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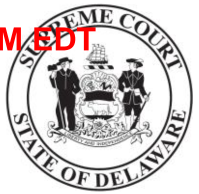

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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,	:	Court below: Court of Chancery of the State of Delaware
v.	:	C.A. No. 11189-VCG
BRACE INDUSTRIAL CONTRACTING, INC. and PETERSON INDUSTRIAL SCAFFOLDING, INC.,	:	
Plaintiffs below/Appellees and Cross-Appellants.	:	

CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

Dated: July 12, 2019

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REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL

I. THE TRIAL COURT ERRED BY FAILING TO AWARD PLAINTIFFS ALL REASONABLE ATTORNEYS' FEES AS REQUIRED BY THE SPA.

Section 6.2 of the SPA[1] requires PEI to indemnify Plaintiffs for "any and all Losses incurred or sustained by, or imposed upon, the Buyer Indemnitees based upon, arising out of, with respect to or by reason of" the breach.[2] The SPA's definition of "Losses" includes "reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder . . . ."[3]

The Trial Court found that PEI breached its representation in SPA Section 3.11(b) by overstating the inventory of PIS in the Scaffolding List.[4] Plaintiffs, therefore, are entitled to all reasonable attorneys' fees "arising out of" PEI's breach. Though Plaintiffs sought approximately $1.3 million in attorneys' fees, the Trial Court erred in awarding Plaintiffs only $241,686 in attorney's fees.[5] The Trial Court erroneously attempted to disaggregate the fees incurred to win the Inventory Claims away from the fees incurred to defeat the affirmative defenses to the Inventory Claims. Then, the Trial Court erroneously disregarded the controlling

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[1] Capitalized terms undefined herein have the meanings ascribed to them in Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal ("Cross-Appeal OB").
[2] *See* OB Ex. C at 1-2.
[3] A-0082; A-0101.
[4] OB Ex. A at 25; OB Ex. C at 1.
[5] OB Ex. C.

contractual fee shifting clause in favor of an "implied contingency fee" based upon only one element of the seven element test stated by DLRPC 1.5.

A. Plaintiffs' Contractual Fee-Shifting Argument was Properly Preserved for Appeal.

1. Plaintiffs Raised Their Contractual Fee-Shifting Argument Below.

Defendants first argue that "Brace did not fairly present to the Chancery Court its new argument that '*all* of Plaintiffs' attorneys' fees incurred in this litigation fall within the scope of Section 6.2 because they 'arose out of' that covered, successful claim.'"[6] According to Defendants, "Brace forfeited below what it now argues regarding the Chancery Court's attorney fee award."[7] That argument is disingenuous.

Plaintiffs raised their request for fee-shifting pursuant to Section 6.2 of the SPA in both their November 7, 2016 motion for reconsideration of the Memorandum Opinion (the "Motion for Reconsideration") and in their April 24, 2018 fee application (the "Fee Application"), and in related oral arguments.[8] In their Motion for Reconsideration, Plaintiffs explained that "Brace winning the

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[6] Appellants' Reply Brief on Appeal and Cross-Appellees' Answering Brief on Cross-Appeal ("AB") at 15-16 (emphasis in original).
[7] AB at 15.
[8] B-319-320; A-1285-1280; *see also* Cross-Appeal OB at 22.

indemnification claim by itself entitles Brace to recover its litigation costs per SPA §6.2, i.e., ***a win equals fees***."[9]

Likewise, in the Fee Application, Plaintiffs sought the full amount of their attorneys' fees and expenses in the Fee Application on the ground that Section 6.2 of the SPA required indemnification of those amounts. In that application, Plaintiffs explained that "[t]he SPA requires Defendant [PEI] to indemnify Plaintiff Brace … for fees and costs incurred in enforcing its indemnification rights. Thus, resolution of the Inventory Claim in Brace's favor requires an award of fees and costs."[10] Plaintiffs further argued:

> PEI will likely argue that the SPA-required fee award must be discounted because Brace did not win the Restrictive Covenant claim. Such a discretionary reduction is inappropriate. ***The Inventory Claim is the core of this case; the remaining claims arose from PEI's unlawful retaliation for the lawful Inventory Claim***. PEI's argument always was that Brace was so incorrect on the Inventory Claim that PEI's unlawful self-help is excusable.[11]

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[9] B-321 (emphasis added).

