-Appellee,	)
v.	) There Heard on Appeal from the) Circuit Court of Cook County,) County Department, Law Division
MU SIGMA, INC. and DHIRAJ C. RAJARAM,	) Circuit No. 2016 L 002470
Defendants-Appellants.	) Hon. Daniel J. Kubasiak and) Hon. John C. Griffin,) Judges Presiding

REPLY BRIEF OF DEFENDANTS-APPELLANTS MU SIGMA, INC AND DHIRAJ C. RAJARAM

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Oral Argument Requested

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ARGUMENT

Walworth's brief fails to justify the errors in the appellate court's decision.

The appellate court's central, erroneous ruling was that the anti-reliance provision at issue in this case—in which Walworth represented that Defendants made no representations to Walworth about the financial condition of Mu Sigma except as set forth in the Repurchase Agreement itself—was somehow "ambiguous." Walworth's efforts to defend that ruling all fail. Most critically, Walworth does not—because it cannot—dispute that the anti-reliance language used in the parties' Repurchase Agreement is indistinguishable from anti-reliance provisions that Delaware courts have consistently found to be *un*ambiguous and have enforced to prevent parties like Walworth from asserting claims (as Walworth tries to do here) based on statements supposedly made to them outside of their agreements.

Failing to enforce the anti-reliance language in this case would therefore undermine the predictability and certainty of Delaware law governing contracts between sophisticated parties, and create an inconsistency between how such contract language is applied in Illinois courts and how it is applied elsewhere. As the Delaware Supreme Court stated in holding that Delaware public policy strongly supports the enforcement of anti-reliance clauses: "The efficient operation of capital markets is dependent upon the uniform interpretation and application of the same language in contracts." *RAA Mgmt., LLC* v. *Savage Sports Holdings Inc.*, 45 A.3d 107, 119 (Del 2012).

Nor would enforcing such language, as Walworth argues, "immunize fraud." Rather, as Delaware courts have recognized, it would *prevent* fraud by parties like Walworth that promise, in writing, that *no* extra-contractual statements were made to them and then, years later—after having buyer's or seller's remorse—reverse course to claim that extra-contractual representations *were* in fact made to it.

While Walworth nonetheless raises strained arguments to try to create "ambiguity" where none exists, these arguments fail, and this Court, like Delaware courts, should not permit parties like Walworth to avoid their contractual obligations by alleging claims based on alleged extra-contractual statements that such parties agreed were never made to them.

Unable to defend successfully the appellate court's "ambiguity" ruling, Walworth seeks affirmance on alternative grounds that the circuit court correctly rejected, and the appellate court did not adopt.

Thus, Walworth argues that Delaware does not enforce anti-reliance provisions when a fiduciary negotiates the transaction. But no Delaware case supports a "fiduciary exception" to the enforcement of anti-reliance provisions, and Walworth itself cites a Delaware decision that enforces an anti-reliance provision in precisely that situation. Similarly, Walworth argues that anti-reliance provisions do not bar claims based on alleged extra-contractual "omissions," when Delaware courts have repeatedly rejected that very effort to end run anti-reliance clauses.

Walworth's remaining arguments fare no better. The decision below should be reversed, and the circuit court's rulings reinstated.

I. WALWORTH CANNOT DEFEND THE APPELLATE COURT'S ERRONEOUS FAILURE TO ENFORCE THE ANTI-RELIANCE PROVISION

A. Walworth Fails to Show that the Anti-Reliance Provision Is "Ambiguous"

The anti-reliance provision, contained in §3(e)(i) of the parties' Repurchase Agreement, is straightforward and unambiguous. It provides:

> **3.** ***Stockholder [Walworth] represents and warrants that***:…(e) Disclosure of Information. Stockholder has received all the information it considers necessary or appropriate for deciding whether to sell the Repurchased Stock to the Company [Mu Sigma] pursuant to this Agreement. Stockholder acknowledges (i) that ***neither the Company, nor any of the Company's Related Parties (as defined below), has made any representation or warranty, express or implied, except as set forth herein, regarding any aspect of the sale and purchase of the Repurchased Stock, the operation or financial condition of the Company or the value of the Repurchased Stock*** and (ii) that the Company is relying upon the truth of the representations and warranties in this Section 3 in connection with the purchase of the Repurchased Stock hereunder.

(A059 (emphasis added).)

Walworth cannot reasonably dispute that this language meets the requirements of an enforceable anti-reliance provision under Delaware law: (i) it contains a representation that Mu Sigma made no representations to Walworth other than those set forth in the Agreement itself; (ii) the representation is from Walworth's "point of view;" (iii) it is in addition to a standard integration clause (§6(g)); and (iv) another section (§4) provides the

written representations that Walworth *was* relying upon. In addition, the Agreement contains a general release of Defendants, which further supports the anti-reliance clause's effectiveness. *See IAC Search, LLC* v. *Conversant LLC*, 2016 WL 6995363, at *7 (Del. Ch. Nov. 30, 2016).

