EFiled: May 01 2019 10:56AM EDT
Filing ID 63214913
Case Number 109,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PETERSON ENTERPRISES, INC., RONALD A. PETERSON, ERIC PETERSON, KIRK PETERSON, RONALD A. PETERSON REVOCABLE TRUST, RONALD A. PETERSON 2010 IRREVOCABLE TRUST and VERNON L. GOEDECKE COMPANY, INC.,	)	No. 109, 2019
Defendants below, Appellants,	)	C.A. No. 11189-VCG
v.	)	
BRACE INDUSTRIAL CONTRACTING, INC. and PETERSON INDUSTRIAL SCAFFOLDING, INC.,	)	
Plaintiffs below, Appellees.	)	

Court Below:
Court of Chancery of the State of Delaware

APPELLANTS' AMENDED OPENING BRIEF

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Dated: May 1, 2019

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NATURE OF THE PROCEEDINGS

This litigation arises from a post-closing dispute following the purchase and sale of a scaffold subcontracting company. Seller made representations and warranties about the quantity of scaffolding equipment it would transfer to Buyer in the sale. After closing, Buyer claimed these representations were inaccurate because less scaffolding equipment than was listed in the stock purchase agreement's (SPA) disclosure schedules was purportedly transferred in the sale. Seller disputed this claim and asserted that the schedules were accurate. Buyer then sued Seller for indemnification under the SPA and other claims.

Following a three-day trial covering all claims, Vice Chancellor Glasscock found in Buyer's favor on the indemnification claim in the amount of $725,059. This appeal challenges: (1) that ruling; (2) Vice Chancellor Glasscock's later related award, in Buyer's favor, of $241,686 in reasonable attorneys' fees for the indemnification claim and $440,149 in "costs" that included Buyer's "deal counsel's" attorney's fees and *all* of Plaintiffs' other litigation expenses; and (3) the entry of judgment against individual Defendants Eric and Kirk Peterson, and the overbroad entry of judgment against individual Defendants Ron Peterson, the Ronald A. Peterson 2010 Irrevocable Trust, and the Ronald A. Peterson Revocable Trust on a guarantee.

SUMMARY OF ARGUMENT

I. The Chancery Court erred in resolving Plaintiffs' indemnification claim in their favor because their claim was based on a methodology for determining the volume of scaffolding at Closing that was unreliable and failed to show that it was more likely than not that the SPA's schedule of scaffolding equipment was inaccurate. That methodology, adopted wholesale by the Court, is not the "product of an orderly and logical deductive process" and thus not entitled to deference on appeal. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

II. The Chancery Court abused its discretion and committed legal errors in awarding Plaintiffs $440,149 in "costs." Rule 54(d) authorized only approximately $18,000 of these costs. The SPA did not generally provide for fee shifting for *all* claims arising from or related to the SPA. The SPA authorized fee-shifting only for reasonable fees, costs, and expenses that Plaintiffs incurred *on their SPA indemnification claim*. Because Plaintiffs failed to identify which specific costs were incurred on that claim, and instead sought to recover *every* expense they incurred in the litigation (including non-indemnification claims they lost), they did not carry their burden to show entitlement to costs under the SPA.

III. The Chancery Court erred as a matter of law in entering judgment against Eric and Kirk Peterson in any amount, and against the Guarantors for judgment amounts beyond what Brace is entitled to as SPA indemnification.

STATEMENT OF FACTS

A. The Parties and the Underlying Claims

Defendant Peterson Enterprises, Inc. is the parent company of its wholly owned subsidiary, Vernon L. Goedecke Company, Inc. ("Goedecke"), a distributor of construction equipment and supplies. October 31, 2016 Memorandum Opinion ("Mem. Op.") 2.[1] PEI was also the parent company of its wholly owned subsidiary Peterson Industrial Scaffolding, Inc. ("PIS"), a scaffolding subcontracting company, until August 10, 2014, when PEI sold its stock in PIS to Brace Industrial Contracting, Inc. ("Brace"). *Id.* Ron, Eric, and Kirk Peterson (father and sons) are Goedecke directors and officers of PEI. *Id.*

As part of the deal, $1.87 million of the purchase price was put into an escrow account, with half to be released roughly eight months after Closing and the other half ten months after that if no indemnification claims were made. The parties agreed to satisfy PEI's indemnification liability from the escrow funds first, and Ron Peterson and his two trusts agreed to guarantee any remaining amount due. *Id.* at 3. (A-0085, A-0339)

In § 3.11(b) of the SPA, PEI represented and warranted that "Section 3.11(b) of the Disclosure Schedules sets forth a true, correct and complete list and general description of substantially all . . . equipment . . . of [PIS] or used solely in the

[1] The October 31, 2016 Memorandum Opinion and February 24, 2017 Interim Order are attached hereto as Exhibit A.

Business and not by the Seller for other purposes in connection with any Affiliates." (A-0056)

PEI also agreed (in § 6.2(a)) to indemnify Brace for "any and all Losses incurred or sustained by, or imposed upon [Brace], based upon, arising out of, with respect to or by reason of: (a) any inaccuracy in or breach of any of the representations or warranties of [PEI] contained in this Agreement." (A-0082)

In March 2015, Brace sent a Notice of Direct Claim to PEI asserting that Section 3.11(b) of the Disclosure Schedules overstated by approximately $1.2 million the extent of PERI brand scaffolding that PIS owed at the time of the sale. (A-0354). It demanded indemnification in this amount. The sole basis for the claim was a physical inventory count that Brace had performed. (A-0355) PEI rejected the claim and Brace later filed this action.

B. Procedural History

Plaintiffs filed their initial Complaint in June 2015 and an amended one in August 2015. Relevant here, Plaintiffs claimed that PEI owed Brace approximately $1.2 million indemnification under the SPA for the inaccurate disclosure schedule, and sought to satisfy the amount with funds in the Escrow Account. Mem. Op. 6–7. Brace alleged further that Defendants were violating restrictive covenants in the SPA and sought preliminary and permanent injunctions. The Chancery Court preliminarily enjoined Defendants from selling

and renting scaffolding pending a determination on the merits of Brace's restrictive-covenant claim. *Id.* at 9.

The Chancery Court held a three-day trial on Brace's indemnification and restrictive-covenant claims, among others, on March 29–31, 2016 and issued its Memorandum Opinion seven months later. It found that Brace's approach was "the more reasonable method to establish the amount of scaffolding conveyed at Closing," which it found was less than listed in the disclosure schedules. *Id.* at 29. It awarded Brace $725,059 on its indemnification claim, the replacement cost of equipment that PEI did not convey. *Id.* at 40. It ruled in Defendants' favor on the restrictive-covenant claim, lifting the preliminary injunction and finding that it was "improvidently entered." *Id.* at 23.

