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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARLOS EDUARDO LOREFICE LYNCH, *Plaintiff Below,* *Appellant*, v. R. ANGEL GONZALEZ GONZALEZ, TELEVIDEO SERVICES, INC., a Florida Corporation, and JUAN PABLO ALVIZ, *Defendants Below,* *Appellees*.	No. 356, 2020 On Appeal from C.A. No. 2019-0356-MTZ in the Court of Chancery of the State of Delaware

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Appellant Carlos Lynch ("Appellant" or "Lynch") respectfully submits this reply brief in further support of his appeal of the Final Order and Judgment, dated October 2, 2020, and the Memorandum Opinion, dated July 31, 2020.

PRELIMINARY STATEMENT

Appellant's Opening Brief identified material legal errors contained in the Trial Court's opinion. In opposition, Appellees do not contest Appellant's legal arguments, nor do they identify any contrary authority. Instead, Appellees argue that Appellant waived the arguments he raised in briefing *before* and *after* trial, and at oral argument. Appellant preserved the legal issues for appeal.

Since commencing this case, Appellant has argued that, "as a matter of policy," courts cannot "permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009). Appellant continues to rely on that authority. Appellees identify no authority to the contrary. Appellees concede the legal issue.

Appellant demonstrated that parties are bound by their representations to government regulators and third parties. Appellant made the same argument below and relied on the same authority: *Patel v. Dimple, Inc.*, 2007 WL 2353155 (Del. Ch. Aug. 16, 2007), and *Morente v. Morente*, 2000 WL 264329 (Del. Ch. Feb. 29, 2000).

Appellees do not address *Patel* and *Morente* in their opposition, and do not identify contrary authority. They concede the issue.

Section 2.05 of the May 4 Agreement bars Appellees from relying on the Counterdocument and related documents. It also confirms Lynch's "full and lawful ownership" of 65% of GBH (A-1801 at § 2.05(a)). It is a detailed specific anti-reliance provision that is enforceable under Delaware law. Appellees do not identify authority to the contrary. Instead, Appellees claim waiver, despite Appellant having quoted Section 2.05 verbatim in his post-trial briefing to support his argument that Section 2.05 barred reliance on the Counterdocument. Preservation of an issue for appeal "does not demand the incantation of particular words," but rather sufficient substance to provide notice. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Appellant preserved the argument.

In his Opening Brief, Appellant argued that the Trial Court failed to follow basic principles of contract law. Appellees did not respond. Despite being required to rely on *objective* evidence, the Trial Court relied on *subjective* evidence. Similarly, the Trial Court failed to enforce an express anti-reliance clause in the parties' notarized agreement. The Trial Court also followed authority that this Court has expressly overruled. The Trial Court's errors require reversal.

Appellees identify no contrary authority for any of the legal issues Appellant raised before this Court. Moreover, Appellant identified numerous fact findings that

were unsupported by the record and, therefore, erroneous. In response, Appellees fail to identify record support for the Trial Court's fact findings. As result, Appellees concede that Appellant accurately identified both legal and factual errors in the Trial Court's decision. The Trial Court's errors compel reversal.

ARGUMENT

I. APPELLANT PRESERVED HIS ARGUMENTS.

Appellant preserved the arguments placed before this Court: he raised the substance of every argument below. *Nelson*, 529 U.S. at 469. Contrary to Appellees' assertion, "[t]he requirement that an issue be preserved for appeal does not demand the incantation of particular words." *Id.*; *accord Pereyron v. Leon Constantin Consulting, Inc.*, 2004 WL 1043724, at *2 (Del. Ch. Apr. 29, 2004) (rejecting argument that failure to use certain words constituted waiver because it would "unnecessarily allow form to triumph over substance"). On appeal, a party may reframe or relabel substantive arguments made below.

Appellees' citation of *Barrett v. American Country Holdings, Inc.*, 951 A.2d 735 (Del. Ch. 2008), for the proposition that "a party waives defenses that it fails to appropriately plead and preserve," is inapposite. In *Barrett*, the relevant argument was first mentioned in the post-trial answering brief, was not supported by citation to legal authority, and was made as a factual rather than legal argument. *Barrett*, 951 A.2d at 735, n.33. In sharp contrast, Appellant raised all issues now on appeal before the Trial Court. Here, Appellees argue "waiver" even where Appellant is relying on the *identical authority* to make the *identical argument* he made to the Trial Court. That is the antithesis of waiver; it is preservation.

A. Appellant Did Not Waive His Estoppel Argument.

Appellees argue that "Lynch failed to timely raise the defenses of equitable estoppel and quasi-estoppel, and expressly waived the defense of judicial estoppel." AB 3. Appellees are mistaken. From day one, Appellant argued that, "it is a common-sense proposition that when a person takes a position under penalty of perjury, that person is barred from taking a contradictory position at a later date." A-765.

In his Post-Trial Opening Brief, Appellant again raised the issue, quoting the New York Court of Appeals:

> "We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009).

A-2202.

Appellant repeated the argument in his Post-Trial Answering Brief: "Plaintiffs seek to estop Defendants from taking a position inconsistent with their prior sworn statements that Lynch is the 65 percent owner of GBH." A-2280-82 (citing *Mahoney-Buntzman*). Appellant repeatedly relied on *Mahoney-Buntzman* before the Trial Court to support his estoppel by tax return argument. Here, he again relies upon *Mahoney-Buntzman* for that argument.

