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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ICATECH CORPORATION AND EMPRESAS ICA, S.A.B. DE. C.V. Defendants and Counterclaim Plaintiffs-Below, Appellants, v. PAUL V. FACCHINA, SR., individually and as Sellers' Representative, Plaintiff and Counterclaim Defendant-Below, Appellee.	No. 121, 2021 Court Below: Superior Court of the State of Delaware C.A. No. N17C-09-163 PRW CCLD CONSOLIDATED

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NATURE OF PROCEEDINGS

Appellants, ICATech Corporation and Empresas ICA, S.A.B. DE. C.V. ("ICATech") appeal from a verdict and judgment in which the trial court found that ICATech failed to prove each and every element of the fraud counterclaim it asserted against Appellee, Paul V. Facchina, Sr. ("Facchina"). The verdict of the trial judge, sitting as the trier of fact, is amply supported by the trial evidence, much of which was uncontroverted by ICATech or came from ICATech's own witnesses.

The case arises from ICATech's purchase of various construction businesses from Facchina (the "Facchina Companies") in April 2014 and its obligations to pay Facchina the balance of the purchase price for the Facchina Companies. Approximately two years after the purchase, ICATech was in dire financial condition and Empresas filed for protection under bankruptcy law in Mexico. ICATech sought to avoid its payments to Facchina, including the release of $3.5 million held in escrow. To justify its refusal to pay Facchina, ICATech alleged that Facchina had fraudulently induced it to purchase the Facchina Companies by intentionally concealing information regarding a single project undertaken by a single company within the larger family of the Facchina Companies, and, more incredibly, that this single action precipitated ICATech's financial collapse. In the same proceeding, Facchina Construction Company, Inc. (FCCI) – which was then

under the control of its surety Travelers – asserted that Facchina owed it indemnity obligations for a project FCCI had been involved with in Silver Spring, Maryland.

In November 2019, the Honorable Paul R. Wallace, who managed the matter through pre-trial proceedings, including the resolution of cross motions for summary judgment, conducted a five-day bench trial on (1) Facchina's claims for the balance of the purchase price, (2) ICATech's efforts – including its fraud claim – to avoid those obligations, and (3) FCCI/Travelers' indemnity claim. The parties each presented testimony from numerous witnesses and submitted extensive documentary evidence, most of which was admitted without objection.

On October 20, 2020, the trial court entered its Decision after Trial (Opinion) denying ICATech's fraud claim on the basis that ICATech had failed to establish ***any*** of the facts necessary to support ***any*** of the elements of its fraud claim. The court denied all other claims asserted by ICATech and FCCI and awarded Facchina the portion of the purchase price that had been held in escrow. ICATech now appeals to this Court seeking to overturn the trial court's denial of the fraud claim.

SUMMARY OF ARGUMENT

I. Facts

(a) ***Denied.*** Rather than presenting a concise summary of legal propositions on appeal as contemplated by Delaware Supreme Court Rule 14(b)(iv), ICATech puts forward its own interpolation of the facts without any citation to the record. Facchina denies the assertions and characterizations presented as "facts" by ICATech, as being contrary to the evidence of record and contrary to the facts as found by the trial court. A full and complete summary of the facts as found by the trial court, along with appropriate citations to the record, is set forth *infra* in Facchina's Statement of Facts.

(b) ***Denied***, for the same reasons stated in I.(a), above.

(c) ***Denied***, for the same reasons stated in I.(a), above.

(d) ***Denied***, for the same reasons stated in I.(a), above.

(e) ***Denied***, for the same reasons stated in I.(a), above.

(f) ***Denied***, for the same reasons stated in I.(a), above.

(g) ***Denied***, for the same reasons stated in I.(a), above.

(h) ***Denied***, for the same reasons stated in I.(a), above.

(i) ***Denied***, for the same reasons stated in I.(a), above.

(k) ***Denied***, for the same reasons stated in I.(a), above.

II. Legal Propositions

(a). ***Denied.*** The trial court properly weighed the evidence and credibility of witnesses before it and denied ICATech's request to admit statements made by Facchina's counsel in a summary judgement brief as substantive evidence in the case. Facchina did not change his deposition testimony at trial, but instead confirmed his previous statements and offered detailed testimony explaining the meaning of those statements. The trial court did not disregard what ICATech calls inconsistencies in Facchina's testimony, but rather it found that the explanatory testimony harmonized the evidence.

(b)(1) ***Denied***. The trial court did not ignore ICATech's arguments. Rather, after weighing the evidence and making credibility determinations, the trial court simply rejected ICATech's assertions that any representations in the PSA were false because there was no evidence to support these assertions.

(b)(2) ***Denied.*** The trial court did not ignore ICATech's arguments, but simply rejected them on the basis that there was no evidence to support the assertions that Facchina knew that the concrete work at the Grove Project had been broken up prior to the ICATech Closing.

(b)(3) ***Denied.*** The trial court did not ignore ICATech's arguments, but simply rejected them on the basis that there was no evidence to support the

assertion that Facchina intended to induce ICATech to rely on any misrepresentation, or that ICATech did rely on any misrepresentation.

(b)(4) ***Denied.*** The trial court did not ignore ICATech's arguments, but simply rejected them on the basis that there was no evidence to support the assertion that Facchina made any misrepresentations or concealed any information, or that ICATech relied upon any misrepresentations or suffered any damages.

(b)(5) ***Denied.*** The trial court did not ignore ICATech's arguments, but simply rejected them on the basis that there was no evidence to support the assertion that any of Facchina's actions caused any losses on the Grove Project, much less the entire collapse of the Facchina Companies.

(b)(6). ***Denied.*** The trial judge found as a matter of fact that Facchina did not engage in any improper or misleading behavior whatsoever. Accordingly, there was no conduct that "flies in the face" of Delaware law warranting sanctions.

(b)(7). ***Denied in part***. Facchina does not dispute the basic legal principle set forth by ICATech, but denies that these principles were in any way violated by Facchina. As the trial court found, Facchina did not engage in any fraud or make any knowingly false representations.

