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Case Number 180,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEMPERATSURE HOLDINGS, LLC, a Delaware limited liability company,	)	
Defendant/Counterclaim Plaintiff/ Third Party Plaintiff-Below/ Appellant,	)	
v.	)	No. 180, 2020
B&C HOLDINGS, INC., a Colorado corporation,	)	CASE BELOW:
Plaintiff/ Counterclaim Defendant-Below/ Appellee,	)	Superior Court of the State of Delaware C.A. No. N19C-02-105 AML CCLD
and	)	
CHRISTOPHER SMITH,	)	
Third Party Defendant-Below/ Appellee.	)	

APPELLANT'S OPENING BRIEF

OF COUNSEL:

SHOOK HARDY & BACON L.L.P.
S. Kirk Ingebretsen
Daniel E. Rohner
1660 17th Street, Suite 450
Denver, Colorado 80202
(303) 285-5300

PRICKETT, JONES & ELLIOTT, P.A.
Elizabeth M. McGeever (#2057)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Defendant/Counterclaim Plaintiff/Third Party Plaintiff-Below/ Appellant Temperatsure Holdings, LLC

Dated: September 9, 2020

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NATURE OF PROCEEDINGS

As part of the sale of a company that manufactures temperature-controlled packaging systems ("OpCo"), the beneficial owners, Christopher Smith ("Smith") and his family, were entitled to a potential earnout based on certain post-transaction performance measures of OpCo and its parent, Temperatsure Holdings, LLC ("Temperatsure"). The earnout was in the form of a subordinated promissory note ("Note") held by the family's company, B&C Holdings, Inc. ("B&C"), where the Principal amount could be as high as $6,000,000 or as low as $0. The final amount of the Note depended upon the Last Twelve Month (LTM) gross profit computation as measured by generally accepted accounting principles (GAAP).

The Note outlined specific procedures for the (i) preparation and delivery of GAAP-compliant LTM Gross Profit Statements for the period beginning in January 2017 and ending July 2017 (the "Evaluation Period"); (ii) calculation of the Principal amount based on those delivered LTM Gross Profit Statements; (iii) delivery of a Principal Statement to B&C setting forth the calculation of Principal; and (iv) accrual and payment of interest, but only *after* delivery of the Principal Statement and, if applicable, *after* resolution of written disputes concerning the amounts or elements of the Principal calculation.

This litigation ensued because the parties do not agree on the Principal amount of the Note. B&C contends that the Principal amount is $6,000,000, the maximum

amount possible. In February 2017 – five months before the end of the Evaluation Period - Temperatsure's CFO verbally informed Smith (who was the CEO of both Temperatsure and B&C) that Temperatsure had met the threshold for payment to B&C of the maximum under the Note, *i.e.*, $6,000,000. At the time, however, as only Smith knew, the CFO had not delivered any LTM Gross Profit Statements to B&C. Months later, on June 28, 2017, Smith sent an email to the CFO (his subordinate) telling the CFO to "plan on paying my Qtrly [sic] Note Payment in July sometime unless you want to do in June." Under the express terms of the Note, however, no such payment could have been due at that time. One week later, on July 7, 2017, in response to Smith's June 28 email directing his subordinate to pay interest that was not yet due, the CFO sent Smith an email (the "July 7 Email") stating: "The interest payment is being wired today. You should receive $125,000 which is 5 months interest on the note."

B&C argues that because it knew that the Note had a 5% simple interest rate, it could deduce from the July 7 Email that the Principal amount was $6,000,000. Therefore, according to B&C, the July 7 Email, which was sent to Smith's internal Temperatsure email address (not to B&C as the Note required) before the end of the Evaluation Period and before the time permitted by the Note, qualifies as the Principal Statement contemplated by the Note. B&C further contends that because

it did not dispute the July 7 Email, the extrapolated Principal amount became "final and binding."

Temperatsure contends that the July 7 Email referencing the payment of interest was not the Principal Statement as a matter of law. First, the July 7 Email does not state a Principal amount. Second, by the Note's terms, the Principal amount must be determined from the *delivered* LTM Gross Profit Statements, and at the time of the July 7 Email, no LTM Gross Profit Statements had been delivered to B&C. Third, by its terms, it is not possible for any amount of interest to accrue or become payable until *after* the delivery of the Principal Statement. As such, it is not possible for communications regarding the payment of not yet due interest to be the Principal Statement.

Temperatsure further contends the only Principal Statement sent to B&C pursuant to Section 2(c) of the Note was sent on August 6, 2018 (the "August 6, 2018 Principal Statement"), which set forth a calculated Principal amount of $946,671, not $6,000,000. Since B&C sent written notice disputing the August 6, 2018 Principal Statement, the Note requires that the final determination of Principal be made by an Arbitrating Accountant.

Based on the dispute resolution procedures in the Note, Temperatsure sought dismissal of the case or a stay of B&C's claims to allow for arbitration. After briefing and oral argument, the Superior Court ("court") denied Temperatsure's

motion. *See* Exhibit A, Transcript of Hearing on Motion to Dismiss. Thereafter, Temperatsure filed responsive pleadings, including counterclaims against B&C and a third-party complaint against Smith for breaching his fiduciary duties.

After completing discovery, B&C and Temperatsure each filed motions for summary judgment. In its April 22, 2020 Memorandum Opinion granting B&C's motion for summary judgment and denying Temperatsure's cross-motion (the "Memorandum Opinion") (Exhibit B), the court construed the Note and held that the July 7 Email was a Principal Statement as a matter of law. The court also concluded that because B&C did not deliver a written dispute within 15 days of receiving the July 7 Email, the $6,000,000 Principal amount became "final and binding."

The court also granted summary judgment in favor of Smith on Temperatsure's claim that he breached his fiduciary duties of loyalty and candor. The court held that Smith's failure to inform the Temperatsure Board of Managers that Temperatsure's CFO had not delivered any LTM Gross Profit Statements to B&C and therefore had not based his Principal calculations on GAAP-compliant LTM Gross Profit Statements delivered to B&C did not breach his fiduciary duties. The court's final order and judgment dated May 6, 2020 is attached as Exhibit C.

Appellant Temperatsure appeals each of these rulings and respectfully requests that the court be reversed and that judgment in Temperatsure's favor be granted.

SUMMARY OF ARGUMENT

1. Temperatsure is entitled to judgment as a matter of law that the July 7 Email is not the Principal Statement. The court's interpretation of the Note (i) disregards the clear and unambiguous definition of Principal Statement, (ii) renders other material provisions in the Note superfluous, and (iii) creates the impossible scenario where an email referencing interest (that was not yet due) is treated as the contractually required first step in determining the amount of Principal, a step that the Note provides must be completed before any interest can even accrue, let alone be due.

First, the court contradicted its own interpretation of the Note when it concluded that the July 7 Email is the Principal Statement. The court correctly states in its Memorandum Opinion that a Principal Statement must contain the "figure Temperatsure determined was the Note's Principal." Exhibit B, Memorandum Opinion at 18. But the July 7 Email undeniably does not contain the figure determined to be the Note's Principal. Therefore, on its face, the July 7 Email does not satisfy the definition of Principal Statement.