B. Unclean Hands.

Appellees argue that Appellant "waived the defense of unclean hands because he failed to raise the defense in his post-trial opening brief." AB 23. To the contrary, Appellant's Post-Trial Opening Brief states:

> Assuming arguendo, that Lynch held the Argentine operations as a nominee for Gonzalez (he did not) instead of as record and beneficial owner, Defendants' claims still fail. The Chancery Court has held: "When parties enter into legal relationships in an effort to mask their illicit arrangements and to deceive regulatory authorities into allowing the parties to carry out their illicit business, they will be left to lie in the bed they have made." *Patel, v. Dimple, Inc.*, 2007 WL 2353155, at *12 (Del. Ch. Aug. 16, 2007).

A-2206. In his Post-Trial Answering Brief, Appellant again argued that *Patel* governed, and supplemented *Patel* with citation to *Morente*, 2000 WL 264329, at *3 ("public resources should not be expended and the integrity of our court should not be sullied in proceedings" to enforce illegal arrangements).

At post-trial argument, Appellant argued that *Morente* and *Patel* controlled, and required judgment in his favor. A-2375-2385. Here, Appellant makes the same argument, based on the same authority. That is not waiver.

C. Anti-Reliance.

Appellees' contention that Appellant, "never raised and failed to preserve" the argument that the May 4 Agreement contains anti-reliance language, is equally

meritless. Appellant argued in his Pre-Trial Brief that Section 2.05 barred Gonzalez from relying on the Counterdocument, stating:

> The language of Section 2.05(c) of the May 4 Agreement defeats Gonzalez's fraudulent inducement and fraudulent misrepresentation defenses. To the extent that Gonzalez claims he was damaged by his reliance on the October 22 Email, that claim is defeated by his agreement to "revoke and destroy" any document that resembles the draft sworn statement. JX-67 at § 2.05(c). By agreeing to destroy documents, Gonzalez cannot claim an injury as a result of a document never having been executed.

A-2216-17; *see also* A-2187-88.

Appellant continues to argue that Gonzalez is bound by his agreement not to rely. Appellant preserved this issue by arguing that Section 2.05 prevented Gonzalez from relying on the unexecuted Counterdocument or any related promise.

D. Acquiescence.

Appellant brought this litigation to enforce the parties' executed, notarized agreements. Appellant's theory of the case is that agreements that were negotiated, executed, and notarized by the parties are enforceable contracts. Appellant raised and presented this issue to the Trial Court.

Gonzalez's acquiescence to the May 4 Agreement is among the many reasons presented below to enforce the executed agreements here at issue. Contrary to Appellees' contention, Rule 8 does not bar consideration of a party's argument when the broader issue was raised in the court below. *N. River Ins. Co. v. Mine Safety*

Appliances Co., 105 A.3d 369, 383 (Del. 2014), *as revised* (Nov. 10, 2014) (rejecting a Rule 8 challenge and allowing additional reasoning to be presented in support of a "broader issue" that had been raised). Even after having received the operating agreement from Lynch and sending Guillermo Cañedo-White to Argentina to meet with Lynch, Appellees did not disavow or question the May 4 Agreement. A-2204-05. Gonzalez continued to demonstrate his acquiescence by signing IRS Form 8879 for the 2017 tax year on March 10, 2018, where, under penalty of perjury, he represented that Lynch owned 65% of GBH. A-2204.

II. APPELLEES ARE BOUND BY THEIR REPRESENTATIONS TO REGULATORS AND GOVERNMENT AUTHORITIES.

A. Appellees Are Bound by Their Representations to Regulators.

Under Delaware law, "[w]hen parties enter into legal relationships in an effort to mask their illicit arrangements and to deceive regulatory authorities into allowing the parties to carry out their illicit business, they will be left to lie in the bed they have made." *Patel*, 2007 WL 2353155, at *12. *See* OB 20-22; *see also* A-2205-08; A-2282-85; A-2375-85.

Appellees do not dispute that under Delaware law, a party's representations to regulators and third parties are binding. Appellees represented to Argentine authorities that Lynch owns 65% of GBH. That representation compels a finding in favor of Appellant. *See* OB 2, 22; *see also Haggerty v. Wilmington Trust Co.*, 194 A. 134 (Del. Ch. 1937) (where son's name is placed on deed at father's direction, with intent to defeat creditors, court cannot grant relief to father even if that rewards son's fraud). *See also* A-2205-08; A-2282-85; A-2375-85.

Every decision identified by Appellant or Appellees that addresses this issue holds that where a party obtains a desired result by making a representation to a regulator or third party, said party is bound by that representation. *See* OB 20-22. Accordingly, this Court must reverse and instruct the Trial Court to hold Gonzalez to his representations to regulators.

Appellees argue that the doctrine of unclean hands prevents application of Appellant's authority. AB 27-28. Not so.

First, Appellant's authority addresses "unclean hands." *See, e.g.*, *Patel*, 2007 WL 2353155, at *12 (Del. Ch. Aug. 16, 2007) ("the unclean hands doctrine is therefore appropriately invoked in this case"); *Morente*, 2000 WL 264329, at *3 (Del. Ch. Feb. 29, 2000) ("the unclean hands doctrine is a rule of public policy and not a matter of defense to be applied on behalf of a litigant. This court has the latitude to apply the doctrine to avoid becoming complicit in a plaintiff's fraudulent act."). Thus, even considering unclean hands, applicable authority compels judgment for Appellant. Even where "fraud" would be rewarded, a party is bound by its representations. *See Haggerty*, 194 A. 134.

