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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NAF HOLDINGS, LLC, Plaintiff/Counter-Defendant, Appellant, v. LI & FUNG (TRADING) LIMITED, Defendant/Counter-Claimant, Appellee.	:	No.: 641, 2014 Certification of Question of Law from the United States Court of Appeals for the Second Circuit in Docket No. 13-830-cv.

REPLY BRIEF OF PLAINTIFF/COUNTER-DEFENDANT, APPELLANT NAF HOLDINGS, LLC

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INTRODUCTION

Per the majority and concurrence opinions of the United States Court of Appeals for the Second Circuit, and this Court's acceptance of the question before it, the sole question before this Court is "[W]hether [this] Court intended that the broad rule announced in *Tooley* [*v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004)] **should apply in equally categorical fashion to a case of this nature**[.]" NAF Holdings, LLC v. Li & Fung (Trading) Ltd., 772 F.3d 740, 745 (2d Cir. 2014) ("NAF II") (emphasis added). See also, e.g., Id. at 749 (emphasis added) (defining the question as "whether the *Tooley* Court **intended to encompass cases of this nature** when it formulated its test" to distinguish between direct and derivative actions). As the Second Circuit explained, if this Court agrees with it that cases of this nature should not be governed by Tooley – because Tooley was not intended to bar one party to a contract from asserting a breach of contract claim against the other party to the contract – then the fact that Plaintiff-Appellant NAF Holdings, LLC's ("NAF") damages may have been incurred in its capacity as the 100% owner of its subsidiaries does not preclude it from asserting a direct claim for breach of contract against the counterparty to its contract, Defendant-Appellee Li & Fung (Trading) Limited ("Trading"). Id. at 743-745.

Yet, contrary to the Second Circuit's repeated and unambiguous statements – all of which follow its rejection of the District Court's reliance on Tooley –

Trading seeks to frame the operative issue in a radically different manner. Instead of following the Second Circuit's explicit directive, Trading baldly asserts that "*Tooley* applies and bars NAF from asserting a direct claim against Trading [because] NAF asserts no direct, independent damages," and in reality, the actual issue underlying the Second Circuit's certified question is "whether the facts of this case **justify a modification or exception to *Tooley*** so as to allow a direct claim by NAF." See Trading's February 11, 2015 Answering Brief ("Trading Br.") at 2, 3 (emphasis added). As NAF properly addressed the actual operative issue identified by the Second Circuit, Trading also attempts to manipulate NAF's asserted position, arguing that NAF is not advocating that "Tooley's "broad pronouncement" should not be applicable to this matter," see NAF's January 9, 2015 Opening Brief ("NAF Br.") at 12, but rather requests this "Court to **abandon or modify *Tooley*… whereby the courts would use a case-by-case analysis**." Trading Br. at 14-15 (emphasis added).

The reason for Trading's departure from the operative issue framed by the Second Circuit is abundantly clear: Trading has no plausible responses to the arguments of the Second Circuit and NAF establishing that Tooley does not and should not apply to cases of this nature, and is unable to support the District Court's erroneous ruling. By altering the operative issue – and assuming Tooley already applies – Trading both circumvents this issue in its entirety, and skews the

entire analysis in its favor by allowing it to paint NAF as attempting to change the status quo. Trading's briefing tactic is not just diversionary, but beset with substantive flaws.

While Trading's tactic positions it to focus on the specific facts of this particular case, this is only achieved by ignoring the Second Circuit's pronouncement that the facts of this case are "**irrelevant**" to the general legal issue to be decided. NAF II at 746, n. 5 (emphasis added).

Moreover, while Trading's tactic affords it a uniform response to all of NAF's arguments – namely, Tooley's application dictates that NAF's claim for breach of contract is barred as derivative – this is only achieved at the expense of it failing to actually address NAF's arguments, and explaining why Tooley should govern the type of claims involved in this case.