Second, the court's interpretation disregards other provisions in the Note and renders material terms superfluous. For example, the Note expressly provides that the amount of Principal will be determined based on GAAP-compliant LTM Gross Profit Statements *delivered* to B&C. It is undisputed that no LTM Gross Profit

Statements were prepared, let alone delivered to B&C, before the July 7 Email. Without delivered LTM Gross Profit Statements, it is simply not possible to calculate any Principal amount. The Note also provides that the calculation of Principal, and the delivery of the Principal Statement, must occur *after* delivery of the LTM Gross Profit Statement for the month ending July 31, 2017. A purported Principal Statement sent July 7, 2017 does not satisfy this contractual requirement.

Third, Section 3 of the Note provides that no interest can accrue or be due unless and until the amount of Principal is "finally determined pursuant to Section 2." (Emphasis in original). The procedures set forth in Section 2 establish that delivery of the Principal Statement is the *first* step in reaching a final determination of the Principal amount of the Note. Thus, the court's conclusion that an email referencing the payment of interest is itself the Principal Statement that starts the process for accrual of the very same interest is illogical and inconsistent with the terms of the Note.

2. The court also erred when it ruled that Temperatsure had waived the condition precedent requiring the parties to base the calculation of Principal on the GAAP-compliant LTM Gross Profit Statements delivered to B&C. In support of its conclusion, the court relies on an argument that was not addressed by either party in the summary judgment briefing or oral argument and is not supported by the record, *i.e.,* that Temperatsure waived its right to calculate Principal based on delivered

LTM Gross Profit Statements when its CFO paid interest before delivering such statements.

Waiver requires knowledge and an intent to waive, and the facts relied on to prove waiver must be unequivocal. Here, Temperatsure's CFO was not even aware that GAAP-compliant LTM Gross Profit Statements and a Principal Statement based on those delivered LTM Gross Profit Statements needed to be delivered to B&C before finally determining Principal or accruing and paying interest. Further, unlike Smith, Temperatsure's Board was not made aware that the LTM Gross Profit Statements and a Principal Statement had not been delivered to B&C. Finally, the record makes clear that neither Temperatsure nor its Board intended to waive the requirements of the Note. Thus, the court's conclusion as a matter of law that Temperatsure *knowingly* and *intentionally* waived the requirements of the Note was legal error that must be reversed.

3. The court erred when it held that Temperatsure's interpretation of the Note was unreasonable because it rendered the "final and binding" language in Section 2(c) superfluous. Temperatsure's interpretation of the Note does no such thing, and the court's finding to the contrary is based on a misunderstanding of Temperatsure's position and a misreading of the Court of Chancery's 2017 decision in *Greenstar IH Rep, LLC v. Tutor Perini Corp*. *Greenstar* involved an earnout provision similar to the Note at issue here. In *Greenstar*, the earnout amount was to

based on delivered Pre-Tax Profit Reports, and the issue was whether mistakes in the prepared and delivered reports justified a recalculation of the earnout. Unlike here, there was no dispute in *Greenstar* as to whether a document actually met the definition of a Pre-Tax Profit Report under the terms of the merger agreement or whether Pre-Tax Profit Reports had actually delivered. At issue was simply whether such a report could be adjusted *after* it was prepared and delivered. The holding in *Greenstar* has no bearing on whether the July 7 Email was in fact a Principal Statement. If it was, Temperatsure agrees that a $6 million principal figure is final and binding. But if it was not, as Temperatsure contends based on the language in the Note, *Greenstar* is simply irrelevant. Thus, the court's reliance on *Greenstar* is misplaced.

4. Finally, the court erred when it held that Smith had not breached his fiduciary duties of loyalty and candor when he failed to inform Temperatsure's Board that its CFO had not delivered GAAP-compliant LTM Gross Profit Statements to B&C from which the Principal amount could properly be determined. While acknowledging that Smith, as CEO of Temperatsure and a member of its Board of Managers, owed fiduciary duties of loyalty and candor, the court's holding is based on its conclusion that B&C had no incentive to demand delivery of the requisite LTM Gross Profit Statements. The court's analysis, however, disregards that the Note's procedures for determining Principal were for the benefit of both

Temperatsure and B&C. It also disregards that Smith was wearing multiple hats. While he was the CEO of B&C, he was also the president and CEO of OpCo, the CEO of Temperatsure, and a member of Temperatsure's Board of Managers. It was his fiduciary duties to Temperatsure, not his self-interest as CEO of B&C, that required him to inform the Board what he alone knew, *i.e.*, that the procedures of the Note for calculating the Principal were not being followed. The fact that Smith (through B&C) benefitted from the failure to comply with those procedures makes his duties of loyalty and candor all the more pressing. The court's summary dismissal of Temperatsure's breach of fiduciary duty claim should therefore be reversed.

STATEMENT OF FACTS

A. The Note (Earnout)

The Note defined "LTM Gross Profit" to mean "the gross profit performance of the [Temperatsure] and OpCo, measured by the last twelve months' ('LTM') consolidated gross profit of [Temperatsure] and OpCo determined in accordance with United States generally accepted accounting principles ('GAAP') as of the last day of each month between (and including) January 31, 2017 and July 31, 2017..." [JA51, Note §1(ii)]. Collectively, the Note defines the months of January 2017 through July 2017 as the Evaluation Period. [Joint Appendix ("JA") at 51, Note §1(ii)].

"[F]ollowing the end of each month during the Evaluation Period," the Note required [Temperatsure] to "prepare, or cause to be prepared, a statement (each, a 'LTM Gross Profit Statement') setting forth the determination of the amount of the LTM Gross Profit for the applicable month. [JA51-52, Note §2(a)]. Thereafter, "[t]he Principal will be determined, based on the greatest LTM Gross Profit ***set forth*** on any LTM Gross Profit Statement ***delivered*** with respect to the Evaluation Period . . . ." [JA52 Note, 2(b)]. (Emphasis added). Section 2(b) of the Note then provides for Principal to be determined "as soon as practicable ***after*** the LTM Gross Profit Statement for the month ended July 31, 2017 is prepared, but in no event later than fifteen (15) days following the last day of the Evaluation Period." (Emphasis added). [JA52, Note, §2(b)].