Walworth identifies no language in §3(e)(i) that it contends is ambiguous. Nor does it dispute that, in the nine decisions listed in Defendants' "Anti-Reliance Language Comparison Chart" (the "Anti-Reliance Chart") in Defendants' opening brief, Delaware courts have ruled that provisions with wording substantially the same as §3(e)(i) were *un*ambiguous and enforceable. (A102-A108.)

Instead, Walworth, like the appellate court, wrongly argues that the next subsection, §3(e)(ii), somehow renders the language in §3(e)(i) ambiguous. In fact, it does the opposite. By acknowledging that Mu Sigma was relying on the truth of Walworth's anti-reliance representation, Walworth acknowledged its *importance*, making the anti-reliance provision here even *stronger*. No other interpretation makes sense. Unsurprisingly, Walworth does not cite any decision from Delaware, or any other jurisdiction, holding that such an acknowledgment renders otherwise unambiguous anti-reliance language "ambiguous."

To the extent Walworth is arguing that §3(e)(i) cannot be read to be an anti-reliance provision because the word "relying" appears in §3(e)(ii) but not in § 3(e)(i), Delaware law is to the contrary. Under Delaware law, "[t]he

language to disclaim…reliance may vary." *FdG Logistics LLC* v. *A&R Holdings Inc.*, 131 A.3d 842, 860 (Del. Ch. 2016). In particular, effective anti-reliance language does not require a "specific formula, such as the two words '*disclaim reliance*.'" *Prairie Capital, III, L.P.* v. *Double E. Holding Corp.,* 132 A.3d 35, 51 (Del. Ch. 2015). Rather, it is sufficient if a provision defines the universe of representations that were made to a party as being those contained in the Agreement itself, *id.*, exactly as 3(e)(i) does here.

For example, in *ChyronHego Corp.* v. *Wight*, 2018 WL 3642132, at *5 (Del. Ch. July 31, 2018), the Delaware Court of Chancery found unambiguous and enforced an anti-reliance provision nearly identical to the one here that also did not use the word "reliance." That provision stated that "neither the Company, any Seller nor any of their respective Affiliates or advisors have made any representation…with respect to the Company, its business or the transactions contemplated by this Agreement, other than those representations…explicitly set forth in this Agreement." Similarly, *none* of the anti-reliance provisions in the nine decisions listed in the Anti-Reliance Chart refer specifically to "disclaiming reliance"—indeed, most of them do not mention "reliance" or "rely" at all—yet each decision found the provision at issue unambiguous and enforceable as a matter of law. (A102-108.)

Walworth's and the appellate court's failure to offer *any* interpretation of §3(e)(i) as being anything other than an anti-reliance provision confirms that

the provision is not ambiguous. Walworth contends it need not offer an alternative interpretation. (WW Br. 26.) But that is not the law.

"[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Rhone-Poulenc Basic Chemicals Co.* v. *Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). Thus, in *Universal Am. Corp.* v. *Partners Healthcare Sols. Holdings, L.P.*, 176 F. Supp. 3d 387, 402 (D. Del. 2016), the court expressly ruled that the anti-reliance clause there (similar to the one here) was "not an ambiguous provision that is 'reasonably or fairly susceptible' to different interpretations."

Similarly, in decisions Walworth itself cites, when Delaware courts decline to enforce language claimed to be an anti-reliance clause, they provide alternative interpretations of that language. *See, e.g.*, *Sanyo Elec. Co.* v. *Intel Corp.*, 2021 WL 747719, at *13 (Del. Ch. Feb. 26, 2021) (language was merely standard integration clause); *MP USA Holdings LLC* v. *DFI USA, LLC*, 2021 WL 3144727, at *11-12 (Del. Ch. July 23, 2021) (language merely "acknowledge[d] the risk inherent in [the plaintiff's] investment," and "expressed [the plaintiff's] ability to protect itself against the risk inherent in its investment").

By failing to offer an alternative interpretation of §3(e)(i), Walworth (and the appellate court) effectively render Walworth's representation in that provision meaningless. That would violate the cardinal rule of contract

interpretation that courts are required to "give each [contractual] provision and term effect, so as not to render any part of the contract mere surplusage." *Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010); *see also IAC Search,* 2016 WL 6995363, at *7 (rejecting interpretation that would render anti-reliance provision "duplicative of [other] provisions").