Second, contrary to Appellees' assertion (OB 28), the Trial Court was required to enforce the parties' notarized contracts that were consistent with the parties' representations to Argentine authorities.[1] The Trial Court could not rely on the Counterdocument—an affidavit that Lynch never executed (Ex. B 49)—in rendering its decision. Moreover, Appellees' argument that the Trial Court "was permitted to proceed as it did in considering evidence outside the four corners of the agreements to decipher the intent of the parties, and to consider public policy

[1] *Derickson v. Derickson*, 281 A.2d 487 (Del. 1971) (a decision of this Court, is binding precedent).

concerns and the equitable interests of the parties, before issuing its opinion that such agreements were unenforceable," is contrary to Delaware law. This Court has stated repeatedly: "[w]hen the language of a ... contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) (quoting *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1195-96 (Del. 1992)). The parties' notarized contracts are not ambiguous: they state unequivocally that Lynch owns 65% of GBH. This Court has "held unequivocally that extrinsic evidence is not to be used to interpret contract language where that language is plain and clear on its face." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001) (internal citations omitted). Further, contrary to Appellees' argument, Delaware's public policy is that representations to regulators and government agencies are binding. *See* OB 20-22.

B. Appellees Are Bound by the Tax Returns that Identify Lynch as the 65% Owner of GBH.

Appellees representations, made under penalty of perjury, in a tax return are binding. OB 23-25. In opposition, Appellees fail to identify any decision to the contrary.

Appellees argue that Appellant "waived" this argument. AB 23-24. Not so. Appellant argued below, based upon *Mahoney-Buntzman*, that "as a matter of

policy" courts cannot "permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." 12 N.Y.3d 415, 422 (2009); *see also In re Robb*, 23 F.3d 895, 898-99 (4th Cir. 1994) (parties are estopped from asserting a position in a judicial proceeding that differs from their income tax returns.). Appellant relied on *Mahoney-Buntzman* to make exactly this argument in his pre-trial brief (A-765), post-trial briefing (A-2202; A-2280), and he referenced tax estoppel at oral argument (A-2353, A-2355; A-2373). Appellant preserved the argument.

The parties identify one Delaware decision addressing estoppel by tax return: *T. v. T.*, 2018 WL 509340 (Del. Fam. Jan. 17, 2018). Appellees explain that in the decision, "the husband was estopped from contending that he was not legally married given that he represented in Federal tax returns that he was married." AB 24. That is exactly the rule of law announced in *Mahoney-Buntzman*, 12 N.Y.3d at 422. Accordingly, having represented in tax returns that Lynch owned 65% of GBH, Gonzalez was estopped from contending otherwise.

Appellees argue that Delaware's doctrine of *judicial estoppel* does not apply to tax returns because they are not judicial statements (AB 24-5). That argument does not respond to the broader rule stated in *Mahoney-Buntzman* and *T. v. T.*, of estoppel by tax return. Neither decision applied *judicial* estoppel. Instead, both decisions merely applied *generic* estoppel. Appellant preserved exactly that

distinction in his post-trial answering brief. A-2280-82. Because Appellant relied on *Mahoney-Buntzman* throughout this proceeding, he preserved his estoppel by tax return argument. Further, Appellees identify no authority contrary to *Mahoney-Buntzman* and *T. v. T.*, and thereby concede that Appellant is correct on the merits.

III. THIS COURT MUST REVERSE BECAUSE THE TRIAL COURT FAILED TO ENFORCE A VALID CONTRACT.

Appellant argued that a "valid contract exists when (1) the parties intended[2] that the contract would bind them; (2) the terms of the contract are sufficiently definite; and (3) the parties exchange legal consideration." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). The May 4 Agreement meets each of those requirements. Appellees did not respond to this point of law.

A. The Trial Court's Failure to Enforce the May 4 Agreement's Anti-Reliance Clause Was Error.

At its core, Section 2.05 of the May 4 Agreement is an anti-reliance provision. It contains: (1) Appellees' representation that Lynch has "full and lawful ownership" of 65% of GBH (A-1801 at § 2.05(a)); and (2) Appellees' promises: (i) that any document "executed between the Parties or by one of the Parties" indicating that Lynch is not the owner of 65% of GBH "shall be deemed null and void" (*id.* at § 2.05(b))—*e.g.*, the Counterdocument, had it been executed; (ii) Appellees will destroy any document transferring ownership of 65% of GBH to Appellees (A-1801-2 at § 2.05(c))—*e.g.*, unexecuted draft documents 7 and 8 attached to the October 22, 2009 email (*see* A-1531); and (iii) Appellees will indemnify Appellant if anyone tries to rely on such documents (A-1802 at § 2.05(c)).

[2] "Intent" is measured not by the signer's subjective claims of what he intended or agreed to, but rather through the objectively observable acts by which s/he manifested intent. *See* Section IV.C., *below*.

Despite the plain language of this provision, Appellees contend that this provision does not bar reliance on the never-executed Counterdocument and related draft documents. AB 33-35. They are wrong.

Section 2.05 is exactly the type of anti-reliance clause that is *encouraged* by *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006) (cited by both parties). *Abry* stands for the proposition that, "standard integration clauses without explicit anti-reliance provisions will not relieve a party of its oral and extra-contractual fraudulent representations." 891 A.2d at 1058-9. Section 2.05 is not a "standard integration" clause. It is a targeted anti-reliance clause. It bars reliance on specific documents outside of the agreement. It "clearly disclaim[s] reliance upon" any writing indicating that Lynch is not the "full and lawful" owner of 65% of GBH. It requires Appellees to destroy such documents, if they exist, and to indemnify Lynch against the use of those documents. That is exactly what Delaware law requires for enforcement. *See* OB 29-30; A-1801-02.