Section 2(c) of the Note provides that after end of the Evaluation Period, Temperatsure was to deliver to B&C "a statement setting forth [Temperatsure's] calculation of the Principal." [JA52, Note, §2(c)]. "Principal" is capitalized because it is a defined term. Section 2(c) also includes a detailed dispute resolution process setting forth exactly when the Principal amount is considered to be "finally determined." [JA52-53, Note, §2(c)]. After delivery of the "Principal Statement," B&C has 15 days "to dispute any elements or amounts reflected on the Principal Statement that affect the calculation of the Principal." [JA52, Note, §2(c)]. If, after receipt of the Principal Statement no written notice of dispute is provided by B&C, the amount of Principal set forth in the Principal Statement becomes "final and binding" and "the Principal set forth in the Principal Statement will be the Principal for all purposes of this [Promissory] Note, effective as of the first day following the end of the Evaluation Period." [JA52, Note, §2(c)]. (Emphasis added). If a dispute notice is delivered by B&C, Temperatsure has 15 days to notify B&C that it disagrees (the "Dispute Response"). *Id*. If Temperatsure does not deliver a Dispute Response, B&C's calculation of Principal becomes "final and binding" and "effective as of the first day following the end of the Evaluation Period." *Id*. Finally, if Temperatsure delivers a Dispute Response and the parties are unable to reach agreement, an Arbitrating Accountant shall resolve "each element of the Dispute." [JA53, Note, §2(c)]. As above, once the Dispute is resolved (either by agreement or

the Arbitrating Accountant), the final determined Principal amount is "effective as of the first day following the end of the Evaluation Period" (i.e., ***after*** July 31, 2017). [JA53, Note, §2(c)]. Thus, the Note expressly provides that the effective date for finally determining Principal is August 1, 2017.

Section 3 of the Note provides that Temperatsure must pay B&C simple interest on the "unpaid Principal, accruing from the date on which the Principal is finally determined to be any amount greater than $0 pursuant to Section 2, at the rate of 5.00% per annum…." [JA53, Note, §3]. Thus, the timing for accrual of interest is dependent on when Principal is "finally determined pursuant to Section 2," and the procedures in Section 2 confirm that the Principal amount cannot be "finally determined" until sometime *after* the delivery of the Principal Statement. [JA53, Note, §3; JA2575-6, Smith Tr. at 10:22 – 12:15, 14:14 – 15, 15:24 – 16:3; JA2578, Smith Tr. at 21:19 – 22:2]. Thus, it is undisputed that delivery of the Principal Statement is the first step in the process to determine the Principal of the Note. [JA52, Note §2(c); JA2575, Smith Tr. 10:5 – 11]. There is no language in the Note that provides that Principal can be final and binding at any time other than 15 days *after* delivery of the Principal Statement. [JA50-60; JA2579, Smith Tr., 28:1 – 7].

B. Communications between Smith and Temperatsure's CFO

Throughout the Memorandum Opinion, the court refers to Smith as Temperatsure's "former" CEO or suggests that he was only a member of the Board.

Exhibit B, Memorandum Opinion at pp. 1, 2, 6, 36. This was a mistake, because after the sale of OpCo and during the period relevant to the claims at issue in this case, Smith also remained the CEO and president of OpCo and the CEO of Temperatsure. [JA664-5; JA2589, Smith Tr. 73:24 – 74:20; JA2590, Smith Tr. 79:9-14]. He, therefore, owed fiduciary duties of loyalty and candor to Temperatsure.

Sometime in February 2017 - five months before the end of the Evaluation Period - Robert Kahle, Temperatsure's CFO, verbally informed Smith that Temperatsure had exceeded the $19 million threshold set forth in Section 1(iii). [JA2595, Smith Tr., 109:6-13; JA2608]. The CFO's assessment of gross profits as of January 31, 2017, that led him to inform Smith that the threshold had been met, was not based on a GAAP-compliant calculation of LTM Gross Profit, nor was it derived from any LTM Gross Profit Statements delivered to B&C as the Note requires. [JA2607, Kahle Tr. 58:20-22, 60:12-15; JA2586, Smith Tr., 65:9-17]. Instead, the CFO's assessment of gross profits was based on internal financial statements that were not GAAP-compliant and did not account for depreciation on costs of goods sold. [JA2608, Kahle Tr. 62:10-17].

Smith was familiar with the terms of the Note. He had a copy of the Note, had read it multiple times, and knew when interest was payable. [JA2586, Smith Tr., 61:22 – 62:7]. At the time of his February communication with the CFO, Smith

knew that the CFO had not delivered LTM Gross Profit Statements to B&C that were prepared in accordance with GAAP. [JA2587, Smith Tr., 65:9-17; JA2600, Smith Tr. 130:21 – 131:7]. Despite this knowledge, Smith, who was Temperatsure's CEO and a member of its Board of Managers, did not instruct the CFO to follow the procedures in the Note. [JA2576, Smith Tr., 16:4 – 10.] He also did not disclose to the other members of Temperatsure's Board of Managers or to Temperatsure's outside auditors that the CFO was not following the procedures in the Note for determining the Principal. [JA2587, Smith Tr., 66:25 – 68:3; JA2597, Smith Tr. 118:25 – 119:4; JA2600, Smith Tr. 130:2 - 131:7].

Because Smith had been told by his CFO that B&C stood to receive the maximum earnout, Smith considered "the matter settled" and decided "not to call out [Temperatsure's] failure to provide B&C Holdings with LTM Gross Profit Statements and supporting documentation as required." [JA36, ¶ 43]. Although it is undisputed that the requirement that the earnout be determined based on GAAP-compliant financials was for Temperatsure's protection as well as B&C's, Smith "did not feel like he had any obligation to inform the Board that Temperatsure was not following the terms of the Note." [JA1734, Smith Tr., 44:7 – 21; JA1740, Smith Tr. 66:25-67:4]. He also did not disclose to Temperatsure's independent accountants that, based on the private conversation he had with the CFO, he believed the maximum earnout under the Note had been achieved. Instead, Smith falsely

represented to the auditors that all material events that occurred after December 31, 2016, had been disclosed. [JA1755-, Smith Tr., 125:24 – 129:16].

On June 28, 2017, a full month before the end of the Evaluation Period and before delivery of a Principal Statement, Smith e-mailed the CFO (his subordinate) directing him to start paying B&C interest on the Promissory Note: "[y]ou should plan on paying my Qtrly Note Payment in July sometime unless you want to do in June." [JA2312; JA2592, Smith Tr., 87:11 – 88:13]. Again, Smith was Temperatsure's CEO and a member of its Board of Managers. At the time, he knew that B&C had not received any LTM Gross Profit Statements from Temperatsure. [JA2587, Smith Tr. 65: 1-17, 68:10-15]. Despite this knowledge, Smith did not tell the CFO that Principal could not be determined until he followed all of the procedures in the Note, including preparation and delivery of GAAP- compliant LTM Gross Profit Statements. [JA2587, Smith Tr. 67:11-22]. Nor did Smith instruct his CFO to follow those procedures to ensure his determination was correct. *Id*. Notwithstanding his position as CEO and a member of Temperatsure's Board of Managers, Smith did not copy the other Managers on his June 28, 2017 email to the CFO where he instructed him to pay interest that was not yet due. According to Smith, "It wasn't my duty to inform the Board." [JA2312; JA2582, Smith Tr., 48:16–22].

Approximately one week later, on July 7, 2017, in response to Smith's email directing the CFO to make his "Qtrly Note Payment," the CFO sent an internal email back to his boss (not to B&C as the Note required [JA54, Note, §8]) stating: "The interest payment is being wired today. You should receive $125,000 which is 5 months interest on the note." [JA2324; JA2582, Smith Tr., 45:23 – 48:15].