The other decisions Walworth relies on (WW Br. 21-26) do not apply here, as the purported anti-reliance language in those cases was ineffective either because—unlike here—another provision in the party's agreement expressly *preserved* fraud claims, or the relevant language (i) consisted solely of a standard integration clause; (ii) was not from plaintiff's "point of view"; (iii) did not identify information the plaintiff *was* relying on; and/or (iv) indicated that the plaintiff *was* relying on extra-contractual information. *See Sanyo Electric*, 2021 WL 747719, at *13 ("standard integration clause"; did not "identify the specific information on which [plaintiff] relied"); *MP USA*, 2021 WL 3144727, at *11-12 (standard "integration clause" that "does not 'come from the point of view'" of the plaintiff); *Anschutz Corp.* v. *Brown Robin Capital, LLC,* 2020 WL 3096744, at *14 (Del. Ch. June 11, 2020) ("Buyer was expressly representing that it *did rely* on extra-contractual information"); *FdG Logistics*, 131 A.3d at 860 (no "affirmative expression" by buyer that it relied only on written representations); *Kronenberg* v. *Katz*, 872 A.2d 568, 592 (Del. Ch. 2004) (standard integration clause); *TrueBlue, Inc.* v. *Leeds Equity Partners IV*, 2015 WL 5968726, at *9 (Del. Super. Sept. 25, 2015) (agreement

expressly "contemplated fraud claims would survive"); *Anvil Holding Corp.* v. *Iron Acquisition Co.*, 2013 WL 2249655, at *7 n.29 (Del. Ch. May 17, 2013) (parties reserved all rights with respect to fraud claims).

Indeed, subsequent decisions have made clear that *Anvil,* which Walworth cites twice (WW Br. 21, 26), does not support Walworth's position. For example, in *Prairie Capital*, the court stated:

> I do not read *Anvil* as requiring a specific formula, such as the two words "*disclaim reliance*." Language is sufficiently powerful to reach the same end by multiple means, and drafters can use any of them to identify with sufficient clarity the universe of information on which the contracting parties relied. Transaction planners can limit their risk by using tested formulations, but they need not employ magic words.

132 A.3d at 51. And, as the court noted in *FdG Logistics*, the disclaimer in *Anvil* was not from the plaintiff's point of view. 131 A.3d at 860. Not so here.[1]

B. Walworth's Reliance on Drafting History Is Unavailing

Having failed to establish ambiguity in the express language of the Repurchase Agreement's anti-reliance provision, Walworth (like the appellate court) wrongly turns to the Repurchase Agreement's drafting history to try to create an ambiguity where none exists. (WW Br. 25.) The effort fails for two reasons.

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[1] *Matsuura* v. *Alston & Bird*, 166 F.3d 1006 (9th Cir. 1999), cited by Walworth, relied on a 1982 decision (*Norton*) involving a boilerplate real estate contract and unsophisticated plaintiff. The Delaware Supreme Court subsequently limited *Norton* to its facts. *See RAA Mgmt.,* 45 A.3d at 118.

First, under Delaware law, extrinsic evidence may not be used to interpret the parties' intent or create ambiguity where, as here, the language of the agreement is clear on its face. *See Eagle Indus., Inc.* v. *DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

Second, the extrinsic evidence supports Defendants' position, not Walworth's. The record unmistakably shows that Walworth's counsel removed from an earlier draft the statement that Walworth references—to the effect that Walworth was not relying on *any* representations or warranties by Mu Sigma—only because she *added*, at the same time, representations by Mu Sigma that Walworth *was* relying on (§4). (SUP SEC C159-60.) Neither the appellate court nor Walworth addresses that clear documentary evidence and obvious explanation of why the parties removed that language.

C. Contrary to Walworth's Argument, Delaware Policy Squarely Supports Enforcement of the Anti-Reliance Provision

Finally, in a last gasp effort, Walworth argues that enforcing the anti-reliance provision here would supposedly "immunize fraud." (WW Br. 3.) The Delaware Supreme Court has held squarely to the contrary, ruling that Delaware policy *favors* "enforcing contractually binding, written disclaimers of reliance on representations outside of a final sale agreement." *RAA Management*, 45 A.3d at 116-17.

As the Supreme Court explained: "To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing—the lie that it was relying only on

contractual representations and that no other representations had been made…." *Id.* at 117 (quoting *ABRY Partners V, L.P.* v. *F&W Acquisition LLC*, 891 A.2d 1032, 1057-58 (Del. Ch. 2006)). In other words, "a party cannot promise…that it will not rely on…representations outside of the agreement and then shirk its own bargain in favor of a 'but we did…rely on those representations' fraudulent inducement claim." [2] *Id.*

Like the appellate court, Walworth simply ignores *RAA Management*, even though it is the controlling Delaware Supreme Court decision on anti-reliance clauses.

Walworth also suggests that its claims are not based on the type of vague, disputed, and generally oral statements that Delaware law seeks to discourage as a basis for fraud claims because of the "reality" that "courts are not perfect in distinguishing meritorious from non-meritorious claims of fraud." *ABRY*, 891 A.2d at 1058. In fact, such statements are at the core of Walworth's pleadings.