As such, Trading's opposition brief fails to address or answer the actual question certified by the Second Circuit, and NAF has a viable direct claim for breach of contract against Trading, which was counterparty to its contract.

ARGUMENT

I. TRADING'S FAILURE TO ANSWER THE CERTIFIED QUESTION RENDERS ITS ARGUMENTS OFF-POINT AND MERITLESS

a. Trading Fails to Properly Address the Certified Question

In its brief, Trading attempts to redefine the certified question now before this Court, the position espoused by NAF, and how this Court should rule and the reason why. Trading erroneously argues that "the Second Circuit referred to this Court an issue of Delaware law as to **whether the facts of this case justify a modification or exception to *Tooley*** so as to allow a direct claim by NAF." Trading Br. at 2 (emphasis added). Concomitantly, Trading erroneously argues that NAF "**espouses abandoning or modifying *Tooley***," in favor of "substitut[ing] a case by case approach." Id. at 2, 15, n. 7 (emphasis added). Based on its self-serving conclusion that NAF's arguments do not "support abandoning or modifying *Tooley*" and do not "support a direct claim here," Trading asks this Court to "advise the Second Circuit that this Court **declines to modify the *Tooley* test.**" Id. at 2, 19, 33 (emphasis added). These strategically wordsmithed arguments, however, find no basis in either the Second Circuit's decision, this Court's acceptance of the certified question or NAF's papers and, as such, fail to address or respond to NAF's arguments.

In its decision, the Second Circuit repeatedly and unambiguously explained that in order for it to rule whether NAF may bring a direct claim for breach of

contract against Trading – just one factual manifestation of its certified legal question – this Court must first rule on "**whether… *Tooley* should apply**… to a case of this nature." NAF II at 749 (emphasis added). Such explicit instructions, which leave no room for interpretation, appear throughout the Second Circuit's decision and this Court's acceptance of the certified question. For avoidance of doubt, the Second Circuit asserts that it is turning to this Court to decide: (a) How "it would rule on this type of claim, rather than guess at the application of *Tooley* to a very different scenario," (Id. at 741); (b) "[W]hether … *Tooley* should apply in equally categorical fashion to a case of this nature," (Id. at 745); and (c) "[W]hether [it] would adhere rigidly to the second prong of the rule stated in its *Tooley* dictum," (Id. at 749).

Indeed, the Second Circuit further explained that "application of *Tooley* to a case in which the plaintiff-shareholder's asserted right derives from the plaintiff's personal contract with the defendant, rather than from a fiduciary duty imposed by law on the defendant, **is a matter of first impression** that has not arisen in the Delaware courts." Id. at 749-750 (emphasis added).

Yet, despite these explicit statements, Trading seeks to redefine the question now before this Court, arguing that "*Tooley* applies" already to claims of this nature, and that what this Court must determine is actually "whether the facts of this case justify a modification or exception to *Tooley* so as to allow a direct claim

by NAF." Trading Br. at 2, 3. Indeed, dispelling any doubt whether the issue it addresses diverges from the one identified by the Second Circuit, Trading asserts that **"the Second Circuit found** that under *Tooley*, NAF had no direct claim against Trading." Id. at 12 (emphasis added). That statement is false, as the Second Circuit made no such finding. See, e.g., NAF II at 741, 745, 749-750. To the contrary, the Second Circuit went to lengths to explain why Tooley is plainly distinguishable from the case at bar; among other reasons because in this case the parties to the suit have direct contractual privity (unlike the case in Tooley and its associated line of case law). Id., *passim*.

By altering the operative issue from whether Tooley "should apply," id. at 745, to whether "the facts of this case justify a modification or exception to *Tooley['s]*" current application, Trading Br. at 2, Trading circumvents the only issue to be decided by this Court. Instead of analyzing an undecided "matter of first impression that has not arisen in the Delaware courts," NAF II at 749-750, Trading erroneously claims that NAF must now provide a "legitimate justification for [a] **radical change in Delaware law.**" Trading Br. at 14 (emphasis added). Trading seeks to put the cart before the horse, as it wrongly and unfairly tries to assume that the question now before this Court already has been answered.