Brace later filed a fee petition that included $440,149 in "costs," which included attorney's fees charged by Brace's deal counsel to monitor litigation counsel in this action. (A-1281, A-1295–96, A-1322–23) It made no effort to segregate the expenses into categories or reduce the total to acknowledge that some expenses were incurred on claims Brace lost. The court awarded Brace $241,686 in attorney's fees incurred by Plaintiffs' for litigating the indemnification claim. In addition, the court awarded Brace, as costs, the full $440,149 requested, based on Chancery Rule 54(d). December 12, 2018 Order 2 ¶ 5.[2] Defendants sought

[2] The December 12, 2018 Order is attached hereto as Exhibit B.

reconsideration, and the court modified its order to include a reference to the SPA § 6.2(a) as another basis for the cost award. January 11, 2019 Order 2 ¶ 5.[3]

The Court entered its Order and Final Judgment ("Judgment") on February 6, 2019.[4] Among other things, the Judgment awarded Plaintiffs $550,743 on the parties' competing cash-reconciliation claims, which the Court had resolved in favor of both parties in different respects; awarded interest on these damages; and embodied its earlier rulings. Judgment 1–2. The judgment acknowledged $725,059.00 in "damages for non-transferred inventory as described in the Court's October 31, 2016 Memorandum Opinion" had "been satisfied, and [was] therefore excluded from this Final Judgment." *Id.* at 3. Finally, the Judgment said that, "under the SPA, the amount owed to the Plaintiffs must first be paid out of the escrow account. Pursuant to this Order of Judgment on Count III, the individual Defendants are liable for the remaining amount." *Id.* at 4.

Defendants timely appealed.

[3] The January 11, 2019 Order is attached hereto as Exhibit C.
[4] The Final Order and Judgment is attached hereto as Exhibit D.

ARGUMENT

I. The Chancery Court Erred in Sustaining Brace's Indemnification Claim; its Decision was not the Product of an Orderly and Logical Deductive Process.

Questions presented

The Chancery Court rejected PEI's threshold challenge to Brace's indemnification claim based on Brace's failure to follow the SPA's notice requirements. The court then ultimately ruled for Brace on its claim that PEI shorted Brace some of the scaffolding promised in the SPA. The questions presented are whether the Court erred in these rulings. Both questions were raised and decided and thus are preserved for appeal. (A-1197–1221); Mem. Op. 26–36.

Scope of review

In a court-tried case, this Court reviews both the law applied and the facts found. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). It reviews "the sufficiency of the evidence" and tests "the propriety of the findings below." *Id.* Although this Court may not "ignore" lower court findings, it can accept them only if "sufficiently supported by the record" and the "product of an orderly and logical deductive process." *Id.* When historical findings—whether based on documentary evidence, credibility determinations, or inferences—are "clearly wrong and the doing of justice requires" overturning them, this Court is free to—and must—"make contradictory findings of fact." *Id.*; *see Bank of New York Mellon Trust*

Co., N.A. v. Liberty Media Corp., 29 A.3d 225, 236 (Del. 2011). Conclusions of law the Court reviews *de novo*. *Liberty Media Corp.*, 29 A.3d at 236.

Merits of Argument

A. Brace did not follow the SPA's requirements for direct claims, so its claim for indemnification SPA failed. The Chancery Court erred in determining otherwise.

Defendants challenged Brace's indemnification claim based on Brace's failure to follow the SPA's notice requirements. The Court determined that Defendants had "not forfeited any rights or defenses by reason of [Brace's] failure" and rejected the challenge. Mem. Op. 26. The record belies this ruling.

The indemnification procedure set forth in Article 6 of the SPA is the parties' "sole and exclusive remedy" for claims of any breach of the SPA's representations and warranties. (A-0088–89) A claimant must give written notice of the claim to the breaching party. (A-0086–87) The notice must describe the claim "in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained." (A-0086)

Brace's claim notice did not follow these requirements. It was a one-page letter with an "Appendix A—Schedule of Estimated Losses" that was a half-page long. (A-0354–55) That schedule said Brace was promised 255,430 scaffolding pieces (according to disclosure schedules) but received only 227,723 pieces, and

thus was short 27,707 pieces. It also said Brace was promised PIS had 233,929 pieces on re-rent from PERI, but actually was renting 5,066 pieces less than that. It claimed it was short a total of 32,773 pieces (owned and rented), which collectively had a replacement cost of $1,179,752.41. The basis for the "actual counts" was a "physical inventory count conducted by Brace." (A-0355) But not a single slip of paper showing the results of that physical count—other than the total number of pieces counted—was included. Such documentation clearly was "material" and had to be supplied with the notice.

In the weeks following Brace's claim notice, Eric Peterson made repeated requests for the documents supporting Brace's claim, with little success.[5] (A-0389–398) Tired of waiting, Eric emailed Pete Vrettakos:

> It is unacceptable that in the 4 weeks since the claim was made, and after many verbal and written requests, I have not AT LEAST received #2 and #5 [on my list in an earlier email]. On April 7, Blake told me that he was putting some "finishing touches" on #5 and should be to me on April 8. I still have not received that document.
>
> . . . .

[5] Blake Kuhlenschmidt testified that he did send Eric Peterson spreadsheets that underlie the inventory claim shortly after Brace made its claim. (A-0662) But any supporting documentation Brace later sent ultimately was unhelpful, as Brace completely altered its claim in February 2016, just a month before trial. Because Brace no longer based its claim on a physical count of scaffolding inventory, documentation supporting the physical count became irrelevant. On the other hand, the physical count is some evidence that Brace's new methodology is flawed.

> We cannot imagine a scenario where the information we have been requesting would not have been used to prepare and justify this claim and should have been readily available and provided when the claim was made.
>
> When I was first contacted by Blake, he expressed embarrassment that the claim was made in the 11th hour and promised that Brace would cooperate fully and quickly provide the pertinent information so we could bring this issue to a close quickly and we could get our Escrow released. That has not happened.
>
> I have almost zero visibility into why this claim was made. All I know is that almost $1M of Escrow is being held hostage with little to no justification, corroborating information or cooperation. This entire claim was made in bad faith and what Brace is doing is not right.