Smith admits that in order for interest to have started to accrue in February (as the July 7 Email suggests), the Principal Statement would have had to have been delivered in January 2017, which all parties agree was never done. [JA2580, Smith Tr. 38:4-10]. The CFO made two payments to B&C as interest that was not due under the Note: (1) the payment of $125,000 in July 2017; and (2) a later payment of $75,000 in November 2017. [JA37; JA1877, Kahle Tr. 98:8-10].

C. Temperatsure's Delivery of the August 2018 Principal Statement

Unlike Smith, the other members of the Board of Managers did not know until 2018 that Temperatsure's CFO had not complied with the procedures in the Note and that he had never delivered GAAP-compliant LTM Gross Profit Statements to B&C. [JA2615-16, Fry Tr. 105:18 – 107:16, 111:2 – 113:10; JA2622, Dorman Tr. 24:11 – 26:9; JA2624, Dorman Tr. 43:25 – 44:25; JA2631-33, Johnson Tr. 23:19-25, 71:9-15, 91:9-20]. On August 6, 2018, Temperatsure's new President, Tony Aleide, delivered to B&C by email seven LTM Gross Profit Statements for each month of the Evaluation Period, along with a Principal Statement based on the

calculations reflected in the delivered LTM Gross Profit Statements which were in turn based on Temperatsure's audited financial statements. [JA40-41, ¶73; JA2327-2426]. The delivered Principal Statement, LTM Gross Profit Statements and supporting documentation delivered to B&C confirmed that Temperatsure did not achieve the $19 million LTM Gross Profit target in any month during the Evaluation Period. [JA2327-2426]. Rather, the highest LTM Gross Profit earned during the Evaluation Period was $18,157,778. [JA2327-2426]. As a result, the actual Principal amount owed to B&C was $946,671, not $6,000,000. [JA2327-2426].

Consistent with the dispute resolution provisions of the Note, 15 days after receiving the August 6, 2018 Principal Statement B&C sent a letter disputing Temperatsure's Principal calculation and arguing that the $6,000,000 figure derived from the July 7, 2017 Email was "final and binding and not subject to re-examination." [JA43, ¶ 82]. Six days later, B&C sent Temperatsure a written notice declaring an event of default under the Note and demanding accelerated payments. [JA43, ¶ 84].

Three days after sending its purported default notice, B&C filed an action in the Court of Chancery seeking, among other things, a declaration that the Principal amount of the Note is $6,000,000. [JA29-48]. The Court of Chancery transferred the action to the Superior Court pursuant to 10 *Del. C.* § 1902 for lack of subject matter jurisdiction. [JA81-86]. After the court denied Temperatsure's motion to

dismiss or stay the action pending arbitration, Temperatsure filed an answer, asserted affirmative defenses and filed counterclaims against B&C and a third-party complaint against Smith. [JA612-662]. By agreement of the parties, the court was also designated to sit as Vice Chancellor of the Court of Chancery "for the purpose of hearing equitable claims and defenses" by Chief Justice Leo E. Stine, Jr. on June 27, 2019. [JA683].

After discovery, B&C, Smith and Temperatsure each filed motions for summary judgment. [JA684-88]. After briefing, the court heard argument on January 28, 2020, and issued the Memorandum Opinion on April 22, 2020. [Exhibit B].

ARGUMENT

I. DEFENDANT TEMPERATSURE, NOT PLAINTIFF B&C, IS ENTITLED TO SUMMARY JUDGMENT BECAUSE AS A MATTER OF LAW THE JULY 7 EMAIL IS NOT THE PRINCIPAL STATEMENT CONTEMPLATED BY THE NOTE.

A. Question Presented

Whether the court erred when it failed to construe the Note as a whole and improperly ruled that an email referencing payment of interest that was not yet due constituted the Principal Statement. [Preserved JA2634-68, JA2825-56, JA2858-2905].

B. Scope of Review

On appeal of a grant or denial of a motion for summary judgment, the scope of review is *de novo*. *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006). Questions of contract interpretation are also reviewed *de novo*. *Paul v. Deloitte & Touche, LLP,* 974 A.2d 140, 145 (Del. 2009) (*citing Motorola, Inc. v. Amkor Tech., Inc*., 958 A.2d 852, 859 (Del. 2008).

C. Merits of Argument

1. The July 7 Email does not "set forth" a Principal amount or a calculation of Principal.

Section 2(c) of the Note provides that "[w]ithin fifteen (15) days after the Evaluation Period, Temperatsure will deliver to [B&C] a statement setting forth [Temperatsure's] calculation of the Principal to [B&C]." [JA52, Note, §2(c)]. The court reasons that this first sentence of Section 2(c) of the Note does "not require

any degree of formality or contain any minimum quantum of data, ***apart from the figure Temperatsure determined was the Note's Principal***." [Exhibit B, Memorandum Opinion at pp. 18-20] (emphasis added). But then, relying on dictionary definitions for the words "statement," "setting forth," and "calculation," the court disregards its own reasoning and holds as a matter of law the following two-sentence email that was not sent to B&C is the Principal Statement contemplated by the Note:

> The interest payment is being wired today. You should receive $125,000 which is 5 months interest on the note. [JA2324].

Even assuming for the sake of argument that the Principal Statement need only contain the "figure Temperatsure determined was the Note's Principal" as the Memorandum Opinion holds, the July 7 Email does not contain such a figure. [JA2324]. At most, it states an amount of interest over a set period of time (that was not yet due) from which one with knowledge of the rate and type of interest could extrapolate the alleged Principal. The July 7 Email does not set forth the Principal amount or any calculation of Principal; it merely identifies two data points from which an amount of alleged Principal could be calculated. If, as the court concluded, the inclusion of the Principal amount figure, *i.e.,* $6,000,000, is the bare minimum for qualification as the Principal Statement contemplated by the Note, the July 7 Email does not meet that criteria.

2. The court's conclusion that the July 7 Email is the Principal Statement is inconsistent with other provisions in the Note.

Accepted rules of contract construction require the Note be construed as a whole and in a manner that gives effect to all of its provisions. *See Riverbend Cmty, LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012); *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) (citations omitted). "[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *Land-Lock, LLC v. Paradise Prop., LLC*, 963 A.2d 139 (Del. 2008).

The Court must consider all relevant provisions in the Note to determine whether the July 7 Email is the Principal Statement contemplated by Section 2(c), including:

- Section 2(a) of the Note, which provides that "following the end of each month during the Evaluation Period," Temperatsure was to "prepare, or cause to be prepared, a statement (each, a 'LTM Gross Profit Statement') setting forth the determination of the amount of the LTM Gross Profit for the applicable month. [JA51-52, Note, §2(a)];
- Section 2(b) of the Note, which provides that *after* delivery of the LTM Gross Profit Statements, "[t]he Principal will be determined, based on the greatest LTM Gross Profit *set forth* on any LTM Gross Profit

Statement *delivered* with respect to the Evaluation Period . . ." [JA52, Note, §2(b)] (Emphasis added);

- Section 2(b) also provides that the Principal will be determined "as soon as practicable *after* the LTM Gross Profit Statement for the month ended July 31, 2017 is prepared, but in no event later than fifteen (15) days following the last day of the Evaluation Period." [JA52, Note, §2(b)] (Emphasis added); and
- Section 3 of the Note provides that the Temperatsure must pay B&C simple interest on the "unpaid Principal, accruing from the date on which the Principal is *finally determined* to be any amount greater than $0 pursuant to Section 2, at the rate of 5.00% per annum.…" [JA52, Note, §3] (Emphasis added).