[10] A-1281.

[11] A-1285 (emphasis added); *see also* BR-3-4 (Plaintiffs' Counsel: "So the plaintiffs' fee request on the contract is on SPA section 6.2(a) and (d). 6.2(a) is if there's a breach of warranty, you recover all the losses, and attorneys' fees are in the definition of Losses, which is at Schedule A. So Your Honor's October 31st, 2016, memorandum opinion held that there was a breach of the warranties. So it's just a straight application of the contract language."); *id.* at 21 ("[T]he attorneys' fees here are not necessarily just a sanction or a contractual right. They're an element of damages that we need to make the plaintiff whole in the vein of the Supreme Court's opinion in *Scion Breckenridge II*").

In their Answering Brief on appeal, Defendants actually *cite* the foregoing language, thus *acknowledging* preservation of Plaintiffs' causal link argument in the underlying proceedings.[12] Yet they contend that "[t]hat bare assertion does not fairly resemble its current argument on appeal."[13] That claim is incomprehensible, as the quoted language *is the very same argument* now before this Court on appeal. Similarly, Defendants note that Plaintiffs argued in the Fee Application that they should "be indemnified for fees and costs incurred *in connection with the Inventory Claims*."[14] Again, the argument now before the Court is the same: because all of Plaintiffs' attorneys' fees arose from the Inventory Claim (PEI's breach), they are indemnifiable under Section 6.2.

Additional record citations demonstrate preservation. For example, in Plaintiffs' reply in support of their Fee Application, Plaintiffs addressed Defendants' argument that "Plaintiffs were required to allocate fees incurred to each claim in the case" by explaining that "[***a***]***ll*** fees … were incurred 'with respect to or by reason of' Defendants' breach of the SPA and TSA and should be shifted."[15] During oral argument on Defendants' motion for reargument in January 2019, Plaintiffs' counsel reiterated this to the Trial Court: "[T]he progress of the

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[12] AB at 16.
[13] *Id.*
[14] *Id.* at 15 (citing A-1285).
[15] A-1321.

litigation starts with the inventory claim. There is a purported setoff defense to the inventory claim that we defeated and ended up with the cash. So it all comes out of the inventory claim. It's all covered by 6.2."[16] Defendants' current argument that Plaintiffs did not fairly raise their contractual fee-shifting argument below is not supported by Delaware law. *See Watkins v. Beatrice Companies, Inc.*, 560 A.2d 1016, 1020 (Del. 1989) ("In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal.") (*citing Sergeson v. Delaware Trust Co.*, 413 A.2d 880, 881–82 (Del. 1980) (*per curiam*)).

Moreover, even to the extent the Court were to conclude that Plaintiffs had not fairly presented the specific nuances of their contractual fee-shifting argument below, this does not preclude review under the appropriate standards set forth in the Cross-Appeal Opening Brief. *See Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547 n.4 (Del. 2006) (rejecting argument that party could not present specific argument that "the court was required to make a preliminary finding of intentional or reckless misconduct before issuing an adverse inference instruction" on appeal where the party "did object generally to the issuance of the pattern jury instruction . . . ." in the underlying proceedings).

[16] B-356-357.