(A-0396)

When PEI asked for the supporting documents in discovery—specifically, those related to computer transaction reports and the methodology for calculating the claim—Brace responded that responsive documents were not relevant to this lawsuit and refused to produce them. (A-0427–28, A-0430–31) Nearly nine months later, as part of its December 21, 2015 interrogatory response, Brace claimed for the first time that the inventories were no longer relevant to the inventory claim because, contrary to its claims notice, "the basis of the March 26, 2015 Notice of Direct Claim to PEI and resulting inventory claims in this lawsuit was a comparison of Defendants' own accounting data against the SPA disclosures." (A-0405)

PEI never received documents fully supporting the inventories that Brace conducted or showing how the claim was calculated. PEI sought computer reports

from PIS's perpetual inventory system and the ship/receive tickets for the jobs that were generated since Closing, which are critical to determining scaffolding inventory. (A-0966, A-0396–37).[6] And even though PEI later received documents supporting Brace's new methodology for its claim (made for the first time in Brace's December 21, 2015 responses to PEI's Second Set of Interrogatories (A-0399)), PEI did not receive them *until February 22, 2016*—little more than one month before trial—when produced as Brace's expert's working papers. That gave Eric Peterson too little time to fully review and analyze them before trial, prejudicing PEI's ability to fully prepare its defense. Under SPA § 6.5(c), a failure to give "prompt written notice" of a claim relieves the indemnifying party of its indemnification obligations if the failure "forfeits rights or defenses by reason of such failure." (A-0086)

SPA § 6.5(c) also required Brace to allow PEI to investigate the "matter or circumstance alleged to give rise to the Direct Claim" and to "assist [PEI's] investigation by giving such information and assistance" as PEI may reasonably

[6] Ship tickets itemize the equipment that goes out to a job; receive tickets do the same when equipment returns from that job. Both are loaded into the perpetual inventory system. (A-0948–49) Eric Peterson likened Brace's inventory to a situation where someone sells a $100 cash box and the buyer waits six months to count it and finds only $70. To determine whether there really was a shortage at the sale, one must know what happened to the box's contents over those six months. (A-0978) Brace would not share what happened to the inventory since Closing by providing ship/receive tickets and computer reports.

request. The purpose of requiring detail and material written evidence is to avoid what happened here, where Brace gave *no* detail until the February 22, 2016 expert report—nearly eleven months after the claim notice, eight months after Brace filed suit, and just five weeks before trial. This delay prejudiced PEI's ability to thoroughly investigate these belated theories.

PEI also suffered from receiving materials in support of Brace's new claim so late. As Eric Peterson explained at trial, he needed these materials to analyze and try to understand (and later debunk) Brace's claim. (A-0966) Had he received all of the documents supporting the basis for the claim, he could have explained to Brace the flaws in its inventory, and the parties might have resolved the claim without the court and the considerable expense this litigation has caused. Indeed, with the information Brace *did* provide, Eric made a couple of quick phone calls to PIS's yards early in the process and was able to locate $300,000 to $400,000 worth of scaffolding that Brace had overlooked in its physical inventory. (A-0966–67) The Court overlooked Brace's incomplete indemnification claim and delay, relying upon the portion of SPA §6.5(c) which states, "the failure to give such prompt written notice shall not, however, relieve the Indemnifying party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defenses by reason of such failure." (Mem. Op. 26). However, to harmonize this provision relied upon by the Court with § 6.5(c)'s

other requirements, the Court erred by failing to determining it was implicit in § 6.5(c) that non-compliance forfeits a claim when the delay causes material prejudice to the other party. The Chancery Court did not properly consider this evidence of prejudice that ultimately caused PEI to forfeit its defense to the claim.

B. The Chancery Court's decision on the inventory claim is clearly wrong and not the product of an orderly and logical deductive process.

Brace's "created for trial" inventory claim was seriously flawed in its methodology. It did not compare the SPA's Disclosure Schedules to any physical count Brace performed after Closing to a perpetual inventory tracking system report. Even though Brace did physical count equipment and originally based its claim on the results, it later abandoned that approach because it was so flawed[7]—though apparently good enough to assert the claim in the first place.

A physical count is the most reliable way to verify inventory. Brace's testifying expert, Steven Kops, said a company can accurately determine inventory without a physical count *if* it uses a perpetual inventory tracking system. (A-0789–90) Periodic cycle counts are needed to ensure the perpetual system is working.

[7] The day before Brace made its direct claim, Mark Talley and Willie Westmoreland called Eric Peterson to say that their new employer was about to make a claim against PEI that Talley and Westmoreland themselves described as "completely ridiculous." (A-0963) Mark Talley confirmed at trial that he thought the shortage that Brace calculated in its direct claim was incorrect. (A-0617–20) And although he did not remember the conversation specifically, Talley does not doubt that he called the claim "ridiculous." (A-0621)

(*Id.*) An outside audit can comfortably accept the perpetual inventory report because it has "stood up to the test of time." (A-0790) Kops used physical counts *exclusively* for assignments that sought to verify inventory. (A-0783–84)

So why did Brace not rely on a physical count? It said that approach made its claim too big, showing that too many pieces were missing. (A-0741) Its expert admitted he could not explain why that was happening. (A-0742) When Brace's attorney interrupted the examination to offer his own reason—that if you counted wrong, Brace would "tag Peterson for more shortages"—the Court immediately pointed out the obvious: "Well if you count wrong one way, you will. If you count wrong the other way, you credit them too much." (A-0742–43) Either "there's an accurate physical count and it leads to a larger claim," the court observed, "or there's an inaccurate physical count that doesn't lead to any claim, but I don't understand how an inaccurate physical count can lead to a larger claim." (A-0742) So again, why abandon a physical count? Counsel suggested that a different witness would explain, but none ever did. (A-0743)

Rather than use a physical count or a report from a perpetual inventory system, Brace create an untested method to determine scaffolding stock at Closing, one Kops had never used before, one riddled with logical gaps and that ignored critical available information. As the plaintiff, Brace had to show the disclosure schedule was inaccurate. And given the flaws in the approach, Brace did not meet

its burden. The Chancery Court's contrary conclusion was not the product of an orderly and logical deductive process. It cannot survive this Court's review.

Brace's inventory claim compared the disclosure schedules to Defendants' accounting records, which Brace thought would accurately identify PIS's scaffolding inventory at Closing. The methodology's logic, Kops explained, is that "you can't convey or sell an item that you don't own or possess." (A-0734)

Kops began by determining PIS's maximum possible scaffolding at Closing. To do that he examined a list of scaffolding that PIS had bought over the years, as maintained in the course of its business—the "Mary Sheet," named after Mary Soffner, who maintained the list—and then subtracted the total number of items Brace claimed PIS had shipped to its affiliate in Africa, leading Kops to the maximum number of units on hand. Kops then compared each category of the parts with those categories disclosed in disclosure schedule. If the number of items for a category listed in the schedule exceeded the maximum number of units on hand for that category of parts, Kops assumed Brace received only the maximum number on hand and was "shorted" the difference. For each item of shorted equipment, Kops multiplied the number of shorted items by the average cost of the item based on PEI's purchasing history. He calculated a total of $703,975 in "shorted" scaffolding equipment and added to this total $21,084, the value of wooden scaffolding boards that Brace claimed separately that it never received, for

a total indemnity claim of $725,059. (A-0446–49, A-0728–34)[8] The Chancery Court accepted Kops's method, finding it was the "more reasonable method to establish the amount of scaffolding conveyed at Closing." Mem. Op. 29, 32.