Contrary to Appellees' contention, the Trial Court erred when it "concluded that [Gonzalez] reasonably relied upon the protection of the Counterdocument in agreeing to execute the May 4th Agreement." AB 35. Gonzalez cannot rely on the Counterdocument to invalidate the very agreement where he disclaimed reliance on it. In this Court's words: a "party cannot promise … that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor

of a 'but we did rely on those other representations' fraudulent inducement claim." *Prairie Capital, III, LP v. Double E Holding Corp.*, 132 A.3d 35, 50 (Del. 2015). Claiming not to have read or known the contents of the May 4 Agreement does not allow Gonzalez to avoid *Prairie Capital*. *See* Section III.B., *below*. Appellees identify no contrary authority.

The Trial Court did exactly what this Court considers impermissible: it allowed Gonzalez to succeed on a fraudulent inducement claim based on his (incorrect) belief that he had a counterdocument, despite having agreed, in a notarized writing, that: (1) such document "shall be null and void" (A1801-2 at § 2.05(b)); (2) he (or his company, Televideo) would destroy all such documents (A-1801-2 at § 2.05(c)); and (3) he would indemnify Lynch against later use or its attempted enforcement (A-1802 at § 2.05(c)). Indeed, the substance of Gonzalez's "fraudulent inducement claim" is his subjective view that he had a counterdocument, which he relied on to form the mistaken belief that his agreements with Lynch were sham agreements. *Prairie Capital* forbids such a claim. *See* OB 27-30.

B. Appellees' Failure to Read the May 4 Agreement Does Not Relieve Them from Its Terms.

Under Delaware law, a party's failure to read a contract is not a defense. *See* OB 31-32. Appellees do not dispute that statement of the law, but contend that the Trial Court properly found that in signing the May 4 Agreement, Gonzalez was still permitted to maintain his belief that, "Televideo's interest was secured by the

Counterdocument." AB 37-38. Appellees are wrong. There is no reasonable reading of the May 4 Agreement that permits continued reliance on the Counterdocument. *See* Section III.A, *above*.

Appellees argue, "the FPA and SPA are the foundation for Lynch's claim to ownership and if the court's determination that they were unenforceable stands, it is irrelevant whether the May 4th Agreement that Lynch asserts contains language that invalidated the Counterdocument is unenforceable." AB 32. Section 2.05(a) fully rebuts that argument. There, Appellees state and acknowledge, "full and lawful ownership of [Lynch] of 65% of GBH." A-1801. To the extent that there was any infirmity in Lynch's ownership claims based on the parties' prior agreements, Appellees' acknowledgement of Lynch's ownership cured such infirmity.

IV. THE TRIAL COURT IMPERMISSIBLY RELIED ON SUBJECTIVE EVIDENCE TO DETERMINE ENFORCEABILITY OF THE MAY 4 AGREEMENT.

A. The Parties Intended the May 4 Agreement To Be Binding.

Appellant argued that Gonzalez intended to assent to the May 4 Agreement because he intentionally signed the contract and had it notarized—the acts through which he manifested assent. OB 33-35. Without reference to any authority, Appellees argue that the May 4 Agreement is not enforceable because, (1) "[Gonzalez] understood that the terms of such agreement were meaningless with respect to the ownership of GBH" (AB 37); and (2) there "was no clear evidence that the parties had a mutual intent to enter into the same as a binding agreement." AB 38. Appellees' argument is contrary to this Court's teachings: "the only intent of the parties to a contract which is essential is an intent to say the words or do the acts *which constitute their manifestation of assent; that the intention to accept is unimportant except as manifested*." *Industrial Am., Inc. v. Fulton Industrial, Inc.*, 285 A.2d 412, 415 (Del. 1971) (emphasis added and quotations omitted); *see also Eagle Force Holdings, LLC v. Campbell*, 235 A.3d 727, 734 (Del. 2020) ("Under Delaware law overt manifestation of assent—not subjective intent—controls formation of a contract").[3] Appellees do not argue that Gonzalez did not intend to

[3] Appellees' reliance on *Kotler v. Shipman Assocs., LLC*, 2019 WL 4025634, at *17 (Del. Ch. Aug. 21, 2019), is misplaced. There, a signature page was executed without the remainder of the agreement being attached and it was not clear whether

execute the May 4 Agreement. Nor do they contend that he did not intend to have it notarized. Under Delaware law, intent to do the acts manifesting assent establishes an intent to be bound.

Appellees' reliance on Gonzalez's purported subjective belief that the May 4 Agreement was "meaningless" (AB 37) is misplaced. Gonzalez's unmanifested beliefs or motivation for executing the May 4 Agreement are immaterial. *Industrial Am.*, 285 A.2d at 415 ("motive in the manifestation of assent is immaterial"). Intent to enter a contract is determined solely based on that party's "overt manifestation of assent" (*Eagle Force Holdings, LLC*, 235 A.3d at 735), *i.e.*, examination of "their words and actions—including the putative contract itself." *Id.* Gonzalez admitted that he signed the May 4 Agreement. A-1341:15-17. Accordingly, the Trial Court erroneously found that Gonzalez did not intend to enter into the May 4 Agreement.

B. The Trial Court Misapplied Delaware Law.

Appellant explained that the Trial Court misapplied Delaware law (*see* OB 36) because it held that, "there is no mutual assent where the parties do not intend to be bound." Ex. B 84 n.390. However, as this Court has explained, there "is no enforceable contract if the parties do not intend to be bound *before a formal written agreement is drafted and signed*." *Anchor Motor Freight v. Ciabattoni*, 716 A.2d

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certain changes to the contract terms had been accepted by the signing party. Here, there is no question that Gonzalez executed a complete copy of the May 4 Agreement; thus, the "more complex picture" in *Kotler* is not present here.