2. The Trial Court Understood Plaintiffs' Argument.

Citing the language of the Fee Order, Defendants next claim that the Trial Court never understood Plaintiffs to argue that they were entitled to all reasonable attorneys' fees arising from PEI's breach of the SPA based on a causal link between the claims and defenses.[17] In the Fee Order, the Trial Court noted that Plaintiffs did not attempt "to provide a break-out of fees for the inventory claim, stating (in their response to Defendants' opposition on this ground) that they have no responsibility to do so."[18]

But the language of the Fee Order proves the opposite of what Defendants wish. That order is *consistent* with the fact that Plaintiffs always sought all attorneys' fees incurred on all claims and the set-off defense under Section 6.2. Plaintiffs' Fee Application declined to disaggregate fees incurred between the claims and defenses precisely because (a) Plaintiffs are contractually entitled to *all* fees incurred both to win the Inventory Claims and defeat the affirmative defenses thereto, and (b) it is not logically possible to balkanize fees incurred to prove a claim from fees incurred to defeat a defense to the same claim.[19]

Other record evidence also refutes Defendants' claim. During the September 2018 hearing on the parties' respective fee applications, Plaintiffs'

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[17] AB at 15-16.
[18] OB Ex. C.
[19] Cross-Appeal OB at 24-30.

counsel explained that, under Section 6.2(a), "if there's a breach of warranty, you recover all the losses, and attorneys' fees are in the definition of Losses, which is at Schedule A. So Your Honor's October 31st, 2016, memorandum opinion held that there was a breach of the warranties. So it's just a straight application of the contract language."[20] The Trial Court responded conclusively, "I understood your argument."[21] In *Sears*, this Court found it relevant in assessing whether a party had sufficiently preserved an argument for appeal that the trial court had "clearly signaled that he understood Sears' argument as being broader than the plaintiffs now claim it was."[22]

And critically, the Trial Court's decision to award Plaintiffs their full amount of costs pursuant to Section 6.2 of the SPA further illustrates the Trial Court's understanding of (and credits) Plaintiffs' position. Section 6.2 of the SPA treats costs and reasonable attorneys' fees equally. In other words, if Plaintiffs are entitled to all costs incurred in the underlying litigation pursuant to Section 6.2, they are also entitled to all reasonable attorneys' fees incurred pursuant to Section

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[20] BR-3-4.

[21] BR-4; *see also id.* at 21 (Plaintiffs' counsel: "[T]he attorneys' fees here are not necessarily just a sanction or a contractual right. They're an element of damages that we need to make the plaintiff whole in the vein of the Supreme Court's opinion in *Scion Breckenridge II*." COURT: You're talking about the contractual fee-shifting. Plaintiffs' Counsel: Correct. COURT: No. I understand.").

[22] 893 A.2d 542 at 547, n.4.

6.2.[23] The Trial Court's commentary during a January 2019 hearing further supports this point: "[T]he way I determined what the reasonable fees were is I looked at the result they obtained and decided what the utter most amount was. But [the SPA] doesn't say anything about reasonable costs. This is actual costs, including reasonable attorneys' fees."[24]

In a last ditch procedural challenge, Defendants make much of the fact that Plaintiffs advanced additional arguments in support of their fee-shifting request in the underlying proceedings which they do not now advance on appeal.[25] This argument has no legal significance. None of Plaintiffs' arguments below were inconsistent with Plaintiffs' current arguments on appeal.[26] This Court will easily discern the logic of Plaintiffs' choice to cross-appeal only their clear contract rights subject to *de novo* review, rather than quibbling over every ruling the Trial Court ever made on an abuse of discretion standard.

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[23] *See Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) ("Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning.").

[24] B-355.

[25] *See* AB at 15.

[26] *See*, *e.g.*, A-1316 (Plaintiffs explaining that "[t]he SPA's use of the word 'any' is important. The Court's determination that $725,059 worth of inaccuracies existed meets the definition of 'any' inaccuracy/breach, triggering SPA, § 6.2. Once triggered, the contract entitles Plaintiffs to be reimbursed for 'any and all Losses . . . arising out of, with respect to or by reason of' the misrepresentation.").