STATEMENT OF FACTS

A. Background

On June 28, 2013, Facchina and ICATech entered into a Purchase and Sale Agreement ("PSA") wherein ICATech agreed to purchase the Facchina Companies, including Facchina Construction Company, Inc. (FCCI) and Facchina Construction Company of Florida, LLC ("FCF"). (Opinion at 1-2). On April 14, 2014, the purchase transaction closed (the "ICATech Closing"). (Opinion at 25; A1528 at 58:14-59:9). During the sixteen months between signing the PSA and the Closing, ICATech conducted exhaustive due diligence, including multiple onsite visits by a team of at least twenty people reviewing voluminous documents made available in a "data room". (Opinion at 24-27; A0360 at ¶43; A1537 at 95:4-96:10; A1668 at 134:2-6 & 136:17-23; A1852:13-21; A1868:1-A1869:7; A1883:2-A1886:16). ICATech was provided with any and all requested information, and nothing was held back by Facchina. (Opinion at 25-27; A1537 at 95:4-96:10; A1538 at 100:3-21; A1668 at 134:2-18; A1883:2-23).

In September 2017, Facchina filed suit against ICATech seeking a declaration that ICATech owed an accelerated payment of the balance of the purchase price, and that certain escrow funds be released to him as part of that payment. (Opinion at 2-4). In October 2017, FCCI filed suit against Facchina seeking, *inter alia*, indemnification under the PSA relating to a project known as the Silver Spring

Matter. Also in October 2017, ICATech answered and filed a counterclaim to Facchina's lawsuit. Eight months later, in June 2018, ICATech amended its counterclaim to include the fraud claim now at issue in this appeal. (Opinion at 4-5).

ICATech's fraud claim alleged that Facchina induced it to buy the Facchina Companies by making knowing and intentionally false representations that concealed material adverse events about a specific project called the Grove at Grand Bay (the "Grove"). ICATech sought the return of the entire $55 million ICATech paid for the Facchina Companies, plus punitive damages, interest, and attorneys' fees . (Opinion at 4-5).

B. The Facchina Companies

In 1987, Facchina formed FCCI as a small start-up construction business. (A1516 at 11:6-7 & 12:12-21). By the early 2000s, FCCI had 200-300 employees and was performing much larger, more complex work, including reinforced concrete construction, complex foundation work, small road and bridge work, and airport construction. FCCI operated primarily in the Washington D.C. metropolitan area, including Northern Virginia, Baltimore and Annapolis. (A1516 at 12:22 – A1517 at 14:18).

In 2003-2004, Facchina entered into a business relationship with another construction professional (Mack McGaughan) and formed Facchina-McGaughan, a

new entity for construction work in Florida. (A1517 at 14:19 – 15:17 & A1518 at 17:1-18:5). After parting ways with McGaughan several years later, Facchina formed FCF in 2007. (A1519 at 22:7-18 & A1520 at 26:17-21). Thereafter, FCF continued operating in Florida, serving as general contractor for numerous large condominium projects. (A1519 at 24:1-23).

By 2012, the Facchina Companies had gross annual sales of $250 million to $300 million and had grown to include not only FCCI and FCF, but also five additional construction-related companies (Facchina Formworks, L.L.C., FSI Equipment, L.L.C., Facchina Crane Rental, L.L.C., The Facchina Group of Companies, L.L.C. and McMelli Equipment, L.L.C.). (A0420; A1520 at 27:2-20).

C. Nature of concrete work at the Facchina Companies

There are many components to concrete work on large construction projects and the various components are often "broken up" and subcontracted out into "packages". (A1522 at 35:1-36:18). Facchina testified that, for construction projects in Florida, it was common practice to procure concrete packages in a range from five to eight different packages. (A1524 at 41:15-42:12). This was also a common practice followed by the Facchina Companies on projects in Maryland, Northern Virginia and Washington D.C. (Opinion at 20; A1527 at 54:18-55:17). His trial testimony was uncontroverted by any evidence presented by ICATech.

Charles McPherson, who was FCCI's CEO and who ***was called to testify by ICATech***, confirmed that concrete packages on Florida projects were routinely handled "both ways", meaning sometimes "broken up" into multiple packages, and sometimes not. (A1652 at 70:1-11 & 71:10-14). McPherson, who readily admitted that he was **not** the "operations guy", testified that he "felt" that FCF was "trying" to hire only one concrete subcontractor to supervise other subcontractors. (A1652 at 70:1-10).

Facchina agreed that the fewer number of concrete packages the better. He explained in detail the various components of the different concrete "packages." (A1522 at 35:12 - A1523 at 40:9). By far, the most complicated aspect of the concrete work is the reinforced steel and post-tensioning work. The complexities are heightened when the various components of the reinforced steel work (design, drawing, fabrication, placement and equipment) and the post-tensioning work (design, drawing, fabrication, installation, stress testing and recordkeeping) are further broken up among numerous individual subcontractors. (A1523 at 40:12 - A1524 at 41:14; A1525 at 46:16- A1526 at 52:10). Therefore, consolidating these more complex components of the concrete work with a single subcontractor was advantageous. *Id.*

D. The Grove Project

In 2012, Jesus Vazquez, who was then FCF's President, approached Facchina for permission to pursue a contract for construction of the Grove Project, a proposed new condominium. The developer on the Grove Project, Terra, was owned by a family with whom the Facchina Companies had previous difficult relations generating significant disputes and legal expenses. However, Vazquez and McPherson convinced Facchina that they could manage Terra effectively on the Grove Project. Moreover, the Grove Project included a conditional bond, which provided significant protections against the types of difficulties the Facchina Companies had previously encountered with Terra's owners. This gave Facchina "great comfort" in moving forward with the Grove Project. (Opinion at 21-22; A1521 at 29:10-32:19).

