No. 127177

In the

Supreme Court of Illinois

WALWORTH INVESTMENTS-LG, LLC,

Plaintiff-Appellee,

v.

MU SIGMA, INC. and DHIRAJ C. RAJARAM,

Defendants-Appellants.

Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-19-1937.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 16 L 2470.
The Honorable **Daniel J. Kubasiak** and **John C. Griffin**, Judges Presiding.

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NATURE OF THE ACTION

This suit arises from what the appellate court described as a "reverse 'Madoff scheme.'" A001 ¶ 1. Defendant Mu Sigma, Inc. (a privately-held Delaware corporation) and Defendant Dhiraj C. Rajaram (Mu Sigma's founder, Chairman, CEO, and largest stockholder) fraudulently induced Plaintiff Walworth Investments-LG, LLC—an investment vehicle owned by Patrick G. Ryan and his family—to sell back its sizeable stock holdings in Mu Sigma. Through a combination of misleading statements, omissions, and acts of concealment, Defendants persuaded Walworth to relinquish its stake in Mu Sigma—depriving Walworth of hundreds of millions of dollars when Mu Sigma later grew exponentially, as Defendants anticipated. And Rajaram accomplished this by taking advantage of his role as a fiduciary to Walworth, disregarding his obligation under Delaware law to deal with his stockholder beneficiary honestly, fairly, and in good faith.

Discovery uncovered smoking gun evidence of Defendants' blatant misconduct, including a stunning email in which Rajaram privately bragged about having duped Walworth into giving up its shares. The circuit court brushed all of that aside. In a series of piecemeal rulings (reversing contrary rulings by a predecessor judge), the court concluded that Walworth's claims failed as a matter of law. In that court's view, Walworth had granted Defendants total immunity for their misconduct by agreeing to two provisions in the contract governing the stock repurchase transaction: (i) a provision stating that Defendants had not made representations and warranties to Walworth other than those set forth in the repurchase agreement, and (ii) a general release. The court's analysis regarding both provisions was predicated on clear misapplications of Delaware law. Which is why—in a unanimous decision—the appellate court reversed those rulings in full.

In a carefully reasoned opinion applying well-established principles of Delaware contract law and public policy, the appellate court held that what Defendants characterized as an "anti-reliance provision" was ambiguous and could not bar Walworth's fraud and breach of fiduciary duty claims as a matter of law. That decision was correct and alone warrants affirmance.

Though this Court need not reach any other issue, the appellate court's decision can also be affirmed on multiple alternative grounds. *First*, even if the parties' contract contained an anti-reliance provision, it would not be enforceable here in light of the parties' fiduciary relationship. *Second*, the appellate court correctly recognized that the purported anti-reliance provision does not unambiguously disclaim Walworth's reliance on information Defendants intentionally omitted or concealed to induce the repurchase transaction. And, *third*, the appellate court correctly held, in the alternative, that a disputed issue of fact precluded summary judgment as to one of Walworth's theories of Rajaram's fiduciary breach—that Rajaram violated his duty of disclosure in connection with a "request for stockholder action," which does not require a showing of reliance.

As for Walworth's breach of contract and unjust enrichment claims, the appellate court concluded that the circuit court wrongly dismissed both claims based on the contract's general release provision, because Walworth had sufficiently alleged that the release—and the entire repurchase agreement—had been procured by fraud. Defendants have not preserved a challenge to that aspect of the appellate court's decision. But even if they had, the court was correct: the general release cannot foreclose those claims on a motion to dismiss. There is simply no avenue for this Court to "reinstate[]" the circuit

court's rulings "dismissing all of Walworth's claims" based on the claims of error Defendants have presented. Defs. Br. 21.

In short, the circuit court's rulings produced a result that no Delaware court would condone: that a corporate fiduciary can contractually immunize himself to escape liability for fraudulently inducing his stockholder-beneficiary to engage in a transaction against the beneficiary's interests. That is not and cannot be the law—in Delaware, Illinois, or any jurisdiction that values the fiduciary relationship and abhors fraud. The Illinois courts should not allow a corporate fiduciary to use ambiguous contractual language to perpetrate fraud on Illinois citizens. The appellate court properly reversed, and this Court should affirm that decision.

STATEMENT OF THE ISSUES

1. Whether the appellate court correctly held that Section 3(e) of the Stock Repurchase Agreement did not explicitly and unambiguously disclaim Walworth's reliance on Defendants' misrepresentations.

2. Whether the appellate court correctly reversed summary judgment on Walworth's fraud and breach of fiduciary duty claims because, in the alternative, (i) a purported anti-reliance provision cannot be enforced to insulate a corporate fiduciary from liability for defrauding a stockholder of that corporation, and (ii) the text of Section 3(e) does not disclaim Walworth's reliance on Defendants' omissions and information they intentionally concealed.

3. Whether the appellate court correctly held that there was a genuine dispute of fact about whether Mu Sigma's buyback offer was a request for stockholder action—precluding summary judgment on Walworth's claim for Rajaram's breach of a fiduciary duty of disclosure.

4. Whether Defendants forfeited any challenge to the appellate court's reinstatement of Walworth's breach of contract and unjust enrichment claims and, if not forfeited, whether the appellate court correctly reversed the dismissal of those claims.

STATEMENT OF FACTS

A. Factual Background

Because Defendants' recitation is selective and incomplete, Walworth summarizes the relevant facts, as presented in the pleadings and the evidence proffered at summary judgment. *See* A002 ¶ 4.[1]

1. Walworth Invests In Mu Sigma And The Company Grows

Defendant Dhiraj Rajaram was the founder and (at all relevant times) the CEO, Chairman, and largest stockholder of Defendant Mu Sigma, Inc. ("Mu Sigma" or "the Company"), a privately-held data analytics company incorporated in Delaware and headquartered in Northbrook, Illinois. C 3834 V4 (A073 ¶¶ 19-20).[2] When he founded Mu Sigma in 2005, Rajaram needed capital and a signature investor to open doors to established companies that might not otherwise be interested in doing business with a risky start-up venture. C 3829 V4 (A068 ¶ 2). To that end, Rajaram approached the Ryan

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[1] The circuit court disposed of each of Walworth's claims as a matter of law, either on the pleadings or on summary judgment. Accordingly, Walworth's factual allegations must be presumed true, *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004), and the allegations and evidence must be evaluated in the light most favorable to Walworth, *see id.*; *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992). In identifying what Defendants "believe" are "inaccuracies" contained in the appellate court's factual background, they ignore those governing standards. Defs. Br. 4.

[2] "C" and "R" refer to the common law record and the record of proceedings, respectively. "Axxx" refers to Defendants' appendix. "SAxxx" refers to Walworth's supplemental appendix.

Family, a well-known Chicago family with strong relationships in the business and civic communities. C 3829 V4, C 3835-36 V4 (A068, A074-75 ¶¶ 2, 24).

In April 2006, the Ryan Family agreed to invest in Mu Sigma via their investment vehicle, Walworth Investments-LG, LLC ("Walworth"). C 3836 V4 (A075 ¶ 26). Walworth purchased 2.2 million shares of Series B Preferred Stock for a total of $1.5 million, becoming the Company's largest outside investor (with an approximate 21% stake). *Id.* Rajaram declared in a press release that "[h]aving Pat Ryan back Mu Sigma validates our vision and provides us the support and guidance we need to take Mu Sigma to the next level." C 2321 V2.

He was right. The Ryan Family's investment helped Mu Sigma attract institutional investors and develop a client roster of household-name companies—including Microsoft, Wal-Mart, and Dell. C 3829-30 V4 (A068-69 ¶ 4). The Company grew exponentially, from around $219,000 in annual gross revenue before Walworth's investment to nearly $14 million just three years later. C 3837-38 V4 (A076-77 ¶¶ 30-31).

2. Rajaram Seeks To Regain Control

But once Rajaram reaped the benefits of the Ryan Family's investment and credibility, his priorities changed. C 3829-30 V4 (A068-69 ¶ 4). Rajaram wanted to own as much of Mu Sigma as possible and control the direction of the Company—what he called his "baby" and "the daughter [he] never had." C 2298 V2 (Rajaram Tr. 90:2-9); C 3830 V4 (A069 ¶ 5). Walworth's considerable ownership stake complicated Rajaram's ambitions. C 3829-30, 3838 V4 (A068-69, A077 ¶¶ 4-6, 32). This tension came to a head in 2008, when Rajaram sought more capital for the Company, and Walworth exercised its right to block Mu Sigma's issuance of new shares to an individual who was later convicted

of insider trading. C 3838 V4 (A077 ¶ 32). Rajaram was upset that Walworth was able to overrule his decision. C 3839 V4 (A078 ¶ 33).

Patrick Ryan Jr. ("Ryan Jr.") promised Rajaram that he would help find another investor, and he did. *Id.* (¶ 34). In August 2008, Mu Sigma raised $15 million in exchange for new shares of its stock. *Id.* To avoid dilution of Walworth's interest, Walworth received additional shares. C 3839, 3847 V4 (A078, A086 ¶¶ 36, 58). Walworth and Mu Sigma also entered into a new investor rights agreement (the "Investor Rights Agreement"), which provided that Mu Sigma would, upon request, give Walworth periodic and annual financial reports reflecting the Company's performance. C 3839-40 V4 (A078-79 ¶ 37); SEC C 2271-344 V2. Walworth made that request, and Rajaram accordingly instructed Mu Sigma's CFO to send the Company's financial reports to Ryan Jr. when they became available; the CFO promised to do so "from now on." C 3840-41 V4 (A079-80 ¶¶ 38-39); C 2508 V2 (Mar. 12, 2009 email).

In October 2009, Mu Sigma made an unsolicited offer to its investors, including Walworth, to repurchase up to three million shares of the Company's stock. C 3841 V4 (A080 ¶ 40). Because they planned to be long-term investors, the Ryan Family declined. C 2340-42 V2 (Ryan Jr. Tr. 177:12-178:3, 179:2-18); C 3842 V4 (A081 ¶ 42).

3. Rajaram Induces The Ryan Family To Sell Their Stake

In March 2010, Rajaram reached out to Ryan Jr. with another buy-back offer. C 2344-58 V2 (Ryan Jr. Tr. 195:12-209:19). But this time his pitch was different.

Rajaram told Ryan Jr. that there had been a turning point in the business, and that it was evident Mu Sigma would not be the success they had hoped for. C 3842 V4 (A081 ¶ 43). Rajaram said that Mu Sigma was losing its biggest customer, IMS Health, and that the Company was unlikely to add new customers to replace the lost revenue. *Id.*; C 2347,

2352, 2357-58 V2 (Ryan Jr. Tr. 198:12-19, 203:19-23, 208:21-209:16). Rajaram also told Ryan Jr.—in a written email—that Mu Sigma was "moving from explosive growth to steady growth." C 2417 V2 (Mar. 22, 2010 email from Rajaram to Ryan Jr.). The email explained that, rather than continuing to rely on new customers and increased revenues to generate growth for Mu Sigma, Rajaram would have to consider "bulking the company up using acquisitions." *Id.* In another conversation, Rajaram urged the Ryan Family to sell because there was no growth on the horizon for Mu Sigma and "no upside left." C 3842 V4 (A081 ¶ 43); *see also* C 2347-48, 2354 V2 (Ryan Jr. Tr. 198:24-199:4, 205:12-21).

Rajaram also explained his motive for making this offer. He said that he valued his relationship with the Ryan Family and was trying to "take care of" them; he wanted to give his early investors an opportunity to get out and avoid having their capital tied to a stagnant company. C 3842-43 V4 (A081-82 ¶ 44); C 2348 V2 (Ryan Jr. Tr. 199:5-22). Mu Sigma was not going to be a "great success," Rajaram said, but his "next company" would be, and he wanted the Ryan Family to be lead investors in that next venture. C 2348 V2 (Ryan Jr. Tr. 199:5-22); C 3842-43 V4 (A081-82 ¶¶ 44-45).

Rajaram therefore proposed that Mu Sigma repurchase some or all of Walworth's shares at $1.20 per share. C 3843 V4 (A082 ¶ 46); C 2417 V2. Rajaram informed Ryan Jr. that Mu Sigma planned to ask other investors to sell back their shares too. C 3843 V4 (A082 ¶ 47); C 2417 V2. Mu Sigma's counsel likewise told Walworth that the repurchase offer would potentially extend to "a small number of stockholders." C 3843 V4 (A082 ¶ 47); SEC C 2363 V2. And a March 29, 2010 Mu Sigma board note stated that the Company expected "non-strategic stockholders" to tender their shares for repurchase. C 3843 V4 (A082 ¶ 47); SEC C 2811 V2.

4. What Rajaram And Mu Sigma Did Not Tell The Ryans

The written and oral representations Rajaram made in March 2010 to induce the Ryan Family to sell their shares were false, misleading, and woefully incomplete. C 3846 V4 (A085 ¶ 55). The true facts, as known to and touted by Rajaram and others within Mu Sigma during the same period, painted a vastly different picture.

Take the loss of Mu Sigma's "biggest customer." C 3842 V4 (A081 ¶ 43). Although it was true that Mu Sigma had lost IMS Health, the Company had expected that loss long before Rajaram approached Ryan Jr. and had already factored it into Mu Sigma's business plans. C 2305-06 V2 (Rajaram Tr. 298:17-299:17). The loss of IMS Health also presented Mu Sigma with a lucrative business opportunity to pursue IMS's customers, an avenue previously restricted under the parties' arrangement. C 3844 V4 (A083 ¶ 49).

As for the Company's growth prospects, Rajaram actually believed in April 2010 that Mu Sigma was "successfully navigating" the Great Recession and was "poised for explosive growth"—a belief that Rajaram shared with Mu Sigma employees internally just weeks after he told Ryan Jr. that Mu Sigma was moving *away* "from explosive growth." C 3843-45 V4 (A082-84 ¶¶ 48, 51); C 2362 V2; C 2417 V2. At that time, Rajaram valued Mu Sigma at $200 million—implying a per-share valuation four times the $1.20/share he offered Walworth. C 2314-16 V2 (Rajaram Tr. 358:16-360:15). Rajaram projected the Company would be worth $500 million "in the next 3 years." C 3843-44 V4 (A082-83 ¶ 48). In fact, as Mu Sigma's Director of Finance later acknowledged, "'Mu Sigma was continuing to grow and in fact setting new records for growth'" in April 2010. C 3844 V4 (A083 ¶ 49).

Internal company documents confirm that at the time Rajaram convinced Walworth to sell, Mu Sigma was in fact increasing its revenue, generating millions of dollars in new

sales, and achieving its greatest percentage increase in growth since its founding. *See, e.g.*, C 2368 V2 (email listing 23 new accounts in 2010, yielding $2.4 million in additional revenue); C 2371 V2 (Mu Sigma presentation indicating $21.3 million in revenue in 2009 and $40 million in revenue in 2010, with $65 million projected revenue for 2011); C 2373 V2 (email stating that Mu Sigma would complete $5.3 million in new sales in 2010); C 2409 V2 (presentation showing year-over-year growth from 2008 to 2013, with 2010 involving the greatest percentage increase of any year).