As set forth below, when attention is shifted to the actual question before this Court, Trading's position is plainly without merit.

b. Trading's Legal Arguments Are Baseless, And Fail To Support *Tooley's* Application To The Type Of Claim Asserted In This Case

Trading's alteration of the operative issue identified by the Second Circuit, and the argument asserted by NAF, does not merely allow it to circumvent the precise issue actually identified by the Second Circuit and NAF's actual argument, but also positions Trading to attempt to insert into the case two new arguments that it would not have otherwise been able to assert. As set forth below, both of these arguments are baseless.

i. Trading's Reliance On Misstatements Of Facts From This Particular Case Is Legally And Factually Deficient

Throughout its brief, Trading seeks to bias this Court by introducing disputed facts concerning this specific case. For example, Trading falsely claims that NAF's subsidiary is the "true party in interest," that it "has already been compensated" and the "fact that [it] has not sued because it released its claims is not a basis for abandoning *Tooley*." Trading Br. at 16, 17, 18. Trading further argues that "[a]llowing NAF to assert a claim solely based on the injury that [its subsidiary] sustained -- and not based on any independent, distinct injury to it where [its subsidiary] has already been compensated for that injury to its satisfaction -- defies logic." Id. at 19.

First and foremost, the facts of this particular case have nothing to do with the purely legal question before this Court. This matter is only before this Court

for a single, discrete purpose: to rule upon a yet undecided issue of Delaware law. See NAF II at 750; November 25, 2014 Order of the Delaware Supreme Court at ¶¶ 1, 5-6, attached to NAF Br. at Exh. "A." Indeed, the identical question of law could easily have come, and likely will come, before this Court on any of a number of different fact-patterns. Therefore, as this Court is called upon merely to decide "an original question of law, which 'seem[s] likely to recur and to have significance beyond the interests of the parties in a particular lawsuit,'" it clearly cannot be decided by the contingent facts of this particular case. NAF II at 750 (internal citation omitted). Trading, however, never once addresses how the specific *facts* it relies upon – or any other fact of this case, for that matter – could have any determinative affect on the purely *legal* question before this Court.

Indeed, the Second Circuit itself stated that the facts that Trading now continually makes reference to are "**irrelevant** to the specific question of whether Delaware law would hold that NAF's claim against Trading is direct or derivative." Id. at 746, n. 5 (emphasis added).[1] Indeed, the Second Circuit explained that "[u]ntil we are instructed by the Delaware Supreme Court whether NAF has asserted a direct or derivative claim, we need not address what effect, if any, [the subsidiaries' settlement] has on NAF's ability to bring this suit." Id. at

[1] Notably, Trading ascribes this position to NAF, stating that "NAF asserts that the Settlement Agreement is irrelevant to the certified question here," without indicating that the Second Circuit on its own indicated the same. Trading Br. at 19, n. 8.

750, n. 7.[2] See Official Committee of Unsecured Creditors of Motors Liquidation Co., v. JPMorgn Chase Bank, N.A., 103 A.3d 1010, 1017 (Del. 2014) (on certified question from Second Circuit, this Court stated that it "refuse[d] [a party's] invitation to answer a separate, fact-laden question that [was] not properly before [it]," noting that "the Second Circuit made clear, it will address that issue itself after it receives the answer to the narrow question put to [it]").

However, if the foregoing alone were not sufficient to demonstrate the futility of its reliance on specific facts from this particular case, Trading's fact-based arguments are rendered completely meritless for an entirely independent reason: its consistent misstatement and revision of those very facts.[3]

As a general matter, Trading's reliance on the Settlement Agreement in support of barring NAF's claim against it is entirely inapposite, as "NAF… was not a party to the Settlement Agreement." NAF Holdings, LLC v. Li & Fung (Trading) Ltd., 2013 WL 489020, at *4 (S.D.N.Y. Feb. 8, 2013) ("NAF I"). See also NAF II at 742 (same). Additionally, NAF and others drafted a complaint against Hampshire alleging numerous claims of wrongdoing, and therefore,

[2] The fact that the Second Circuit specifically noted the Settlement Agreement's irrelevance to the purely legal issue renders Trading's repeated reliance upon it all the more absurd. See Trading Br. at 18-20, 25.