Based on the foregoing, and as set forth in the Cross-Appeal Opening Brief, Plaintiffs' contractual fee-shifting argument is properly before this Court on appeal. The Court of Chancery's interpretation of the contractual fee-shifting provision is subject to *de novo* review, and its decision to award attorneys' fees and costs is reviewed for abuse of discretion.[27]

B. Plaintiffs are Contractually Entitled to All of Their Requested Attorneys' Fees Under Section 6.2 of the SPA.

1. The Trial Court Did Not Reject the Causal Link Between Plaintiffs' Claims and the Set-Off Defense.

Defendants claim that "it was not bare and unauthorized self-help that caused PEI to withhold cash from Brace, but rather PEI's contractual right under the SPA's set-off provision in § 6.7."[28] They argue that the Trial Court "rejected—several times—Brace's retaliation and self-help arguments."[29]

As an initial matter, Defendants mischaracterize the Trial Court's ruling in the Fee Order: the Trial Court did *not* determine that Defendants' withholding of Customer Payments was lawful; but rather that it was not "improper self-help ***justifying fee shifting***" under the bad-faith exception to the American Rule.[30] Defendants apparently fail to recognize that Plaintiffs' lead argument always was

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[27] *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).
[28] AB at 19.
[29] *Id.* at 18.
[30] OB Ex. C (emphasis added).

contractual fee-shifting.[31] The Trial Court's denial (to both sides) of alternative relief under an exception to the American Rule has no bearing on the contractual fee-shifting argument.[32] To the contrary, the Trial Court endorsed the independent contractual right by shifting fees and costs pursuant to the SPA, though it erred in interpretation and calculation.[33]

Defendants present their self-help argument as if they *won* their set-off defense. In reality, the Trial Court ruled that "Plaintiffs generally prevailed in the litigation."[34] A ruling that Defendants' conduct did not rise to the level of egregious "bad faith" does not somehow convert Defendants' losing set-off defense into a win, thus removing it from the realm of contractual fee-shifting. Plaintiffs are contractually entitled to their fees and expenses incurred in defending the set-off either way.

Further, Defendants' argument actually supports Plaintiffs' right to fees incurred in defending the set-off defense. Plaintiffs asserted the covered Inventory Claim on the SPA, which triggered Defendants to withhold cash on the TSA as a purported set-off. Plaintiffs challenged Defendants' right to set-off on the basis

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[31] *Supra* 4-7.

[32] *See Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998). Neither side has appealed the Trial Court's ruling on fee-shifting under the bad faith exception to the American Rule.

[33] OB Ex. C.

[34] *Id.* at 1.

that the SPA's set-off clause applies only to sums owed on the SPA, not the TSA.[35] But the Trial Court ruled that the TSA is incorporated into the SPA, and thus the SPA set-off clause applies to sums owed on the TSA.[36] Thus, the *only* reason that Defendants avoided a bad faith, self-help ruling is that the Trial Court interpreted the TSA as integrated into the SPA, and thus covered by the SPA's set-off clause. Otherwise, there was no legal basis for Defendants to withhold cash owed on the TSA; the usurpation would have been naked theft. That ruling has a "sauce for the goose is sauce for the gander" effect. Because the Trial Court ruled that the set-off defense was incorporated into the SPA and covered by the SPA's set-off clause, Defendants cannot now argue that Plaintiffs are not entitled to fees incurred in connection with that defense because the TSA does not contain an independent fee-shifting clause.[37]

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[35] *See* B-333.
[36] B-334 ("It seems to me, however, that the Set–Off Counterclaims does set off an amount payable under the SPA, because the SPA incorporates the TSA. The SPA defines "Agreement" as "this Stock Purchase Agreement," that is, the Agreement is the SPA."). The Trial Court reserved judgment on Defendants' set-off claim. B-339.
[37] AB at 22. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("Parties have a right to enter into good and bad contracts, the law enforces both."); *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties.").