Thus, despite earning more than a 600% return on its Mu Sigma investment, Walworth asserts that Defendant Rajaram, Mu Sigma's CEO, defrauded Walworth into selling its stock back to Mu Sigma by purportedly saying that (i) Mu Sigma was moving from "explosive growth to steady growth" (WW Br. 7) which in fact it was (Op. Br. 6); and (ii) there was "no growth on

[2] While the *RAA Management* Court applied New York law, the Court cited Delaware cases and said "the results would be the same under Delaware law," and that *ABRY* "accurately states Delaware law." 45 A.3d at 118.

the horizon" (WW Br. 28), which Walworth's Pat Ryan, Jr. admitted at his deposition Rajaram did *not* say. (Op. Br. 13.) Walworth also claims that Rajaram "bragged" in an email about "dup[ing] Walworth" (WW Br. 1), when the email says nothing of the sort and instead indicates Mu Sigma's belief that it never said anything inaccurate to Walworth.[3] (C 2417 V2.)

In sum, Delaware courts enforce anti-reliance provisions to prevent claims based on precisely the types of allegations that Walworth raises here.[4]

II. WALWORTH'S ALTERNATIVE GROUNDS FOR AFFIRMANCE FAIL

Unable to defend the basis on which the appellate court actually rested its ruling, Walworth reaches for two alternative grounds to uphold that ruling.

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[3] Walworth's unfounded and inappropriate allegations also extend to its original complaint, where Walworth alleged that Mr. Rajaram was motivated to commit fraud due to his belief in the Hindu deity Shiva (C76-77), an offensive slur that Walworth deleted in its amended pleading after media reports highlighted it.

[4] The two *amicus* briefs, which also incorrectly argue that enforcing the anti-reliance provision would supposedly "immunize fraud," are similarly at odds with Delaware law, which is no doubt why *amici* rely on inapposite law from other jurisdictions. *See* Illinois Trial Lawyers' Association Br. at 1; Northwestern Legal Clinic Br. at 5. To the extent the *amici* address Delaware decisions, their arguments are wrong. Contrary to ITLA's arguments, Delaware courts have *never* recognized a "fiduciary exception" to enforcing anti-reliance provisions. (*See* below, at 12.) And, the Legal Clinic (at 4) incorrectly asserts that "Delaware law states that 'even an explicit anti-reliance clause does not bar fraud claims.'" But the passage it characterizes as "Delaware law" merely describes what the "plaintiffs argue[d]" in the case. *See Kronenberg*, 872 A.2d at 589. That court found, as discussed above, that there was no anti-reliance provision—merely a standard integration clause. *Id.* at 592.

The appellate court did not adopt either argument, and the circuit court correctly rejected both of them as contrary to Delaware law.

A. There Is No "Fiduciary Exception" to Delaware's Enforcement of Anti-Reliance Provisions

Walworth first argues that Delaware does not enforce anti-reliance provisions where a fiduciary negotiated the transaction at issue. (WW Br. 29.) But, as the circuit court correctly found, there is no such exception to Delaware's unwavering enforcement of anti-reliance provisions. (A040-A041.)

Indeed, Walworth has never identified *any* Delaware decision applying such an exception. To the contrary, Walworth cites a Delaware decision ruling that an anti-reliance provision *did* bar claims that a company's president—an acknowledged fiduciary—made extra-contractual statements that fraudulently induced the company to enter a separation agreement. *See Xu Hong Bin* v. *Heckmann Corp*, 2009 WL 3440004, at 10 n.36 & 11 (Del. Ch. Oct. 26, 2009).[5]

Walworth's argument that, despite contrary authority, this Court should nonetheless interpret Delaware law as recognizing a "fiduciary

[5] Walworth wrongly asserts this ruling was "dicta." (WW Br. 34.) The court expressly ruled that the anti-reliance provision at issue barred the defendant's fraudulent inducement defense based on *extra-contractual* statements. 2009 WL 3440004, at *11. The court's later statement that it had "not specifically rule[d] on" the fraudulent inducement defense, *id.* at *13 n.51, refers to the separate defense that the plaintiff allegedly made misrepresentations *in the separation agreement itself*, to which the anti-reliance provision did not apply. *Id.* at *11.

exception" to the enforcement of freely negotiated anti-reliance provisions by sophisticated parties (WW Br. 29) is meritless.

As an initial matter, as a matter of comity, this Court should be wary of creating a novel exception to Delaware's enforcement of anti-reliance provisions. *Cf. Lake River Corp.* v. *Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) ("The responsibility for making innovations in the common law of Illinois rests with the courts of Illinois….").

Also, Delaware courts have consistently refused to create exceptions like the one Walworth seeks. In *RAA Management*, for example, the Delaware Supreme Court declined to create a "peculiar-knowledge" exception—that is, a rule that would make anti-reliance provisions unenforceable where the facts at issue were "peculiarly within the misrepresenting party's knowledge." 45 A.3d at 115 (citation omitted).