Facchina and McPherson instructed or advised Vazquez not to break up the concrete portion of the contract work on the Grove Project. (Opinion at 22; A1579 at 9:16-10:7; A1651 at 68:21-23 & A1652 at 69:1-5). However, Facchina explained in detail what he meant by this instruction, which was in no way a dictate forbidding the use of more than one concrete subcontractor for the entire job. (A1578 at 6:8-14 & A1579 at 9:20-10:7). In fact, Facchina explained that he was not aware of a single individual concrete contractor in Florida that could perform all the various components of the concrete work required. (A1524 at 42:15-43:9). Instead, what

Facchina meant by "one-stop shopping" was that Vasquez should make his life easier by bundling the concrete work to the greatest extent possible and purchasing it in "chunks", rather than as numerous individual piecemeal packages. (Opinion at 40-41; A1522 at 34:22-36:18 and A1528 at 58:1-13). Again, Facchina's trial testimony was uncontroverted by any evidence presented by ICATech.

The initial Contract for the Grove Project was signed in January 2013. A more detailed Guaranteed Maximum Price (GMP) Amendment with cost breakdowns was signed in May 2013. (A0431-A0521 & A1185-A1327). Although Facchina approved these agreements in general, he was not involved in preparing or reviewing the actual documents, and he was not familiar with any of the details regarding the subcontracts or subcontractors that had been procured for the Grove Project. (A1522 at 34:3-11; A1524 at 43:13-19; A1527 at 55:18-56:16 & A1528 at 59:8-18). Neither Facchina nor McPherson involved themselves in the details of such documents. (Opinion at 23; A1522 at 33:20-34:2). Nothing in the GMP or the GMP Amendment indicate how many subcontractors Vazquez had hired. (A0431-A0521 & A1185-A1327).

At some point in early 2014, Facchina raised a question about a specific construction concern at the Grove Project relating to thermal contraction and expansion at the concrete-steel interface, and that issue was fully addressed and resolved no later than February of 2014. (A1539 at 102:13-104:19). Other than

inquiring about this single discrete issue, Facchina had no further involvement with any details relating to the Grove Project. (Opinion at 43).

E. The ICATech Acquisition and the Decline of the Facchina Companies

In late 2012, Facchina and ICATech entered into negotiations for ICATech to purchase the Facchina Companies, which included FCCI, FCF and the five additional construction-related companies. (A1535 at 879-A1536 at 89:23). The PSA was signed in June 2013, but various regulatory issues delayed a final closing on the transaction for approximately nine months. (A1536 at 90:1-19 & A1884:5-14). As indicated above, ICATech conducted extensive due diligence and was provided full access to the Facchina Companies' records, personnel, and facilities. McPherson oversaw the creation of a "data room", where all relevant documents, including all of the contracts and subcontracts relating to the Grove Project, were placed. (A1662 at 109:1-110:1). Facchina had no access to the data room and no involvement with its creation or maintenance. (A1538 at 98:2-99:7). Facchina and McPherson confirmed that nothing whatsoever was held back from review and that anything and everything was made available for review by ICATech. (A1537 at 95:4-96:10; A1538 at 100:3-21; A1668 at 134:2-18; A1883:2-23). Neither McPherson nor Facchina omitted, or instructed anyone to omit, any information from the PSA Schedules. (A1538 at 100: 8-21 & A1669 at 137:5-138:2). ICATech

presented no evidence to contradict these facts. The ICATech Closing took place on April 14, 2014.

Within approximately 1-2 years following the ICATech Closing, FCCI and ICATech began facing a multitude of financial challenges and operational difficulties, a few of which related to the Grove Project, but most of which were totally unrelated to that project. (Opinion at 28-36; A1630 at 214:4-A1631 at 217:6; A1677 at 172:1-A1678 at 176:23).

The Grove Project problems surfaced in approximately 2015, and involved multiple issues mostly unrelated to the concrete work. (A1542 at 116:7- A1543 at 117:23; A1544 at 122:1-123:3; A1672 at 149:1-152:21; & A1673 at 156:4- A1675 at 163:22). During his 2015 investigation of the Grove, McPherson learned that Vazquez awarded the concrete packages to three different subcontractors: one for the form work (Capform); one to place and finish the concrete (C&C); and one for all of the reinforced steel and post-tensioning work combined (Titon). (A1670 at 142:6-20, A1674 at 160:4-9 & A1529 at 62:2-16). McPherson then advised Facchina of the manner in which the concrete subcontracts had been "broken up" at the Grove Project. ***This was the first time that either Facchina or McPherson knew anything about the manner in which the concrete packages had been procured on the Grove Project.*** (A1528 at 58:14-59:9; A1670 at 142:6-20 & A1681 at 188:11-19). ICATech presented no evidence to refute that testimony.

In any event, the problems at the Grove Project were not related to the manner in which the concrete subcontracts were "broken up", but instead related to workmanship issues, and other issues having nothing whatsoever to do with the concrete work (*e.g.*, a 46-day delay with the steel contractor and major errors in scheduling of the project). (Opinion at 29-34; A1672 at 149:1-150:23; A1670 at 144:2-22 & A1674 at 157:7-12). Moreover, the problems at the Grove Project were miniscule in comparison to the other major problems facing FCCI and ICATech at that time. These included: a financial audit finding deficiencies in FCCI's internal controls, (Opinion, at 30; A1543 at 118:6-119:15; A1673 at 154:19-155:4); serious cash flow issues caused by a $5 million loss on a National Park job, a $4.3 million earnout payment, and a $6 million dollar investment that were supposed to be reimbursed by ICATech, but were not, (Opinion, at 33; A1678 at 173:14- A1679 at 177:9); huge decreases in revenues in 2015 and 2016 caused by a 53% drop in site work and a 39% drop in heavy construction work for those years, (Opinion at 33; A1677 at 172:1-A1678 at 173:9); the lack of civil work in Maryland (A1671 at 145:12-146:16); an excessive amount of overhead caused by the increased number of individuals FCCI was required to retain in order to transition from a private company to a public company, (Opinion at 34; A1673 at 155:13-156:3); and a massive default by ICATech's parent company, Empresas, on a more than $1 billion bond, (Opinion at 35; A1546 at 131:15-132:16). Shortly after this massive bond

default, a credit freeze was imposed on ICATech and FCCI was no longer able to secure surety bonds, which is "a death knell for a construction company because without [surety support] one cannot work on larger, bonded projects." (Opinion, at 35; A1547 at 133:7-134:3; A1739:1-23 & A1787:4-15) This type of surety work was FCCI's "bread and butter". (A1677 at 169:17-170:3).