[3] NAF reiterates that its position is that the specific facts of this case are entirely inapposite to the discrete legal issue before this Court, and the flood of irrelevant factual minutiae Trading provides serves no purpose other than to divert this Court's attention from the operative legal issue involved. Nevertheless, because Trading has asserted multiple, erroneous facts in support of its argument, NAF is compelled to respond to at least some of the more egregious examples.

Hampshire (including at the time it entered into the Settlement Agreement) was aware that NAF intended to pursue claims against Trading. NAF II at 741.

Similarly, Trading also falsely asserts that in the Settlement Agreement, Gerszberg and the Subsidiaries agreed "not to sue any person or entity for damage or losses relating to the failed merger". Trading Br. at 7. This assertion is inaccurate, as, among other things, the covenant not to sue did not apply to "losses relating to the failed merger," and instead applied only to losses as specifically defined in the Transaction Documents. See NAF I at *3-*4 (emphasis in original) (District Court specifically cited Settlement Agreement, noting that the "Subsidiaries and Gerszberg agreed not to" institute a claim based upon damages "*allegedly sustained as a result of the Transaction Agreements or the Transaction*"). See also NAF II at 742 (same). Furthermore, the contract between NAF and Trading was not included in the defined term of "Transaction Documents," which define with limitation the only claims which were agreed not to be sued upon, and only then limited to exclusion from suit by NAF's subsidiaries. See NAF I at *3-*4.

As yet a further example of irrelevant (and disputed) factual contentions wrongly introduced into this proceeding by Trading, Trading asserts in its papers that "Gerszberg repeatedly and unequivocally stated (including under oath) that the reason for the termination was Hampshire's breach of covenants set forth in the

Merger Agreement and Hampshire's eroding financial condition." Trading Br. at 6. This contention is disputed. The full factual record of the case shows that Gerszberg was legally permitted to terminate the tender, and the deal was terminated because of Trading's material breach of contract giving rise to this action. See NAF I at *3.

ii. Trading Has Failed To Address Much Less Rebut NAF's Arguments

Further support for the argument that Trading has failed to address the operative issue identified by the Second Circuit is garnered from the fact that it has also failed to address NAF's actual arguments.

Based on its alteration of the issue identified by the Second Circuit, Trading positions itself to offer a single, cookie-cutter response to all of the Second Circuit's and NAF's arguments – namely, because Trading created the strawman argument that Tooley already applies, Trading claims that NAF has not suffered a direct injury and its claim for breach of contract is barred, and that no legitimate factual argument has been proffered to justify Tooley's abandonment or modification. For example, Trading attempts to summarily dispose of NAF's claim by arguing that it does not have legal standing to assert its breach of contract claim because standing "requires injury," and based on Tooley "NAF sustained no direct injury so it lacks standing to bring its direct claim." Trading Br. at 23, 24. Similarly, Trading argues that "*Tooley*, however, has been applied to analyze

contract claims and does *not* preclude a shareholder that is owed a direct contractual duty from bringing a direct claim based on a breach of that duty, provided that two key prerequisites of the test are met: there is a breach of that duty and there is direct injury to the shareholder." Id. at 15.

However, as Trading's alteration of the operative issue identified by the Second Circuit is completely misplaced and unpersuasive, it follows that its repeated reliance on Tooley in its responses to NAF's specific arguments are also misplaced. As such, Trading has failed to actually address NAF's different arguments in support of not extending Tooley to "cases of this nature," NAF II at 749, which further underscores its failure to address the operative issue identified by the Second Circuit.