154, 156 (Del. 1998) (emphasis added). Here, the parties prepared written contracts to document their agreement. As negotiations progressed, they executed certain documents, modified others and discarded the remainder. Under *Ciabattoni*, only the executed documents are enforceable—those are the contracts that document the parties' agreement and for which there was objective manifestation of assent.

In response, Appellees—without authority—argue that the Trial Court was correct in its interpretation of Delaware law because, "where the parties have objectively demonstrated intent to eschew the terms of a written contract, the contract is voidable." AB 42. Here, however, the parties objectively manifested assent to written contracts. There is no evidence that the parties opted to avoid or abstain from using written contracts. To the contrary, the parties documented their agreement in a series of notarized contracts.

Appellees also argue that the Court should consider the parties' course of conduct to interpret the May 4 Agreement. AB 43. "The parol evidence rule bars the admission of evidence extrinsic to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that contract. The policy underlying that rule is cautionary: to avoid upsetting the sanctity of fully integrated written agreements." *Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012)); *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent

of the parties, to vary the terms of the contract or to create an ambiguity"). There is no ambiguity in the May 4 Agreement. This Court must reject Appellees' argument.

C. The Trial Court Improperly Relied on Subjective Evidence.

Appellees do not dispute that only *objective* evidence may be relied upon to determine assent to a contract. *See* OB 33-35, 36-37. Nor do Appellees dispute that the Trial Court relied upon subjective evidence. Indeed, Appellees do not address the subjective evidence underpinning the Trial Court's fact findings and identified in Appellant's Opening Brief. OB 37. Instead, Appellees argue that a subjective standard should be applied, or "what a reasonable negotiator in Lynch's position" would believe. AB 44. Appellees are wrong. The Trial Court was required to "examine the parties' objective manifestation of assent, not their subjective understanding." *Trexler v. Billingsley*, 166 A.3d 101, 2017 WL 2665059, at *3 (Del. 2017). Assent to a contract is measured by the "intent to say the words or do the acts which constitute their manifestation of assent; that the intention to accept is unimportant except as manifested." *Industrial Am., Inc.*, 285 A.2d at 415. What Lynch or Gonzalez claim to have believed, or what the Trial Court thinks they believed, is not relevant. Assent is determined by what the parties did. Here, the parties intended to sign the agreements and have them notarized—*i.e.*, their "intent to … do the acts which constitute their manifestation of assent." *Trexler*, 2017 WL 2665059, at *3. Gonzalez intended to execute the May 4 Agreement. He intended

that it be notarized. Thus, even accepting Appellees' erroneous standard, a reasonable negotiator in Lynch's position would have observed Gonzalez's objective manifestation of assent when he signed the May 4 Agreement and had it notarized.

D. The Trial Court Erred by Considering Non-Contemporaneous Evidence.

Appellant stated that the only contemporaneous evidence concerning the parties' intent to be bound by the May 4 Agreement was:

- The May 4 Agreement is executed by Gonzalez (A-1782);
- Gonzalez admitted he signed the May 4 Agreement for Televideo (A-1339);
- Lynch made, and Gonzalez accepted, the payments required under the May 4 Agreement's terms (A-1637, A-1813, A-2072); and
- The May 4 Agreement is notarized (A-1781).

See OB 38-39. Appellees do not identify any additional contemporaneous evidence concerning the execution of the May 4 Agreement. Appellees muster only Gonzalez's assertion that Lynch usually summarized the documents Gonzalez was signing. AB 57. That statement, however, does not provide any basis to conclude that Lynch made a false or misleading representation concerning the May 4 Agreement. Appellees argue that the Trial Court could look at the parties' past dealings to interpret the May 4 Agreement (AB 58), but every executed document concerning the parties' prior dealings is consistent with the May 4 Agreement's

statement that Lynch owns 65% of GBH. Finally, Appellees assert that the Trial Court could properly rely on its conclusion that Gonzalez held a "reasonable belief that there was a signed Counterdocument protecting his ownership in GBH." AB 58. That is wrong: Gonzalez's unmanifested subjective belief is not relevant to the analysis, particularly where it is directly contradicted by the May 4 Agreement. *See* Sections IV.A. and IV.C., *above.*

E. The May 4 Agreement Has Definite Terms and Consideration Was Exchanged.

Appellees do not contest Appellant's showing that the May 4 Agreement's terms were definite. *See* OB 40.

Appellees do not challenge Appellant's showing that, "consideration for a contract can consist of either a benefit to the promisor or detriment to the promisee." *First Mortg. Co. of Penn. v. Fed. Leasing Corp.*, 456 A.2d 794, 795-96 (Del. 1982). Nor do Appellees challenge that the May 4 Agreement contains Lynch's promise to pay Gonzalez $8.4 million—a detriment to Lynch and benefit to Gonzalez. Instead, Appellees quibble over whether the original $16 million price was arbitrary. AB 59-60.[4] That distinction is meaningless because the inquiry into consideration is limited to "existence and not whether it is fair or adequate." *Osborn*, 991 A.2d at 1159.

[4] Lynch's purchase price was not arbitrary. *See* OB 58.