F. The trial court's rejection of ICATech's fraud claim.

After being sued by Facchina for payment of the escrow funds, ICATech asserted for the first time that Facchina had fraudulently induced it to enter into the PSA and close on the transaction. The sole basis for ICATech's claim is that Facchina knew prior to signing the PSA and prior to the ICATech Closing that Vazquez had "broken up" the Grove Project concrete work to more than one subcontractor, purportedly in direct violation of an express order not to do so. According to ICATech, Facchina concealed this information by intentionally failing to identify the concrete subcontracts on Schedule 2.12 of the PSA and intentionally failing to identify Vazquez's purported insubordination as a circumstance "outside the ordinary course of business" and/or a "material adverse effect" under Section 2.6 of the PSA.

The trial court, however, rejected each and every asserted fact necessary for ICATech to prevail on its fraud claim. (Opinion at 38-44). The trial court found as a matter of fact that Facchina had no knowledge about how Vazquez subcontracted

the concrete work on the Grove Project until approximately a year after the ICATech Closing. (Opinion at 23-24 & 40). The trial court found that when Facchina ultimately reviewed the details of the Grove Project subcontracts, he determined that Vazquez had done a "masterful" job at keeping all of the most complex concrete work with a single subcontractor, Titon, consistent with Facchina's advice. (A1526 at 50:20-52:10; A1527 at 54:5-17; A1528 at 59:19-60:18; A1580 at 16:3-11 & A1584 at 29:5-9). Further, the trial court found that Facchina did not conceal information from ICATech, but instead provided full and complete disclosures during an extensive due diligence process. Even McPherson testified unequivocally that nothing was held back and that there was "no fraud". (A1670 at 144:23- A1671 at 145:2).

ARGUMENT

I. Introduction and General Legal Principles

After a 5-day bench trial involving the testimony of multiple witnesses and the presentation of extensive documentary evidence, the trial court determined that ICATech failed to prove ***any*** of the facts necessary to establish ***any*** of the elements of its fraud claim. This was a purely factual determination made after weighing the evidence, observing the witnesses, making credibility determinations, and considering extensive post-trial arguments by the parties. In this appeal, ICATech seeks to reverse the trial court's unfavorable factual determinations on the fraud claim, in large part by attempting to recast them as legal conclusions purportedly subject to *de novo* review, or by mischaracterizing them as being inconsistent with the evidence of record. To be clear, however, the failure of ICATech's fraud claim was based entirely on ***its failure to prove the necessary facts at trial***, rather than on any erroneous or misapplied legal analysis. Moreover, and most importantly, all the critical factual determinations made by the trial court are entirely consistent with, and fully supported by, the evidence of record.

A. Legal Standards for Proving Fraud

In order to prevail on its fraud claim, ICATech was required to prove by a preponderance of the evidence that:

(1) Facchina made a false representation;

(2) Facchina knew the representation was untrue or made the statement with reckless indifference to the truth;

(3) Facchina intended to induce ICATech to act based on the representation;

(4) ICATech justifiably relied on the representation; and

(5) ICATech suffered causally related damages. *Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725, 807 (Del. Ch. 2014).

The "false representation" that forms the underpinning of a fraud claim can occur either through an overt misrepresentation or a material omission, such as the deliberate concealment of material facts, silence in the face of a duty to speak. *In re Wayport Inc. Litigation*, 76 A.3d 296, 323 (Del. Ch. 2013) , (citation omitted).

When a claim of fraud is based on a material omission in the form of active concealment, the plaintiff must show that the defendant:

> took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.

Transdigm Inc. v. Alcoa Global Fasteners, Inc., 2013 WL 2326881 at *6 (Del. Ch. May, 29, 2013), quoting, *Metro Commc'ns Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 150 (Del. Ch. 2004).

B. Legal Standards for Reviewing the Trial Court's Factual Findings Regarding ICATech's Fraud Claim

This Honorable Court will not overturn a trial court's factual findings unless they are clearly erroneous such that "the doing of justice requires their overturn." *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94–95 (Del. 2021) (citations omitted). Factual findings are not clearly erroneous "if they are 'sufficiently supported by the record and are the product of an orderly and logical deductive process.' " *Id. at 95*. "When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*

Further, "when factual findings are based on determinations regarding the credibility of witnesses, the deference already required by the clearly erroneous standard of appellate review is enhanced." *Eagle Force Holdings, LLC v. Campbell*, 235 A.3d 727, 735 (Del. 2020), cert. denied, 141 S. Ct. 1371, 209 L. Ed. 2d 119 (2021). This Court defers to the unique opportunity of the factfinder, whether judge or jury, to observe the live witnesses, to evaluate their demeanor and credibility and to resolve conflicts in the testimony. *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002). Individual findings of fact are reviewed only to ensure that the factual findings and inferences are supported by "competent evidence." The weight to be given to evidence, however, is for the trier of fact to determine. *Id.*

C. Inapplicability of *De Novo* Standard of Review

ICATech's fraud claim was based entirely upon ***factual*** assertions regarding:

Facchina's conduct, state of mind, and intentions; the effect that alleged conduct had on ICATech; and damages allegedly caused by such conduct. Likewise, the trial court's adjudication of ICATech's fraud claim was based entirely upon ***factual*** determinations relating to these assertions: what Facchina did, knew and intended; what affect, if any, Facchina's conduct had on ICATech; and what, if any, harm was shown to be causally related to that conduct. *See, e.g.*, *Backer*, 246 A.3d at 96 (issue of whether conduct is deceptive is purely a factual determination; *see also, Wilmington Trust Co. v. Aetna Cas. & Sur. Co.*, 690 A.2d 914, 916-17 (Del. 1996) (reliance on misrepresentation is a factual issue); and *Eagle Force Holdings,* 235 A.2d at 735 and *Continental Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969) (motive and intention are factual issues). Yet, despite the fundamentally ***factual*** nature of the fraud claim, ICATech attempts to cast its appeal almost entirely in terms of legal questions for which it seeks *de novo* review. This is not only procedurally improper, but also indicative of the lack of merit of ICATech's appeal.