Critically, though, the very fact that all of Trading's responses to NAF's different arguments can be undercut in such a uniform manner is itself revealing. Even if Trading were correct – and NAF was actually seeking Tooley's abandonment or modification – it would still need to explain *why* an abandonment or modification of Tooley in cases like this one would not be justified. Trading, however, has failed to do even that, opting to respond to disparate arguments offered by NAF by relying upon its technical argument that Tooley's application bars NAF's breach of contract claim. However, NAF's papers do not consist of merely disparate arguments.

NAF did not merely proffer separate and unrelated arguments. Rather, NAF's individual arguments were provided in support of its position that:

> [T]he policies underlying shareholder derivative litigation can only be effectuated if and when applied to suitable cases, consisting of appropriate facts… [and that] [b]y imposing a shareholder derivative action upon NAF's direct breach of contract claim, the District Court expanded the rubric of this type of action beyond the bounds for which it is both intended to operate, and where its underlying policies can be effectively achieved… [and] disregarded prior jurisprudence recognizing that shareholder derivative actions are inapplicable to cases such as this one where the policies underlying derivative actions cannot be effectuated.

NAF Br. at 2, 3.[4] In support of this position, NAF's specific, individual arguments were arranged around, and in support of, a number of broader themes that uniformly supported the general conclusion that the policies and rationales underlying shareholder derivative litigation cannot be properly effectuated in this case. These themes included the following:

- NAF's "breach of contract claim rests on an independent duty owed to it directly, which precludes the policies underlying shareholder derivative litigation from being effectuated in this case," NAF Br. at 11;

[4] Indeed, NAF even tied its textual analysis of Tooley to this consideration, noting that "[t]he District Court based its ruling squarely upon its perceived inability to circumvent certain language articulated by this Court in *Tooley*. However, in so ruling, the District Court ignored the independent contractual duty Trading owed directly to NAF, and further disregarded prior jurisprudence recognizing that shareholder derivative actions are inapplicable **to cases such as this one where the policies underlying derivative actions cannot be effectuated.**" NAF Br. at 3 (emphasis added).

- Application of Tooley to NAF's breach of contract claim will "conflict with existing precedent in the law of contract," id. at 24;
- Application of Tooley to NAF's breach of contract claim will result in wrongs without remedies, and other absurd results, id. at 27-28; and
- Application of Tooley to NAF's breach of contract claim will "yield anomalous results within the internal structure of the laws governing derivative actions, and their intended rationales," including the fact that the affirmative defense that a direct claim must be barred because it can only be asserted derivatively would be asserted by Trading, "a third-party outsider that would assert the defense solely to protect itself, and not to effectuate its intended purpose." Id. at 29-30. Tellingly, these themes are patently absent from Trading's responses to NAF's arguments, and it is no coincidence then that the only three times the words 'policy' or 'rationale' are used in Trading's brief are all quotations or references to NAF's brief. See Trading Br. at 14, 19 and 20.

Trading's choice to attack NAF's arguments piecemeal, without even broaching these broader themes, speaks volumes. This failure cannot be explained merely by Trading's alteration of the operative issue identified by the Second Circuit. Rather, it underscores the fact that Trading is simply unable to provide

any substantive responses to the broader themes organizing NAF's individual arguments, or to defend the District Court's erroneous decision.[5]

Indeed, this conclusion is further supported by other dodges offered by Trading to avoid engaging in any substantive analysis. For example, in the course of discussing the broader impact of the existence of an independent contractual duty on the requirement to institute a shareholder derivative action, NAF argued that:

> [W]hile this case does not neatly fit into the direct-derivative dichotomy, it easily corresponds to a line of precedent, which has routinely recognized that while [i]n general, a shareholder has no individual cause of action for injuries to his corporation… [there is an] exception[] to the general rule… **where there is a special duty, such as a contractual duty, between the alleged wrongdoer and the shareholder** … Applying the holdings of these precedents to cases like this one – in which the shareholder is a corporate entity, asserting non fiduciary breach claims – is a logical extension. **Indeed, courts have already done this**.