V. ESTABLISHING A DEFENSE OF FRAUDULENT INDUCEMENT DOES NOT RENDER A CONTRACT VOID, MERELY VOIDABLE.

A. The May 4 Agreement Was Not Void or Invalid.

Appellees argue that the Trial Court properly applied *Klaassen v. Allegro Development Corp.*, 106 A.3d 1035 (Del. 2014) (AB 45), even though the Trial Court relied on authority overruled by *Klaassen*, and did not cite *Klaassen*. *See* OB 42-44. Appellants are wrong. Under *Klaassen*, even if Gonzalez were fraudulently induced into executing the May 4 Agreement, that does not support the Trial Court's holding that the May 4 Agreement was *void*. It merely renders the May 4 Agreement *voidable*. *See Klaassen*, 106 A.3d at 1047.

Appellees sought to have the May 4 Agreement rendered *void*. Under *Klaassen*, proving claims of fraudulent inducement or equitable estoppel against Lynch would only render the May 4 Agreement "*voidable*," not "*void*." *See Klaassen*, 106 A.3d at 1045-47. To render the May 4 Agreement *void* Appellees had to promptly contest the purportedly *voidable* agreement.[5] They did not. The Trial Court's findings establish that Appellees acquiesced.

[5] Appellees argue in a footnote that Appellant has not appealed the Trial Court's decision on Appellees' promissory estoppel defense. AB 34 n.1. They argue that if Appellant prevails on his fraudulent inducement defense, Appellees must nonetheless prevail on their promissory estoppel defense. *Id.* Appellant appealed the Trial Court's holdings regardless of the theory asserted by Appellees. Both defenses rely on the same erroneous holdings. The Trial Court stated, "[b]oth defenses seek to unwind transactions obtained through a false promise or statement on which the counterparty relied to his detriment." Ex. B 91. Gonzalez was bound

B. Appellees Acquiesced to the May 4 Agreement.

Appellees argue that Gonzalez did not acquiesce to Lynch's exclusive control of GBH after execution of the May 4 Agreement. AB 47-48. Assuming, *arguendo*, that Gonzalez—a sophisticated businessman—did not comprehend the May 4 Agreement, Cañedo-White, his advisor, explained Lynch's position to him. In February 2018, Cañedo-White conveyed the terms of Lynch's offer to sell his 65% of GBH back to Gonzalez. Ex. B 73-4. Lynch also sent Gonzalez the operating agreement naming Lynch as GBH's sole manager that month. Ex B 75.

Aside from "laugh[ing] and curs[ing] and [having] a mix of emotions" when Cañedo-White conveyed Lynch's position, "*that was the end of it*." A-1384 (emphasis added). Cañedo-White's meeting with Lynch in Argentina and his relaying of Lynch's position occurred in *February 2018*. Ex. B 74-75. For more than thirteen months, "that was the end of it;" Gonzalez did nothing. On "April 11, 2019, Gonzalez responded." Ex. B 75.

Appellees do not dispute that "more than thirteen months" is a "considerable time." *See, e.g.*, *Nevins v. Bryan*, 885 A.2d 233, 247 (Del. Ch. May 4, 2005), *aff'd*, 884 A.2d 512 (Del. 2005); *Klaassen*, 106 A.3d at 1047. Instead, Appellees seek to

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by the May 4 Agreement. Because Gonzalez could not have reasonably relied on the Counterdocument after signing the May 4 Agreement, both defenses fail.

identify documents showing Gonzalez did something. *See* AB 47-48. Appellees' effort fails; every document they identify is dated April or May 2019:

- Gonzalez's Certificate of Amendment, *dated April 11, 2019* (A-2102);
- A Special Power of Attorney issued by Alviz, *dated April 12, 2019* (B212-19);
- A General Power of Attorney issued by Alviz, *dated April 12, 2019* (B220-29);
- A Certificate of Correction filed with the Delaware Secretary of State, *dated May 8, 2019* (B334); and
- Gonzalez's commencement of legal proceedings in Argentina based on the first three of those documents on *April 29, 2019* (B230-329).

The calendar does not lie: April and May 2019 are "a considerable time" after February 2018—more than thirteen months.

Appellees argue that Gonzalez's authorization of GBH's tax return on March 10, 2018—the month *after* he learned of Lynch's position—is of no moment because the tax return was for 2017 and Gonzalez did not learn of Lynch's view until 2018. AB 48. Appellees' position is wrong. Regardless of whether Gonzalez understood the May 4 Agreement in 2017, he understood Lynch's position *before* he authorized GBH's 2017 tax return. Even accepting, *arguendo*, that Lynch did not obtain beneficial ownership of 65% of GBH until November 2017, when Gonzalez executed the May 4 Agreement, Gonzalez understood that Lynch claimed ownership of 65% of GBH.

The 2017 tax return identifies exactly one person as a "direct *or indirect*" owner of more than 50% of GBH: Lynch. A-608. He owns 65% of GBH. A-612. Thus, in 2018, Gonzalez admitted that there was no indirect owner of GBH—an admission that Lynch was both the record and beneficial owner of GBH. That admission is inconsistent with his subsequent attempt to repudiate Lynch's ownership, by claiming beneficial ownership of Lynch's 65% of GBH.

VI. THE TRIAL COURT'S FACTUAL FINDINGS ARE ERRONEOUS BECAUSE THEY ARE NOT SUPPORTED BY EVIDENCE.

A. The Trial Court's Finding that Lynch Held 5% of IMC "In Name Only" Is Unsupported by Evidence.

Appellant explained that the Trial Court's finding that Lynch held 5% of IMC in name only was a matter not placed before the Trial Court. OB 49 (quoting Ex. B 18-19 n.68). Appellees do not disagree, arguing only that the finding is "not precedential." AB 50-51.