As discussed in detail below, when reviewed under the proper "clearly erroneous" standard, the trial court's factual findings must be upheld. In fact, in most instances, the trial court's findings are based upon undisputed facts, often from ICATech's own witnesses.

II. The Trial Court Rejected All of the Fundamental Factual Premises on Which ICATech's Fraud Claim Was Based Thereby Precluding Any Finding of Fraud.

A. Question Presented

Whether the Trial Court's factual findings are supported by substantial evidence of record and preclude any finding of fraud? (Opinion at 20-44).

B. Standard of Review

Findings of fact are reviewed under the deferential clearly erroneous standard solely to determine "if they are 'sufficiently supported by the record and are the product of an orderly and logical deductive process'". *Backer, supra.* ICATech incorrectly seeks to apply a *de novo* standard of review in an effort to supplant the trial court's factual determinations.

C. Merits of Argument

ICATech's fraud claim hinged entirely on the following key factual assertions, all of which it had to prove to the trial court in order for ICATech to prevail: (1) that Facchina knew prior to the ICATech Closing that the concrete work on the Grove Project had been awarded to more than one subcontractor; (2) that the concrete subcontracts had been awarded in a manner that was directly contrary to an express instruction of management; (3) that this information was detrimental not only to the Grove Project, but to the pending ICATech purchase of the Facchina Companies; (4) that Facchina therefore intentionally concealed this information

from ICATech in order to induce them to consummate the purchase of the Facchina Companies, and (5) that ICATech suffered damages causally related to Facchina's alleged conduct. The trial court soundly rejected each and every one of these factual assertions.

Each of these factual underpinnings were essential to ICATech's fraud claim, and, therefore, the trial court's rejection of any one was fatal to ICATech's fraud claim.

1. The facts as found by the trial court establish unequivocally that Facchina did not know that the concrete work at the Grove had been "broken up" until well after Closing on the PSA.

The trial court found that Facchina did not know that the concrete work on the Grove Project had been "broken up" among several subcontractors until well after the ICATech Closing. (Opinion at 23-24, 40, 42 & 44). This finding was fully supported by the undisputed testimony of Facchina, as well as the undisputed testimony of Charles McPherson, ***ICATech's own witness***. That testimony was the only direct evidence on the issue presented at trial. ICATech's appeal is entirely based upon supposition about what Facchina must have known.

a) The undisputed evidence is that Facchina did not know how the concrete subcontracts were awarded until after the Closing.

Facchina testified unequivocally that he had no involvement in procuring the concrete packages relating to the Grove Project and did not learn that the concrete

work had been awarded to more than one subcontractor until approximately mid-2015, *i.e.*, more than a year after the ICATech Closing. (A1528 at 58:14-59:9). McPherson confirmed and corroborated Facchina's testimony, testifying that he himself did not learn that the concrete work had been awarded to more than one subcontractor until "well after" the ICATech Closing, and that he was the person who then told Facchina this information. (A1670 at 142:6-20 & A1681 at 188:11-19).

ICATech improperly seeks to dismantle the trial court's factual findings surrounding this critical issue based on the theory that Facchina's testimony regarding his lack of knowledge concerning the concrete work on the Grove Project was "obviously false." (Opening Brief at 31-32). This completely ignores the fundamental principle that credibility determinations are within the unique province of the fact finder and are entitled to great deference. *Eagle Force Holdings,* 235 A.2d at 735. Moreover, it ignores the corroborating testimony of its own witness, McPherson.

b) <u>ICATech's fraud theory is not based on any direct evidence, but upon supposition of what Facchina "must have known".</u>

Having failed to present any direct evidence to contradict Facchina and McPherson's testimony, ICATech suggests that the trial court made inconsistent and irreconcilable findings regarding Facchina's knowledge of the Grove Project

concrete work and further suggests that the trial court ignored "overwhelming" documentary evidence that supposedly establishes that Facchina did in fact know about the multiple concrete subcontractors on the Grove Project prior to the ICATech Closing. Neither of these arguments withstand scrutiny.

First, the supposed "overwhelming" documentary evidence on which ICATech relies consists of precisely three documents – two subcontractor estimates for the concrete work on the Grove Project, (A0522 & A0526), and the cost breakdown for the concrete work as reflected in the GMP Amendment (A1188-1189). At trial, ICATech showed each of these documents to Facchina, but failed to establish that he had participated in their creation, or was even aware of their contents, at any time prior to the ICATech Closing. (A1528 at 59:10-22; A1586 at 37:8-14 & A1588 at 46:2-48:4). In fact, Facchina clearly and consistently testified that he had "zero" involvement in the creation or preparation of these documents, and only reviewed them for the first time just prior to trial (*i.e.*, approximately 5 years after closing on the ICATech transaction). *Id.* ***ICATech presented no evidence whatsoever to rebut Facchina's testimony in this regard.***

Unable to point to any direct evidence that Facchina knew the details of FCF's concrete subcontracting at the Grove before the Closing, ICATech misconstrues two sentences in the Opinion to argue that the trial judge rejected Facchina's testimony that he had "zero" familiarity with the contents of these documents prior to the

ICATech Closing. (Opening Brief at 31 & 32). This misrepresents the trial court's findings in relation to the evidence of record.