Investor reports from that period likewise showed Mu Sigma's upward trajectory. The March 2010 report demonstrated that for the first time in Mu Sigma's history, monthly revenues had exceeded $3 million, every business unit was exceeding projections, and Mu Sigma was experiencing month-on-month growth of 16%. C 3845 V4 (A084 ¶ 52); C 2360 V2. The April 2010 report similarly showed that the Company had outperformed its first-quarter projections. C 3845 V4 (A084 ¶ 52); C 2365-66 V2. But notwithstanding Walworth's contractual entitlement to those reports, Walworth never received them. C 3845 V4 (A084 ¶ 52). That is because Rajaram explicitly instructed Mu Sigma's CFO, in a written email, not to send the March 2010 report to the Ryans—to which the CFO responded, "[y]es – I too thought I should not send it; hence held it back." *Id.*; C 2420 V2.[3]

[3] Defendants assert that Rajaram held back the financial reports so that "communications *** would run through counsel" during the repurchase negotiations. Defs. Br. 15 n.4 (citing Rajaram's deposition). But Rajaram did not testify that anybody *told* Walworth that Mu Sigma was withholding the reports; nor do Defendants explain why Mu Sigma did not provide the reports through counsel. Defendants also argue that Walworth did not reiterate its request to receive investor reports during the months in question. *See id.* But given Walworth's standing request and the CFO's promise to pass along the reports (once they were available) "from now on," C 2508 V2, Walworth was in no way obligated to renew its request. In any event, this is neither the time nor the forum to litigate the underlying facts of Walworth's claims.

As to Rajaram's professed motive for approaching Walworth, there was no "next company" for the Ryan Family to invest in. C 3845 V4 (A084 ¶ 51); C 2307 V2 (Rajaram Tr. 308:3-16). Rajaram's true objective was to enrich himself at the Ryan Family's expense and gain greater control over "his" company. C 3844-46 V4 (A083-85 ¶¶ 50, 53).

5. The Ryan Family Relinquishes Walworth's Stock

Relying on Rajaram's statements, and unaware of the contrary facts above, the Ryan Family agreed to sell Walworth's shares back to the Company. C 3845-46 V4 (A084-85 ¶ 53). They did so because they believed in Rajaram and trusted him as their fiduciary. *Id.* Rajaram, in turn, instructed his team to "move like lightning" to complete the repurchase transaction as quickly as possible. C 2422 V2. And he remained personally involved in the negotiations. *See, e.g.*, SEC C 2363 V2. On May 27, 2010, the parties executed a Stock Repurchase Agreement ("SRA"), which Rajaram signed on Mu Sigma's behalf. C 3847 V4 (A086 ¶ 58); C 813 (A064) (SRA).

A few provisions of the SRA are relevant to this appeal. The first, Section 3(e), is titled "Disclosure of Information" and states:

> Stockholder [Walworth] has received all the information it considers necessary or appropriate for deciding whether to sell the Repurchased Stock to the Company pursuant to this Agreement. Stockholder acknowledges (i) that neither the Company, nor any of the Company's Related Parties (as defined below) [including Rajaram], 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.

C 808 (A059). An earlier draft of Section 3(e) contained additional language stating that Walworth was "not relying upon the Company or any of the Company's Related Parties in making its decision to sell the Repurchased Stock to the Company pursuant to this

Agreement." C 2452 V2 (original in strike-through font). During negotiations, Walworth struck that language from the draft because, as Ryan Jr. later testified, the Ryan Family *had* relied on Rajaram's representations in deciding to sell back Walworth's holdings. SEC C 2797 V2 (Ryan Jr. Tr. 248:1-14).

Another SRA provision, Section 5, is titled "Release" and states:

> Stockholder [Walworth] hereby forever generally and completely releases and discharges the Company and its Related Parties [including Rajaram] and their respective successors and assigns from any and all claims, liabilities, obligations and demands of every kind and nature, in law, equity or otherwise, known and unknown, suspected and unsuspected, disclosed and undisclosed, and in particular of and from all claims and demands of every kind of nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, that arose out of or are in any way related to events, acts, conduct or omissions occurring prior to the date of this Agreement; provided, however, that the foregoing release shall not apply to claims relating to Stockholder's right to payment by the Company.

C 810 (A061).

The SRA also contains a standard integration clause. C 811 (A062) (Section 6(g)). Finally, Section 6(b) states that the agreement shall "be construed in accordance with, and governed in all respects by, the laws of the State of Delaware." C 810 (A061).

6. Mu Sigma Continues To Thrive After Walworth Sells Back Its Stake

On the day the repurchase transaction closed, Rajaram sent an email to other members of Mu Sigma leadership stating, "Congrats . . . We all now own more of Mu Sigma." SEC C 2352 V2. The next day, Rajaram pulled up the March 22, 2010 email he had sent to Ryan Jr.—the one discussing Mu Sigma's negative prospects and encouraging Walworth to sell—and forwarded it to Mu Sigma's CFO. C 2417 V2. Rajaram boasted: "I am very proud of this email *** This email started the ball rolling for us." *Id.* The CFO

agreed that Rajaram's email was "brilliant": "You tempted [Ryan Jr.] enough without trying to oversell. That's probably the reason it worked." *Id.*

A few months later, Rajaram lauded Mu Sigma's prospects in an interview with the Chicago Sun-Times, reporting "huge growth as data becomes ubiquitous," and projecting that "Mu Sigma w[ould] double its revenues to $100 million *** in the next three years." C 3847-48 V4 (A086-87 ¶ 59) (alteration in original). Consistent with those statements (but unknown to the Ryan Family as now-former stockholders of a privately-held company), Mu Sigma continued to experience rapid growth with existing clients and to attract new clients, many of whom were already in the pipeline when Rajaram approached Ryan Jr. about selling. C 3848 V4 (A087 ¶ 60). The Company continued to grow organically, and the "bulking-up through acquisitions" that Rajaram told Ryan Jr. would be necessary never occurred. *Id.*

By 2015, Mu Sigma had grown to more than $250 million in annual revenue and was generating over $125 million in annual profits. *Id.* As of 2019, the Company was estimated to be worth over $1.5 billion. *Id.* Had Walworth not relinquished its stake, it would own Mu Sigma shares worth hundreds of millions of dollars. C 3828 V4 (A067 ¶ 1).

B. Procedural History

Walworth filed suit against Rajaram and Mu Sigma in 2016, asserting claims for fraudulent inducement, fraudulent concealment, negligent misrepresentation, breach of fiduciary duty, unjust enrichment, and breach of contract. C 102-25 (First Am. Compl.).

1. The Circuit Court Ultimately Dismisses Walworth's Claims As A Matter Of Law

Defendants filed three different pre-trial motions—a motion to dismiss, then a

motion for reconsideration of that decision, and then a summary judgment motion—repeatedly arguing that Walworth's fraud and fiduciary-breach claims were barred by provisions in the SRA. The circuit court (Griffin, J.) rejected Defendants' arguments each time. As relevant here (in opinions and orders inexplicably excluded from Defendants' appendix), the circuit court held that Section 3(e) of the SRA did not unambiguously disclaim Walworth's reliance on Defendants' misrepresentations. R74-75, 78 (SA18-19, SA22); SUP SEC R331-33 (SA12-14); C 1366, 1368-71 (SA2, SA4-7). The court reasoned that Section 3(e), by its terms, refers only to *Mu Sigma's* reliance and lacks comparable language from Walworth's perspective. C 1370 (SA6). The court also found that the SRA's general release could not bar Walworth's claims as a matter of law because Rajaram, as a fiduciary, had the burden to show he made a full and frank disclosure of all relevant information to Walworth, his beneficiary, before inducing Walworth to give up its claims. R78-80 (SA22-24).

When Judge Griffin was appointed to the appellate court, the case was reassigned to Judge Kubasiak. Although more than 30 days had elapsed since Judge Griffin's summary judgment decision rejecting Defendants' arguments about the SRA, and without asserting new evidence, Defendants filed a motion asking Judge Kubasiak to reconsider Judge Griffin's rulings.

In a series of iterative decisions, the circuit court reversed course. The court first granted in part Defendants' reconsideration motion and awarded Defendants summary judgment on Walworth's fraud claims. C 2591 V2 (A027). The court then granted another reconsideration motion filed by Defendants and awarded them summary judgment on Walworth's fiduciary-breach claim. C 3781 V4 (A035). After Walworth filed a second

amended complaint re-pleading its unjust enrichment claim and alleging a new breach of contract claim (based on Mu Sigma's breach of the Investor Rights Agreement), the court granted Defendants' motion to dismiss those claims too. C 4254 V4 (A045).

In all three decisions, the circuit court ruled for Defendants as a matter of Delaware law, based on Section 3(e) (for the fraud and fiduciary-breach claims) and the release (for the unjust enrichment and breach of contract claims). C 2591 V2 (A027); C 3783 V4 (A037); C 4258 V4 (A049). The court also granted Defendants' motion to strike an expert declaration by a former justice of the Delaware Supreme Court (proffered by Walworth) opining that, under established principles of Delaware law, the parties' fiduciary relationship rendered the purported anti-reliance provision and the release unenforceable. C 4103 V4 (SA1); C 3864-78 V4 (citing Declaration of Hon. Jack B. Jacobs). The court additionally held Walworth's unjust enrichment claim non-actionable under Illinois law. C 4263-64 V4 (A054-55).

2. The Appellate Court Reverses And Reinstates Walworth's Claims

Walworth appealed, and the appellate court unanimously reversed and remanded the case for trial on all six claims. A002 ¶ 2; A024 ¶ 73.

Summarizing Walworth's allegations and the record evidence, the appellate court observed that Walworth's case was based on "what is best described as a reverse 'Madoff scheme' to induce [Walworth] to sell its substantial ownership interest in [Mu Sigma]." A001 ¶ 1. The court described Rajaram's post-transaction email to his CFO as "effectively admitt[ing] that he engaged in a soft 'con job' to obtain [Walworth's] assent to the SRA." A016 ¶ 44. And the court noted Walworth's allegation that it was "defrauded in excess of 'hundreds of millions of dollars'" by Defendants, which is "a far cry from the

approximately '9.3 million dollars' that defense counsel thought [Walworth] should have been satisfied with." A016 n.2; *see* Defs. Br. 7 (continuing to make the same suggestion).

The appellate court began its analysis by setting forth Walworth's multiple, alternative grounds for reversal on the fraud and fiduciary-breach claims. Walworth had argued that Section 3(e) of the SRA: (i) "did not effectively disclaim its reliance on [any of] Rajaram's alleged extra-contractual representations"; (ii) at minimum, "did not cover" information Defendants omitted or concealed; (iii) "should not be enforced in the context of a fiduciary relationship" in any event; and (iv) should not bar the fiduciary duty of disclosure claim because "reliance" is not an element. A009 ¶ 29.

The appellate court agreed with Walworth's first argument and held that Section 3(e) did not unambiguously disclaim Walworth's reliance on Defendants' extra-contractual misrepresentations. The court explained that under Delaware law, "a contract must contain unambiguous antireliance language to 'bar a contracting party from asserting claims for fraud based on [the defendant's] representations outside the four corners of the agreement.'" A010 ¶ 32 (citation omitted). The court found Section 3(e) "ambiguous" because, among other reasons, "the language *** 'only expressly refers to Mu Sigma's "reliance"' and 'does not have comparable language referring to [plaintiff].'" A013 ¶ 36 (alteration in original) (citation omitted); *id.* ¶ 35 (citing Section 3(e) language acknowledging that "*the Company is relying upon* the truth of the representations and warranties in this Section 3" (emphasis in original)).

After "determin[ing] that the SRA was ambiguous," the appellate court went on to consider extrinsic evidence of the parties' negotiating history. A015-16 ¶¶ 41-43. The court noted that an earlier SRA draft included language that "certainly would have

amounted to a clear disclaimer of reliance from plaintiff's point of view," but that Walworth had "specifically had it removed"—which "certainly supports [Walworth's] claim that it never intended to disclaim reliance on defendants' alleged extra-contractual statements." A016 ¶¶ 42-43.

Having rejected Defendants' argument that Section 3(e) unambiguously disclaimed Walworth's reliance—the circuit court's only ground for granting summary judgment on the fraud and fiduciary-breach claims—the appellate court could have stopped there. But the court also addressed one of Walworth's alternative arguments: that the fiduciary-breach claim should go forward even if Section 3(e) were enforceable, because one of Rajaram's fiduciary breaches—his breach of a duty of disclosure in connection with a "request for stockholder action"—does not require Walworth to prove reliance. *See* A020 ¶ 52. The question was whether Mu Sigma's stock repurchase was merely an "individual stockholder transaction" or a "request for stockholder action." A019-20 ¶¶ 51, 53. On that question, the court found a factual dispute precluding summary judgment; Walworth had presented evidence that Mu Sigma "intended to extend their repurchase offer to *** other shareholders." A020-21 ¶¶ 54-55.

The appellate court also briefly addressed another of Walworth's alternative arguments: that, at the very least, the text of Section 3(e) does not unambiguously bar fraud and fiduciary-breach claims based on Defendants' omissions and acts of concealment. A017 ¶ 46. The court cited Delaware case law holding that similarly worded contractual provisions could not bar such claims. *See id.* The court also distinguished other Delaware cases, cited by Defendants, where courts had dismissed omission-based claims based on anti-reliance provisions. *Id.*

The appellate court then turned to the circuit court's dismissal of Walworth's breach of contract and unjust enrichment claims, which the circuit court had found barred by the SRA's general release. Here too, the appellate court acknowledged that Walworth had alternative arguments as to why the release was unenforceable: (i) that Rajaram committed a separate fiduciary breach "by not disclosing his wrongdoing to plaintiff before it entered into the SRA," and (ii) that the SRA itself "was the product of fraud." A022 ¶ 61. The court reversed for the second reason (without reaching the first), concluding that "[i]f [Walworth] proves that [Defendants] procured the SRA through fraud," "then the entire agreement, including the general release provision, presumably would be unenforceable." A022-23 ¶ 63. The court also rejected Defendants' argument that Walworth's tort-based unjust enrichment claim should be dismissed because of the parties' contractual relationship. A023-24 ¶¶ 66-67.

Justice Pucinski specially concurred. She agreed that the circuit court erred in granting summary judgment to Defendants on the fraud and fiduciary-breach claims, "because the contract at issue is ambiguous." A024 ¶ 73. She also agreed that genuine factual disputes precluded dismissal of the contract and unjust enrichment claims based on the general release. *Id.* She specified six "questions of material fact" precluding judgment in Defendants' favor. A025 ¶ 75. "Any one" of those six fact issues should have prevented summary judgment or dismissal, Justice Pucinski concluded, and "[a]ll of them taken together clearly require remand." *Id.* ¶ 76.

STANDARD OF REVIEW

The circuit court granted summary judgment against Walworth on its fraud and fiduciary-breach claims under 735 ILCS 5/2-1005(b), and dismissed Walworth's breach of contract and unjust enrichment claims under 735 ILCS 5/2-619.1 and 5/2-615. "Summary

judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt"; it is appropriate only "when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992). Likewise, in ruling on a section 2-615 motion, a court must accept as true all well-pleaded facts and all reasonable inferences therefrom, to determine whether the complaint's allegations—construed in the light most favorable to the plaintiff—state a cause of action. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). Section 2-619.1 motions may be granted only where the defendant raises an affirmative defense or other matter that defeats the plaintiff's claim as a matter of law or based on an easily proved issue of fact. *Kedzie & 103rd Currency Exch., Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). This Court reviews de novo grants of all such motions. *Outboard Marine*, 154 Ill. 2d at 102; *Carr v. Koch*, 2012 IL 113414, ¶ 27.