The court's analysis concluding that the July 7 Email is the Principal Statement renders each of the above provisions of the Note superfluous. First, the July 7 Email references the anticipated payment of interest that Smith and the CFO mistakenly believed was already due. But Section 3 of the Note expressly provides that interest accrues from the date on which Principal is "finally determined" to be any amount greater than $0 "pursuant to Section 2" of the Note. [JA52, Note, §3]. Further, under Section 2 of the Note, the *first* step in "finally determining" the amount of Principal is the delivery of the Principal Statement. Only 15 days after

delivery of the Principal Statement, and only if no dispute is delivered, can the Principal amount be considered "finally determined." [JA51-53, Note, §2]. Smith admitted that, based on the language of the Note, the earliest date interest can begin to accrue is fifteen days *after* delivery of the Principal Statement. [JA1727, Smith Tr. 15:7-16:3].

Viewing the provisions together, the key order of operations under the Note is indisputable: Step One – delivery of the Principle Statement; Step Two – final determination of Principal through the procedures set forth in Section 2; and Step 3 – after final determination under Section 2, interest on the Note can begin to accrue. Smith also admitted that for five months of interest to have accrued by July 7, 2017 (which the July 7 Email suggests), the Principal Statement would have had to have been delivered in mid-January, which never happened. [JA1733, Smith Tr, 38:4-10]. The court's conclusion that an email incorrectly referencing an amount of interest that is not yet due can itself be the Principal Statement that starts the clock for accruing interest is illogical and results in an absurd interpretation of the Note.

Even if this Court were to limit its analysis to 2(c) alone and disregard the other provisions in the Note (and it should not), the result should be the same. Under Section 2(c), the delivery of the Principal Statement is not only the mechanism to establish the *timing* of when any dispute regarding the calculation of the Principal is to be resolved, but the Statement itself is also the deliverable of the *substantive*

information through which the finally determined amount of Principal is to be calculated. Under Section 2(c), after delivery of the Principal Statement, B&C has 15 days "to dispute any elements of or amounts reflected on the Principal Statement that affect the calculation of the Principal." The terms "elements" and "amounts" have meaning. *See NAMA Holdings, LLC v. World Market Center Venture, LLC*, 2007 WL 2008 8851, at *6 (Del. Ch. July 20, 2007) ("When interpreting contracts, the Court gives meaning to every word in the agreement and avoids interpretations that would result in 'superfluous verbiage.'"). The court's conclusion that the July 7 Email (which does nothing more than identify, albeit incorrectly, an amount of not yet due interest from which a Principal amount could be mathematically deduced) can itself constitute the Principal Statement that triggers the accrual of interest would render the terms "elements" and "amounts" superfluous.

Section 2(c)'s requirement that a Principal Statement must include more than simply the Principal amount figure (which the July 7 Email does not include) is further confirmed by Section 2(c)'s description of the role of the Arbitrating Accountant and the process for finalizing a revised Principal Statement in the event of a Dispute. Section 2(c) provides that in the event of a Dispute the Arbitrating Accountant "will resolve each element of the Dispute that has not been resolved by agreement of [Temperatsure] and [B&C], revise the Principal Statement to reflect such resolutions, and calculate the Principal based on the element**s** and amount**s**

reflected on the revised Principal Statement." [JA52-53, Note, §2(c)]. (Emphasis added).

In response to the fact that the July 7 Email does not include the Principal amount or any elements or amounts of the Principal calculation, the court relies on the dictionary definition of the word "any" and reasons that because the word "any" means "a or some without reference to quantity or extent," then it follows that "[a]ny could in fact mean none at all." [Exhibit B, Memorandum Opinion at 22]. But there is no support for the conclusion that "a or some" can also mean "none at all." While "a or some" may not reference an actual quantity, it undeniably means more than "none." More importantly, the notion that a Principal Statement contemplated by the Note could potentially not include any amounts or elements to be considered and reviewed by the recipient of the Principal Statement would render the entire dispute process in the Note meaningless.

Third, the first sentence of Section 2(c) expressly provides that the Principal Statement is to be delivered "[*w*]*ithin* fifteen (15) days *after* the Evaluation Period." (Emphasis added). While Section 2(c) expressly contemplates delivery of the Principal Statement after July 31, 2017, the court relies on the dictionary definition of the word "within" and concludes that it means "before the end of" and, therefore, the early delivery of the purported Principal Statement, *i.e.,* on July 7, is irrelevant to whether the July 7 Email was the Principal Statement. [Exhibit B, Memorandum

Opinion at 19-20]. The court's conclusion, however, renders Section 2(b) of the Note superfluous. Section 2(b) expressly provides the Principal will be determined "as soon as practicable *after* the LTM Gross Profit Statement for the month ended July 31, 2017 is prepared . . . ." [JA52, Note §2(b)]

Implicit in the court's analysis that "within" can mean any time before 15 days after delivery of the final LTM Gross Profit Statement is the erroneous assumption, unsupported by the record, that the Note's procedures are solely for B&C's benefit. To the contrary, the Note's procedures protected both parties. [JA50-60; JA1686, Fry Tr. 220:17-25; JA1740, Smith Tr. 66:25-67:4]. Requiring calculations in accordance with GAAP assured that both parties understood exactly what financial results were to be considered in determining Principal. Requiring that Principal be determined based on the GAAP-compliant LTM Gross Profit Statements assured that the parties were working off the same, transparent information. Identifying a definitive and finite evaluation period and requiring delivery of the Principal Statement after that period assured that both parties knew exactly when Principal was to be "finally determined" and exactly when the clock for identifying and resolving disputes was to start and stop. On their face, and as acknowledged by witnesses on both sides, the procedures were expressly designed to assure that the calculations are accurate, that the process is fair, and that each party can comfortably rely on the finally determined Principal amount.

In sum, it is undisputed that Smith's and his CFO's belief that interest on the Note had accrued and was payable as of July 7, 2017, was incorrect. As a matter of law, the court should have held that a mistaken belief that interest is due under a Note cannot then constitute the first step in the final determination of the Principal amount of a Note – especially when the Note provides that the interest could not even begin to accrue until at least 15 days *after* the delivery of the Principal Statement which was the first step in finally determining the Principal amount.

For these reasons, this Court should enforce the Note as written and hold that the July 7 Email is not the Principal Statement as a matter of law.

3. The court's interpretation disregards the context of the July 7 Email and undermines the overriding purpose of the Note and its procedures.