The two sentences from which ICATech constructs its theory read: "Mr. Facchina reviewed the estimates and made many comments about the structure." and "Mr. Facchina approved the GMP Agreement, in part, because it included a 'conditional bond,' which gave him 'great comfort'". (Opening Brief at 31, citing Opinion at 22). ICATech implies that the word "estimates" in the first sentence specifically refers to the two concrete subcontractor estimates (that ICATech identifies as the May 1, 2013 Estimate and the May 15, 2013 Estimate), and that the trial court concluded that Facchina reviewed these specific documents prior to the ICATech Closing. However, the trial court's opinion makes no reference whatsoever to the specific documents, which ICATech now asserts must have been the May 1, 2013 Estimate and the May 15, 2013 Estimate, or to any testimony discussing those documents. (Opinion at 22). In fact, the only evidence cited by the trial court in support of this sentence was an entirely different document, a March 4, 2016 email from McPherson (JX 100) who testified at trial that Facchina and he did not know about the specifics about how the concrete subcontracts were awarded until after the Closing. (Opinion at 22). The email made no reference whatsoever to any particular estimate regarding any particular structural component of the Grove Project, nor did it provide any temporal reference as to when Facchina purportedly

reviewed any estimate or provided any comments[1]. Clearly, the judge's reference to Facchina having reviewed "estimates" was a generic reference, not a specific finding that he reviewed the specific "Estimates" that ICATech now claims.

A similar analysis applies to the second sentence from the trial court's opinion on which ICATech relies in claiming an irreconcilable inconsistency in the judge's findings. Again, ICATech argues that the trial court's statement that Facchina "approved the GMP Amendment" is tantamount to a finding that Facchina actually reviewed the content of the GMP Amendment prior to giving his approval for the Grove Project. This simply is not the case. The testimony cited by the trial court in support of this statement refers only to Facchina's brief discussion with Vasquez and McPherson when they were "pitching" the Grove Project to him, not to any actual review of the GMP Amendment document by Facchina. The GMP Amendment document was not referenced at all in this portion of the testimony. (A1521 at 32-A1522 at 34). Facchina specifically explained that his approval of the Grove Project was based purely on discussions, rather than the review of any specific

[1] McPherson was questioned about this email, but provided no insight whatsoever as to which "estimate" Facchina reportedly reviewed or when. (A1665 at 124:4-13). Moreover, McPherson testified repeatedly about the "bad estimate" relating to scheduling deficiencies on the Grove Project, which had nothing whatsoever to do with "the Estimates" ICATech attempts to connect with this email. (A1653 at 73:14-74:22; A1670 at 144:2-22 & A1675 at 162:22-163:5). McPherson also testified that the only discussion he had with Facchina regarding the "structure" of the Grove Project related to the steel structure, not the number of concrete subcontractors. (A1654 at 79:14-80:23 & A1669 at 138:3-139:10).

documents. (A1522 at 33:12-34:21). When Facchina was questioned regarding the GMP Amendment, he testified unequivocally that he had never reviewed that document until shortly before trial. (A1586 at 37:4-14). Moreover, the GMP Amendment provides estimates for all of the categories of work to be performed at the Grove, including the concrete work. It does not list the subcontractor's names or indicate how many subcontractors were to be awarded the various aspects of the work described. (A1188-A1189).

In sum, the trial court did not reject Facchina's testimony and did not make any findings that Facchina actually reviewed any of the three documents at issue at any time prior to the ICATech Closing. Accordingly, the purportedly irreconcilable inconsistencies in the trial court's decision touted by ICATech simply do not exist.

2. The trial court found that there could be no material misrepresentation because Vazquez did not violate any directive from management and the concrete work at the Grove was not broken up in any manner to cause concern.

The trial court made another factual finding that renders ICATech's fraud claim unsustainable -- namely that Vasquez did not break up the concrete packages at the Grove Project in any manner that was inconsistent with Facchina's expectations or that was materially detrimental to the Grove Project . (Opinion, at 40-41, 42 & 44). As the trial court specifically found, "the evidence does not show that the Grove concrete subcontracts were 'broken up' in a manner to cause concern. For instance, the most complicated work and the work Facchina would have found

most concerning resided with a single concrete subcontractor, Titon." (Opinion at 42). Additionally, the trial court found "no evidence that Vazquez did not follow Mr. Facchina's instructions regarding the concrete work at the Grove". (Opinion at 40). ICATech does not challenge these findings on appeal, nor would there be any basis for such a challenge considering the uncontradicted testimony of record.

Facchina testified that when he did review the concrete subcontracts well after the Closing he noted that Vasquez had secured a single subcontractor – Titon – to perform the most complicated and concerning aspects of the work, *i.e.*, the reinforced steel and post-tensioning work. Facchina testified in detail regarding the complexity of these aspects of the concrete work, and the need for coordination and precision in performing these tasks. (A1523 at 40:12 - A1524 at 41:14; A1525 at 46:16- A1526 at 52:10). Thus, when Facchina ultimately reviewed the Titon subcontract, he found that Vasquez had done a "masterful job" in securing all aspects of the reinforced steel and post-tension work under "one umbrella". (A1526 at 51-52).