ARGUMENT

The issues under review are largely governed by Delaware law. The SRA provides that the contract shall "be construed in accordance with, and governed in all respects by, the laws of the State of Delaware." C 810 (A061) (Section 6(b)); *see also* Defs. Br. 1. Additionally, because Mu Sigma is incorporated in Delaware, Delaware law governs Rajaram's fiduciary obligations to the Company's stockholders. *See Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 314 n.1 (2002). Walworth's unjust enrichment claim, in contrast, is a non-contract claim governed by Illinois law based on general choice-of-law principles. *Cf. Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 193 Ill. 2d 560, 571-72 (2000); Restatement (Second) of Conflict of Laws § 221 (1971); *see also* A009 ¶ 27 (noting that Defendants "focus[ed] almost exclusively on Illinois law" for the unjust enrichment

claim). As the appellate court recognized, under the controlling law applicable to each claim, Walworth's case should proceed.

I. THE APPELLATE COURT CORRECTLY RULED THAT SECTION 3(e) DOES NOT BAR WALWORTH'S FRAUD AND FIDUCIARY-BREACH CLAIMS

A. The Appellate Court Correctly Held That Section 3(e) Does Not Unambiguously Disclaim Walworth's Reliance

Defendants' primary argument on appeal is that Section 3(e) is an "anti-reliance provision" in which Walworth expressly disclaimed its reliance on the statements Rajaram and Mu Sigma made to induce Walworth to give up its stake in the Company. As a result, Defendants argue, Walworth's fraud and fiduciary-breach claims are barred as a matter of law. But Defendants' recitation of Delaware law on this contract-interpretation issue is selective and misleading. And their attacks on the appellate court's analysis are meritless. The appellate court applied well-settled Delaware law to the unique provision at issue and unanimously held that the language did not explicitly and unambiguously disclaim Walworth's reliance on Defendants' extra-contractual misrepresentations. That ruling is correct and is reason enough to remand the fraud and fiduciary-breach claims for trial.

1. Delaware Law Enforces Only Explicit And Unambiguous Disclaimers Of Reliance

After reviewing Defendants' brief, one might conclude that Delaware has a "public policy" in favor of enforcing contractual anti-reliance provisions at nearly any cost. *See, e.g.*, Defs. Br. 23-25. One might also think that Delaware law mandates a four-factor test categorically defining what language qualifies as an enforceable anti-reliance provision. *See id.* at 28-29. Neither is true.

Delaware (like most jurisdictions) respects the "strong" tradition of "freedom of contract." *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1058, 1059-

60 (Del. Ch. 2006). But Delaware (like most jurisdictions) also shares "the law's traditional abhorrence of fraud" and is loath to "immuniz[e]" fraud. *Id.* at 1058, 1061. This is an "unwavering policy." *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 904 (Del. 2021). Anti-reliance provisions, which can effectively operate to immunize one contracting party's fraud, present a conflict between those competing interests.

Delaware law reconciles this tension by enforcing contractual disclaimers of reliance only if the disclaimer is "explicit" and "unambiguous" on its face (and only in arm's-length transactions between parties in a purely commercial relationship, *see infra* at 29-32). *ABRY*, 891 A.2d at 1058-59. Delaware courts "will not insulate a party from liability for its counterparty's reliance on fraudulent statements made outside of an agreement absent a clear statement by that counterparty—that is, the one who is seeking to rely on extra-contractual statements—disclaiming such reliance." *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 859 (Del. Ch.), *aff'd*, 148 A.3d 1171 (Del. 2016) (table); *see also, e.g.*, *Shareholder Representative Servs. LLC v. Albertsons Cos.*, No. CV 2020-0710-JRS, 2021 WL 2311455, at *12 (Del. Ch. June 7, 2021) (deeming it "settled" that a contractual provision must "demonstrat[e] with clarity that the plaintiff had agreed that it was not relying on facts outside the contract" in order to "bar fraud claims"); *Partners & Simons, Inc. v. Sandbox Acquisitions, LLC*, No. CV 2020-0776-MTZ, 2021 WL 3159883, at *6-7 (Del. Ch. July 26, 2021) (a provision cannot bar fraud claims if it does not "unambiguously disclaim reliance on extracontractual statements").

So while "parties can protect themselves against unfounded fraud claims through *explicit* anti-reliance language," "[i]f parties fail to include unambiguous anti-reliance language, they will not be able to escape responsibility for their own fraudulent

misrepresentations made outside of the agreement's four corners." *ABRY*, 891 A.3d at 1059 (emphasis added); *accord Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004), *aff'd*, 867 A.2d 902 (Del. 2005) (table). This requirement "achieves a sensible balance between fairness and equity." *ABRY*, 891 A.2d at 1059. And under this standard, Delaware courts routinely decline to enforce purported anti-reliance provisions when their text is not sufficiently clear.[4]

2. Section 3(e) Does Not Explicitly And Unambiguously Disclaim Walworth's Reliance

Section 3(e) does not satisfy Delaware's heightened standard requiring "explicit anti-reliance language." Titled "Disclosure of Information," it provides:

> Stockholder has received all the information it considers necessary or appropriate for deciding whether to sell the Repurchased Stock to the Company 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.

C 808 (A059) (emphasis added).

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[4] *See, e.g.*, *Sanyo Elec. Co. v. Intel Corp.*, C.A. No. 2018-0723-MTZ, 2021 WL 747719, at *13 (Del. Ch. Feb. 26, 2021); *Anschutz Corp. v. Brown Robin Capital, LLC*, C.A. No. 2019-0710-JRS, 2020 WL 3096744, at *14-15 (Del. Ch. June 11, 2020); *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 859-61 (Del. Ch.), *aff'd*, 148 A.3d 1171 (Del. 2016) (unpublished table decision); *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, C.A. No. N14C-12-112 WCC CCLD, 2015 WL 5968726, at *8 (Del. Super. Ct. Sept. 25, 2015); *Anvil Holding Corp. v. Iron Acquisition Co.*, C.A. Nos. 7975-VCP, N12C-11-053-DFP, 2013 WL 2249655, at *7-8 (Del. Ch. May 17, 2013); *Kronenberg*, 872 A.2d at 591-94; *see also Matsuura v. Alston & Bird*, 166 F.3d 1006, 1011 (9th Cir.) (per curiam) ("The Supreme Court of Delaware has repeatedly said that fraudulent inducement claims based on representations made outside a contract are not barred by contract language stating the parties relied only on representations in the contract"; citing cases), *modified*, 179 F.3d 1131 (9th Cir. 1999).

As the appellate court explained, "[w]hat is absent from that language is an unqualified disclaimer from plaintiff's point of view that it did not rely on the extra-contractual statements allegedly made by defendants." A013 ¶ 35. This is significant because Section 3(e) *does* reference a party's "reliance"—just not Walworth's. Specifically, clause (ii) states 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." C 808 (A059) (emphases added). Another SRA provision—Section 3(h)— is similarly express when referring to a party's reliance, stating that Walworth "is *relying* solely" on its own tax advisors with respect to the tax consequences of the transaction. C 809 (A060) (emphasis added).

Defendants' argument, then, is that the same parties who used the word "relying" elsewhere in the SRA—and indeed, who used that word in the very same provision—chose to disclaim Walworth's reliance on Defendants' misrepresentations by means of far less precise language. Such an inexplicable drafting choice presents a textbook case of ambiguity. *See Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, No. Civ.A. 15478, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999) (finding it "difficult to believe" that contracting parties would have "buried" a significant issue by using "less *** significant" terms); *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011) (when parties use a term in one place and a different term elsewhere, they are presumed to do so "purposefully," and it is "clear" they did not intend for the terms to mean the same thing).

In this respect, Section 3(e) is *not* a "standard" and "widely used" anti-reliance provision "identical" to those in other Delaware cases. Defs. Br. 17-18. Not a single one of Defendants' favored cases (*see id.* at 29-30, 35)—or any of those listed in Defendants'

seven-page, nearly 3000-word "Anti-Reliance Language Comparison Chart"—involved a provision with one-sided reliance language of this kind. A102-08. Which leaves the Court with a basic question of contract interpretation: when a purported disclaimer of reliance expressly speaks to one party's "reliance" but says nothing about the other party's, can it be said the provision is clear and unequivocal? Both the appellate court and the original circuit court judge correctly answered that question in the negative. *See* A013 ¶ 36; C 1370 (SA6).

The absence of language disclaiming Walworth's reliance on Defendants' representations was no accident. An earlier draft of Section 3(e) included "an unqualified disclaimer from [Walworth's] point of view that it did not rely on the extra-contractual statements allegedly made by defendants." A013 ¶ 35; *see also* C 2452 V2 (draft Section 3(e) stating that "Stockholder is not relying upon the Company or any of the Company's Related Parties in making its decision to sell the Repurchased Stock"). Walworth specifically asked for that explicit anti-reliance language to be removed because Ryan Jr. "did rely" on Rajaram's statements. C 3877 V4. As both the appellate court and Judge Griffin reasoned, this drafting history—interpreted in the light most favorable to Walworth—confirms the textual ambiguity on the face of the final provision. A013 ¶¶ 35-36; C 1370-71 (SA6-7). *But see* Defs. Br. 44-45 (wrongly characterizing the appellate court as using this history to "create" ambiguity). To be clear, that confirmation was icing on the cake. Under Delaware law, a finding of ambiguity *ends the analysis* and renders the purported anti-reliance provision unenforceable. *See ABRY*, 891 A.2d at 1058-59.[5]

[5] To the extent the appellate court's analysis suggests a jury would need to *resolve* the ambiguity by considering extrinsic evidence of the parties' intent, *see* A015-16 ¶¶ 41, 43,

3. Defendants' Counterarguments Are Meritless

Defendants make no attempt to squarely engage with the appellate court's reasoning about the significance of the one-sided reliance language. *See* Defs. Br. 37-38 (contesting only whether the language in clause (ii) amounts to a "disclaimer" by Mu Sigma). And their attacks on other aspects of the appellate court's reasoning are not persuasive.

First, Defendants insist that the language in Section 3(e) is sufficient to disclaim Walworth's reliance because Walworth represented that no extra-contractual representations and warranties were made. Defs. Br. 29. But Delaware courts have declined to treat "no representations were made" language as sufficient to bar fraud claims. Most recently, in *MP USA Holdings LLC v. DFI USA, LLC*, the Court of Chancery (Laster, V.C.) considered a clause stating that "[t]he parties have not made any representations or warranties with respect to the subject matter hereof not set forth herein, except as set forth in [another agreement]." No. 2020-0091-JTL, 2021 WL 3144727, at *11-12 (Del. Ch. July 23, 2021). The court held that because this sentence "does not contain a promise by MP USA that it did not rely on statements outside of the parties' agreements[,] it therefore is not an anti-reliance clause."[6] *Id.* at *12; *see also TrueBlue, Inc. v. Leeds Equity Partners*

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that is not correct. Under Delaware law, if a purported anti-reliance provision is not sufficiently clear, it cannot bar the plaintiff's claims, period. *See, e.g.*, *FdG*, 131 A.3d at 860; *TrueBlue*, 2015 WL 5968726, at *7-8. On remand, it will not be necessary for the jury to decide whether Section 3(e) constitutes an anti-reliance provision; a finding of textual ambiguity decides the issue. *See* A015 ¶ 41; A024 ¶ 73.

[6] The *MP USA* court additionally noted that the clause was not written from the plaintiff's point of view—but this was a *second* reason why the provision was insufficient. *See* 2021 WL 3144727, at *12 (introducing this second point with "also"). And while Defendants rely on the observation in *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 51 (Del. Ch. 2015), that "magic words" are not required, the author of *Prairie Capital*—Vice Chancellor Laster—decided *MP USA*.

IV, LP, C.A. No. N14C-12-112 WCC CCLD, 2015 WL 5968726, at *7-8 (Del. Super. Ct. Sept. 25, 2015) (holding that a provision in which the plaintiff "acknowledge[d]" that the other party had not made any extra-contractual "representation or warranty" did not qualify as a clear anti-reliance provision).

Second, Defendants argue that the general release in Section 5 of the SRA makes "the anti-reliance language *** even stronger." Defs. Br. 30, 58; *see also* C 2592 V2 (A032). But they do not explain how. Nor do they point to Delaware authority finding the presence of a general release relevant to the anti-reliance inquiry. They cite *IAC Search, LLC v. Conversant LLC*, C.A. No. 11774-CB, 2016 WL 6995363 (Del. Ch. Nov. 30, 2016), but that court did not say that the presence of *any* release "further reinforces the effect of an anti-reliance provision." Defs. Br. 30. The court made a comparison to a specific provision (from *ABRY*) that released liability based on the buyer's "reliance" on misstatements offered during due diligence. *IAC Search*, 2016 WL 6995363, at *7. In any event, the SRA's release is unenforceable. *See infra* at 42-47.

Third, Defendants supply their own version of the drafting history, asserting that Walworth took out the language about Walworth's non-reliance on Mu Sigma's representations because of the presence of Section 4 of the SRA. Defs. Br. 45-46. But Ryan Jr. specifically testified about why Walworth had the non-reliance language in Section 3(e) removed: because he *had* relied on Rajaram's representations. SEC C 2797 V2 (Ryan Jr. Tr. 248:1-14) (Defendants "had asked for language that specifically said *** we did not rely on Dhiraj, anything he said. And the fact is, I said I did rely on it, *which is why we took that language out*." (emphasis added)). At summary judgment, Defendants cannot negate that testimony with their own self-serving account of

Walworth's motivations.

Fourth, Defendants protest that Walworth and the appellate court have not offered an alternative explanation for what Section 3(e) was intended to accomplish. Defs. Br. 36. But that was equally true in numerous other cases where Delaware courts refused to enforce purported anti-reliance provisions when their language was not explicit enough. *See, e.g.*, *Anschutz Corp. v. Brown Robin Capital, LLC*, C.A. No. 2019-0710-JRS, 2020 WL 3096744, at *14-15 (Del. Ch. June 11, 2020); *TrueBlue*, 2015 WL 5968726, at *8; *Anvil Holding Corp. v. Iron Acquisition Co.*, C.A. Nos. 7975-VCP, N12C-11-053-DFP [CCLD], 2013 WL 2249655, at *7-8 (Del. Ch. May 17, 2013); *FdG*, 131 A.3d at 861. Delaware courts decline to enforce such provisions not because they conclude the language might have some other meaning, but because it is not sufficiently clear the parties intended to absolve fraud. *See Kronenberg*, 872 A.2d at 593 ("Because Delaware's public policy is intolerant of fraud, the intent to preclude reliance on extra-contractual statements must emerge clearly and unambiguously from the contract."). Defendants' sole citation on this point does not involve an anti-reliance provision and does not implicate this clear-statement rule. *See Mickman v. Am. Int'l Processing, L.L.C.*, Civ. Action No. 3869-VCP, 2009 WL 2244608, at *2 (Del. Ch. July 28, 2009) (interpreting inspection-rights provision in LLC agreements).