The overriding purpose of the Note is to compensate B&C fairly for additional value created by Temperatsure's positive performance during the Evaluation Period. Towards that end, the parties agreed that the financial performance would be measured in accordance with GAAP. The parties also agreed that the calculation of the Principal amount would be based on the LTM Gross Profit Statements actually delivered B&C (as opposed to internal non-GAAP compliant numbers that were never delivered to B&C).

In its Memorandum Opinion concluding that the July 7 Email is the Principal Statement, the court disregards the overriding purpose of the procedures in the Note

and the context in which the July 7 Email was sent and received. It is undisputed that when the CFO responded to Smith's email, which unjustifiably requested payment of interest that was not yet due, the CFO was not even aware of Temperatsure's obligation to deliver a Principal Statement as the first step in the process of finally determining the amount of Principal. [JA1869, Kahle Tr. 65:15 – 66:1]. In its Memorandum Opinion, the court concludes that the CFO's "intent" in sending the July 7 Email, and whether he even knew that delivery of a Principal Statement was required, is irrelevant to whether it satisfies the definition for a Principal Statement. Exhibit B, Memorandum Opinion at 27. The court also suggests that following the Note's procedures was somehow less important because the CFO had already verbally communicated to Smith that the maximum threshold had been met. *Id*. at 21-22.

Temperatsure submits that the CFO's lack of knowledge and understanding of the Note's procedural requirements explains why those procedures were not followed. Though the court concluded that B&C would not need to receive the LTM Gross Profit Statements once the CFO verbally informed Smith that the maximum threshold had been met, the interpretation of the Note and the procedures it requires should not change depending on what information B&C claims it "needs." It is a contract, and it must be interpreted according to its express language.

Finally, before deciding whether the July 7 Email is the Principal Statement, this Court should ask itself if its conclusion would be different if the referenced interest in the July 7 Email had suggested a Principal amount less than the maximum. In other words, if the July 7 Email had reflected a lower interest payment, and had B&C not provided a written dispute within 15 days, would any court entertain an argument that the lower Principal amount that could conceivably be deduced from the limited information in such an email became "final and binding?" Temperatsure respectfully submits that if the roles in this case were reversed, and it was Temperatsure seeking to enforce a similar email exchange as being a "final and binding" Principal Statement, the argument would be roundly rejected. Again, the interpretation of the Note should not be different depending upon the party making the argument.

II. THE COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT TEMPERATSURE WAIVED THE CONDITION PRECEDENT THAT PRINCIPAL WAS TO BE CALCULATED BASED ON THE GAAP-COMPLIANT LTM GROSS PROFIT STATEMENTS DELIVERED TO B&C

A. Question Presented

Whether the record supports the court's conclusion that Temperatsure waived the condition precedent that Principal was to be calculated based on the GAAP-compliant LTM Gross Profit Statements delivered to B & C. [Preserved JA2634-68, JA2825-56, JA2858-2905].

B. Scope of Review

On appeal of a grant or denial of a motion for summary judgment, the scope of review is *de novo*. *Lank,* 909 A.2d at 108 (Del. 2006). Questions of contract interpretation are also reviewed *de novo*. *Paul,* 974 A.2d at 145 (Del. 2009) (*citing Motorola, Inc. v. Amkor Tech., Inc*., 958 A.2d 852, 859 (Del. 2008)). "Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." Del. Super. Ct. Civ. R. 56(h). Notwithstanding 56(h), neither party raised the issue nor sought summary judgment based on the court's waiver theory, and the facts relevant to the theory, *i.e*., whether Temperatsure's purported waiver was done with knowledge and intent, are in dispute. Further, the fact that there are cross motions for summary

judgment does not preclude the existence of factual issues, and summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial." *ION Geophysical Corp. v. Fletcher Int'l, Ltd.*, 2010 WL 4378400, at *5 (Del. Ch. Nov. 5, 2010) (citations omitted). As such, a court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application." *Id*.

C. Merits of Argument

In reaching its conclusion that the July 7 Email was the Principal Statement, the court relied on a waiver argument that was not raised by either party in their briefing or oral argument and that is not supported by the undisputed facts in the record. The court held that "[e]ven if the GAAP compliance requirement [in the Note] could be construed as a condition precedent imposed for both parties' protection and benefit, both parties effectively waived this condition through their performance under the Note." [Exhibit B, Memorandum Opinion at 25-27].

Based on an unsupported conclusion that the Note's procedures for determining Principal were exclusively for B&C's benefit, the court holds as a matter of law that Temperatsure is precluded from relying on the Note's procedures as a defense. [Exhibit B, Memorandum Opinion, at 25]. The court reasons that since the procedures are solely for B&C's benefit, they are covenants by Temperatsure rather than conditions precedent. *Id*. First, contrary to the court's conclusion, the

record confirms that the procedures in the Note were intended to protect both parties, not just B&C. *See supra* at p. 26.

Second, the court's covenant/condition precedent analysis improperly suggests that Temperatsure argued that the July 7 Email is not the Principal Statement simply because the Principal amount was not based on GAAP-compliant financials. [Exhibit B, Memorandum Opinion at 24-27]. Temperatsure made no such argument. What Temperatsure argued is that the express terms of the Note require that the Principal amount be determined based on the GAAP-compliant LTM Gross Profit Statements *delivered* to B&C. It is the *delivery* of LTM Gross Profit Statements that is a condition precedent to calculating the Principal, not merely whether LTM Gross Profit Statements ultimately comply with GAAP. And here it is undisputed that no LTM Gross Profit Statements were delivered to B&C until August 2018. [JA1740, Smith Tr. 67:11-22, JA1879, Kahle Tr. 104:23-105:3; JA2327-2426].

Ultimately, the court concluded that even if the procedures at issue are conditions precedent (which they are), by paying interest early Temperatsure waived its right to demand that the procedures be followed [Exhibit B, Memorandum Opinion, p. 27]. While Temperatsure agrees that a condition precedent may be waived, it does contest the ability of the court to reach such a conclusion as a matter of law based on this record. Under Delaware law, the standards for demonstrating

waiver—the voluntary and intentional relinquishment of a known right—are "quite exacting." *See Amirsaleh v. Bd. of Trade of City of New York, Inc*., 27 A.3d 522, 529–30 (Del. 2011), *quoting Bantum v. New Castle Cnty. Vo–Tech Educ. Ass'n*, 21 A.3d 44, 50 (Del. 2011). "[The doctrine] implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those [ ] rights." *Id.* The facts relied upon to demonstrate waiver must be unequivocal. *Id.* Based on these principles, the three elements that must be proved to invoke the waiver doctrine under Delaware law are: (1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition. *Id*. at 530.

Here, the record is inconsistent with a finding of waiver. While the CFO testified that he told Smith that the threshold for the maximum earnout had been met, he admitted that his analysis was based on internal financials rather than GAAP-compliant LTM Gross Profit statements delivered to B&C. [JA2607-08, Kahle Tr. 58:12-22, 64:12-22]. In fact, at the time the CFO purportedly performed his analysis and communicated with Smith about it, he was not even aware that the Note required him to deliver to B&C a Principal Statement setting forth the calculation of Principal based on the delivered LTM Gross Profit Statement. [JA1869, Kahle Tr. 65:15 – 66:1].