Moreover, Facchina explained in detail what he meant when he advised Vasquez to "one-stop shop" the concrete work on the Grove Project and, contrary to ICATech's representation, it was in no way an order forbidding the use of more than one concrete subcontractor for the entire job. Instead, what Facchina meant by "one-stop shopping" was that Vasquez should make his life easier by bundling the

concrete work to the greatest extent possible and purchasing it in "chunks", rather than as numerous individual piecemeal packages. (A1522 at 34:22-36:18). This was precisely what Vasquez did in awarding the concrete work to a total of only three subcontractors, with all of the most complicated components of the work being awarded to a single contractor, Titon.

a) <u>The trial court did not err in imposing an adverse inference based upon ICATech's failure to call Vazquez to testify at trial and, in any event, such adverse interest was largely immaterial.</u>

Despite having submitted an affidavit by Vazquez in opposition to Facchina's summary judgment motion, ICATech chose not to call Vazquez as a witness at trial. As a result, the trial court found that there was *no evidence of record* to establish how Vazquez interpreted his conversation with Facchina regarding the procurement of the concrete packages for the Grove Project and his intention to comply (or, as alleged by ICATech, to not comply) with Facchina's wishes. (Opinion at 41). Thus, irrespective of any negative inference regarding what Vazquez would have testified to, ICATech's failure to call him as a witness was first and foremost simply a failure of proof. One of ICATech's key factual contentions was that Vazquez disobeyed an instruction from Facchina, but it failed to present testimony to establish this contention.

Although the trial court did infer that Vazquez's testimony would have corroborated Facchina's, this was merely a secondary observation that was in no

way critical to the outcome of the case. Moreover, this inference was entirely within the trial court's discretion. "Where it would be 'natural' for the party to produce the witness if his testimony would be favorable," but when the witness is not produced, it is permissible for the factfinder to draw a negative inference from the witness's absence. *Wheatley v. State*, 465 A.2d 1110, 1111 (Del. 1983); *see also, Demby v. State*, 744 A.2d 976, 978 (Del. 2000), and *In re Emerging Commc'ns, Inc. S'holders Litig.* 2004 WL 1305745, at *25 (Del. Ch. May 3, 2004).

b) Facchina did not make any intentionally false representations in the PSA.

For the reasons explained above, there is no merit to ICATech's argument that the trial court erred as a matter of law and/or abused its discretion in refusing to find that Facchina made false representations in Section 2.6 and 2.12 of the PSA. The trial court found that Facchina did not know anything about the concrete subcontracting issue until well after the ICATech Closing, that Vazquez did not act in contravention of any management directive, and that the subcontracting of the Grove concrete work was not cause for concern. Given those facts, nothing in the PSA can be considered false.

Moreover, irrespective of Facchina's knowledge – or lack thereof – the mere fact that the concrete work was awarded to more than one subcontractor was not a circumstance that would warrant identification under Section 2.6 of the PSA as being outside the "ordinary course of business", as argued by ICATech. Facchina testified

that in Maryland, Northern Virginia, and Washington, D.C., the Facchina Companies regularly "broke up" concrete packages. (A1527 at 54:18-55:17). Facchina also testified that, for construction projects in Florida, it was common practice to procure concrete packages in a range from five to eight different subcontractors. (A1524 at 41:15-42:12). Even McPherson, ICATech's own witness, testified that concrete subcontracting was done both ways (*i.e.*, sometimes broken up and not broken up) in Florida. (A1652 at 70:1-11 and 71:10-14). Even though McPherson, who admittedly was **not** the "operations guy", testified that he "felt" that FCF was "trying" to hire only one concrete subcontractor to supervise other subcontractors, (A1652 at 71:10-14)[2], it was clearly not outside the ordinary course of business for FCF to break up the concrete work since it routinely did it "both ways".

Nor did the concrete subcontracting on the Grove Project in any way implicate the "material adverse effect" provisions in Section 2.6 of the PSA. First, ICATech provides an incomplete definition of "Material Adverse Effect" under the PSA, intentionally omitting the last phrase of the definition which requires that the circumstance at issue must impair, or reasonably be expected to impair, "***the ability***

[2] Although the trial court stated that McPherson testified that "as a matter of operational policy" FCF would not break up concrete subcontracts in Florida, this is not supported by the record. (Opinion at 21, n. 77 citing A1652 at 69-70). McPherson stated this was standard practice in Maryland, not Florida. (A1652 at 70:1-3).

of any Seller or the Companies to consummate the transactions contemplated hereby or by its Related Agreements in a timely manner." (A0686) (emphasis added). A Material Adverse Effect, therefore, only relates to those effects that inhibit the consummation of the transaction - the sale of the Facchina Companies to ICATech - from being completed in a timely manner. ICATech presented no evidence that the retention of concrete contractors at the Grove had any effect on the parties' ability to close the transaction in a timely manner.

Finally, while the concrete *subcontracts* themselves were not listed on Schedule 2.12(b) of the PSA, it is undisputed that purchase orders and/or change orders ***identifying all of the concrete subcontractors by name*** were listed on the Schedule ***and that all of the subcontracts were in the data room.*** ICATech had full access to all of the concrete subcontracts prior to Closing, and therefore had access to all of the information it needed to fully understand the nature of the concrete subcontracting at the Grove.

3. The Facts as Found by the Trial Court Unequivocally Establish that Facchina Did not Intentionally Conceal Any Information From ICATech and Therefore Did Not Intentionally Seek to Induce any Action by ICATech.

The trial court rejected ICATech's assertion that Facchina engaged in an elaborate scheme to conceal information from ICATech regarding the concrete work on the Grove Project so that ICATech would purchase the Facchina Companies. The trial court found that Facchina "never withheld any information from [ICATech]

regarding [the Grove Project]", (Opinion at 43), and that ICATech had full access to all information relating to the Grove Project, including the identity of all of the concrete subcontractors, (Opinion at 22-27 & 42-43). Additionally, the trial court found that Facchina instructed McPherson to provide "any and all information" to ICATech, that all requested information was provided to ICATech, and that nothing was held back. (Opinion at 24-26). Furthermore, Facchina had no involvement in the preparation of the Schedules to the PSA, and in any event all the concrete subcontractors were identified on Schedule 2.12. (Opinion at 27 & 43). Likewise, Facchina did not have access to the data room, had no role whatsoever in placing documents in the data room and never instructed anyone to withhold any information from the data room or to leave any information out of the PSA Schedules. *Id.*

These are ***unchallenged*** factual findings made by the trial court based upon ***the undisputed evidence of record***. These findings establish conclusively that there was no attempt to conceal any information whatsoever relating to the Grove Project, and therefore no intent to induce ICATech to rely upon any misinformation relating to that project.

a) <u>The trial court did not err in finding that the concrete subcontracts were in the data room prior to the ICATech Closing.</u>

Additionally, it was not Facchina's burden to prove that the concrete subcontracts ***were*** in the data room, although the data room screenshot evidence

certainly did establish that fact. Instead, ICATech had the burden of proving that the subcontracts were ***not*** in the data room. ICATech presented no evidence whatsoever on this issue, thereby making its attack on Facchina's evidence essentially immaterial.