Fifth, Defendants nitpick aspects of the majority opinion that had no impact on the outcome. They take issue with the majority's statement that the disagreement between the two circuit court judges on the meaning of Section 3(e) supports a finding of ambiguity. A013 ¶¶ 35-36; Defs. Br. 43-44. While it is true that a disagreement among jurists does not itself establish textual ambiguity, it can certainly support such a finding. *See Ready v.*

United/Goedecke Servs., Inc., 232 Ill. 2d 369, 379 (2008) ("Though the difference in appellate court interpretations *** is not dispositive as to whether the statute is ambiguous, it strongly suggests that it is."); *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69-72 (Del. 2011) (citing disagreement among courts to support finding of contractual ambiguity). Defendants additionally criticize the appellate court's aside about citing unpublished Delaware opinions. Defs. Br. 41-43. But the court still considered *ChryonHego Corp. v. Wight*, C.A. No. 2017-0548-SG, 2018 WL 3642132 (Del. Ch. July 31, 2018), *see* A013-15 ¶¶ 37-39; the decision just has no bearing because it did not involve the kind of one-sided reliance language at issue here.

Sixth, Defendants assert that Walworth is "a sophisticated party." Defs. Br. 27. But the context of this stock-repurchase transaction cuts *against* Defendants' argument for enforcement—because it is undisputed that Rajaram acted as Walworth's fiduciary. *See infra* at 29-35. Even putting that critical factor aside, the fact that this sale involved sophisticated parties "echoes both ways": "If [Mu Sigma]—a sophisticated party—wished for certain fraud to be barred, it could have drafted the agreement that way. It didn't. A sophisticated party cannot use litigation to extract contractual protections it failed to negotiate at the bargaining table." *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, No. C.A. No. 2019-0417-PRW, 2021 WL 4344172, at *20 (Del. Super. Ct. Sept. 23, 2021). That Mu Sigma *tried* to include explicit anti-reliance language in the SRA—an effort that Walworth rebuffed—reinforces the point. *See supra* at 23.

Finally, Defendants appeal to policy. They argue that zealous enforcement of language even resembling an anti-reliance provision is necessary to avoid destabilizing commercial transactions. Defs. Br. 22-23. Of course, Delaware courts have often declined

to enforce supposed anti-reliance provisions (*see supra* note 4), yet the sky has not fallen. Defendants nonetheless warn that affirmance will "jeopard[ize]" the expectations of Illinois companies who select Delaware law to govern their transactions. Def. Br. 23. But not a single one of the companies listed in Defendants' out-of-record affidavit, or any entity representing their interests, is here as an amicus lending credence to Defendants' overdramatic claims. A109-10. This is not surprising: the appellate court's decision reflects the unremarkable application of well-established Delaware law to the idiosyncratic contract provision at issue.

Defendants also argue that anti-reliance provisions are beneficial because they can preclude fraud claims premised on "vague, disputed, and generally oral statements." Defs. Br. 26-27. Whatever the merit of that rationale in other contexts, it does not fit this case; some of Rajaram's key misrepresentations about the Company appeared in a written email. *See supra* at 7, 11. And although Defendants suggest that Ryan Jr. later recanted one of the oral statements—Rajaram's representation that there was "no growth on the horizon" for Mu Sigma, *see* Defs. Br. 13, 27 n.7—they overplay their hand. Ryan Jr. merely testified that those words were written down in his notes as summary "characterizations" of what Rajaram said. C 2503-05 V2 (Ryan Jr. Dep. 203:19-205:21).

In any case, the Delaware courts have already carefully weighed the policy considerations in play and struck an appropriate balance: "clauses without explicit anti-reliance representations[] will not relieve a party of its oral and extra-contractual fraudulent representations." *ABRY*, 891 A.2d at 1059. The appellate court applied that rule and reached the correct conclusion. This Court can—and should—affirm that decision on this basis alone.

B. The Appellate Court's Ruling Reinstating The Fraud And Fiduciary-Breach Claims Can Be Affirmed On Two Alternative Grounds

The appellate court's reversal of summary judgment on the fraud and fiduciary-breach claims can be affirmed on additional grounds too. *See Outboard Marine*, 154 Ill. 2d at 102-03.

1. Under Delaware Law, An Anti-Reliance Provision Cannot Be Enforced In The Context Of A Fiduciary Relationship

Even if Section 3(e) could be read as an unambiguous disclaimer of Walworth's reliance on Defendants' misrepresentations, it could not be enforced because of the fiduciary relationship between Rajaram and Walworth. The appellate court noted Walworth's argument, but had no need to decide it. A009 ¶ 29. If this Court disagrees with the appellate court about the proper interpretation of Section 3(e), it should nonetheless affirm the judgment on this alternative ground.

As a director and CEO of a Delaware corporation in which Walworth was a stockholder, Rajaram owed Walworth a fiduciary duty of loyalty. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) ("[D]irectors owe fiduciary duties of care and loyalty to the corporation and its shareholders."); *see also ICD Publ'ns, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 66 (corporate officer "undoubtedly owed fiduciary duties to his fellow shareholders"). This is undisputed; Rajaram acknowledged that he was acting in a fiduciary capacity vis-à-vis Walworth. SEC C 2347-48 V2 (Rajaram Tr. 47:21-48:22); C 2303 V2 (Rajaram Tr. 271:6-19). That "unremitting" duty of loyalty is a "constant compass" that guides "all" interactions with stockholders. *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) ("[W]hen directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty."); *see also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360

(Del. 1993) (directors of Delaware corporations "are charged with an unyielding fiduciary duty" to "act in the best interests of [the corporation's] shareholders"), *modified on other grounds*, 636 A.2d 956 (Del. 1994). Accordingly, "[t]he traditional deference given to agreements freely negotiated between sophisticated parties *is limited by fiduciary principles*." *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 840 (Del. Ch. 2011) (emphasis added).

This common-law limit is reflected in a Delaware statute. Section 102(b)(7) of Title 8 of the Delaware Code (part of Delaware's General Corporation Law) expressly prohibits corporations, such as Mu Sigma, from including provisions in their charters exculpating directors for breaching their duty of loyalty to stockholders for "acts or omissions not in good faith or which involve intentional misconduct." Del. Code Ann. tit. 8, § 102(b)(7). This is in contrast to limited partnerships and limited liability companies, which Delaware law allows to eliminate the duty of loyalty. *See* Del. Code Ann. tit. 6, §§ 17-1101(d), 18-1101(c); *Dieckman v. Regency GP LP*, C.A. No. 11130, 2016 WL 1223348, at *8 (Del. Ch. Mar. 29, 2016) ("[I]n stark contrast to the corporate context, in which fiduciary duties cannot be waived, a limited partnership may eliminate all fiduciary duties ***."), *rev'd on other grounds*, 155 A.3d 358 (Del. 2017); *Auriga Cap. Corp. v. Gatz Props. LLC*, 40 A.3d 839, 849 (Del. Ch.) (noting that although "contracting parties" can modify or eliminate fiduciary duties when it comes to LLCs, that is not allowed for corporations), *aff'd*, 59 A.3d 1206 (Del. Nov. 7, 2012).

Delaware's prohibition on waivers of corporate directors' duty of loyalty applies to all contracts, not just charters. As the Delaware Supreme Court has explained, "[a]s a matter of public policy, there are certain fundamental features of a corporation that are

essential to that entity's identity and cannot be waived." *Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1204 (Del. 2021); *see also id.* at 1217, 1227 n.189 (noting that Delaware law favors private ordering, "provided *** principles of fiduciary duty are honored" (citation omitted)); *Paramount Comm'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."); Suren Gomtsian, *The Governance of Publicly Traded Limited Liability Companies*, 40 Del. J. Corp. L. 207, 273 (2015) ("The fiduciary duties in Delaware corporations are mandatory and cannot be eliminated or restricted by contract."). Enforcing an anti-reliance provision against a stockholder-beneficiary to preclude the beneficiary from proving that it relied on a director-fiduciary's false and misleading representations would allow corporate directors to accomplish indirectly what they cannot do directly.

Defendants' attempt to invoke Section 3(e) to shield Rajaram from liability for breaching his fiduciary duty of loyalty is an affront to these bedrock principles of Delaware law. Which likely explains why *none* of the Delaware cases on which Defendants rely (*i.e.*, enforcing an anti-reliance provision to bar fraud claim) arise in the context of a fiduciary relationship. Those cases exclusively involve arm's-length transactions—often between two commercial entities following extensive due diligence—a context those decisions have emphasized. *See, e.g.*, *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 43, 52 (Del. Ch. 2015).

Beneficiaries in the fiduciary context stand in a fundamentally different posture. *See Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 144 (Del. Ch. 2009)

(contrasting "counterparties who negotiated at arm's length" with the "relationship of trust [and] confidence" embodied in a "fiduciary relationship[] such as that between a director and stockholder"). The balance to be achieved is no longer limited to the law's "abhorrence of fraud," on the one hand, and "freedom of contract," on the other. *See supra* at 20-21. The latter imperative is necessarily circumscribed by the fiduciary relationship—a "special relationship of trust and confidence," where "scrupulous concerns of equity" are at their height. *Addy v. Piedmonte*, Civ. Action No. 3571-VCP, 2009 WL 707641, at *17 (Del. Ch. Mar. 18, 2009).

Consistent with those well-established principles, the Delaware Court of Chancery recently ruled that an anti-reliance provision cannot bar claims by a beneficiary against a fiduciary. In *McDonald's Corp. v. Easterbrook*, the defendant (the former CEO of McDonald's) argued that a provision in his severance agreement constituted an anti-reliance provision, barring McDonald's later claims of fraud against him. C.A. No. 2020-0658-JRS, 2021 WL 351967, at *6 (Del. Ch. Feb. 2, 2021). The court rejected the CEO's argument that the contract language amounted to an unambiguous anti-reliance provision. *Id.* at *7. But the court also explained that, even if the provision were clear, "an anti-reliance clause would have no bearing on the Company's ability to assert a claim that [the CEO] breached his fiduciary duty of candor and good faith, *inter alia*, by hiding and misrepresenting material facts." *Id.* at *6 n.46. This is because, as explained above, "[t]he traditional deference given to agreements freely negotiated between sophisticated parties is limited by fiduciary principles." *Id.* (quoting *Del Monte*, 25 A.3d at 840). *McDonald's* thus reinforces that under Delaware law, Section 3(e) could never bar Walworth's claims.

In resisting that conclusion below, Defendants primarily argued that Walworth was unable to point to a specific Delaware case declining to enforce an anti-reliance provision in the fiduciary context (a point Judge Kubasiak found persuasive). *See* C 3786-87 V4 (A040-41). But even putting aside the weakness of that logic, a specific case now exists: the Court of Chancery's decision in *McDonald's*, which was decided after briefing and argument in the appellate court. An Illinois appellate court also recently reached the same result under Illinois law. *See Marler v. Wulf*, 2021 IL App. (1st) 200200-U, ¶¶ 55-56 (holding that because "the parties were in a fiduciary relationship," an anti-reliance provision could not foreclose the beneficiary's fraud claim).

Defendants have also argued that anti-reliance provisions do not *literally* "exculpate" fiduciaries, but instead bar beneficiaries from basing fiduciary-breach claims on extra-contractual misstatements. That is a distinction without a difference; the whole point of anti-reliance provisions is to eliminate the possibility of claims based on misrepresentations. *See* Defs. Br. 25. If courts enforced such provisions to protect corporate fiduciaries from facing claims for breaches of loyalty, it would accomplish indirectly what Del. Code Ann. tit. 8, § 102(b)(7), prohibits them from contracting for outright. Indeed, the Delaware Court of Chancery recently rejected a corporate fiduciary's similar attempt to argue that a clause eliminating the possibility of a fiduciary-breach claim does not amount to a "waiver" of the duty itself. *See Manti Holdings, LLC v. Carlyle Grp., Inc.*, C.A. No. 2020-0657-SG, 2022 WL 444272, at *3 (Del. Ch. Feb. 14, 2022) (calling the fiduciary's argument "a distinction too fine for my legal palate," because "[a] right without an enforcement mechanism is an empty right").

Defendants have additionally relied on another Court of Chancery decision, where the court observed—in a case involving a beneficiary and a fiduciary—that an anti-reliance provision might partially defeat the beneficiary's fraudulent-inducement defense to the fiduciary's claim. *See Xu Hong Bin v. Heckmann Corp.*, Civ. Action No. 4637-CC, 2009 WL 3440004, at *11 (Del. Ch. Oct. 26, 2009); C 3787 V4 (A026). But that court explicitly stated that it did "not specifically rule on" the fraudulent-inducement defense—so its discussion of that issue, including the effect of the anti-reliance provision, was dicta. *Heckmann*, 2009 WL 3440004, at *13 n.51. In that non-binding discussion, the court never considered the argument that such a provision is unenforceable because of the parties' fiduciary relationship, because the beneficiary did not brief that issue. *See Heckmann* Answering Br. of Defs. & Counterclaim Plfs. at 23 & n.8, 2009 WL 2704023. That the Court of Chancery in *McDonald's* saw no need to address *Heckmann* is therefore unsurprising.

At the very least, no Delaware court would allow a corporate director to waive his duty of loyalty through the murky language in Section 3(e). In *Manti Holdings*, the Delaware Court of Chancery (in a decision by the same Vice Chancellor who decided *ChryonHego*) considered the corporate directors' argument that stockholders had waived their right to bring an action for the directors' breach of the fiduciary duty of loyalty, via a provision in a stockholder agreement. 2022 WL 444272, at *1-2. The court expressed skepticism that such a contractual waiver could be enforced in the corporate context at all. *See id.* at *4 & n.45 (enforcing such waivers "would blur the line between LLCs and the corporate form and represent a departure from norms of corporate governance"); *id.* at *1 (such a waiver may be "unenforceable for reasons of public policy").

But the *Manti Holdings* court opted not to decide that broader issue, instead resolving the case under the principle—derived from contexts, like LLCs, where such waivers are permissible—that a "waiver of fiduciary duties *** must be clear and unambiguous." *Id.* at *2 & n.28; *see id.* at *2 (contract drafters "'must make their intent to eliminate fiduciary duties plain and unambiguous' in order for such waivers to be effective" and "'the interpretive scales *** tip in favor of preserving fiduciary duties'" (alteration in original) (citation omitted)). Applying that rule, the court found that the provision in the stockholder agreement was not "clear and unequivocal," because it made "no reference to fiduciary duties." *Id.* at *3.

Here too, the language of Section 3(e) is worlds away from a "clear and unequivocal" waiver of Rajaram's duty of loyalty. It does not reference that duty (or any other fiduciary obligation), let alone make clear that Walworth was forsaking it. For this reason too, no Delaware court would enforce Section 3(e) to preclude Walworth's fiduciary-breach and related fraud claims. *See id.* at *4.