2. The Plain Language of Section 6.2 Requires Indemnification of Plaintiffs' Requested Attorneys' Fees.

Defendants acknowledge that Section 6.2 requires reimbursement to Brace for all "Losses incurred or sustained by, or imposed upon, [Brace] *based upon, arising out of, or with respect to or by reason of* . . . any inaccuracy or breach of any of the representations or warranties of [PEI] contained in this Agreement."[38] Yet, without citing a *single* case in support, Defendants assert a slew of odd textual arguments raised for the first time on appeal. None are valid.

First, Defendants argue that "[e]ach of the italicized phrases…limits the scope of recoverable fees to those incurred prosecuting a claim for indemnification and defeating defenses intrinsic to the claim."[39] According to Defendants, "[n]one of the phrases reasonably encompasses Brace's Cash Claim or Restrictive Covenant Claim" because those claims "had absolutely nothing to do with the Inventory Claim."[40] Defendants cite no authority for their position, which is unsurprising given that it contradicts both the plain text of the SPA and controlling authority addressing similar clauses.

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[38] AB at 19 (citing A-0082 (emphasis added)).
[39] *Id.*
[40] *Id.*

In both *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*[41] and *Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc.*,[42] the Court of Chancery found that the provision at issue encompassed attorneys' fees incurred in prosecuting and defending ancillary claims which only arose as a result of an underlying breach.[43] Those provisions were not "far more broad than" Section 6.2.[44] Like the indemnification provision in *Ivize* and the fee-shifting provision in *Edgewater*, the SPA requires Defendants to indemnify Plaintiffs against "any and all Losses," including "reasonable attorneys' fees and the cost of enforcing any right to indemnification," that are "incurred or sustained by, or imposed upon" Plaintiffs "based upon, arising out of, with respect to or by reason of" breaches by PEI of its representations and warranties.[45] As in *Ivize*, PEI's breach of the SPA both precipitated and was inextricably intertwined to Defendants' conduct

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[41] 2009 WL 1111179, at *13 (Del. Ch. Apr. 27, 2009) (addressing a contractual indemnification provision requiring indemnification for "all … losses and expenses (including reasonable attorneys' fees) of any nature (collectively, 'Losses') arising out of or relating to ... any breach or violation of the representations, warranties, covenants or agreements of [Compex] set forth in the Agreement").

[42] 68 A.3d 197, 239 (Del. Ch. 2013) (addressing a contractual fee-shifting provision requiring payment of "all attorneys fees and all other costs and expenses" HIG "may" incur "in connection with the enforcement of this Guaranty or in any way arising out of, or consequential to, the protection, assertion, or enforcement of the Guarantied Obligations....").

[43] *See* Cross-Appeal OB at 26-29.

[44] AB at 26.

[45] A-0082.

regarding their purported "set-off" and the resulting claims and defenses.[46] As in *Edgewater*, PEI's motivation to withhold Customer Payments owed to Brace was its desire to avoid its obligations to indemnify Brace for the missing inventory.[47] Moreover, Delaware courts have confirmed that they interpret language such as that used in Section 6.2 broadly. *See DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *10 (Del. Ch. Jan. 23, 2006) (describing "arising out of, connecting with or simply relating to" as "far-reaching terms often used by lawyers when they wish to capture the broadest possible universe").[48] Thus, Section 6.2 must also be read to encompass reasonable attorneys' fees incurred to defeat an affirmative defense of set-off to a covered claim.

Second, Defendants cite the lack of a "prevailing party" provision in Article VIII of the SPA (titled "Miscellaneous") and the parties' agreement in Article II (governing disputes regarding post-closing adjustments) that the losing party would bear responsibility for the accountant's fees as evidence that the parties

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[46] 2009 WL 1111179, at *14.

[47] 68 A.3d at 203, 238.