That was the wrong question to ask. Putting the choice in those terms saddled *Defendants* with a burden to offer a "more reasonable" method to determine scaffolding at closing. That was error. The question in a civil case is never whether the defendant has offered the "more reasonable" interpretation of evidence, but whether *the plaintiff* has shown it more likely than not that its position is true. *See Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 206 (Del. 2018); *Physiotherapy Corp. v. Moncure*, 2018 WL 1256492, at *3 (Del. Ch. Mar. 12, 2018). The defendant need never disprove the plaintiff's claim.

Here, then, Defendants had no burden to show that their ordinary approach for counting scaffolding used in the operation of their business was the "more reasonable" one. And in finding that it had to pick between them, the Chancery Court set up a false choice when it could have (and should have) instead simply rejected Brace's approach as unreliable. It lost sight of the fact that Brace had to prove it was more likely true than not that it was shorted scaffolding at Closing. In doing so, the Chancery Court made a legal error that demands this Court ask for

[8] Kops also added the cost to rent these items from PERI ($521,981), on the assumption that if Brace did not have them, it would have to rent them for its business. The Chancery Court denied recovery of rental cost. Mem. Op. 35–36.

itself whether Brace's approach carried its burden using the correct standard of proof. *See Levin v. Smith*, 513 A.2d 1292, 1293–94 (Del. 1986); *accord Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 165 n.23 (3d Cir. 1995).[9]

1. Brace's methodology creates but fails to count "overages."

When the difference between the SPA disclosure schedule and PIS's maximum number of on-hand units based on the Mary Sheet was a positive number—suggesting that Brace received *more* than the schedule promised, *i.e.*, an "overage"—Kops assumed Brace did *not* receive the extras. In other words, he did not "net out" shortages and overages. (A-0797–98) That makes no sense; Brace cannot have it both ways, tallying up perceived shortages but refusing to offset them by overages. Overages were no small matter, either—they totaled $983,004. (A-0810) That is too much to ignore.

Kops did not wholly ignore them. He acknowledged that in many cases (in 69 of the 217 unique categories of equipment) the number of purchased items exceeded the amounts disclosed in the schedules. (A-0809) But they did not affect his shortage total. Such overages, he explained, may have been "disposals,"

[9] To be sure, the Chancery Court also said "the Mary Sheet Analysis presents the best method available to quantify the inventory transferred, and that it is more likely than not that the shortage stated under Plaintiff's analysis is less than or equal to the actual shortage." Mem. Op. 29–30. But whether Brace's approach was the "best method available" does not determine whether Brace carried its burden. The court's choice to opt for the "more reasonable method" undermines confidence in its statement that Brace had carried its burden.

equipment that PEI disposed of because it was old or was damaged or stolen and thus could not be transferred in the sale. Or overages could have represented scaffolding not transferred for some other unknown reason Kops did not know. (A-0805–06, A-0448) So he refused to offset the shortages by any of the overages.

Kops also acknowledged that available data on real disposals, which PEI tracked, showed a significantly smaller total for disposals relative to the nearly $1 million that Kops attributed to disposals—only $309,000. (A-807) He nevertheless maintained that PEI must receive *no credit* for any amount of these overages, even if Brace actually received them, because he could not personally validate how many "overages" it actually received. (A-0809, A0812) The easy rejoinder is that you simply assume that *all* scaffolding equipment (except for items the disclosure schedule said PEI was keeping) transferred with the sale. You make that assumption across the board—not just for shortages.

Brace's abandoned physical count, it turns out, supports this assumption. Consider this example raised at trial. In Exhibit A-1 of his report (at Ref # 92), Kops credited PEI with transferring just 3,949 units of STD UVR 200 (Item No. 100009), giving no credit for amounts over what was listed in the schedule. (A-0454–55) But Brace actually counted around 5,800 of those items before abandoning the physical count. (A0629–30, A-0823–24) So, according to an actual physical count (though an imperfect one), Brace did in fact receive 1,800 or

so more units than Kops acknowledged. Kops had access to this critical information, yet ignored it. (A-0822–23)

Brace deliberately ignored data from its own physical count many other times.[10] When confronted with these flaws on cross-examination, Mark Talley acknowledged that there may be errors on individual items in Kops's report, but that what really mattered is "whether Brace received $7.9 million of PERI equipment" as stated in the SPA. (A-0630–31) The Chancery Court should not have ignored this information undermining assumptions in Brace's methodology made to explain away inconsistencies. It should have rejected the approach as unreliable.

[10] According to Exhibit A-1 of Kops' expert report, he gave PEI credit for transferring 2,158 units of "Industrial Deck UDI 25 x 125" (Item No. 106880). But according to Brace's own physical count, Brace actually counted 3,132 units that it received. The same hold true for "UDI 25 x 250 deck Steel" (Item No. 108540), where Kops gave PEI credit for only 4,437 units, but Brace actually counted 4,797. Ditto for "Swing Gate UPX 100" (Item No. 110478): Kops only gave PEI credit for 82 units, but Brace counted 462.

The lengthy spreadsheet showing the results of Brace's preliminary physical count is included in the JX199 natives, was before the Chancery Court, and can be supplied to this Court electronically at its instruction and with its guidance for submitting electronic materials. The Excel file is titled "basis for average cost misc items," and "Replacement Analysis" is the sheet in that file (*see* Column H (indicating the actual count) and Column L (indicating the variance from the SPA amount)). (A-0792–93) The Replacement Analysis sheet showing the actual counts was not provided until February 22, 2016, when it was included in Plaintiffs' expert's working papers.