B. The Trial Court Ignored Admissions by Appellees.

Appellant noted (OB 50) that the Trial Court ignored the following admissions by Appellees:

- Morelia Gonzalez signed a certificate submitted to Argentine regulators showing that Lynch owned 65% of GBH. A-1352-53 (Gonzalez); A-1146-47 (Morelia).
- Gonzalez admitted he sold 5% of GBH to Lynch. A-1315:10-14.
- GBH's tax returns state that Lynch owned 65% and is the only person to hold a majority directly or indirectly.

Appellees confirm those admissions in their brief and confirm that the documentation, "reflects on its face that Lynch was an owner of GBH." AB 51-52. Yet, they argue that the admissions "dovetailed with other evidence" regarding the parties' alleged intent not to be bound. AB 52. Appellees do not identify that other evidence. Morelia's and Gonzalez's admissions show that they believed Lynch owned 65% of GBH. The Trial Court ignored their admissions.

C. Erroneous Findings Related to Section 2.05 of the May 4 Agreement.

Lynch was the only witness who testified regarding the substance and purpose of Section 2.05 of the May 4 Agreement. Consistent with Section 2.05's express language, Lynch explained that Section 2.05 was intended to protect against Gonzalez's future assertion of the unexecuted Counterdocument or another challenge to his ownership of 65% of GBH. A-1108-09. Gonzalez only testified regarding his and Lynch's general practice in handling documents. OB 51-52. Appellees do not identify any testimony concerning Section 2.05 by any witness other than Lynch.

Thus, there is no basis for any finding by the Trial Court inconsistent with Lynch's testimony concerning Section 2.05. Appellees identify none. Accordingly, the Trial Court's findings are erroneous.

D. Erroneous Findings Concerning the Delaware Certificate of Amendment.

The Trial Court erroneously found that Morelia did not receive JX-7 until 2008 or 2009. Ex. B 27. It misstated Morelia's testimony: Morelia testified that she did not receive any document showing Lynch's 65% ownership *other than JX-7* in 2007—meaning she received JX-7 in 2007. Appellees identify nothing to support the Trial Court's finding. OB 52 (citing A-1116).

Appellees argue, "Morelia testified that the document was not signed until December 31, 2008." AB 54 (citing A-1117-18). That testimony, however, refers to JX-**37**, not JX-**7**. Both documents state Lynch owns 65% of GBH. Appellees cite Morelia's testimony that she had *not* "received any document evidencing the transfer of ownership of 65 percent interest in GBH to [Lynch]." AB 54 (citing A-1117-18). Minutes earlier, however, Morelia admitted to receiving JX-7 in 2007. A-1115-16. That document shows that the Trial Court's finding "that the September 2007 and January 2008 'verbal agreements' never happened," was erroneous. Ex. B 28 n.115.

E. Erroneous Findings Concerning the Signing of the Counterdocument.

The Trial Court erroneously found that Gonzalez "signed the Counterdocument after receiving the October 22 email." Ex. B 46. There is no evidence that occurred. The Court concluded that Lynch never signed the Counterdocument. Ex. B 49.

Appellees state that the Trial Court relies on Morelia's testimony that she, "printed the attachments, and I had my father sign them." AB 56 (citing JX-24, A-1531-35). An unsigned copy of the draft Counterdocument was attached to the October 22 Email as Document 1. JX-25 (A-1536-40). However, the email requests that Gonzalez sign documents 2 through 5, not Document 1. JX-24 at 2 (A-1532). The Counterdocument is in the form of a judicial declaration—an affidavit, not a contract—it has signature lines only for Lynch and his wife. *See* A-1536-37. There

was no place for Gonzalez to sign. Moreover, Gonzalez had a history of using counterdocuments, he knew that the Counterdocument was not intended for his signature. *See* A-996:14-16 ("Q. You drafted a number of these counterdocuments for Mr. Gonzalez, correct? A. Correct."); *see also* A-1284:18-1285:3.

Appellees also rely on testimony of two witnesses that a copy of the Counterdocument arrived at GBH's offices, but neither testified that it was signed by Gonzalez or anyone else. AB 56; *see* A-1406-08 (Casaleggio) ("Q. Did you see handwritten signatures on it? A. No."); A-1370 (Curutchet) ("Q. But you saw a signature on it; right? A. I don't remember."). There is no record support for the Trial Court's finding that Gonzalez signed the Counterdocument.

F. Erroneous Findings That Documents Were Created to Bolster a Sham Transaction.

Appellees argue that "Lynch posits that the court misconstrued the addendum and cites to a single page from the fifty-six-page document as evidence of the same, when the court specifically cited to a different page that demonstrates the validity of its determination. (A-1601)." AB 57. Regardless of how page 48 of JX-33 (A-1601) is identified, it contains Lynch's statement that Televideo assigned him $16 million of debt. Moreover, the revisions to the Addenda and creation of the Complement demonstrate a change in the deal structure away from the Counterdocument to a traditional secured loan structure. The Trial Court's conclusion that Gonzalez reasonably believed that the Counterdocument was

executed and stored for safekeeping is contradicted by its own finding that Lynch never executed the Counterdocument. The absence of the Counterdocument from this email conforms to the change in the deal structure.

G. Erroneous Findings Regarding Lynch's Statements To Gonzalez.

Without record support, the Trial Court made specific findings on what Lynch told Gonzalez when Gonzalez executed the May 4 Agreement. Ex. B 22-23 (citing A-1306-07; A-1358). Appellees do not identify record support for the Trial Court's fact findings about the parties' execution of the May 4 Agreement. Instead, Appellees argue that the Trial Court could rely on the parties' typical process to reach specific fact findings about what Lynch said or did at the execution of the May 4 Agreement. Appellees are wrong. Such unsupported findings are "not adequately supported by the record" and, therefore, are "erroneous." *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 1000-01 (Del. 2004).