The court's apparent reliance on the action or inaction of the Board as supposedly "affirming" Kahle's maximum Principal determination is also inappropriate. [Exhibit B, Memorandum Opinion at 8-10]. The record confirms that the Board was under the false impression that the procedures in the Note had been followed and that the threshold had been met (because Smith did not tell them otherwise). Smith did not copy any Board members with his emails to or from the CFO, and in fact testified that he did not believe he had any obligation to do so notwithstanding his duties as an officer and member of Temperatsure's Board of Managers. [JA2312, 2324; JA2582, Smith Tr. 48:16 – 22]. The other Board members testified that they believed that the procedures of the Note had been followed by Temperatsure's CFO and CEO. [JA2615-16, Fry Tr. 105:18 – 107:16, 111:2 – 113:10; JA2622-23, Dorman Tr. 24:11 – 26:9; JA2624, Dorman Tr. 43:25 – 44:25; JA2631-31, Johnson Tr. 23:19-25; 71:9-15; 91:9-20]. The Board members were dependent upon the information (or lack of information) provided by Temperatsure's management, including Smith, its CEO. The "course of performance" identified by the court does nothing more than confirm that the Board (with the exception of Smith) was unaware that the Note's procedures had not been followed. Without knowledge, there can be no waiver. *Realty Growth Inv. v. Council of Unit Owners,* 453 A.2d 450, 456 (Del. 1982) ("[Waiver] implies knowledge of all material facts and intent to waive.").

Based on the record, and given that B&C argued that it was not relying on waiver to support its claims, *see* [JA2650, 2898], the court's conclusion that both parties had waived the condition precedent to calculate Principal based on GAAP-compliant LTM Gross Profit Statements delivered to B&C was wrong. The record is replete with evidence that (1) the CFO was unaware of the condition precedent requirements of the Note; and (2) Temperatsure did not intend to waive the requirement or condition. [JA1869, Kahle Tr. 65:15 – 66:1; JA2615-16, Fry Tr. 105:18 – 107:16, 111:2 – 113:10; JA2622-23, Dorman Tr. 24:11 – 26:9; JA2624, Dorman Tr. 43:25 – 44:25; JA2631-33, Johnson Tr. 23:19-25; 71:9-15; 91:9-20].

III. THE COURT ERRED WHEN IT RELIED ON *GREENSTAR IH REP, LLC V. TUTOR PERINI CORP.* FOR THE PROPOSITION THAT TEMPERATSURE'S INTERPRETATION OF THE NOTE RENDERS THE "FINAL AND BINDING" LANGUAGE SUPERFLUOUS.

A. Question Presented

Whether the court improperly relied on *Greenstar IH Rep, LLC v. Tutor Perini Corp*. for its argument that the "final and binding" language in the Note would be superfluous if the July 7 Email were not the Principal Statement. [Preserved JA2634-68, JA2825-56, JA2858-2905].

B. Scope of Review

On appeal of a grant or denial of a motion for summary judgment, the scope of review is *de novo*. *Lank,* 909 A.2d at 108. Questions of contract interpretation are also reviewed *de novo*. *Paul,* 974 A.2d at 145 (*citing Motorola, Inc. v. Amkor Tech., Inc*., 958 A.2d 852, 859 (Del. 2008).

C. Merits of Argument

The court relies on *Greenstar IH Rep, LLC v. Tutor Perini Cor*p., 2017 WL 5035567 (Del. Ch. Oct. 31, 2017), *aff'd*, 186 A. 3d 799 (Del. 2018), for the proposition that the "final and binding" language in Section 2(c) of the Note precludes the conclusion that the information delivered to B&C in August 2018 was the Principal Statement. Similar to the case at bar, *Greenstar* concerned earnout payments flowing from a merger agreement where certain Pre-Tax Profit Reports were deemed "binding" if not disputed within a certain amount of time. *Id*. at *6.

The defendant in *Greenstar* argued that it was not required to make the earnout payments because the Pre-Tax Profit Reports it prepared and delivered were inaccurate. The *Greenstar* court rejected the argument, holding that accepting such an interpretation would render the "shall be binding" language superfluous. The court held that the same would be true here, and that to accept Temperatsure's interpretation would similarly render Section 2(c)'s "final and binding" language superfluous. *Id*. The court misapplies *Greenstar*.

At issue in *Greenstar* was whether purported errors and inaccuracies in the prepared and delivered Pre-Tax Profit Reports precluded those reports from being used to calculate the earnout amount. In contrast, the issue here is whether the July 7 Email satisfied the definition of a "Principal Statement." The court's conclusion that the July 7 Email must be the Principal Statement because otherwise the "final and binding" language would be superfluous is circular reasoning and unsupported by the holding in *Greenstar*. Temperatsure did not deliver LTM Gross Profit Statements from which Principal amount could have been determined until August 2018. [JA1740, Smith Tr. 67:11-22, JA1879, Kahle Tr. 104:23-105:3; JA2327-2426]. Also, it was at that time that Temperatsure first delivered a statement including the "figure" for the Principal. [JA2327-2426]. Finally, within 15 days after receiving the LTM Gross Profit Statements and the Principal Statement reflecting the Principal amount figure of $946,671, B&C provided a written response

that disputed Temperatsure's calculation. [JA42]. Under the express terms of the Note, the final determination of the Principal amount needs to be made by the Arbitrating Accountant. [JA52-53]. Once made, that amount would become "final and binding" under the terms of the Note. *Id*.

Simply put, Temperatsure's interpretation does not render the "final and binding" language in the Note superfluous. The July 7 Email is not the Principal Statement. To conclude otherwise would render other provisions in Section 2 of the Note superfluous. Therefore, the court's reliance on *Greenstar* is misplaced and should be rejected.

IV. THE COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT CHRISTOPHER SMITH DID NOT BREACH HIS FIDUCIARY DUTIES OF LOYALTY AND CANDOR.

A. Question Presented

Whether the court erred when it held as a matter of law that it was not a breach of Smith's fiduciary duties to conceal from Temperatsure's Board that its CFO was not complying with the Note's procedures to (1) deliver GAAP-compliant LTM Gross Profit Statements to the noteholder; and (2) calculate the Principal of the Note based on the greatest LTM Gross Profit amount reflected in those delivered LTM Gross Profit Statements. [Preserved JA2634-68, JA2825-56, JA2858-2905].

B. Scope of Review

On appeal of a grant or denial of a motion for summary judgment, the scope of review is *de novo*. *Lank,* 909 A.2d at 108. The *de novo* standard of review applies to summary judgment on fiduciary duty claims. *Bershal v. Curtiss-Wright, Corp*., 535 A.2d 840, 844 (Del. 1987).