Had Brace not treated all overages as disposed items, treating only true disposals as disposals, its claim would have been essentially zero. According to PEI's records—reflected in Kops's report—PEI had $454,035 in disposals for its then current scaffolding. (A-0466) Roughly $145,000 was for scaffolding sent to PEI's affiliate in Africa, leaving $309,034 in domestic disposals. (A-0807, A-0468) Using this more accurate figure for disposals (instead of treating *all* overages as disposals), overages fall from $983,004 to $673,970. And when those overages are offset against the total alleged non-board shortages that Kops calculated ($703,975), Brace is left with an inventory claim of just $30,005 by comparing the maximum units on hand to the schedules. And even including board items, Brace's claim is still far below the $300,000 indemnification basket. (A-0083) In essence, Brace's methodology corroborates what really mattered: PEI had purchased more than $7.9 million of equipment that it was required to convey, and likely did convey, at Closing.

Brace's inconsistent application of its own methodology, along with ignoring contradictory information from its own physical count, was the largest flaw in Brace's inventory claim, preventing Brace from carrying its burden. It makes the Chancery Court's decision adopting it not the product of an orderly and logical deductive process and entitled to no deference on appeal.

Critically, the Chancery Court overlooked the import of overages. Instead of recognizing that Brace's disparate treatment of overages and shortages called into serious question that approach's reliability, the court asked whether the total value of these overages, "in equity should be offset against the value of shortages." Mem. Op. 33. Although PEI did also argue that it should receive credit for overages to avoid a windfall, its primary argument was that acknowledging shortages without at the same time crediting overages was illogical and inconsistent. (A-1204–09, A-1214–15)

The Chancery Court gave three reasons for not crediting overages, all unpersuasive. First, it assumed that surplus equipment was lost, stolen, or discarded, instead of transferred in the sale. This explanation, the Court believed, "logically accounts for some, if not all, of any overstatement of scaffolding available for transfer." Mem. Op. 33. But as noted, this approach ignored *real data* about disposals. This explanation was imprecise and could only account with any accuracy for "some" of the overstatement. *Id.* The choice to essentially ignore real data on overages—which Brace did not impugn as inaccurate—was error.

Second, the Chancery Court thought it appropriate to give Brace the benefit of any imprecision about inventory transferred because Defendants prepared the schedules based on its inventory data. *Id.* at 33–34. This improperly applied the standard of proof. Doubts and uncertainties should be resolved *against*, not in

favor of, the party with the burden of proof—here, Brace. Its inability to plausibly account for overages when it had real data about disposals that challenged its explanation was a vice of Brace's approach that the court should have held *against* Brace, who had the burden of proof. *Cf. OptimisCorp v. Waite*, 2015 WL 5147038, at *55 (Del. Ch. Aug. 26, 2015) ("By implication, the preponderance of the evidence standard also means that if the evidence is in equipoise, Plaintiffs lose.").

Finally, the court questioned whether overages had any value because it could not determine from the evidence whether they "complement the fittings that the Plaintiffs did receive," as items "are not necessarily interchangeable from one scaffolding set to another." Mem. Op. 34. This was based on "logic," not evidence. *Id.* The evidence does not support this "logic" (*id.*) and indeed contradicts it. Plaintiffs' Mark Talley testified that what matters is *not* whether there are shortages or overages on individual items, but whether "Brace received $7.9 million of PERI equipment." (A-0631) In other words, he "go[es] by the total" amount transferred, *not* piece by piece. (*Id.*) Consider too that shortly after Closing Brace bought $15 to $20 million in additional scaffolding. (A0625–26) It could have put this $700,000 worth of scaffolding "extras" to use (or not bought the pieces if had extras of) given Brace's massive purchase of additional equipment.

This third explanation also papers over a deep logical gap. Brace's entire approach assumed Defendants either never bought the scaffolding they claimed to have transferred, or kept too much after the sale. But if the pieces only work in certain ratios (as Brace claims), why would Defendants have bought them in ratios that did not work together? Conversely, why would they *keep* items in ratios that do not work together? And if PIS was using these so called overages when it PEI owned it, certainly Brace, which bought $15 to $20 million more scaffolding could have used it. The Chancery Court's decision accepted an unreliable methodology that was contrived for litigation and overlooked the more logical explanation: there were no "shortages" or "overages." Brace simply received all of the PERI equipment used by PIS in operating the business, as promised in the SPA.

2. Miscounting equipment sent to Africa

Apart from not crediting overages, another flaw in Brace's approach was it assumed much more equipment was sent to PEI's company in Africa than actually was. (A-0982) Brace supplied no documentary evidence to support the extent of equipment that it claimed was sent to Africa. That flaw decreased the scaffolding that PEI had on hand and thereby increased the perceived shortage. In fact, the $30,005 in alleged shortages mentioned above would actually be *an overage* if Brace had properly counted the equipment sent to Africa.

3. Improper reliance on purchase records

Another flaw was relying on PEI's purchase records—the Mary Sheet—to determine how much scaffolding PEI had on hand and could transfer to Brace. (A-0728) This is an unreliable way to determine an inventory. The Mary Sheet listed items individually because that is how the equipment appeared in purchase orders and invoices. But that is not how PEI tracked its inventory over time. Instead, PEI uses a computer system called FACTS. (A-0940–41)

The FACTS system is "a perpetual inventory system that tracks inventory going in and out, transfers between locations, tracks all the purchases." (A-0944) It works in conjunction with the physical shipping and receiving tickets that are entered into the system before and after each job to accurately track inventory over time by showing the items going out on a job and those that return. (A-0940–41, A-0948–49) If a ticket is not entered into the system, the amounts on hand will be off. (A-0956) A system like FACTS is the best way to track inventory. (A-0977)

On hand equipment also fluctuates over time, making the use of purchase orders a poor way to track inventory in real time. (A-0944) Eric explained at trial that PEI would collapse item codes for similar items in FACTS into a single code for tracking purposes. So PEI might "buy ten of item one, ten of item two, ten of item three, and if they're all similar products, from the management perspective, they're always getting mixed up, so what we would do is we would roll those 30

items into product code one" for tracking purposes. (A-0983–84) Under Brace's approach, these items are split back apart and show that Brace is short 20 units of item codes two and three, yet gives PEI no credit for an overage of 20 units of item code one. (A-0984) Reviewing purchase orders is also a poor way to count current inventory because items are frequently "re-inventoried" as different parts over time due to damage. A three-meter bar, for example, might come back from a job damaged, so PEI would cut off the damaged part and use it as a two-meter bar. FACTS would identify the piece as a two-meter bar, but the purchase order would still show it as a three-meter one. (A0983)

The Chancery Court did not find FACTS reliable. Mem. Op. 32. But again, that did not mean it had to choose Plaintiffs' methodology. It could have found both approaches unreliable and determined that Brace did not carry its burden.