The Delaware Supreme Court recognized that such an exception—which resembles the "fiduciary exception" Walworth urges—is particularly inappropriate where, like here, "sophisticated parties could have easily insisted on contractual protections for themselves." *Id.*; *see also ABRY*, 891 A2d at 1061-62 ("[T]he common law ought to be especially chary about relieving sophisticated business entities of the burden of freely negotiated contracts.").

Indeed, the exception Walworth urges would render anti-reliance provisions useless in a variety of commonplace transactions, such as stock

repurchases, that are routinely negotiated by company officials with individual stockholders. In such situations, the Delaware courts recognize that the parties' relationship becomes contractual rather than fiduciary. *See Dohmen* v. *Goodman*, 234 A.3d 1161, 1172 (Del. 2020) (no fiduciary duty of disclosure where a general partner individually negotiated a capital contribution from a limited partner); *Blaustein* v. *Lord Baltimore Capital Corp.*, 2013 WL 1810956, at *17 (Del. Ch. Apr. 30, 2013) ("[Plaintiff's] interest in obtaining a higher redemption price was in opposition to the interests of [the company] and its shareholders generally. That circumstance is not one that, by itself, would give rise to a fiduciary relationship…").

Walworth mixes apples and oranges in arguing that a fiduciary exception should apply because Delaware prohibits charter provisions and contracts that prospectively exculpate directors for breaching their duty of loyalty to stockholders. (WW Br. 30.) Anti-reliance provisions do not "exculpate" a fiduciary breach. Rather, they simply state what information the parties did and did not rely on in connection with a transaction and bar parties like Walworth from walking away from their representations on that subject. *See ABRY*, 891 A.2d at 1057 ("[A] law intolerant of fraud should abhor parties that make [anti-reliance] representations knowing they are false.").

Walworth's reliance on *Manti Holdings, LLC* v. *Carlyle Grp.*, 2022 WL 444272 (Del. Ch. Feb. 14, 2022), fails for the same reason. *Manti* involved a general stockholder's agreement that defendants argued waived breach of

fiduciary duty claims in a future transaction. *Id.* at *3. The Repurchase Agreement here does no such thing. It merely states what the parties did and did not reply upon in connection with that Agreement.

Walworth also misconstrues *McDonald's Corp.* v. *Easterbrook*, 2021 WL 351967 (Del. Ch. Feb. 2, 2021), which Walworth incorrectly claims supports a "fiduciary exception." (WW Br. 33.) There, McDonald's former CEO argued that purported anti-reliance language in his separation agreement precluded McDonald's claim that he fraudulently induced the company to enter into the agreement instead of firing him. The court did *not* reject the CEO's argument because he was a fiduciary, but, rather, because he relied on a "standard integration clause" that was insufficient to bar reliance on extra-contractual statements. *Id.*, at *6-7. The court said that, if the CEO had wanted protection from claims of extra-contractual fraud, he "need only [have] bargain[ed] for a clear anti-reliance provision, as defined by our courts in legion authority."[6] *Id.* at *8. There is no hint of endorsing a fiduciary exception in that ruling.

Walworth points to a footnote in *McDonald's* in which the court noted that, even if the agreement had contained an anti-reliance clause, it "would have no bearing on the Company's ability to assert that [the former CEO] breached his fiduciary duty of candor and good faith…by hiding and misrepresenting material facts during the Company's investigation of his

[6] The court also noted that—also unlike here—the CEO's separation agreement did *not* include any release of claims against the CEO by the company. *Id.* at *2.

misconduct." *Id.* at *6 n.46. That footnote simply acknowledges the unremarkable point that an anti-reliance provision in the separation agreement would not reach the company's *independent* claim—separate from the Company's fraudulent inducement claim—alleging the former CEO breached his fiduciary duties by engaging in improper sexual relations with employees and lying about it during the Company's investigation. *See id.* at *1. Here, in contrast, Walworth's only alleged fiduciary duty claim is that Defendants supposedly made misrepresentations to induce it to enter the Repurchase Agreement itself.[7]

B. The Anti-Reliance Language Bars "Omissions" Claims

As a second alternative ground for at least partial affirmance, Walworth argues that the anti-reliance provision should not be interpreted as barring claims alleging "omissions," rather than misrepresentations, in extra-contractual statements. Again, the appellate court did not adopt that theory, and the circuit court correctly rejected it as contrary to Delaware law. (A039-A040.)

In a series of decisions that Walworth fails to mention, Delaware courts have repeatedly ruled that plaintiffs cannot evade an anti-reliance clause's effect by pleading reliance on purported "omissions" (as opposed to misrepresentations) in extra-contractual statements. *See Prairie Capital*,

[7] Walworth also mistakenly relies on *Marler* v. *Wulf*, 2021 IL App. (1st) 200200-U, an unpublished, non-precedential decision applying Illinois, not Delaware, law. (WW Br. 33.)