[48] *See also Parfi Holding AB v. Mirror Image Internet, Inc.,* 817 A.2d 149, 155 (Del. 2002) (finding that an arbitration clause requiring the parties to submit "any dispute, controversy, or claim arising out of or in connection with" the agreement to arbitration was broad in scope); *Town of Smyrna v. Kent Cty. Levy Court,* 2004 WL 2671745, at *2 (Del. Ch. Nov. 9, 2004) ("there is no question that the arbitration clause found in the Agreement is broad, as it covers all claims 'arising out of' or 'related to' the Agreement").

intended to foreclose this result.[49] But this argument carries no weight in the face of the unambiguous language of Section 6.2 and applicable authority construing similar provisions.

Defendants also contend – without support – that "[i]f the parties had intended to allow the party that prevailed in a dispute arising from the performance of the TSA to recover its costs and expenses incurred in the litigation, then they would have said so directly in the TSA."[50] But, as explained above, this argument regarding the TSA runs contrary to Defendants' (successful) argument in the below proceedings that they should be permitted to set-off amounts owed under the TSA pursuant to the set-off provision in the SPA. In response to *Defendants' own arguments*, the Trial Court expressly found that the TSA is incorporated into the SPA.[51] Defendants cannot now claim that Section 6.2 of the SPA does not extend to the TSA.[52]

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[49] AB at 20-21.

[50] *Id.* at 22.

[51] *See* B-335 ("The SPA cannot be consummated without the incorporation of the TSA. I find under these circumstances that the TSA is incorporated into the SPA, such that "amounts payable under this Agreement," under the facts here, includes the remittance of amounts collected by the Defendants pursuant to the TSA.")

[52] *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008) ("Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding….[J]udicial estoppel also prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling.").

Third, Defendants argue that Plaintiffs' position makes no sense because, "[u]nder Brace's reading, Brace may recover all attorneys' fees incurred in opposing *any* counterclaim—regardless its relationship to the indemnification claims—because only by defeating these counterclaims can the claimant realize the full value of its own claims and not be limited to an offsetting judgment."[53] But Defendants are arguing a hypothetical instead of the record. There is no hypothetical common law set-off in play here: there is only the covered Inventory Claim and the unsuccessful set-off defense, which both sound exclusively in the SPA and arose from PEI's breach of the SPA.

Fourth, Defendants assert that Plaintiffs are precluded from recovery of their requested attorneys' fees because Brace did not "plead its Cash Claim as a 'Loss' arising from its Inventory Claim" and did not specifically request its attorneys' fees arising from the Customer Payments Claims as "Losses" in the Complaint.[54] This argument mischaracterizes the record. Plaintiffs made well-pled allegations that Defendants usurped Customer Payments and engaged in retaliatory conduct in response to the Claim Notice,[55] and they appropriately sought "an award of breach of contract damages to make Plaintiffs whole for PEI's breach of the TSA."[56]

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[53] AB at 22.
[54] *Id.* at 23.
[55] B-011-12, B-023.
[56] B-024.

Plaintiffs also requested an order "[d]eclaring that Brace may further recover its reasonable fees and costs from the escrow, pursuant to the terms of the SPA and the Escrow Agreement."[57] Defendants also failed to raise this objection in response to Plaintiffs' Fee Application in the underlying proceedings and raise it now for the first time on appeal, so it should be disregarded.

Finally, Defendants attack Plaintiffs for not specifically defending the command in the Final Order that the full amount of the judgment, including the additional $550,743 owed to Brace on the Customer Payment Claims and pre- and post-judgment interest, be paid from escrow in their opening brief.[58] According to Defendants, this is evidence that "even Brace acknowledges that its argument on fees proves too much."[59] That is an odd argument. The required award to Plaintiffs is greater than the amount in escrow. For the avoidance of doubt, Plaintiffs assert entitlement to the entire escrow account plus the right to execute any remaining judgment sum against Defendants. Moreover, there is a logical explanation for Plaintiffs' emphasis on attorneys' fees and expenses (and lack of corresponding emphasis on other components of the Final Order): unlike attorneys' fees and expenses, which were incurred and paid, the $550,743 and the interest components were never out-of-pocket *losses* to Plaintiffs.