NAF Br. at 16, 22 (emphasis in original). NAF then went on to discuss Lawrence Ins. Group, Inc. v. KPMG Peat Marwick L.L.P., 5 A.D. 3d 918, 919 (N.Y. App.

[5] Not only does Trading fail to address these themes, it affirmatively perverts them by consistently attempting to reduce them all to the single argument upon which it repeatedly relies: the requirement that one suffer direct damages. For example, Trading asserts that application of Tooley here "honors the separateness between the parent and subsidiary by not allowing NAF to claim damages suffered by its indirect subsidiary, which would otherwise blur the distinction between the distinct corporations," and that "a parent corporation cannot create a subsidiary corporation and then ignore the separate corporate existence of that subsidiary whenever doing so would be advantageous." Trading Br. at 17, 25. Notably, however, Trading utterly fails to address the arguments asserted by NAF in its Opening Brief, that honoring corporate separateness in fact *supports* NAF being able to assert a direct claim. See NAF Br. at 28-29. Moreover, Trading also fails to address NAF's argument that the result it seeks would also substantially conflict with existing law governing shareholder derivative actions, as well as the laws of contract and legal standing. Id.

Div. 2004), a factually analogous case, where the precise relief requested by NAF herein was granted. NAF Br. at 22-23. However, Trading's entire response to Lawrence, and two other cases cited by NAF, consists in nothing but evasion. First, Trading argues that Lawrence and other out-of-state cases cited by NAF "are not binding on this Court and lend no support for NAF's position." Trading Br. at 29.[6] Trading then simply relies on Tooley's application and asserts that "[t]hese cases are distinguishable from the instant case because they do not involve a situation, like here, in which a parent sues for damages incurred by its subsidiary, where the subsidiary has been compensated to its satisfaction for the alleged damage it incurred." Trading Br. at 31.[7]

Similarly, Trading bypasses analyzing the Second Circuit's discussion on third-party beneficiary law in the Agent/Club/Performer hypothetical posed by the Second Circuit, NAF II at 747-748, and relied upon by NAF, NAF Br. at 25-27, through terse and conclusory assertions. Trading argues that the Second Circuit was incorrect to equate its hypothetical to this case arguing that it "is different from the instant case… [because] Agent was entitled to a separate fee… and

[6] This argument is rendered even more absurd by the fact that Trading itself relies on out-of-state precedent whenever it deems it to its benefit. See, e.g., Trading Br. at 13, 31-33.

[7] Trading also provides an additional throwaway line to these cases, asserting that "[i]n any event, these cases pre-date *Tooley* and more recently the New York courts have expressly adopted the *Tooley* standard." Trading Br. at 31. However, the fact that these cases pre-date Tooley, and New York subsequently adopted the Tooley standard, just begs the question as to whether or not Tooley should apply to a case as this one, in which the parties have contractual privity.

suffered a distinct, individual injury [whereas] NAF has no contractual right to the assets of its wholly-owned Subsidiaries." Trading Br. at 21-22. By stating that NAF has "no contractual right to the assets" of its subsidiary, id., Trading baldly assumes that the only damages that arose in this case – and the only damages NAF can attempt to collect – were those suffered by NAF's subsidiary, and that NAF's contract with Trading could not itself have yielded any independent damages. However, that is just another way of stating that Tooley already applies. Therefore, Trading incorporates that assumption into its analysis of the Second Circuit's hypothetical. Trading is simply unable to explain why NAF's loss – which arises indirectly through its subsidiary, as an independent third-party beneficiary – is any different than the "Agent's loss [which] results indirectly from the loss suffered by an independent third-party beneficiary." NAF II at 748.