2. Section 3(e) Does Not Disclaim Walworth's Reliance On Information Defendants Omitted Or Concealed

There is a second, alternative basis for affirmance. Even if Section 3(e) could be read as an unambiguous disclaimer of Walworth's reliance on Defendants' *affirmative misrepresentations*, the provision does not disclaim Walworth's reliance on information that Defendants *omitted* or *concealed*. Although the appellate court had no need to definitively resolve this issue—having already held that Section 3(e) was ambiguous—the court was right to signal its agreement with Walworth on this point as well. A017 ¶ 46; A021 ¶ 55; *see also* A025 ¶ 75 (Pucinski, J., specially concurring). Because Walworth's fiduciary-breach and fraud claims are premised in part on Defendants' actionable

omissions and their intentional concealment of Mu Sigma's investor reports (among other things), Section 3(e) cannot bar those claims.

The Delaware Court of Chancery's decision in *Transdigm Inc. v. Alcoa Global Fasteners, Inc.*, C.A. No. 7135-VCP, 2013 WL 2326881 (Del. Ch. May 29, 2013), illustrates the proper analysis. There, the court considered whether an anti-reliance provision precluded the plaintiff-buyer from bringing a fraudulent concealment claim against the defendant-seller based on the seller's failure to disclose material information about a client. *Id.* at *1. The court refused to dismiss the concealment claim because the provision did not specifically disclaim the plaintiff-buyer's reliance on the seller's "omissions"; rather, the provision disclaimed only "'reliance upon any express or implied representations or warranties.'" *Id.* at *1, *7-9 (emphasis omitted).

The *Transdigm* court also found it significant that the provision contained "no representation as to the 'accuracy and completeness' of the information" provided to the plaintiff-buyer. *Id.* at *8. To address that gap, the defendant-seller had pointed to language stating that the plaintiff-buyer had "undertaken such investigation and has been provided with and has evaluated such documents and information as [the buyer] has deemed necessary to enable it to make an informed decision." *Id.* at *7. But the court did not find that language sufficient to disclaim the plaintiff-buyer's reliance on information that had been *concealed*: it reasoned that the statement was "[c]onsistent" with the plaintiff-buyer's reasonable reliance on the "assumption that [the seller] was not actively concealing information that was responsive to [the buyer's] inquiries and that [the seller] was not engaged in a scheme to hide information material to [the] purchase." *Id.* at *9.

Section 3(e) parallels the provision in *Transdigm* in all relevant respects:

- Section 3(e) does not mention "omissions"; it states only that the Company had not made certain "representation[s] or warrant[ies], express or implied." C 808, 810 (A059, A061). And the parties used the word "omissions" elsewhere in the agreement (*i.e.*, in the release)—showing they knew how to refer specifically to the subject when they so intended. C 810 (A061).
- Section 3(e) does not contain any statement as to the "accuracy and completeness" of the information Defendants provided Walworth. It states only that Walworth received all of the information it "consider[ed] necessary or appropriate for deciding whether to sell," C 808 (A059)—the exact kind of statement *Transdigm* considered insufficient to disclaim reliance on concealed information.
- As in *Transdigm*, it was more than reasonable for Walworth to believe that Defendants were not actively concealing material information—especially because Walworth had a contractual right to receive this information and because Rajaram owed fiduciary duties to Walworth, *see supra* at 6, 29-30.

Because, as in *Transdigm*, Section 3(e) does "not clearly disclaim reliance on the type of concealment and omission" alleged, Walworth's claims based on misleading omissions and concealed information should go forward. 2013 WL 2326881, at *9.

Delaware courts have followed *Transdigm* to hold that fraudulent concealment claims are not covered by anti-reliance provisions that do not specifically disclaim reliance on the accuracy or completeness of information provided. *See Sofregen Med. Inc. v. Allergan Sales, LLC*, C.A. No. N20C-03-319 EMD CCLD, 2021 WL 1400071, at *5 (Del. Super. Ct. Apr. 1, 2021); *Pilot Air Freight, LLC v. Manna Freight Sys., Inc.*, C.A. No.

2019-0992-JRS, 2020 WL 5588671, at *22 & n.215 (Del. Ch. Sept. 18, 2020); *Wind Point Partners VII-A, L.P. v. Insight Equity A.P. X Co.*, C.A. No. N19C-08-260 EMD CCLD, 2020 WL 5054791, at *16-17 (Del. Super. Ct. Aug. 17, 2020); *see also Wind Point Partners VII-A, L.P. v. Insight Equity A.P. X. Co.*, C.A. No. N19C-08-260 EMD CCLD, 2020 WL 5525846, at *3-4 (Del. Super. Ct. Sept. 15, 2020). Delaware courts have also followed *Transdigm* to hold that anti-reliance provisions that do not specifically disclaim reliance on omissions do not preclude omission-based claims. *See Pilot Air*, 2020 WL 5588671, at *22 & n.215; *Wind Point*, 2020 WL 5054791, at *18. Requiring such precision makes sense: a disclaimer of reliance on affirmative "representations or warranties" is not the same—let alone *unequivocally* the same—as a disclaimer of reliance on information that had been omitted or concealed.[7]

Defendants ignore every one of these decisions. Instead, they point to *Prairie Capital*, as well as other trial-level decisions adopting *Prairie Capital*'s reasoning with respect to omissions-based claims. *See* 132 A.3d at 54; Defs. Br. 48-49. The appellate court found those other cases distinguishable based on the provisions' text. A017-19 ¶¶ 46-49. And none of them took issue with *Transdigm*'s reasoning regarding claims based on *concealed* information (like Walworth's claim based on the withheld investor reports).

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[7] This line of Delaware authority also accords with the approach taken in Illinois. In *Benson v. Stafford*, the court held that because an anti-reliance provision "only applie[d] to a 'warranty, representation, opinion, advice or assertion of fact,'" the provision did not bar a fraudulent concealment claim. 407 Ill. App. 3d 902, 927-28 (2010). Courts applying Illinois law have adhered to that reasoning. *See Sears Home Appliance Showrooms, LLC v. Charlotte Outlet Store, LLC*, No. 17 CV 8478, 2018 WL 3068459, at *7 (N.D. Ill. June 21, 2018); *Walls v. Vre Chicago Eleven, LLC*, No. 16-CV-4048, 2016 WL 5477554, at *3 (N.D. Ill. Sept. 29, 2016); *cf. McMahan v. Deutsche Bank AG*, 938 F. Supp. 2d 795, 804-06 & n.3 (N.D. Ill. 2013); *Greer v. Advanced Equities, Inc.*, 2012 IL App. (1st) 112458, ¶ 12.

Even when it comes to omission-based claims, *Prairie Capital* based its conclusion on policy concerns—specifically, the court's view that it might be too easy for some plaintiffs to reframe misrepresentations as omissions—not the contractual text. *See* 132 A.3d at 54-55. But Delaware requires contractual disclaimers of reliance to be explicit, *see supra* at 20-21, and so the provision must likewise be explicit to foreclose omission-based claims.

C. The Appellate Court Correctly Held That Issues Of Fact Preclude Summary Judgment On Whether Mu Sigma's Buyback Offer Was A Request For Stockholder Action

Defendants also contest the appellate court's determination that a fact issue prevented summary judgment as to whether Mu Sigma's buyback invitation was a "request for stockholder action." Defs. Br. 2, 52-57; *see* A019-21 ¶¶ 50-55. As an initial matter, Defendants' arguments overplay the significance of this issue to Walworth's case.

The "request for stockholder action" issue is relevant to only one of Walworth's alternative theories of Rajaram's fiduciary breach: that Rajaram breached his fiduciary duty of disclosure in connection with a request for stockholder action. *See Malone*, 722 A.2d at 10; *see also* C 3852 (A091 ¶¶ 88-89). Delaware law holds that a claim for a breach of this specific duty "does not include the element[] of reliance," *Malone*, 722 A.2d at 12—meaning that a claim based on this theory could go forward regardless whether Section 3(e) is an enforceable anti-reliance provision. *See* A020-21 ¶ 54. But Walworth does not need to prevail on this "stockholder action" issue to recover on its *other* theories of fiduciary breach—including its theory that Rajaram breached his fiduciary duty to deal with his beneficiary fairly and honestly. Nor does Walworth need this argument to prevail on its other claims. So if this Court agrees (i) that Section 3(e) is ambiguous, *or* (ii) that Section 3(e) cannot be enforced because of the fiduciary relationship, *or* (iii) that Section 3(e) cannot bar claims based on concealed information or omissions, then it does not have

to decide the stockholder action issue.

In any event, the appellate court's determination on this narrow issue was correct. Citing *Dohmen v. Goodman*, 234 A.3d 1161 (Del. 2020), the court recognized that an "individual" transaction does not constitute a request for stockholder action triggering this particular disclosure obligation. A019-20 ¶ 51. In other words, the appellate court squarely applied the controlling law Defendants argue it ignored.[8] But the question is whether this truly was an individual transaction, or whether Mu Sigma had extended the buyback offer to stockholders other than Walworth. And on that question, the appellate court recognized there was a dispute of fact: Walworth had pointed to evidence that Mu Sigma "intended to extend their repurchase offer" beyond Walworth, and Defendants did not rebut that evidence below. A020-21 ¶ 54; *see supra* at 7 (describing Rajaram email, email from Mu Sigma's counsel, and Mu Sigma board note).

Defendants now claim that Mu Sigma never in fact offered "the same [repurchase] terms to other shareholders." Defs. Br. 56; *see id.* at 19. But they cite nothing in the record for this assertion. And they cite no Delaware case for the proposition that offers made to multiple stockholders must include the "same terms" to collectively qualify as a request for stockholder action. *See Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 95-96 (2002) (argument made without supporting legal authority is waived). The appellate court correctly ruled Defendants were not entitled to summary judgment on this theory of Rajaram's fiduciary breach.

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[8] Defendants also complain that the appellate court failed to cite *Sims v. Tezak*, 296 Ill. App. 3d 503 (1998), an Illinois appellate decision interpreting Delaware law and reaching a conclusion similar to *Dohmen*. Defs. Br. 54. This is a strange quibble, given that the court cited and applied the controlling Delaware Supreme Court decision instead.

II. THE APPELLATE COURT CORRECTLY RULED THAT THE BREACH OF CONTRACT AND UNJUST ENRICHMENT CLAIMS SHOULD BE REINSTATED

Defendants ask this Court to reinstate the circuit court's dismissal of Walworth's breach of contract and unjust enrichment claims. Defs. Br. 58-60. But those issues are not properly before the Court.

The circuit court dismissed the breach of contract and unjust enrichment claims based primarily on the SRA's general release. C 4258-62 V4 (A049-53). Although the appellate court noted that Walworth had presented multiple grounds on which to hold the release unenforceable, the court relied on only one of them: that Walworth had alleged it was fraudulently induced to enter into the SRA, rendering both the release and the entire SRA voidable. A022-23 ¶¶ 61-64; *see also* A017 ¶ 45. Defendants had argued that Section 3(e) precludes Walworth from establishing fraudulent inducement, but the appellate court rejected that argument because it had already rejected Defendants' reading of Section 3(e). A023 ¶ 64. The appellate court also rejected the circuit court's alternative reason for dismissing the unjust enrichment claim. A023-24 ¶¶ 66-67.

In their petition for leave to appeal, Defendants did not ask this Court to review the appellate court's rulings on the breach of contract and unjust enrichment claims. *See* Pet. 13-24 (argument section never mentioning those claims); Pet. Answer 15. They therefore forfeited the opportunity to obtain review of those rulings. *See Jackson v. Bd. of Election Comm'rs*, 2012 IL 111928, ¶ 32. Nor will a decision on preserved issues necessarily impact the disposition of either claim. *See Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 429-30 (2002) (this Court may exercise its discretion to decide unpreserved issues that are inextricably intertwined with preserved issues). Walworth has presented additional arguments why the contract and unjust enrichment claims must go forward even if Section

3(e) were deemed an effective anti-reliance provision—so reversing the appellate court on Section 3(e) would not resolve those claims. Defendants chose not to address those other arguments in their opening brief, and those issues are now forfeited. *See* Ill. Sup. Ct. R. 341(h)(7). The Court would be well within its discretion to give effect to Defendants' forfeiture and decline to review those claims until properly raised after a final judgment. But if the Court chooses to reach the breach of contract and unjust enrichment claims, it should affirm.

A. The Appellate Court Correctly Held That The Release Is Unenforceable As The Product Of Fraud

The appellate court correctly held that the release—and the entire SRA—is voidable due to Defendants' fraud in obtaining it. Under Delaware law, when a plaintiff asserts that a release was induced by fraud, "the party seeking enforcement of the release bears the burden of proving that the released fraud claim was within the contemplation of the releasing party." *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999); *see also* A017, A022 ¶¶ 45, 62. If the defendant cannot make that showing, the release can be rescinded at the releasing party's option. *DuPont*, 744 A.2d at 458, 465; *see also PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1067 (Del. 2011); A022-23 ¶ 63. This is true regardless of how broadly the release is worded. *See DuPont*, 744 A.2d at 460-61 (applying this rule against a release covering "known or unknown" claims, and finding the specific release language "immaterial"); *see also Alvarez v. Castellon*, 55 A.3d 352, 354 (Del. 2012) ("A court may *** set aside a clear and unambiguous release where there is fraud ***."). Illinois law is in accord. *E.g.*, *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 23-24, 26 (2003); *see also* Restatement (Second) of Torts § 900 cmt. b (1979) ("A release *** that has been obtained

by fraud *** may be set aside as ineffective, and in actions of tort a release *** thus obtained is not a defense to the action.").

Defendants do not dispute this well-settled law. They argue only that the appellate court's ruling about the release hinged on its earlier ruling about Section 3(e), such that if the latter is reversed, the release must be enforced. Defs. Br. 58-59. It is true that if this Court affirms the appellate court's ruling on Section 3(e), Defendants' (belated) challenge to the court's ruling on the release must fail too.

But the converse is not true, for this reason: Even if the Court were to agree with Defendants that Section 3(e) is an enforceable anti-reliance provision, it does not follow that the provision precludes Walworth from showing that it was fraudulently induced into executing *the release*. Section 3(e) discusses only representations by Defendants "regarding any aspect of the sale or purchase of the Repurchased Stock, the operation or financial condition of the Company or the value of the Repurchased Stock." C 808 (A059). The provision does *not* reference representations Defendants made to induce Walworth to enter into *the release*, or the SRA as a whole. So Defendants' federal cases (at 59) involving anti-reliance provisions that specifically reference what representations were made (or not made) to induce the plaintiff *to enter into the release* are inapposite. *See ADM All. Nutrition, Inc. v. SGA Pharm Lab, Inc.*, 877 F.3d 742, 749 (7th Cir. 2017) ("No representations or commitments were made by the parties to induce each other to enter into this Agreement *** ."); *Sequel Cap., LLC v. Pearson*, No. 07-cv-2642, 2012 WL 2597759, at *2 (N.D. Ill. July 3, 2012) (quoting the provision as stating that "[t]he parties executing [the Release] do so freely and voluntarily, solely relying upon their own judgment and that

of his or its attorney and not as a result of any fraud, duress or coercion" (alterations in original)).