132 A.3d at 52-55; *Universal American*, 176 F. Supp. 3d at 401; *MidCap Funding X Trust* v. *Graebel Cos.,* 2020 WL 2095899, at *21 (Del. Ch. Apr. 30, 2020); *Infomedia Grp., Inc.* v. *Orange Health Solutions, Inc.*, 2020 WL 4384087, at *7-8 (Del. Super. July 31, 2020).

In *Prairie Capital,* for example, the court explained that anti-reliance provisions bar claims based on both extra-contractual misrepresentations *and* "omissions," because, otherwise, a party could improperly avoid its agreement through clever pleading whereby an extra-contractual statement is merely recharacterized not as a misrepresentation, but as an "omission":

> Every misrepresentation, to some extent, involves an omission of the truth. Consequently, any misrepresentation can be re-framed for pleading purposes as an omission. If a plaintiff could escape [an anti-reliance] provision…by re-framing an extra-contractual misrepresentation as an omission, then the clause would be rendered nugatory. When parties identify a universe of contractually operative representations in a written agreement, they remain in that universe. A party that is later disappointed with the written agreement cannot escape through a wormhole into an alternative universe of extra-contractual omissions…

132 A.3d at 52-53.

Walworth cites *TransDigm Inc.* v. *Alcoa Global Fasteners*, *Inc.*, 2013 WL 2326881 (Del. Ch. May 29, 2013), but that decision is an outlier rejected by *Prairie Capital* and other Delaware decisions. As *Prairie Capital* explains, the critical point under Delaware law is that the anti-reliance provision defines the universe of representations that were relied on:

> Delaware law permits contracting parties to define in an agreement 'those representations of fact that formed the reality upon which the parties premised their decision to bargain.' The critical distinction is not between misrepresentations and

> omissions, but between information identified in the written agreement and information outside of it.… [A] party cannot point to extra-contractual information and escape the contractual limitation by arguing that the extra-contractual information was incomplete.

132 A.3d at 52. Accordingly, *Prairie Capital* concluded: "to the extent *TransDigm* suggests that an agreement must use a magic word like 'omissions,' then I respectfully disagree with that interpretation." *Id.* at 54.

A series of subsequent Delaware decisions agree with *Prairie Capital* and disagree with *TransDigm*. *See, e.g., Universal American*, 176 F. Supp. 3d at 401 (rejecting *TransDigm* and "agree[ing] with *Prairie Capital*"); *MidCap Funding,* 2020 WL 2095899, at *21 (recognizing that "*Prairie Capital* is controlling here" and enforcing an anti-reliance provision that did not refer specifically to omissions); *Infomedia*, 2020 WL 4384087, at *8 (agreeing with *Prairie Capital* and recognizing that *TransDigm* would "eviscerate" the effect of anti-reliance provisions).

The circuit court here correctly followed *Prairie Capital* and the series of decisions that follow it. (A039-A040.)

While Walworth's appeal was pending, a single Delaware judge broke with consensus and relied on *TransDigm* in two decisions. *See Wind Point Partners VII-A, L.P.* v. *Insight Equity A.P. X Co.,* 2020 WL 5054791 (Del. Super. Aug. 17, 2020), *denying leave to appeal*, 2020 WL 5525846 (Del. Super.

Sept. 15, 2020), *appeal refused*, 238 A.3d 879 (Del. 2020); *Sofregen Medical Inc.* v. *Allergan Sales, LLC*, 2021 WL 1400071 (Del. Super. Apr. 1, 2021).[8]

Defendants submit that, contrary to Walworth's suggestion, *Prairie Capital* remains Delaware law, and *TransDigm* and a single judge's decisions are against the overwhelming weight of authority. This Court need not address that issue, as Walworth's theory is not viable for two other, independent reasons.

First, unlike the plaintiffs in *TransDigm* and the other outlier cases, Walworth expressly *released* any claims based on "omissions." (A061 (§5) (releasing Defendants from all claims related to "events, acts, conduct *or omissions* occurring prior to the date of this Agreement" (emphasis added)). When considering anti-reliance language, Delaware courts examine a contract in its entirety to determine if its provisions "add up to a clear anti-reliance clause." *Prairie Capital*, 132 A.3d at 51. Here, the combination of the anti-reliance clause (§3(e)(i)); Walworth's representation that it had "received all the information it considers necessary and appropriate for deciding whether to sell the Repurchased Stock" (§3(e)); the integration clause (§5); and the Agreement's general release of all claims including those based on omissions

[8] In *Pilot Air Freight, LLC* v. *Manna Freight Sys., Inc.*, 2020 WL 5588671 (June 2, 2020), the court included as *dictum* in a footnote that it agreed with *TransDigm*'s analysis, *id.* at *22 n.14, but the court ruled that the anti-reliance provision there *barred* omissions claims, *id.* at 22.

(§6(g)) manifest the parties' clear intent to bar claims outside of the Agreement itself, whether based on alleged misrepresentations or omissions.