C. Brace received a windfall by succeeding on its inventory claim.

As noted, the total amount of scaffolding overages that Brace calculated (less the amount of the true disposals, not including Africa scaffolding) roughly equaled the value of its inventory claim. Yet Brace asked—and the Court awarded—the *full amount* of its claim (roughly $725,000), granting Brace a windfall. By adopting Kops's methodology, Brace was awarded $725,000 *and* got to keep the "overages" in roughly the same amount.

Equity demanded avoiding a windfall for Brace at PEI's great expense. *See Patel v. Dimple, Inc.*, No. Civ.A. 1661-VCS, 2007 WL 2353155, at *13 (Del. Ch. Aug. 16, 2007) ("As important, this court of equity has no proper role in helping Chetan secure an unfair windfall at Vinod's expense."); *Courtland Manor, Inc. v. Leeds*, 347 A.2d 144, 148 (Del. Ch. 1975) (noting that "equity strives to avoid" windfalls); *see also Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009) (explaining that contract damages "should not act as a windfall").

D. Section 3.11(b) of the Disclosure Schedules sets forth a true, correct, and complete list and general description of the scaffolding assets.

Not only did Brace not carry its burden to prove that the disclosure was inaccurate, but the evidence showed that section 3.11(b) of the SPA disclosure schedule accurately set forth the scaffolding equipment that PEI transferred at Closing. As explained, Brace's inventory claim, once it properly accounts for overages and actual disposals, fell to $30,005.[11] But given that PEI was transferring approximately $8,648,294 in scaffolding (A-0113), even if Brace received $30,005 less than was stated in the schedule, the schedule set forth a "true, correct and complete list and general description of *substantially all* . . . equipment . . . of the Company" as SPA § 3.11(b) represented. Using the $30,005 shortage figure, PEI's disclosure was off by just 0.34%. The difference

[11] Again, properly counting shipments to Africa would at the very least reduce this to zero.

shows that PEI gave "a true, correct, and complete list and general description of substantially all equipment," even if not perfect.

But the evidence in the case proved that it was not off at all, that PEI's method ensured the disclosure was spot on. Eric Peterson prepared the scaffolding asset disclosure schedule using an inventory report exported from FACTS. (A1059) FACTS was the audited perpetual inventory system that PIS used to track its scaffolding equipment before the sale, and which Goedecke still used at the time of trial. (A-0944)

The evidence showed that the report from FACTS was accurate. Before the sale, PEI checked the information in FACTS each year with a physical count of inventory. Third-party auditors participated to ensure accuracy and worked with PEI on any adjustments and issues found. (A0944) Yearly counts were pretty "hands-on," with "core" (*i.e.*, non-union) employees at all six locations helping out. Teams of two or three went into the yards and do the counts together. (A-0949) Third-party auditors, showing up unannounced and at different yards, sometimes watched the employees count individual items. They watched the original count and sometimes went back and counted the items themselves to make sure what was entered into the system was accurate. (A-0946–47)

The command center in St. Louis (where the inventory control person, PEI's accountants, and third-party auditors are located) used a mobile app to queue up

individual items for the people in the yards to count. Once the number of pieces for that item was transmitted back to St. Louis, the next item queued and the St. Louis folks reviewed the last number to make sure it conformed to FACTS, and made adjustments to FACTS if necessary. If there was a significant discrepancy, St. Louis would ask the yard manager to look around to see if items were missed. (A-0945–46) There were fluctuations due to errors in the shipping and receiving tickets with employees mixing up nearly identical items. (A-0944–45) The physical counts and third-party audits ensured that FACTS was accurate. In addition, FACTS is a perpetual inventory system, which by its very nature corrects itself over time as transactions take place.

PIS performed its last audited physical count towards the end of 2013. (A-0947) But it did an unaudited physical count in July, weeks before the sale, to make sure that FACTS was up to date before the sale. Area managers and employees of the six yards counted all of the scaffolding. (A-0956) Eric Peterson, Mark Talley, and Willie Westmoreland worked with the area managers to make sure that each yard's shipping and receiving tickets had been entered in the system. (A-0955—56) FACTS was then updated with the results of the count and Eric Peterson worked with Talley and Westmoreland to make sure everything was in order. (A-0957–58) Eric then exported the updated FACTS report into an Excel spreadsheet and analyzed it by himself and also with Mark Talley. They compared

it with PEI's records of scaffolding purchases and shipping records to Africa to make sure that it all made sense. Eric and Mark both felt good about it. That spreadsheet became the SPA's scaffolding assets disclosure schedule. (A-0958) There can be no serious debate that PEI followed a reasonable procedure for creating the disclosure schedule, one designed to ensure that it was accurate. And it was.

In finding otherwise, the court credited testimony from Mark Talley that "there were many problems with the inventory in FACTS before the sale," and that "physical counts were attempted three different times with no success." Mem. Op. 30–31. This testimony was equivocal and undermined by, among other things, Talley's earlier statements that the SPA schedules were in fact accurate.

Eric Peterson involved Talley only when PEI had issues or discrepancies with the yearly inventories (A-0947), and Mark would "review the errors." (A-0952) Eric "could see why maybe [Mark] thought [the inventories] were junk." (A-0952) "But the significant portion of the inventories were good. [Mark] and [Eric] worked together to deal with just the inventory issues." (A-0952) With respect to the last physical count that PEI did, just before the sale, Eric testified that he and Mark analyzed the spreadsheet and "went through the whole report, and we both felt good about it at the end of the day." (A0958)

Also, Talley signed the separation agreement with PEI, representing therein that he "assisted [PEI] in good faith" in due diligence on sale to Brace, and was "unaware of any fact or circumstance that may cause [PEI] to be in breach of the proposed SPA to be executed in connection with the sale." That representation is contrary to any claim that PEI knew its representation on the scaffolding list were false. The Chancery Court's finding that the FACTS system unreliable is clearly erroneous. But again, that court did not have to assess the accuracy of the FACTS system to reject Brace' flawed methodology as unreliable.

* * *

Sustaining Defendants' challenge on the indemnification claim would reverse the judgment for $725,059 in damages, $241,686 in fees, and $400,149 in costs.

II. The Chancery Court abused its discretion and committed legal errors in awarding Plaintiffs' $440,149 in "costs."

Question presented

The Chancery Court awarded Brace $400,149 in "costs," which included attorney's fees charged by Brace's deal counsel (not attorney of record in this matter), on the basis of Chancery Rule 54(d) and SPA § 6.2(a). The question presented is whether the Court erred in this award. Defendants preserved this issue for review, both in their opposition to Plaintiffs' Petition for fees and in their Motion to Reconsider Costs Award. (A-1301–1310, A-1327–34). The Court need not reach this issue if it reverses the judgment on Plaintiffs' indemnification claim.