B. In The Alternative, The Release Is Unenforceable Because Rajaram Failed To Fully Disclose His Wrongdoing To Walworth Beforehand

The release cannot bar any of Walworth's claims for an independent reason, too. The release is voidable because Rajaram—a fiduciary to Walworth and a party covered by the release—failed to make a full and frank disclosure of his wrongdoing to Walworth before inducing Walworth to execute it. *See* A022 ¶ 61 (noting this argument). Should this Court have need to reach the issue, it should affirm the appellate court's ruling regarding the contract and unjust enrichment claims on this alternative ground.

As Judge Griffin correctly explained in an early ruling, "[w]here a fiduciary relationship exists between the parties, the defendant has the burden to show that a full and frank disclosure of all relevant information was made to the other party" before a release can be enforced. R 78-79 (SA22-23). This is a correct application of Delaware law: because "'a fiduciary owes a duty of full disclosure when entering into a transaction with the fiduciary's [beneficiary],'" the "'fiduciary's failure to disclose material facts relating to a mutual release of claims between the parties is sufficient to set aside the release.'" *Heckmann*, 2009 WL 3440004, at *7 (quoting *Wal-Mart Stores, Inc. v. Coughlin*, 255 S.W.3d 424, 429 (Ark. 2007)).

As the Court of Chancery explained in *Heckmann*, this rule "simply follows general principles of Delaware law that require a director to make full disclosure of his interest in a transaction before engaging in that transaction with the [beneficiary]." *Id.*; *see also Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (fiduciaries "are not permitted to use their position of trust and confidence to further their private interests"). A fiduciary has a significant

interest in a contract that will eliminate his liability for past wrongdoing, so the beneficiary needs to know about that wrongdoing before it can decide whether to relinquish those claims. *See Heckmann*, 2009 WL 3440004, at *7. If the fiduciary fails to disclose such information, that is an independent fiduciary breach that renders the release voidable. *Id.* at *6-8, *13.

This is black-letter law in most of the country. "[A] significant majority of other jurisdictions *** h[old] that a fiduciary owes a duty of full disclosure when entering into a transaction with the fiduciary's [beneficiary] and that the fiduciary's failure to disclose material facts relating to a mutual release of claims between the parties is sufficient to set aside the release." *Wal-Mart*, 255 S.W.3d at 429 (citing cases); *Mazak Corp. v. King*, 496 F. App'x 507, 511 (6th Cir. 2012) ("[T]he vast majority of state and federal courts have held that a release must be set aside if the fiduciary failed to make a full disclosure of all relevant facts to the beneficiary."). It is also the law in Illinois. *See Peskin v. Deutsch*, 134 Ill. App. 3d 48, 55 (1985) ("A release between fiduciaries is to be evaluated in the context of the fiduciary relationship" and the fiduciary must show "that a full and frank disclosure of all relevant information was made to the other party."); *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 33 (2003). And the rule has been applied to a wide variety of fiduciary-beneficiary relationships, including those involving directors and stockholders.[9]

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[9] *See ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶¶ 3, 65-66 (president/CEO and stockholders); *Cwikla*, 345 Ill. App. 3d at 26, 33 (2003) (corporate director's duty to fellow director and stockholder); *Shane v. Shane*, 891 F.2d 976, 985-86 (1st Cir. 1989) (fellow stockholders); *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982, 984-85, 988-90 (1998) (partners); *Pacelli Bros. Transp., Inc. v. Pacelli*, 456 A.2d 325, 329, 407-09 (Conn. 1983) (brother and fellow director); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1474, 1481-82 (6th Cir. 1989) (investors and broker); *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 104-07 (Alaska 2001) (joint venturers).

That rule is fully applicable here. It is undisputed that Rajaram acted as a fiduciary to Walworth. And the SRA's release covered claims against Rajaram, giving him an interest in the transaction triggering his disclosure duty. C 808-09 (A059-61). Yet Defendants never even attempted to show that Rajaram disclosed all material information relevant to the release (including his wrongdoing) to Walworth before the parties executed the SRA. It was therefore plain legal error for the circuit court to hold that the release barred all of Walworth's claims.

The counterarguments Defendants offered below are unavailing. *First*, they (and Judge Kubasiak) pointed to cases standing at most for the proposition that a fiduciary need not make a full disclosure when the parties are settling *known* claims. *See* C 4260 V4 (A051); *e.g.*, *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 149-50 (Del. Ch. 2003) (discussing in dicta corporate practice of executing releases "when *** pay[ing] value to settle a claim"). *Heckmann* recognizes this distinction; it explained that if a beneficiary already knows of the fiduciary's wrongdoing at the time it enters into the release (even if the beneficiary does not know the wrongdoing's full scope), then the fiduciary may not be under an obligation to make any further disclosure. *See* 2009 WL 3440004, at *7-8. But where—as alleged here—the beneficiary does *not* know of the fiduciary's wrongdoing before it executes the release, it is "unaware of the director's existing personal interest" in the provision, and the disclosure obligation remains. *Id.*; *see also* A016-17 ¶¶ 44-45 (noting evidence that Walworth did not know of Rajaram's "soft 'con job' to obtain [Walworth's] assent to the SRA").

Second, Defendants have claimed that the Delaware Supreme Court's decision in *Dohmen* abrogated this release-specific duty of disclosure. But *Dohmen* was about

corporate directors' duty to disclose material information about the company in connection with a request for stockholder action; the case had nothing to do with releases. And as even Defendants acknowledge, "the duties of corporate fiduciaries change 'in the specific context of the action the [fiduciary] is taking.'" Defs. Br. 52 (alteration in original) (quoting *Malone*, 722 A.2d at 10). For that reason, *Dohmen* made clear that its ruling did not carry over to other kinds of fiduciary breaches. *See* 234 A.3d at 1175 (distinguishing duty of disclosure from duty of loyalty). The Delaware Supreme Court certainly did not disclaim (*sub silentio*) *Heckmann*'s holding—and the majority rule—that a fiduciary must make a disclosure of his interest in a release to enforce the release against his beneficiary.

Third, Defendants have taken refuge in the facially broad language of the release and Walworth's supposed "sophistication." But the breadth of the release has no bearing on the fiduciary's obligation to disclose his wrongdoing beforehand. *E.g.*, *Wal-Mart*, 255 S.W.3d at 428-29 (refusing to enforce "clear and unambiguous" release barring "known or unknown" claims). And the majority rule applies to protect sophisticated and unsophisticated beneficiaries alike, as the *Wal-Mart* case—where Wal-Mart was the *beneficiary*—also makes clear. *Id.* at 429-30.

For this reason too, the release in the SRA is voidable at Walworth's option, *see Heckmann*, *2*009 WL 3440004, at *6-8, *13; *Wal-Mart*, 255 S.W.3d at 429-30, and cannot bar the contract and unjust enrichment claims (or any other claim).

C. Defendants' Alternative Challenges To The Unjust Enrichment Claim Are Not Properly Presented And Are Meritless

Defendants "respectfully also note" two other grounds for reversing the appellate court on Walworth's unjust enrichment claim: (i) that the claim is not viable because the repurchase transaction was governed by a contract; and (ii) that where an unjust enrichment

claim is based upon the same allegations as tort claims, and the tort claims are dismissed, the unjust enrichment claim necessarily fails as well. Defs. Br. 59. But as Defendants' introductory phrasing suggests, there is no question they failed to preserve these issues for the Court's review. Those additional grounds for reversing the appellate court appeared nowhere in Defendants' petition, and they are in no way intertwined with the appellate court's ruling on Section 3(e). *See People v. Williams*, 235 Ill. 2d 286, 298 (2009) (issues presenting a separate basis for relief are not "inextricably intertwined" with preserved issues). Regardless, both arguments are meritless.

First, the appellate court correctly rejected Defendants' argument that the SRA bars the claim. A023 ¶ 67. The existence of an enforceable contract precludes a party from seeking a *quasi-contract* remedy for the other party's breach. But Walworth is not seeking a remedy for Mu Sigma's failure to perform under the SRA. Rather, Walworth is seeking a remedy for the unjust benefit Defendants retained by virtue of wrongfully inducing Walworth to give up its stake. *See Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 949 (1998) (reinstating unjust enrichment claim based on defendant inducing plaintiff to make an inequitable sale, even though a contract governed the sale itself); *Melnick v. TAMKO Bldg. Prods., Inc.*, 469 F. Supp. 3d 1082, 1107 (D. Kan. 2020) ("As numerous courts have recognized, *** a claim for unjust enrichment under Illinois law may be based on quasi-contract or tort, and the existence of a contract does not defeat the latter type of claim."). When it comes to that type of tort-based claim, the SRA is beside the point.

Second, Defendants cite no Illinois authority to support their contention that a tort-based unjust enrichment claim must "stand or fall" with other tort claims. The federal case Defendants invoke, *Cleary v. Philip Morris Inc.*, 656 F.3d 511 (7th Cir. 2011), was merely

"suggest[ing]" an interpretation of Illinois cases and offering "reflections" about whether the plaintiffs' claim in that case could stand alone; the court actually dismissed the claim on another ground. *See id.* at 516-18. Nor has *Cleary* ever been cited in a reported Illinois decision. In any event, this Court should not break new ground in a case where Defendants failed to preserve the issue.

III. IF THE COURT DOES NOT AFFIRM, IT SHOULD CERTIFY QUESTIONS OF DELAWARE LAW

The appellate court correctly applied well-established Delaware law to reverse the circuit court. At minimum, before this Court reverses the appellate court on any issue of Delaware law—or before the Court rejects any of Walworth's alternative grounds for affirmance—it should certify the relevant question or questions to the Delaware Supreme Court. *See* Del. Sup. Ct. R. 41; *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1127 (Del. 2016) (requiring a set of stipulated facts for certified questions). This Court should not submit only the questions presented in Defendants' opening brief—which are case- and fact-specific, and the resolution of which would not resolve this appeal.

CONCLUSION

The Court should affirm the appellate court's decision.

Dated: April 29, 2022

Respectfully submitted,

/s/ Robert A. Clifford

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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 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 14,846 words.

/s/ Robert A. Clifford
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CC M.H.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

WALWORTH Investments LLC
v.
Mu Sigma, Inc.
Rajaram Dhiraj

No. 16 L 2470

ORDER

This matter coming to be heard for a report on status and for presentment of defendants' motion to dismiss the second Amended Complaint and defendants' motion to strike the declaration of Jack B. Jacobs, the Court being fully advised of the premises hereto,

IT IS HEREBY ORDERED:

(1.) The plaintiff's motion for reconsideration is denied; 285

(2) Defendants' motion to strike the Jacobs declaration is granted. The declaration is stricken from the record; 446

(3.) Footnote 2 of Defendants' motion to strike is stricken from the record; and 446

(4) Defendants' motion to dismiss is subject to the scheduling order entered on May 2, 2019.

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Judge Daniel J. Kubasiak

ENTERED: MAY 16 2019
Circuit Court-2072

Dated: _____, _____

D Kubasiak 2021
Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

C 4103 V4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Walworth Investments – LG, LLC,	)	
	)	
Plaintiff,	)	No. 2016 L 2470
	)	
v.	)	Commercial Calendar T
	)	
Mu Sigma, Inc. and Dhiraj C. Rajaram,	)	Judge John C. Griffin
	)	
Defendants.	)	

OPINION

This cause is before the court on defendants', Mu Sigma, Inc. ("Mu Sigma") and Dhiraj C. Rajaram ("Rajaram"), motion for summary judgment against plaintiff Walworth Investments – LG, LLC ("Walworth") pursuant to section 2-1005.

The court reviewed the pleadings, the depositions of Rhajaram and Patrick Ryan, Jr., the affidavit of Peter A. Silverman, the parties' briefs, and the exhibits attached thereto. After reviewing these materials, and after applying summary judgment motion standards, the court denies defendants', Mu Sigma and Rajaram, motion for summary judgment. The court finds that the Buyer's Acknowledgement Clause in *IAC Search* is distinguishable from the Stock Repurchase Agreement's provisions. Further, a question of fact exists as to whether section 3(e) of the Stock Repurchase Agreement was intended to function as a reliance clause that would bar Walworth's non-contractual claims.

BACKGROUND

The following allegations are contained in the first amended complaint. Plaintiff Walworth owned stock in Mu Sigma, a data analytics company founded by defendant Rajaram. According to Walworth, the defendants misrepresented facts about "Mu Sigma's value, growth prospects, and future business plans, as well as Rajaram's motives for pursuing the repurchase transaction," thus inducing Walworth to sell its ownership stake back to Mu Sigma. Walworth's first amended

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complaint alleges fraudulent inducement (count I), fraudulent concealment (count II), negligent misrepresentation (count III), unjust enrichment (count IV), breach of fiduciary duty (count V), breach of contract (count VI), and punitive damages (count VII).

STANDARD OF REVIEW

Summary judgment is proper when the pleadings, affidavits, depositions, admissions, and affidavits on file fail to establish a genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c); *N. Ill. Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). A genuine issue of material fact exists when the material facts are disputed or when reasonable persons might draw different inferences from the undisputed facts. *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). A defendant may be granted summary judgment in two instances: "(1) when the movant affirmatively disproves the nonmovant's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law ... or (2) when the movant can establish the nonmovant lacks sufficient evidence to prove an essential element of the cause of action." *Rice v. AAA Aerostar*, 294 Ill. App. 3d 801, 805 (4th Dist. 1998), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The burden of making a prima facie showing that there are no genuine issues of material fact is on the moving party. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 689 (4th Dist. 2000). Once the movant has met this initial burden, the non-movant must produce facts that would arguably entitle it to a favorable judgment. *Helfers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 267-68 (3rd Dist. 2010). Summary judgment is considered a "drastic means of disposing of litigation," and "should be allowed only when the right of the moving party is clear and free from doubt." *Adams*, 211 Ill. 2d 32 at 43; *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001).

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The trial court cannot make credibility determinations or weigh the evidence at the summary judgment stage. *Pietruszynski v. McClier Corp.*, 338 Ill. App. 3d 58, 67-68 (2003).

DISCUSSION

Reliance under Stock Repurchase Agreement

The parties dispute whether their Stock Repurchase Agreement expressly disclaims Walworth's reliance on any statements made outside the agreement. Mu Sigma asserts that a new Delaware case, *IAC Search, LLC v. Conversant LLC*, is directly applicable and prevents Walworth from relying on any extra-contractual representations. 2016 WL 6995363; 2016 Del. Ch. LEXIS 176.

In *IAC Search*, the plaintiff company purchased six subsidiaries of the defendant company. *Id.* at 1. According to the *IAC Search* plaintiff, the defendant fraudulently induced the plaintiff to overpay for one subsidiary by misrepresenting its ad revenue. *Id.* The contract in *IAC Search* contained a provision in which the "Seller" defendant expressly disclaimed making any extra-contractual representations. *Id.* at 13. An additional provision stated:

> The Buyer acknowledges that neither the Seller nor any of its Affiliates or Representatives is making, directly or indirectly, any representation or warranty with respect to any data rooms, management presentations, due diligence discussions, estimates, projections or forecasts involving the Transferred Group, including, without limitation, as contained in the Confidential Information Packet dated August 2013 and any other projections provided to Buyer, unless any such information is expressly included in a representation or warranty contained in Article III.

Id. at 14-15. Lastly, the contract also contained an integration clause. *Id.* at 15.