C. Merits of Argument

As CEO and a member of the Board of Managers, Smith owed Temperatsure fiduciary duties. Under Delaware law "the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *OptimisCorp v. Waite,* 2015 WL 5147038, at *59 (Del. Ch. Aug. 26, 2015, *affd*, 2016 WL 2585871 (Del. Apr. 25, 2016). Smith's dual role as a

fiduciary to Temperatsure and his family company, B&C, did not dilute the "scrupulous observance of his duty" affirmatively to protect the interests Temperatsure and to refrain from doing anything that would injure it. *Weinberger v. UOP, Inc.*, 457 A2d 701, 710 (Del. 1983). Smith also owed Temperatsure and its board a duty of candor. *Mills Acq. Co. v. Macmillan, Inc*., 559 A.2d 1261, 1283 (Del. 1989).

At the time, Temperatsure's CFO told Smith that Temperatsure's gross profits (**not** "LTM Gross Profits") had exceeded the threshold for a maximum earnout under the Note, only Smith knew that the CFO had not delivered a GAAP-complaint LTM Gross Profit Statement to B&C as the Note required. The calculations the CFO supposedly performed at that time to determine the Principal amount of the Note were based on internal financial results that had not been prepared in accordance with GAAP. [JA2608, Kahle Tr. 62:10-17]. It is undisputed that Smith *knew* that the CFO was not following the required procedures for calculating the Principal of the Note. [JA2587, Smith Tr. 65:1-17; 68:10-15]. Because he was also the CEO of B&C, Smith knew that Temperatsure had never delivered the LTM Gross Profit Statements required by the Note. [JA2587, Smith Tr. 67:5-17]. It is also undisputed that, despite this knowledge, and despite the express language in the Note requiring the calculation of Principal to be based on the *delivered* LTM Gross Profit Statements prepared in accordance with GAAP, Smith never informed the Board

that the CFO was not following the Note's procedures, nor did he direct the CFO to do so. [JA2576, Smith Tr., 16:4–10; JA2587, Smith Tr. 66:25–68:3; JA2597, Smith Tr. 118:25–119:4; JA2600, Smith Tr. 130:2-131:7]. Even though the Note's procedures for calculating Principal were for the benefit of both parties, it was not in Smith's personal interest to disclose these material facts to the Board. Despite being Temperatsure's CEO and a member of its Board of Managers, Smith "did not feel like he had any obligation to inform the Board that Temperatsure was not following the terms of the Note." [JA2581, Smith Tr. 44:7 – 21]. Accordingly, Smith "elected not to call out [Temperatsure]" for having failed to deliver any LTM Gross Profit Statements "[b]elieving the matter settled and the maximum Note amount earned." [JA36 ¶ 42-43].

In its Memorandum Opinion granting summary judgment in Smith's favor on Temperatsure's fiduciary duty claims, the court stated that "[u]nder the facts as Smith knew them, B&C achieved the maximum earnout . . ." and "B&C therefore would have no reason to insist that Temperatsure provide the monthly statements at issue." Exhibit B, Memorandum Opinion p. 38-39. But, whether B&C had a reason to insist that Temperatsure provide the monthly LTM Gross Profit statements misses the point. First, the procedures in the Note for determining the Principal amount were for the benefit of both B&C and Temperatsure. As CEO and a member of its Board of Managers, Smith owed fiduciary duties to Temperatsure. While the court

refers to Smith as Temperatsure's "former" CEO, s*ee e.g.*, Memorandum Opinion at 1, 2, 6, the court's understanding is inaccurate. During the period relevant to these claims, including when Smith and Temperatsure's CFO communicated about the payment of interest (that was not yet due), Smith was the CEO and president of OpCo and the CEO of Temperatsure. [JA664-5; JA2589, Smith Tr. 73:24 – 74:20; JA2590, Smith Tr. 79:9-14].

Second, Smith had direct knowledge of the requirements of the Note and that Temperatsure's CFO was not complying with them. Smith knew that the Note required Temperatsure to determine Principal based on the GAAP-compliant LTM Gross Profit Statements delivered to B&C. Smith, as CEO of B&C, also knew that no GAAP-compliant LTM Gross Profit Statements had been delivered. In light of the express language of the Note, Smith knew that Temperatsure's CFO was not following the procedures of the Note. While it may have been true that B&C had no reason to call out the CFO's failure to follow the Note's procedures, the same is not true with respect to Smith in his role as CEO of Temperatsure and a member of its Board of Managers. Smith's failure to direct the CFO to follow the Note's procedures or to inform the Board that the CFO was ignoring those procedures was far from immaterial. It is indisputable that Temperatsure paid interest that was not – and under the express terms of the Note – could not have been due. Smith knew this and did nothing. It is undisputed that Temperatsure and the Board operated for

almost a full year under the mistaken impression that the Note's procedures had been followed and that the Principal amount of the Note had been properly determined to be $6,000,000. [JA2615-16, Fry Tr. 105:18 – 107:16, 111:2 – 113:10; JA2622-23, Dorman Tr. 24:11 – 26:9; JA2624, Dorman Tr. 43:25 – 44:25; JA2631-33, Johnson Tr. 23:19-25; 71:9-15; 91:9-20]. As a result of the CFO's failure to follow the Note's procedures (which only Smith knew), B&C is seeking more than $5,000,000 in Principal beyond the amount supported by Temperatsure's *actual* GAAP-compliant LTM Gross Profits. Smith seeks to take personal advantage of his breach of fiduciary duties.

The court's interpretation of the duty of candor turns the duty on its head. Its conclusion that Smith had no duty to disclose the material information that he alone knew because his family's company, B&C, stood to benefit from the nondisclosure would mean that a director and officer of a company has no duty to disclose material information if concealment of such information benefits him personally. In fact, the opposite is true. If this were the case (and it is not), corporate officers would be incentivized *not* to disclose contract breaches or accounting errors that are to their benefit. By sitting on his hands and remaining silent when he *knew* that the Note's procedures were not being followed, Smith exposed Temperatsure to harm. Thus, Smith's silence breached his duties of loyalty and candor.

CONCLUSION

For the foregoing reasons, this Court should reverse the court's grant of B&C's Motion for Summary Judgment and denial of Temperatsure's Cross-Motion for Summary Judgment.

OF COUNSEL:

SHOOK HARDY & BACON L.L.P.
S. Kirk Ingebretsen
Daniel E. Rohner
1660 17th Street
Suite 450
Denver, Colorado 80202
(303) 285-5300

PRICKETT, JONES & ELLIOTT, P.A.

By: */s/ Elizabeth M. McGeever*
Elizabeth M. McGeever (#2057)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Defendant/Counterclaim Plaintiff/Third Party Plaintiff-Below/ Appellant Temperatsure Holdings, LLC

Dated: September 9, 2020

CERTIFICATE OF SERVICE

I, Elizabeth M. McGeever, do hereby certify on this 9th day of September, 2020, that I caused a copy of Appellant's Opening Brief to be served by efiling via File and Serve*Xpress* upon counsel for the parties as follows:

Philip Trainer, Jr., Esquire
Randall J. Teti, Esquire
Ashby & Geddes
500 Delaware Avenue, 8th Floor
Wilmington, Delaware 19801

/s/ Elizabeth M. McGeever
Elizabeth M. McGeever (#2057)