Another example is the dodge Trading provides in response to NAF's argument that application of Tooley to the type of claim involved herein will result in wrongs without remedies. NAF Br. at 27. Trading responds by asserting that "[c]ontractual claims for damages would only be barred when the putative plaintiff has not suffered independent damages and, even then, a damaged third-party beneficiary may bring suit." Trading Br. at 16. However, that assumes that Tooley applies and that NAF has not suffered independent damages – the very question before this Court.

In all events, Trading's reliance on the rights of a third-party beneficiary is of no merit, as NAF's hypothetical was premised upon "there [being] no "intended third-party beneficiary."" NAF Br. at 27. Trading subsequently addresses this point, asserting that "in the strained hypothetical posed by NAF, in which the parent is not independently damaged by a breach and the subsidiary is not an intended third-party beneficiary, the contracting parties' choice should be respected." Trading Br. at 28, n. 13. Putting aside the fact that it has not explained how this hypothetical is "strained," Trading all but admits that application of Tooley to claims of this type will result in scenarios where a party can breach a contract without recourse due to the lack of *any* plaintiff with standing.

Trading also all but admits it has no response to NAF's argument that application of Tooley to claims like the one involved herein would result in a direct party to a contract being unable to sue for its breach, NAF Br. at 28, arguing that "[n]or is it incongruous that a parent cannot sue directly for damages incurred by its subsidiary even though the counterparty may sue the parent for breach of contract. (NAF Br. at 28). The elements of a breach of contract are the same in either case and in either case damages must be shown. If the damages are to the subsidiary it is the subsidiary, not the parent, who should be permitted to bring suit (as a third-party beneficiary)." Trading Br. at 23, n. 9. Putting aside the fact that

Trading's response assumes Tooley's current application, it provides absolutely no answer to this basic violation of the fundamental law of contract.[8]

To be clear, as a matter of contract law a company that is party to the contract should have direct standing to sue the counterparty to the contract for breach of the contract. Trading has provided no valid legal support, or given any good reason, to the contrary. Of course, to the extent that contracting parent company suffered damages by virtue of damages to its subsidiaries, such nonetheless remains an actual form of damages. Indeed, it is axiomatic that the value of a business is a function of its assets and holdings, whether in the form of cash, property and/or subsidiary holdings.

Accordingly, in the final analysis, Trading's complete failure to analyze why this Court should not "either modify *Tooley* or carve out an exception," Trading Br. at 9, serves as proof that it has failed to address NAF's arguments, and cannot defend the District Court's erroneous decision.

[8] Moreover, Trading's attempt to avoid such an absurd conclusion by arguing that while the third-party beneficiary may not seek money damages the "rule articulated in *Tooley* does not preclude a promisee-shareholder from seeking to specifically enforce its contract," fails for multiple reasons. Trading Br. at 28. First, this argument – as with all of Trading's arguments – assumes that Tooley already applies. Second, even if Tooley did already apply, Trading's assertion finds no basis in that case. Tooley nowhere makes the distinction that Trading is asserting, and notably, Trading does not cite to the portion of that decision that supports its argument. Lastly, the broad array of authorities relied upon by Trading do not support its argument that the promisee's contractual rights can only be exercised through specific performance, and not monetary damages, as they are either factually inapposite – see, e.g., Wilson v. Hayes, 77 A.3d 392, 407 (D.C. 2013), Hawkins v. Gilbo, 663 A.2d 9, 11 (Me. 1995) and Williams v. Habul, 724 S.E.2d 104, 110 (N.C. Ct. App. 2012) – or simply discuss the general parameters governing third-party beneficiary law. See, e.g., 13 Williston on Contracts § 37:55 (4th ed.); 25 Williston on Contracts § 67:112 (4th ed.).

CONCLUSION

For all the foregoing reasons, and the reasons set forth in NAF's Opening Brief, it is respectfully requested that this Court clarify that a party (promisee) to a contract has the right to pursue a direct breach of contract claim against the other party (promisor) to the contract notwithstanding that the third-party beneficiary of the contract is a corporation in which the promisee owns stock, and the promissee's loss derives indirectly from the loss suffered by the third-party beneficiary corporation.

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