The *IAC Search* court found that the "Buyer" plaintiff had disclaimed reliance on any extra-contractual representations. *Id.* at 24. The court reasoned that "'Delaware law does not require magic words' to disclaim reliance, and *** the specific language of an agreement may vary but still 'add up to a clear anti-reliance

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clause.'" *Id.* at 17, *quoting Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A. 3d 35, 51 (Del. Ch. 2015). The *IAC Search* court further reasoned:

> [I]n order to bar fraud claims, a disclaimer of reliance "must come from the point of view of the aggrieved party," meaning that it must come from the *buyer* who is asserting the fraud claim. An assertion from the *seller* of "what it was and was not representing and warranting" is not sufficient given the law's abhorrence of fraud.
>
> ***
>
> [T]he Buyer's Acknowledgement Clause here defines *in precise terms* from IAC's perspective as the buyer the universe of information on which IAC relied and did not rely when it entered into the Agreement through IAC's express acknowledgement that ValueClick was making no representation about information provided during due diligence, except as otherwise provided in an express representation in the Agreement. As the Court explained in *Prairie Capital*, it is not necessary that such a provision be "framed negatively" in terms of what the buyer did not rely on; it is sufficient if the contract states affirmatively what the buyer did rely on. The Buyer's Acknowledgement Clause here *** does that.

Id. at 17-18, 20 (emphasis added), *citing FdG Logistics LLC v. A&R Holdings, Inc.*, 131 A. 3d 842, 860 (Del. Ch. 2016) & *Prairie Capital III, L.P.*, 132 A. 3d.

The Stock Repurchase Agreement, which defines Walworth as the "Stockholder," states:

> 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.

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The court finds that the contract in *IAC Search* is distinguishable from the Stock Repurchase Agreement. Specifically, the contract in *IAC Search* provided a detailed description of the information on which the plaintiff relied, listing the specific topics on which the Seller was not making any representations or warranties. *Id.* at 14-15, 20. The *IAC Search* court found this particularly relevant, observing that "the Buyer's Acknowledgement Clause here defines *in precise terms* from IAC's perspective as the buyer the universe of information on which IAC relied and did not rely." *Id.* at 20 (emphasis added). The Stock Repurchase Agreement, on the other hand, contains no precise terms as to the scope of Walworth's reliance disclaimer. Rather, the provision at issue is much more broadly worded in defining the representations made by Mu Sigma.

Further, as Walworth argues, section 3(e) of the finalized Stock Repurchase Agreement only expressly refers to Mu Sigma's "reliance" upon the "truth of the representations and warranties in this section 3." Section 3(e), however, does not have comparable language referring to Walworth. Accordingly, the court finds that the language of the Stock Repurchase Agreement is ambiguous as to whether the parties intended that Walworth disclaim reliance on the defendants' representations.

Where the language of a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 242 (2007). In response to the defendants' motion for summary judgment Walworth provides the affidavit of John Del Monaco, an attorney for Kirkland & Ellis LLP. Del Monaco alleges that exhibit H to Walworth's response is a copy of "a draft Stock Repurchase Agreement, among and between Walworth Investment, LG – LLC and Mu Sigma, containing comments from Sidley Austin LLP, counsel to Patrick Ryan, Jr." Section 3(e) of this "draft Stock Repurchase Agreement" appears to be similar to section 3(e) of the finalized Stock Repurchase Agreement. However, there is additional text, crossed out, which states:

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> (ii) that Stockholder *is not relying upon* the Company or any of the Company's Related Parties in making its decision to sell the Repurchased Stock to the Company pursuant to the Agreement.

(Emphasis added).

Summary judgment is considered a "drastic means of disposing of litigation," and "should be allowed only when the right of the moving party is clear and free from doubt." *Adams,* 211 Ill. 2d 32 at 43; *Morris,* 197 Ill. 2d at 35. On a summary judgment motion, the court must construe the pleadings, depositions, admissions, and affidavits strictly against defendants Mu Sigma and Rajaram and liberally in favor of Walworth. *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d at 43. Applying summary judgment standards, the court finds that the Stock Repurchase Agreement is ambiguous, and that Walworth has raised extrinsic evidence that, viewed liberally in Walworth's favor, raises a question of fact as to the parties' intent in drafting section 3(e).

Therefore, the court denies defendants', Mu Sigma and Rajaram, motion for summary judgment as to counts I, II, III, and V.

Fraudulent Concealment

The defendants lastly argue that Illinois does not recognize a claim for fraudulent concealment, citing *Doe v. BSA*. 2016 IL App (1st) 152406, ¶ 80. *Doe v. BSA*, however, only states that section 13-215 is a tolling statute and does not create a cause of action. *Id.* at ¶¶ 80-81. The court in *BSA* cites *Cangemi v. Advocate South Suburban Hosp.*, which further clarifies this issue, stating "fraudulent concealment, *as codified in section 13-215*, is not a cause of action in and of itself; rather, it acts as an exception to the time limitations imposed on other, underlying causes of action.". *Id.*; *Cangemi v. Advocate South Suburban Hosp.*, 364 Ill. App. 3d 446, 459 (1st Dist. 2006) (emphasis added).

Illinois courts have consistently recognized fraudulent concealment as a cause of action. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996); *W.W.*

Vincent & Co. v. First Colony Life Ins. Co., 351 Ill. App. 3d 752, 762 (1st Dist. 2004); *Abazari v. Rosalind Franklin Univ. of Med. & Sci.*, 2015 IL App (2d) 140952, ¶ 27. Accordingly, Walworth has the right to make a claim for fraudulent concealment.

The court denies defendants', Mu Sigma and Rajaram, motion for summary judgment as to count II.

ORDER

It is ordered:

(1) Defendants', Mu Sigma, Inc. and Dhiraj C. Rajaram, motion for summary judgment against plaintiff Walworth Investments – LG, LLC is denied;

(2) The case is set for a report on status on April 6, 2018, at 9:30 a.m., to set a trial date.

ENTERED
JUDGE JOHN C. GRIFFIN-1981
MAR 29 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED

Judge John C. Griffin, No. 1981

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

WALWORTH INVESTMENTS - LG, LLC, Plaintiff,	)	
vs.	)	No. 2016 L 2470
MU SIGMA, INC. and DHIRAJ C. RAJARAM Defendants.	)	Hon. John C. Griffin

ORDER

THIS MATTER COMING TO BE PRESENTED TO THE COURT on Defendants' Section 2-619.1 Motion to Dismiss, the Court being fully advised of the premises hereto, and after having considered the written submissions of the parties and hearing oral argument, for the reasons stated in open court, IT IS HEREBY ORDERED:

(1) The Section 2-615 portion of the Motion to Dismiss is denied without prejudice as to Counts I, II, III, V and VI of Plaintiff's First Amended Complaint. The Section 2-615 portion of the Motion to Dismiss is granted without prejudice as to Counts IV and VII of Plaintiffs' First Amended Complaint; and

(2) The Section 2-619 portion of the Motion to Dismiss is denied without prejudice.

ENTERED
JUDGE JOHN C. GRIFFIN-1981
AUG - 1 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Date: _____

Entered: _____
Judge John C. Griffin

Prepared by agreement of the parties:

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C 465

Date: October 18, 2016
Volume: I
Case No.: 2016-L-002470

WALWORTH INVESTMENTS-LG, LLC,

Plaintiff,

v.

MU SIGMA, INC. and DHIRAJ C. RAJARAM,

Defendants.

.

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Email: nscolahurst@gmail.com

STATE OF ILLINOIS)

COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT-LAW DIVISION

WALWORTH INVESTMENTS-LG, LLC	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	No. 2016 L 002470
	)	
MU SIGMA AND DHIRAJ C. RAJARAM,	)	
	)	
DEFENDANTS,	)	

REPORT OF PROCEEDINGS held before the Honorable, Judge John Griffin, taken in the above-entitled cause before GWENDOLYN BEDFORD, a Certified Shorthand Reporter within and for the County of Cook, State of Illinois, taken at the RICHARD J. DALEY CENTER, 50 West Randolph Street, Room 2303, Chicago, Illinois 60602, held on the 18th day of October, 2016 at the hour of 11 o'clock a.m. pursuant to notice.

are issues on which there is substantial differences of opinion. There's substantial grounds for the difference of opinion to use the language of 308. On each of those three issues -- and there is really no question that having Appellate review now would materially advance the termination of litigation.

So we ask again, if your Honor is not going to reconsider to recertify those issue for appeal. Thank you, Judge.

THE COURT: Thanks. I appreciate all the work you've done and thanks again.

I'm going to deny the Motion to Reconsider based on the reconsiderations standard. But just to reiterate, I think there is numerous fact questions in this. The truthfulness of the article is one. But when I -- we talked about judicial admissions. When you look at the definition of judicial admissions, which counsel accurately stated in the record earlier, and then I looked at the Complaint and Paragraph 41, "When Ryan Jr. Confronted Rajaram about the contents of the "Chicago Sun-Times" article, Rajaram had no answer and he made no attempt to reconcile the

inconsistencies. To this day Mu Sigma continues to try to hide the contradictions between Rajaram's statement and admission to Ryan Jr. And the truth notably while the Company's website contains a nearly exhaustive list of 300 plus articles regarding the company since 2005, the "Chicago Sun-Times" article is missing from the otherwise comprehensive list."

The Complaint has allegations and, you know, the Court has to look at the Complaint and the favor of the party not against the moving party.

It has allegations. It's actually that they were covering it up. But, you know, the delay, was it prejudicial? Was there a length between the delay and prejudice to the Defendant? Was the Defendant misled by the delay? The length of delay, the unreasonableness of the delay. All those things ended up being fact questions. And I am educated by the Appellate Court to seriously take the issue of fact questions seriously.

As far as the 308, I again agree. I don't think this is applicable. They strongly frown on 308 language unless it is a discreet issue that there's clearly a reason for a difference of

opinion.
I don't think that is the case here. I think this is a case of applying the law to the facts. If I'm wrong, that is what I'm wrong on. It's not -- so I just don't think that the 308 language is appropriate.

So what do we have next?

MR. CLUBOK: Your Honor, there's one other item. I think this one is an easy one, I think, if the parties are in agreement, unless your Honor disagrees. We submitted a confidentiality order to allow them to produce documents to us. I don't know if you have had a chance to review that. Am I correct about that, that it has not been ruled on yet?

MR. ARFFA: It was submitted.

THE COURT: If you are in agreement with it, I'm fine with it, but I don't remember seeing it. But if it's an agreed Confidentiality Agreement, I don't have a problem with it. So I need to --

MR. ARFFA: We'll make sure you get a copy if you don't have it.

THE COURT: It could be around somewhere,

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

WALWORTH INVESTMENTS, Plaintiff,	)
vs.	) No. 16 L 2470
MU SIGMA, INC., and DHIRAJ C. RAJARAM, Defendants.	)

REPORT OF PROCEEDINGS at the hearing of the above-entitled case before the HONORABLE JOHN C. GRIFFIN, Judge of said Court, on the 14th day of July, 2016, at 10:20 a.m.

do apologize.

What happened in these other cases is the courts upheld a nonreliance provision where somebody said I didn't rely on anything the seller told me. Here it is stronger. Here what it is saying is the seller didn't tell me anything about these topics. It is actually a much stronger position, and if you give meaning to the language -- and I don't know what the history -- I honestly don't know what the history was on the provision, but if you look at the language and you give it some meaning, that is a -- it is a stronger statement, your Honor, to say the Court never said X than to say I didn't rely on what the Court said about X.

That's our position. Thank you very much.

MR. ARFFA: Thank you, Judge.

THE COURT: Thanks.

MR. CLUBOK: Thank you, your Honor.

THE COURT: Thanks. I really appreciate all of the work that's been put in here, and it is really top level, and I truly appreciate it.

I am applying Delaware law to the contract claims because paragraph 6(b) of the stock repurchase agreement states that the parties are --

it should be interpreted based on Delaware law and Illinois law on the other claims.

We are all familiar with this language, but some of the argument actually supports why I want to read it in the record. I am going to skip all of the -- I am going to skip all of the citations, but a 2-619 is a motion that combines a 615 and a 2-619. In 615 the movant challenges the legal sufficiency of a complaint based on certain defects or defenses apparent on the face of the complaint. In such a motion, all well-pleaded facts in the complaint must be taken as true.

When reviewing a 2-615, the Court must view all of the allegations in the light most favorable to the plaintiff and all reasonable inferences taken as true. A motion to dismiss should be granted only if the plaintiff can prove no set of facts to support the cause of action asserted. Illinois is a fact pleading jurisdiction. The plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. Plaintiff must allege specific facts because mere conclusions of law and unsupported conclusionary factual allegations are insufficient to survive a 2-615

motion to dismiss.

Pleadings are to be liberally construed, so as to do justice between the opposing parties. However, absent the necessary allegations, even the general policy favoring the liberal construction of pleadings will not satisfy the requirement that a complaint set forth facts necessary for recovery under the theory asserted.

Now, the case law says I need to rule on the 2-615 before I rule on the 2-619, and I am going to do that even though the arguments as laid out in the briefs were the opposite. It doesn't matter. So the 2-615 argument begins with Count VI, which is the breach of contract count, and I am going to deny the motion to dismiss Count VI based on 2-615. Paragraph 4(d) of the contract, for example, alleges that there were no other negotiations going on, and based on the 2-615 standard, I think it survives the motion to dismiss.

Counts I, II, and III basically -- and those are the counts for fraudulent inducement, fraudulent concealment, and negligent misrepresentation. Certainly a big part of the argument is that there are inactionable statements

of opinion regarding future events.

Again, applying -- some of the statements that are alleged in the complaint would not be sufficient to support a complaint because they would be inactionable statement of opinion regarding future events. However, when I look at the totality and I apply the 2-615 standard, I am going to deny the motion to dismiss under 2-615 as to Counts I, II, and III because I think they're minimally pled.

Unjust enrichment is Count IV, and unjust enrichment can be alleged in the alternative, but it has to be alleged in the alternative, and in this case it is not. Count IV incorporates Counts 1 through 47 -- paragraphs, not counts, paragraphs 1 through 47 -- seems like there's 47 counts -- and paragraph 7 and paragraph 38 clearly allege a complaint. When you incorporate in the count with the breach of fiduciary duty -- I'm sorry, unjust enrichment, that is grounds for dismissal.

Punitive damages is Count VII. There was some discussion about whether 5/2-604.1 applies, which is the fact that you have to have a motion to approve a count for -- or a claim for punitive damages. I don't think it applies because I think

the language that starts that section talks about personal injury and property damage cases, and this is not a personal injury or property damage case. However, I'm still granting the motion to dismiss because a count for punitive damages standing alone is not an action. It's a --

MR. ARFFA: Form of relief.

THE COURT: Form of relief.

Fraud, you know, when you look at Jury Instructions 800.05 and 800.06, clearly under the right circumstances, you can recover punitive damages in a fraud theory, and that's I think what was being attempted here because the willful and wanton is the necessary allegations, but that would just be in the count for the fraudulent counts as opposed to its own count. So I think that covers the 2-615. Because I did deny the motion to dismiss based on 2-615, I do go to 2-619.