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[57] B-030.
[58] AB at 23-24.
[59] *Id.* at 24.

C. The Trial Court Erred in its Assessment of the Reasonableness of Plaintiffs' Attorneys' Fees.

Defendants assert that the Trial Court "applied the correct legal standard for assessing reasonableness by expressly considering all of the factors set forth in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct and giving them appropriate weight."[60] According to Defendants, "[t]he Chancery Court did not give 'dispositive' weight to the fourth factor" (the amount involved and the results obtained).[61] This is not accurate; the record shows that the Trial Court *did* place dispositive weight on DRPC 1.5 Factor No. 4. During a January 2019 hearing, the Trial Court explained that "the way I determined what the reasonable fees were is I looked at the result they obtained and decided what the utter most amount was."[62] The Trial Court did exactly what *Edgewater* says not to do: employ DLRPC 1.5(4) to interpret a contractual fee shifting clause as an implied contingency fee against the amount recovered without reference to the defenses asserted or to the length and scope of the litigation. Nor did Plaintiffs did "invite" that error by not breaking out attorneys' fees between claims and defenses; to the contrary, Plaintiffs repeatedly explained that the fees need not be so segregated.[63]

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[60] *Id.* at 27-28.
[61] *Id.* at 28.
[62] B-355.
[63] *Supra* 4-7.

As for application of the DRPC 1.5 Factors, Defendants claim that "Brace's unreasonable position" was the root cause of the protracted litigation but, by Defendants' *own admission*, the fight over Customer Payments would never have arisen in the first place had PEI not engaged in (admitted) retaliatory behavior.

Defendants do not dispute the reasonableness of Plaintiffs' attorneys' rates or the application of other DRPC 1.5 Factors.

D. This Court May Consider Whether Plaintiffs are Entitled to Attorneys' Fees Equal to One-Third of Plaintiffs' Total Recovery.

In the Cross-Appeal Opening Brief, Plaintiffs explained that the total amount recovered on claims and defenses was actually $3,488,199.82, reflected in the Final Order. Accordingly, Plaintiffs argued that, to the extent an implied contingency fee is appropriate (it is not), one third of that sum (33%) should set the lower bound.[64] Defendants argue that the Court should reject this argument because "Brace never asked the Chancery Court for this relief" and because it is based upon the "same flawed argument that Brace may recover fees it incurred on claims it lost and that were entirely unrelated to its Inventory Claim (the only claim that allowed the court to shift fees by contract)."[65] As an initial matter, Defendants' own rebuttal *concedes* that this alternate formulation is based upon the same interpretation of the SPA Plaintiffs have invoked all along. This argument

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[64] Cross Appeal OB at 35-36.

[65] AB at 31-32.

merely reconciles the Trial Court's sole reliance on DRPC 1.5(a)(4) with the total amount recovered by Plaintiffs as memorialized in the Final Order, which is not in dispute. *See Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547 n.4 (Del. 2006) (rejecting argument that party could not present specific argument that "the court was required to make a preliminary finding of intentional or reckless misconduct before issuing an adverse inference instruction" where the party "did object generally to the issuance of the pattern jury instruction . . . .").

The Trial Court erred by imposing an implied contingency fee at all. Plaintiffs paid their counsel on an hourly basis, and did not enjoy a contingent benefit of not paying lawyers had they lost the case. But if *arguendo* Plaintiffs are deemed entitled to only 1/3 of the recovery (in defiance of the plain text of the SPA), then the "recovery" must at least be set at the correct amount of $3,488,199.82 stated by the Final Order.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fee Order to the extent that it fails to award Plaintiffs the full amount of their attorneys' fees incurred in this litigation, as contractually mandated under Section 6.2 of the SPA.

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