Scope of review

This Court reviews an award of costs for abuse of discretion, but reviews *de novo* the legal principles underlying the decision, including matters of contract interpretation and whether particular litigation expenses are recoverable under Chancery Rule 54(d). *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010); *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

Merits of Argument

Neither Chancery Rule 54(d), which Brace invoked for the first time on reconsideration, nor SPA § 6.2(a) supports the full award of $440,149 in costs.

Rule 54(d). In their Petition for Fees, Plaintiffs sought all of their costs under SPA § 6.2(a) and bad-faith fee shifting. (A-1280) The single passing reference Plaintiffs made in their petition to Rule 54(d) was to support their argument that awarding all of their *fees* (not just those for claims they won) was reasonable because they won at least a part of their claims. (A-1291–92; A-1304). They invoked Rule 54 only on reconsideration, which is too late. *See Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 2315943, at *3, 4 (Del. Ch. May 21, 2018).

Rule 54(d) did not authorize all of $440,149 in any event. "Costs" are not synonymous with "expenses." *Gaffin v. Teledyne, Inc.*, 1993 WL 271443, at *1 (Del. Ch. July 13, 1993). "A successful litigant is not entitled to reimbursement under Chancery Rule 54(d) merely because the expenditure was necessary to the prosecution, maintenance and presentation of the case." *Id.* Rule 54(d) is not intended to "fully compensate a litigant for all the expenses the litigant incurred." *Id.* The Court overlooked the limited scope of Rule 54(d) when it awarded Plaintiffs $440,149 in "costs"—which accounted for literally every expenditure Plaintiffs made (except trial counsel's fees, a portion of which the court separately awarded).

Just a handful of items for which Plaintiffs sought reimbursement are taxable as "costs" under Rule 54(d). That includes "expert witness fees that are covered by

statute, court filing fees, the usual and customary costs incurred in serving of process," and all "required ordinary and reasonable fees . . . incurred in the process of eFiling." *Dewey Beach Lions Club v. Longacre*, 2006 WL 2987052, at *1 (Del. Ch. Oct. 11, 2006).

But not all expert witness expenses are recoverable—only those "covered by statute," including 10 *Del. C.* § 8906 here, are. Faithful to this statute's reference to "*testifying* as experts," reimbursement for expert witness fees is limited to "time necessarily spent in attendance upon the court," *Gaffin*, 1993 WL 271443, at *2, which can include time spent traveling to the court to give testimony, though at a lower rate than the witness charges to testify, *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *5 (Del. Ch. Apr. 27, 2004). "Excluded from the scope of recoverable expert witness fees are fees incurred in connection with the experts' time spent (1) consulting with or advising a party's attorney; (2) preparing for testimony in court; and (3) preparing for and providing deposition testimony." *Id.*

Other expenses Rule 54(d) shifts include "the expense of computer legal research, transcript fees, miscellaneous expenses (such as travel and meals), and the cost of photocopying." *Dewey Beach*, 2006 WL 2987052, at *1; *see also All Pro Maids, Inc. v. Layton*, 2004 WL 3029869, at *4 (Del. Ch. Dec. 20, 2004), *aff'd*, 880 A.2d 1047 (Del. 2005) (disallowing costs for Federal Express, long distance, photocopying, postage, computer research, litigation support in the

form of conversion of images, digital prints and document retrieval, expert fees, and transcript and other costs associated with depositions or the trial); Ct. Ch. R. 54(d) ("The costs in any action shall not include any charge for the Court's copy of the transcript of the testimony or any depositions."). Mail and courier expenses are excluded as well. *See Gaffin*, 1993 WL 271443, at *2. Out too are attorneys' fees. *CM & M Group v. Carrol*, 453 A.2d 788, 795 (Del. 1982).

Here only a small fraction of the expenses Plaintiffs sought were properly awardable as "costs" under Rule 54(d). Based on a line-by-line analysis of each expense Plaintiffs listed in Exhibits B and C to their fee petition, Defendants determined that, at most, $15,913.88 was allowed. Those covered court and e-filing fees, and customary costs in servicing process. (A-1332, A-1383–84)

Although some expert witness expenses are recoverable, neither of the expenses listed in Plaintiffs' Exhibit B—on February 27, 2016 for $80,625, and on March 8, 2016 for $24,405—appears to be. (A-1338–1357) That is because both payments were made *before* Plaintiffs' expert testified at trial in this case, on March 29 and 30, 2016. So it is difficult to see how these fees were incurred for "time necessarily spent in attendance upon the court" and thus recoverable under Rule 54(d). *See Gaffin*, 1993 WL 271443, at *2.

At most (and even though omitted as expenses on Plaintiffs' cost sheet), Plaintiffs could recover fees for the 4.5 hours their expert spent on the stand. (A-

1332–33) Using the expert's $500 hourly rate disclosed in his report (A-0444), Plaintiffs may recover no more than $2,250 for this testimony time, plus perhaps two additional hours of travel time, billed at half of the experts testifying rate. *See Comrie*, 2004 WL 936505, at *5. Without evidence to support a higher amount actually paid to their expert witness for trial testimony, the Court could have awarded Plaintiffs no more than $2,750 for expert witness fees incurred. Rule 54(d) authorized no more.

Apart from expert witness fees, the overwhelming majority of expenses included in Exhibit B (A-1338–1357)—totaling $168,479.77—were for photocopies, travel, parking, meals, transcripts, computer legal research, database hosting, litigation support from outside vendors, postage, and courier services. These expenses are *not* recoverable as Rule 54(d) costs under the settled authority cited above.

Also not recoverable was $150,725 in fees explicitly referenced in Plaintiffs' counsel's declaration as "paid to Plaintiffs' outside general counsel" at an hourly rate of $400 (and itemized in Exhibit C thereto). (A-1295–96, A-1358–1381). *See also CM & M Group*, 453 A.2d at 795. In their reply before the Chancery Court, Plaintiffs conceded that this vaguely-described $150,725 expense was actually additional attorneys' fees paid directly by Brace. (A-1322–23) ("Defendants challenge the *legal fees* paid to Plaintiffs' commercial counsel Tom Wippman.

Mr. Wippman is Brace's preferred lawyer who was charged with hiring and monitoring litigation counsel.").

The Chancery Court already had determined that Plaintiffs were entitled to no more than $241,686 in reasonable attorneys' fees. *See* Dec. 12, 2018 Order ¶ 11 (Dkt. 275) ("I find that to be the upper limit of a reasonable fee for the inventory claims . . . ."). Awarding Plaintiffs an additional $150,725 in attorneys' fees, but under the guise of Rule 54 "costs," was unwarranted and undermined the court's decision to limit the fee award to $241,686.