Second, TransDigm and its few similar cases permitted claims based on omissions to proceed only in unique circumstances inapplicable here involving "active concealment." Those cases involved specific requests necessary to the plaintiff's decision to transact, to which the defendant responded with manipulated information. In *TransDigm*, plaintiff sought due diligence information about customer discounts and disputes, and defendant provided "some" information but did not reveal a "5% discount to its largest customer" or the anticipated loss of substantial business from that customer. 2013 WL 2326881, at *2. In *Wind Point*, during due diligence, plaintiff requested financial statements and received statements with undisclosed "manipulations" of EBITDA. 2020 WL 5054791, at *4-5; *see also Sofregen*, 2021 WL 1400071, at *3 (plaintiff received diligence information about drug product manipulated to hide negative studies).

In contrast, Walworth did not make—and does not allege that it made—*any* request for information in connection with the Stock Repurchase, let alone allege that Defendants supplied manipulated information in response. Instead, Walworth merely asserts that Mu Sigma stopped providing regular monthly investor reports that Walworth had sought for unrelated purposes more than a year before the parties began negotiating the Stock Repurchase. (A084 ¶¶ 39, 52.) Those regular reports, which Walworth of

course knew it had not received in the two months leading up to the Repurchase Agreement when they "abruptly stopped" (*id.* ¶ 39), cannot amount to "active concealment," particularly when Walworth represented in the Repurchase Agreement that it had received "all the information it considers necessary or appropriate for deciding whether to sell the Repurchased Stock." (A059.)

III. WALWORTH IS UNABLE TO DEFEND THE APPELLATE COURT'S RULING THAT THE STOCK REPURCHASE MAY HAVE BEEN A "REQUEST FOR STOCKHOLDER ACTION"

Walworth offers no meaningful response to Defendants' showing that the appellate court also erred in holding that there was a genuine issue of material fact as to whether the Repurchase Transaction was part of a "request for stockholder action" rather than an individually negotiated transaction. (Op. Br. 52-57.)

As the circuit court correctly ruled, under Delaware law, there is a fiduciary duty of "full disclosure" only with a "request for stockholder action" (such as a proxy solicitation or tender offer)—but not in an individually negotiated transaction such as a stock repurchase. *See Dohmen*, 234 A.3d at 1171 (no "affirmative duty of disclosure for individual transactions"); *Sims* v. *Tezak*, 296 Ill. App. 3d 503 (1st Dist. 1998) (stock repurchase not a request for "shareholder action") (applying Delaware law). As those decisions make clear, in an individually negotiated transaction, a shareholder can request whatever information it wishes, and reach its own bargain, as opposed to a "request for

shareholder action," where stockholders cannot individually request information or negotiate deal terms. *Id.*

Walworth's only response is that the record does not show whether Mu Sigma offered the same terms to other stockholders. (WW Br. 40.) Aside from the fact that the parties completed fact discovery (A042) and Walworth knows that Mu Sigma did not offer the terms to other stockholders, the issue is irrelevant, because there is no dispute that the transaction with Walworth *was* individually negotiated. As a matter of law, under both *Dohmen* and *Sims,* that is not a "request for stockholder action," regardless of whether the same terms were offered to other stockholders.

IV. WALWORTH IS UNABLE TO DEFEND THE APPELLATE COURT'S RULLING THAT IT WAS PREMATURE TO DIMISS WALWORTH'S BREACH OF CONTRACT AND UNJUST ENRICHMENT CLAIMS BASED ON ITS RELEASE

Walworth similarly has little to say in defense of the appellate court's erroneous ruling that it was "premature" for the circuit court to dismiss Walworth's breach of contract and unjust enrichment claims based on Walworth's general release of Defendants. Therefore, we note only the following:

First, contrary to Walworth's argument (WW Br. 41), the issue is properly before the Court. Defendants' petition for leave to appeal expressly sought review of the appellate court's incorrect conclusion that "the release the investor agreed to did not bar two of its claims." (PLA at 7.) In any event, this Court "w[ill] not hesitate to consider issues not raised in petitions for leave to

appeal when they are 'inextricably intertwined' with other issues being considered." *People* v. *Williams*, 235 Ill. 2d 286, 298 (2009). The appellate court's decision makes clear that its ruling on the release was based on its ruling on the anti-reliance provision. (A023.)

Second, the appellate court's ruling that it was "premature" to dismiss Walworth's other claims based on the Agreement's release was based on the court's view that the anti-reliance provision was "ambiguous" and hence Walworth still might be able to argue that the parties' Agreement was induced by fraud. Because, for all of the reasons noted above, the court's ruling that the anti-reliance clause was "ambiguous" was clearly wrong, its ruling on the release fails as well.

Third, Walworth argues that, even if the anti-reliance provision is effective, it does not reach statements made to induce Walworth to enter the release or the Repurchase Agreement as a whole. (WW Br. 43.) This is an entirely new argument by Walworth and should not be considered for that reason alone. It also fails because the anti-reliance provision bars all claims based on extra-contractual statements about "any aspect of the sale or purchase of the Repurchased Stock" (A059), which plainly covers statements about the release and the Agreement.