H. Erroneous Findings Regarding Lynch's Purchase Price.

The Trial Court incorrectly found that Lynch's $16 million purchase price for 65% of GBH was "arbitrary" and an "artifice." Ex. B 43 & n.193; *see* OB 11 n.3; *id.* at 58. Gonzalez paid $27.345 million for the group. Lynch's pro rata share of that amount is 65% of 90% of $27.345 million, approximately $16 million, which is the debt he assumed.

Appellees argue that this amount was not "fair value" because the transaction was not "between a willing buyer and a willing seller." AB 60. They miss the point. Gonzalez's $27.345 million purchase price was between a willing buyer and a willing seller—Gonzalez and Haddad. Lynch's price was his pro rata share of what Gonzalez paid Haddad for this illiquid asset a few months earlier. Thus, it was fair value. Further, under Delaware law, the existence of consideration is sufficient to create an enforceable contract, regardless of its adequacy. *See* Section IV.E., *above*.

I. Erroneous Findings Regarding The Parties' Intent To Form A "Sham" Transaction.

The Trial Court correctly found that Lynch did not execute the Counterdocument. Ex. B 49. The Trial Court incorrectly found that Gonzalez executed the Counterdocument. *See supra* § E. Lynch testified that he told Gonzalez he would not execute the Counterdocument. A-877:14-A-878:10. Gonzalez did not contradict Lynch's testimony regarding their meeting in Miami soon after the October 22 Email. A-1303-61. Morelia testified that she was not present when Lynch and Gonzalez met. A-1154. She could not, and did not, contradict Lynch's testimony. Appellees do not identify any record support to contradict Lynch's testimony. AB 61. The Trial Court's unsupported findings are erroneous.

J. Lynch Never Advised Gonzalez that the "Sham" Transaction Was Permissible.

The Trial Court erred in finding that Lynch advised Gonzalez that the scheme was permissible under Argentine law. Ex. B 32, 86. There is no record support for that finding, and Appellees do not identify any. AB 61-62.

K. There Is No Evidence that Lynch Sought to "Paper The Record."

The Trial Court found that Lynch created the various restructuring agreements "in furtherance of their agreed-upon 'solution' to satisfy Argentine laws." Ex. B 56. The Trial Court did not cite any record evidence for this conclusion and Appellees identify none. *See* AB 61-62.

L. The Record Does Not Reflect that It Was "Widely Known" that Gonzalez Had "Exclusive Control Over and Ownership of GBH."

The Trial Court relied on the testimony of two witnesses for its finding that as late as February 2018, "other advisors and employees" understood that Gonzalez owned and controlled GBH. Ex. B 20. Curutchet testified that she appeared at trial because she had "a moral obligation to Mr. Gonzalez, who gave me the job in 2007"—before Lynch was majority owner. A-1377. Casaleggio testified that, although Gonzalez approved "any new proposal regarding contracts or new shows, programs," Lynch had to approve budgets. A-1400. Their testimony is not evidence of the ownership structure. Neither Appellees nor the Trial Court identify any record support for the Trial Court's conclusion. It was erroneous.

VII. LYNCH ACTED IN GOOD FAITH AND CONSISTENT WITH THE EVIDENCE; IT WAS ERROR TO AWARD FEES.

Appellant commenced this litigation in good faith and consistent with his belief, supported by executed, notarized agreements, that he owned 65% of GBH. Appellees rely upon *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005), where, "throughout the litigation Kaung's representatives made excessive and duplicative deposition requests while ignoring their own discovery obligations … refused to facilitate the schedule of [a] deposition … refused to answer questions and instead peppered [the] attorneys with questions and accusations." *Id*. The findings of bad faith in *Kaung* were supported by emails describing the party's improper motive for bringing the case. *Id*. The conduct of consultants and witnesses in litigating *Kaung* was so uncivil and obstructionist that this Court included an admonishment in its opinion. *Id.* That reprehensible conduct did not occur here.

"[T]he bad faith exception applies only in extraordinary cases, and the party seeking to invoke that exception must demonstrate by clear evidence that the party from whom fees are sought ... acted in subjective bad faith." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 877 (Del. 2015). The Trial Court made numerous errors of law and fact. Indeed, Appellees have conceded the Trial Court's errors through their failure to challenge Appellant's showings.

Although the Trial Court described this case as a "he said – he said" story, that characterization erroneously ignores the entire, voluminous, documentary

record of the parties' written notarized agreements. Each of those executed, notarized agreements is consistent with Appellant's position that he owns 65% of GBH. Appellant has shown that the Trial Court's decision is inconsistent with Delaware contract law. Appellees did not rebut that showing. *See* Sections II-V.

Further, Appellant did not abandon or alter his claims, nor were his claims baseless, as Appellees argue. Appellant asked the Trial Court to enforce the executed, notarized agreements that he entered into with Appellees. Appellant has unwaveringly requested this relief since beginning this litigation. The finding that Lynch acted in bad faith was erroneous, and the Trial Court lacked both a factual and legal basis for awarding fees.

CONCLUSION

For all the reasons stated herein as well as in the Opening Brief, Appellant respectfully requests that this Honorable Court reverse the Judgment in accordance with the arguments outlined in this appeal.

Dated: February 12, 2021

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