In total, then, Plaintiffs were entitled to, at most, $18,663.88 in taxable costs under Rule 54(d). The Court's award of any other amount of the $440,149 under Rule 54(d), was a misapplication of the Rule.

SPA § 6.2(a). Plaintiffs did not meet their burden to show entitlement to an award of $440,149 in costs and expenses under the SPA. In the SPA, PEI agreed to reimburse Brace for "any and all Losses" that Brace incurred "based upon, arising out of, with respect to or by reason of" *any inaccuracy in or breach of any of the representations or warranties PEI made in the SPA*, i.e., for indemnification losses only. (A-0082) "Losses" means "costs or expenses of whatever kind," including the "costs of enforcing any right to indemnification." (A-0101) But rather than identify the costs and expenses Plaintiffs incurred on their indemnification claim, or approximate what percentage of total costs were incurred

on the indemnification claim relative to the other claims, Brace asked for *all* of its costs and expenses incurred on every claim, including on the restrictive covenant (which it lost) and on cash reconciliation (which it won in part but which is not an indemnification claim). (A-1280–82, A-1321–23). That was unreasonable and did not carry Brace's burden of proof.

Awarding costs under a contract's cost-shifting provision "will inevitably involve some judicial judgments," which may require the court "to allocate efforts between aspects (or claims) that were not meritorious and those that were." *See El Paso Natural Gas Co. v. Amoco Prod. Co.*, 1994 WL 728816, at *6 (Del. Ch. Dec. 16, 1994) (addressing fee awards, but the point is the same). A party that seeks costs must "facilitate this exercise of judgment by segregating [costs] that were incurred in connection with those claims where success was achieved from others." *Id.*; 20 C.J.S. *Costs* § 159 ("Where separate claims or parties are involved, the movant generally must categorize the costs and fees sought as to the separate claims or parties.").

In *Clemens v. New York Central Mutual Fire Insurance Co*., 903 F.3d 396, (3rd Cir. 2018), the court held that trial courts have discretion to "deny a fee request in its entirety when the requested amount is 'outrageously excessive' under the circumstances." *Id.* at 402. Without such discretion, "claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable

consequence of such conduct would be reduction of their fee to what they should have asked for in the first place." *Id.* A fee (or cost) petition is not the "opening bid in the quest for an award." *Id.* A party's failure to segregate fees in a case with multiple claims, "only some of which entitle the recovery of attorney's fees, can result in the recovery of zero" costs. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *see Jackson v. Morse*, 871 A.2d 47, 55 (N.H. 2005) ("The [petitioners] had the burden of showing the amount of fees and/or costs they were entitled to recover. By failing to separate or apportion the recoverable fees from the nonrecoverable fees, they failed in their burden.").

Fatal to Plaintiffs' cost request under the SPA was its failure to back out costs Plaintiffs incurred on their restrictive covenant and cash-reconciliation claims, which the SPA did not authorize the Court to shift to Defendants. Plaintiffs thus should have been awarded either zero costs and expenses under the SPA, or at most those related to the indemnification claim. The Court's unreasoned decision to award *all* of their costs and expenses was an abuse of discretion and a misapplication of the plain language of the SPA's limited indemnification provision. The SPA did not contain a cost-shifting provision for *any and all* claims, just those for SPA indemnification.

III. The Chancery Court erred in entering judgment against Eric and Kirk Peterson in any amount, and against the Guarantors for judgment amounts beyond what Brace is entitled to as SPA indemnification.

Question presented

The Judgment states: "under the SPA, the amount owed to the Plaintiffs must first be paid out of the escrow account. Pursuant to this Order of Judgment on Count III, the individual Defendants are liable for the remaining amount." The question presented is whether this portion of the Judgment contradicts the SPA. The issue is preserved for review because Defendants had no opportunity to object to this ruling before it was entered; it was raised for the first time when included in the Judgment. Del. Ch. R. 46. The Court need not reach this issue if it reverses the judgment on Plaintiffs' indemnification claim.

Scope of review

This Court reviews *de novo* a lower court's interpretation and application of unambiguous contract language. *See BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

Merits of Argument

The Escrow Account was established to satisfy indemnification claims under the SPA. Per § 1.3(c) and 1.5(a), escrow funds not used for that purpose are disbursed to Defendants once all such claims are satisfied. (A-0214–15) Escrow funds may not be used to satisfy non-indemnification claims. Nevertheless, the Judgment says "the amount owed to the Plaintiffs"—referring to *all* amounts owed

under the Judgment, including non-indemnification awards—"must first be paid out of the escrow account." This violates § 1.3(c) of the Escrow Agreement.

In addition, the Judgment stating that the "individual Defendants are liable for the remaining amount"—insofar as this includes Eric and Kirk Peterson[12]—is contrary to the personal guaranty, which obligates only Ron Peterson, the Ronald A. Peterson 2010 Irrevocable Trust, and the Ronald A. Peterson Revocable Trust ("Guarantors"). (A-0339)

Finally, the scope of liability the Judgment placed on the Guarantors (to cover "the amount owed to the Plaintiffs" under the Judgment) is overbroad. Each guaranteed payment "of all monetary obligations of Seller to Buyer arising under Section 6.2(a) of the Purchase Agreement," which covers indemnification obligations only. (A-0339, A-0082) The Court thus erred by imposing liability on the Guarantors for "the amount owed to the Plaintiffs" under the Judgment, which includes awards beyond the indemnification award. In fact, apart from $681,835 in litigation fees and costs that PEI and Guarantors currently owe under the judgment—which the Escrow Account is capable of satisfying—PEI has already satisfied the indemnification award. Judgment ¶ 3(a). If the Court affirms the indemnification claim, it should alter the Judgment to state that Guarantors are responsible for $18,663.88 in costs if escrow funds are unavailable.

[12] Eric and Kirk Peterson were joined in the action only because they signed the restrictive covenants that Plaintiffs sought (unsuccessfully) to enforce.

CONCLUSION

For these reasons, the Court should reverse the judgment for Brace on its indemnification claim (consisting of $725,059 in damages and $681,835 in fees and costs) and remand for entry of judgment on the claim in PEI's favor. If the Court affirms the judgment on that claim, it should reduce the award of costs to $18,663.88 and modify the judgment to state that Guarantors are responsible for up to $18,663.88 if that amount is not satisfied with escrow funds.

Respectfully submitted,

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Dated: May 1, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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CERTIFICATE OF SERVICE

I hereby certify that, on May 1, 2019, true and correct copies of the foregoing document were served via **File&ServeXpress** upon the following counsel of record:

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