Finally, Walworth argues another alternative ground for affirmance that the appellate court did not address: that the release is not enforceable because Rajaram "failed to fully disclose" his supposed wrongdoing, which he

purportedly had a fiduciary duty to disclose. (WW Br. 44.) As the circuit court correctly ruled, Delaware law does not support this argument, either. (A051-A053.)

As an initial matter, the Delaware Supreme Court's decision in *Dohmen*, which was issued after the circuit court's ruling, puts this argument to rest. There, as noted above, the Court expressly held that, under Delaware law, there is no fiduciary duty of disclosure where the parties individually negotiate an agreement. 234 A.3d at 1171.

In addition, Walworth's argument turns on misreading *Heckmann*, the case discussed at page 12 above that enforced an anti-reliance provision negotiated by a fiduciary. In *Heckmann*, the court also ruled the separation agreement's release was not effective to bar claims that the released party (Heckmann's president) had engaged in a massive fraud against the company unrelated to the issues that led to the separation agreement, where the company had no reason to suspect that other fraud. 2009 WL 344004, at *6-9.

Here, however, in regard to Walworth's breach of contract claim, Rajaram had no duty to disclose that Mu Sigma had stopped providing its monthly investor reports to Walworth because, as discussed above, Walworth itself obviously knew that when it signed the Repurchase Agreement, which included its release. And, in regard to the unjust enrichment claim, unlike in *Heckmann*, Walworth is not alleging that Rajaram failed to disclose wrongdoing separate and apart from the Repurchase Agreement itself.

Rather, the "wrongdoing" Walworth alleges are the very same extra-contractual statements that it alleges induced it to enter into the Repurchase Agreement, which, under *Heckmann*, cannot be the basis a claim because of the anti-reliance clause.

Walworth also has no adequate response to the circuit court's alternative ruling that Walworth's unjust enrichment claim fails not only because of the release but also because (i) a written agreement governed the parties' transaction; and (ii) to the extent it is a "tort-based" claim, it "stands or falls" with tort claims based on the same conduct. (*See* A054-A055 (citing *Dietrichson* v. *Knott*, 2017 WL 1400552 (Del. Ch. Apr. 19, 2017); *Cleary* v. *Philip Morris Inc.*, 656 F.3d 511 (7th Cir. 2011)).

As to the latter issue, Walworth asserts that only Illinois federal courts have applied the "stand or fall" doctrine. (WW 48-49.) But Walworth fails to explain why those decisions are incorrect, much less how *any* court could sustain a "tort-based" claim after ruling that there was no tort.

CONCLUSION

The appellate court's rulings should be reversed, and the circuit court's rulings dismissing all of Walworth's claims should be reinstated.

As we have stated previously, while Defendants believe the relevant Delaware case law is sufficiently clear that the Court can reverse all of the appellate court's rulings without certifying any questions to the Delaware Supreme Court, such certification is also an option if this Court finds it appropriate.

Dated: June 24, 2022

Respectfully submitted,

Defendants Mu Sigma, Inc. and
Dhiraj C. Rajaram

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CERTIFICATION OF COMPLIANCE

I certify that this Reply Brief conforms to the requirements of Rules 341 (a) and (b). The length of this Reply Brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 5,994 words.

/s/ *James R. Figliulo*

No. 127177

IN THE
SUPREME COURT OF ILLINOIS

WALWORTH INVESTMENTS-LG, LLC,	) Appeal from the Illinois) Appellate Court,) First District, No. 1-19-1937
Plaintiff-Appellee,	)
v.	) There Heard on Appeal from the) Circuit Court of Cook County,) County Department, Law Division
MU SIGMA, INC. and DHIRAJ C. RAJARAM,	) Circuit No. 2016 L 002470
Defendants-Appellants.	) Hon. Daniel J. Kubasiak and) Hon. John C. Griffin,) Judges Presiding

NOTICE OF FILING

To: See attached service list

PLEASE TAKE NOTICE that the **Reply Brief of Defendants-Appellants Mu Sigma, Inc. and Dhiraj C. Rjaram** in the above matter was electronically submitted to the Clerk of the Supreme Court on June 24, 2022, via the court's e-filing system and File and Serve Illinois. A copy of said document is attached.

/s/ *James R. Figliulo*

CERTIFICATE OF SERVICE

James R. Figliulo, an attorney, certifies that he served the foregoing **Notice of Filing** and **Reply Brief of Defendants-Appellants Mu Sigma, Inc. and Dhiraj C. Rjaram** on the above-named attorneys at the above addresses on June 24, 2022, via the court's e-filing system and File and Serve Illinois. Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies the statements set forth in this instrument are true and correct.

/s/ *James R. Figliulo*

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