2-619 motions to dismiss admit the legal sufficiency of the plaintiff's allegations. A 2-619 motion to dismiss raises defects, defenses, some other affirmative matter appearing on the face of the complaint which defeats the plaintiff's claim. In particular, affirmative matter is something in

the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred in the complaint. All well-pled facts and reasonable inferences must be taken as true, and all pleadings and supporting documents must be considered in a light most favorable to the nonmovant, in this case the plaintiff.

My notes indicate that the laches argument did go to all seven counts was what -- I can review it, but that's what my notes indicate, and I'm sure they're right. Anyway, Mo is a critical case. It's an interesting case, affirming Judge Sanjay Tailor, one of the judges here in the commercial section, but I do think Mo is distinguishable. I think that there were no fact questions in Mo, and I think we have fact questions here, you know, the newspaper article, whether the newspaper article was accurate, whether there were accurate quotes, what all of that meant with that discussion subsequent to the article coming out between Mr. Ryan and Mr. Rajaram. I think those are -- those are -- there's fact questions surrounding them, and Mo was 10 years and just the facts of Mo and some of the -- I'll leave

it at the facts of Mo. I am going to deny the motion without prejudice to raise it as an affirmative defense.

With regard to the stock purchase agreement, the disclosure paragraph 3(c), I am going to deny the motion to dismiss based on the FdG case. Delaware law strictly requires anti-reliance language contain an affirmative disclaimer of reliance by the plaintiff sufficient to preclude it from asserting a claim. That's on page 846.

And also paragraph 6(g), the integration clause, I think there's fact questions here. Again, there is case law that says it's a classic question of fact whether one -- justifiable reliance and a misrepresentation situation. So I am going to deny that.

And then on the release, the party seeking enforcement of the release bears the burden of proving that the released fraud claim was within the contemplation of the releasing parties. A case that you didn't cite that I am going to cite -- it's one of my favorites because I got reversed on a fraud claim -- I'm sorry, on a release claim, Construction Systems versus FagelHaber, 2015 IL App (1st) 141700.

This is Illinois law. I realize the release is in the contract, and I should apply the Delaware law. I don't think there's any difference to be honest at this point, but this particular case, a release will not be construed to defeat a valid claim that was not contemplated by the parties at the time the agreement was executed. General words of release are inapplicable to claims that were unknown to the releasing party. Indeed, no formal words, no matter how all-encompassing, will foreclose scrutiny of a release to prevent a reviewing court from inquiring into surrounding circumstances to ascertain whether it was fairly made and accurately reflected the intention of the parties.

Where the releasing party is unaware of other claims, general releases are restricted to the specific claims contained in the release agreement. Where a fiduciary relationship exists between the parties, the defendant has the burden to show that a full and frank disclosure of all relevant information was made to the other party.

Again, that reversed me. So that's what the Appellate Court said, and I think there's fact

questions based on that analysis. So, again, these are things that can be raised as affirmative defenses, and we will get on with the litigation. Again, I appreciate the work that was done here, and I just think it was outstanding.

Do you want to file an amended complaint? I obviously have denied it. You can stand on the counts you have.

MR. CLIFFORD: Right. Just as it relates to the punitive --

THE COURT: Or whatever else you might --

MR. CLIFFORD: As long as it's denied without prejudice.

THE COURT: Yes. They are all denied without prejudice, and, you know, there's language I put in when I do written decisions that sometimes when I grant motions to dismiss, in circumstances like this case, I'll say without prejudice to amend the complaint upon motion prior to the closing of discovery. I can do that. Procedurally I am trying to figure out --

MR. CLIFFORD: That makes sense to us.

THE COURT: -- do you want time to amend it now? No? That's what I am hearing is no?

MR. CLUBOK: With the one issue, your Honor -- because we do appreciate that language and we do anticipate, as we get discovery -- you have placed -- they are on notice of more detail.

But the unjust enrichment, if we were to amend to plead that in the alternative, is that something -- has your Honor granted that with prejudice or with leave to amend on --

THE COURT: No, no, no, clearly not with prejudice. It's the same language.

MR. CLUBOK: Yes.

THE COURT: Without prejudice to amend it prior to the closing of discovery upon motion.

MR. CLUBOK: Thank you very much, your Honor.

MR. ARFFA: I just don't want to take that to mean what I am afraid I am hearing from the other side, that they can go all the way through discovery and then, when discovery is over finally, we get a whole new pleading. So I take it at some point we have to be put on notice if they've got some kind of change.

THE COURT: Is it the Code of Civil Procedure? What do we call that? Or am I dating

myself with that? Rules of --

MR. ARFFA: These guys should know.

MR. CLIFFORD: We should know.

THE COURT: Anyway, it provides the standard for amendment, and we'll be following that.

MR. ARFFA: Good.

THE COURT: It is just a matter of procedure. Sometimes it keeps the case going along a little bit faster when we don't keep revisiting motions to dismiss, but it is without prejudice to you raising all of the reasons. I think it's the Loyola cases that --

MR. CLUBOK: Thank you.

MR. ARFFA: Great.

THE COURT: So now it goes to you. How long do you want to answer?

MR. DWYER: Thirty days, is that --

MR. CLUBOK: That's absolutely fine.

THE COURT: Twenty-eight would be what we usually do.

MR. DWYER: That's fine.

MR. ARFFA: That's fine, Judge.

MR. CLUBOK: We assume that you will not hold up discovery during the time you are working on

your answer.

MR. CLIFFORD: And, by the way, can I ask a question about process there, your Honor?

THE COURT: About what?

MR. CLIFFORD: Process, just with the Court?

THE COURT: Yes.

MR. CLIFFORD: We are currently negotiating a protective order that we would ultimately submit to the Court for consideration, but in the course of this case, it's pretty clear to me from what I am hearing thus far that we may well have some discovery disputes, i.e., you know, that they want to -- they have already told us that they want to give us documents sufficient to show X and, therefore, they're self-defining relevancy.

So if we can't -- if we have an impasse there, is there a specific routine that the Court follows about coming before you?

THE COURT: No. I give a fantastic speech on the initial intake day of cases that probably none of you were here for, but today was the day. I can give it again.

There's a standard standing order for the

commercial section. So there's a copy of it over there, or it's online. Anytime the case is up, you can piggyback motions. So to answer your question, you can piggyback motions anytime the case is up.

Typically, you know, we do a briefing schedule. I ask for two complete sets of the courtesies, and then we have a clerk status, and at the clerk status, we -- usually I rule in writing. Usually I don't hear oral argument, but if somebody has a burning desire, I do it. The tricky part with that always is if I'm on trial, that's where it gets tricky to find the time, but I usually do it at --

MR. FIGLIULO: Ungodly hours of the morning.

THE COURT: I do it at 8:15 so I can finish by my 9 o'clock call. Counsel tried, I think, a five-week case so he is -- so I usually do it at maybe -- anytime 8:15, 8:30, 8:45. And as a matter of fact, I will make that option available to you. Some cases they always come in early because I only will set one case a day and you can get 10 or 15 minutes or a half hour without any -- otherwise, I set up the 10 cases every half hour but some cases -- I get in at quarter to eight. So I am fine

with you coming in -- I don't think you can get in till about 8:15 is why -- but, anyway, if you want to do that, we can set the regular statuses.

The last thing on your question, typically on motions to compel, typically I do a motion, a response, and I don't do replies because I do do oral arguments on motions to compel because usually there's things to talk about.

MR. CLIFFORD: Right.

THE COURT: I don't know if I am answering your question.

MR. CLIFFORD: You are, yes. Thank you.

THE COURT: But the last thing is if you have motions, the motion call is Wednesdays, Wednesday mornings at nine, beginning at nine. I put 10 on per half hour up to 30, I think, but I've never had that many.

So did anybody else have any procedural questions?

MR. FIGLIULO: Judge, when I was taking notes on what your rulings were, Count V, I didn't hear a ruling on Count V.

THE COURT: I don't have Count V in my notes. Count V was breach of fiduciary duty.

MR. FIGLIULO: Right.

THE COURT: I'm not sure -- I would have to look at it. I don't know why I don't have it in my notes. Was it under the 2-615?

MR. DWYER: It was definitely addressed by the 2-619, and we had a separate 2-615.

MR. FELLER: Your Honor, if I remember their papers correctly, their argument was the breach of fiduciary duty count fails if the fraud counts fail. We don't agree that that's the standard, but clearly if the Court has denied the motion to dismiss with the fraud count, it would necessarily follow the fiduciary duty count is denied as well.

THE COURT: I mean, you are right, I didn't, and I noticed that, and I kind of went over it again this morning and I thought -- in any case, if it was a 2-615, if it was minimally pled. Now, the case that was --

MR. FIGLIULO: Can we file an amended motion to dismiss on that --

THE COURT: Now, that case was a new one?

MR. DWYER: Right.

MR. FIGLIULO: Could we have leave to file

an amended motion to dismiss with respect to Count V only?

MR. DWYER: Three pages.

THE COURT: I am not -- don't worry about the number of pages.

MR. CLIFFORD: Well, if it's minimally pled -- I mean, we obviously would object, but the Court -- I mean, it's certainly -- you know, what Mr. Feller said was correct, and that is their argument was that if the fraud counts failed, breach of fiduciary duty fails, and we clearly think that you could have a breach of fiduciary duty without a fraud. And if it's minimally pled, the motion to dismiss ought to be summarily denied and follow the fraud ruling.

MR. DWYER: So, your Honor, so that is true. That is what we argued in our papers, and so if we are stuck with the papers, I think that's accurate. We did -- your Honor, it is a separate issue. It is a separate claim that's actually very different from those other claims.

I do think we can brief it in a very short time. We wouldn't have to come back to have oral argument. It just seems Delaware law applies. I

actually think it's relatively clear under Delaware law that there is no fiduciary duty owed. We would love to get that straight.

THE COURT: By the way, the only time I did cover V was actually under the laches was I through VII.

MR. FIGLIULO: Okay.

THE COURT: So V was covered under that part, but as far as the 615, I am -- maybe it's under plaintiff's other claims also fail.

MR. DWYER: It is, and it's one or two sentences as plaintiff's counsel said.

THE COURT: Okay.

MR. FELLER: Your Honor, I --

THE COURT: Do you have an objection to this, what he is proposing?

MR. FELLER: I think we do have an objection, your Honor. I think what counsel has just admitted is they filed a motion to dismiss. Based on the argument in the motion to dismiss and the Court's ruling, the motion to dismiss as to the breach of fiduciary duty count should be denied.

What they are saying now is we have a new argument and we would like to make it in

supplemental briefing. They will have a chance to do that in summary judgment. They will have a chance to do that, but why we would continue a motion to dismiss with you right now is --

THE COURT: I mean really it is a motion to reconsider.

MR. FIGLIULO: Okay.

THE COURT: It really is, and this would not be theoretically a basis for a motion to reconsider. It's not fatal in the sense -- and I did see it is related to fraud claim. I just saw that on page 19 or whatever. Because you can raise it in summary judgment and I think the -- you know, the standard for motion to reconsider and that there's language you can't stand, whatever, silently and then, you know, raise something that you could have had at that time, I think it fails as a motion to reconsider, but it's not a final ruling in the sense that -- I am sure we will be revisiting it on other motions.

MR. ARFFA: Judge, I am going to hope my adversaries, despite being a little overly technical here, and I really don't appreciate their approach to it, despite that, I hope they will go back and

look at the law, and if they see that we're right, perhaps they will agree to remove it. So that's what --

MR. FIGLIULO: We could also do a motion for partial summary judgment on that issue.

MR. CLIFFORD: We will talk about it.

THE COURT: Yes, that's what I am saying. This is all procedural, but the way you are raising it sounds to me like a motion to reconsider.

MR. ARFFA: Yes.

THE COURT: And I think that's probably not appropriate.

MR. FIGLIULO: It's probably easier to do motion for partial summary judgment on that issue.

THE COURT: Oh, yes. Actually, this was set at 8:15 and we moved it because my trial went away.

MR. FIGLIULO: Yes, you did.

MR. DWYER: Thank you, your Honor, for doing that.

THE COURT: That's what we do, but sometimes if we are on trial, what are we going to do?

Oh, gosh. I lost my train of thought. It

was something I wanted to -- oh, just -- that's on the breach of fiduciary duty. What I would also like covered is is that a contract claim, because the Delaware law -- paragraph 6 talks about applying Delaware law to the enforcement of this contract if I remember correctly.

MR. DWYER: So --

THE COURT: It is a question. It's not --

MR. DWYER: So, your Honor, I actually think -- the question is is the breach of fiduciary duty claim -- when we bring it back to the Court's attention, will it be governed by Delaware law, out of curiosity? The answer I think we probably would all agree is clearly yes.

THE COURT: Okay.

MR. DWYER: Because it is a Delaware corporation, there is the internal affairs doctrine which says that when looking at the relationships between different parties within a corporation, you apply the law of the state of incorporation.

MR. FIGLIULO: I was going to say that.

MR. CLUBOK: Your Honor, I was going to say I still believe in a place called hope, and I suspect that as we get into this case and tensions

cool a little, we will all work together very professionally. We will work things out hopefully and bring as little as possible -- as little as necessary, shall we say, to your Honor's attention.

THE COURT: No, but I'm here all the time. That's all fine.

MR. CLUBOK: All right. Well, fair enough.

THE COURT: Paragraph 6(b), this agreement shall be construed in accordance with and governed in all respects by the laws of the state of Delaware. So that was just another one that I had on my mind, but it sounds like you have an answer to that one, which is not surprising so --

MR. DWYER: I don't have any -- you hit my sweet spot, so I had to jump on it.

THE COURT: Just so none of us get in any trouble, are you -- you are appearing pro hac vice?

MR. DWYER: I am.

THE COURT: Did you file with the ARDC?

MR. FIGLIULO: I think we did.

MR. SILVERMAN: Yes.

THE COURT: Did we?

MR. SILVERMAN: Yes.

THE COURT: Okay. I remember seeing

something that came in front of me, and it may not have even been in this case under -- 707 or something, because that changed. Within about the last year or two --

MR. FIGLIULO: Right, it did.

THE COURT: -- that changed, and I didn't want somebody not -- I mean just do it if you didn't.

MR. SILVERMAN: We did, Judge.

MR. FIGLIULO: We jumped through the hoops. We knew that there were hoops, and we jumped through them.

MR. ARFFA: I think the same for me, Judge.

THE COURT: Yes. I mean, I think you have to pay $250.

MR. ARFFA: We will. I am sure we did.

THE COURT: Okay. So you want 28 days to -- now, as far as the order goes, if somebody has good penmanship, you can write it. If you want to type it up and agree on the language of it -- you are not going to agree on the --

MR. CLUBOK: We will take a stab at it.

MR. ARFFA: That's fine.

THE COURT: You are not going to agree on

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

WALWORTH INVESTMENTS-LG, LLC,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 127177
	)	
MU SIGMA, INC. and DHIRAJ C. RAJARAM,	)	
	)	
Defendants-Appellants.	)	

The undersigned, being first duly sworn, deposes and states that on April 29, 2022, there was electronically filed and served upon the Clerk of the above court the Brief and Supplemental Appendix of Plaintiff-Appellee. On April 29, 2022, service of the Brief will be accomplished by email to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Robert A. Clifford
Robert A. Clifford

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

/s/ Robert A. Clifford
Robert A. Clifford