Regardless, the trial court's conclusion that the concrete subcontracts were placed in the data room prior to the ICATech Closing was not based solely only the screenshots submitted into evidence by Facchina. As discussed above, the undisputed testimony of McPherson was sufficient to establish that ***all*** the documents were uploaded into the data room and that ***nothing was held back***. The screenshots merely corroborated McPherson's testimony in this regard.

Moreover, the trial court gave full consideration to ICATech's arguments attempting to call into question the authenticity of the screenshots, and properly concluded that these arguments went to the weight, not the admissibility, of the evidence. (A1892 & A1940). The testimony of Dolores Laputka, Facchina's legal counsel for the ICATech transaction, was more than sufficient to establish that the screenshots were what they purported to be. Ms. Laputka explained that, at her direction, the contents of the data room were placed onto a thumb drive and that she personally witnessed the screenshots being prepared from the thumb drive. (A1888-1896). ICATech did not produce ***any*** evidence – forensic or otherwise – disputing the authenticity of the screenshots and no evidence that the subcontracts were not in

the data room. ICATech instead chose to rely solely on innuendo to suggest that the information reflected on the screenshots was false. The trial judge clearly rejected ICATech's argument, as was its prerogative in weighing the evidence and making factual findings.

4. ICATech Failed to Prove Justifiable Reliance on the Alleged Misrepresentation

As to the "justifiable reliance" element of the fraud claim, ICATech relies solely on the self-serving testimony of its own witness, Rodrigo Quintana, who testified that had he known that Vazquez had broken up the concrete work on the Grove Project in violation of the purportedly express orders of Facchina, that would have "killed the deal". (A1861-A1862). Although ICATech now claims that the trial court inexplicably ignored this evidence, the fact that the trial judge did not specifically discuss this particular statement by Quintana does not mean that it was not considered. A review of Quintana's testimony as a whole offers a ready explanation for why the trial court did not find this particular statement worthy of discussion.

First, Quintana's testimony was, at best, equivocal. Immediately after stating that the information regarding Vazquez's handling of the Grove Project would have "killed the deal", Quintana then stated that "best case scenario we would have reevaluated the whole deal", because the Miami-based business was an essential factor in the deal and Vazquez was leading that business. (A1862:14-17). Thus,

within a matter of a few sentences, Quintana backed off his assertion that the information regarding the concrete work at the Grove Project would have "killed the deal".

Moreover, Quintana's own testimony seriously undermined any assertion that information relating to the Grove Project was of any particular importance to him, or ICATech, in relation to the decision to purchase the Facchina Companies. Quintano admitted that he **did not know** whether anyone on behalf of ICATech even looked for the concrete subcontracts in the data room, (A1869:21-A1870:6), and that **he did not know** whether anyone even asked questions about the Grove contract even though the Florida operations were purportedly "very important" to ICATech. (A1870:19-22 & A1871:9-12).

Based upon these admissions it simply is not credible for ICATech to now claim reliance on information relating to the concrete subcontracting at the Grove when no one from ICATech ever inquired about, looked for or otherwise showed any interest in the details of the concrete subcontracting during ICATech's two years of due diligence prior to closing. The trial judge apparently agreed, making particular note of the fact that ICATech made no effort whatsoever to inquire about the Grove Project even though the Florida operations were purportedly "very important" to ICATech. (Opinion at 26-27). Given ICATech's apparent lack of interest in, or concern with the Grove Project, during due diligence, the trial court

properly found that ICATech failed to prove reliance on any representations made by Facchina relating to this issue.

Furthermore, ICATech was required to establish not only that it *actually* relied on a statement or omission, but that such reliance was *justified*. *Wayport*, 76 A.3d at 325. The trial court found that ICATech conducted extensive due diligence; that all requested information was provided to ICATech and nothing was held back; and that ICATech had complete access to all Facchina's information and personnel. (Opinion at 24-26 & 43.) ICATech representatives visited the FCF offices and construction sites in Florida and actually reviewed the Grove Project contract. All of the names of contractors – including the three concrete subcontractors - were identified on the PSA disclosure schedules such that one could easily determine the nature of the work provided by each contractor. Moreover, all of the actual subcontracts were included in the data room. However, ICATech's own witness, Rodrigo Quintana, admitted that he had no idea whether anyone from ICATech ever even looked for or inquired about any of this information. (Opinion at 43). Again, these are ***unchallenged*** factual findings made by the trial court based upon ***the undisputed evidence of record***. Therefore, there is no proof that ICATech relied on the alleged misrepresentation, and certainly that any reliance was justified given the extensive amount of due diligence.

5. ICATech Failed to Prove Causally Related Damages

As to the final element of its fraud claim – proof of causally related damages – ICATech's argument is likewise meritless. ICATech devotes a total of six sentences to the critical issue of damages, and collectively they say nothing more than that ICATech is purportedly owed $56.4 million because this is the amount it paid Facchina for the Companies. (Opening Brief at 39-40). ICATech cites to no testimony, no evidence of record, and no legal authority to support its claim for damages. It simply asserts – with no basis whatsoever – that it is somehow automatically owed a full refund as if it had asserted a claim for rescission of the PSA. But ICATech did not sue for rescission, and even if it had, rescission is not available as a remedy because the sale cannot be unwound, and Mr. Facchina cannot be returned to the status quo as FCCI is now defunct. *See Hegarty v. American Commonwealth Power Corp.*, 163 A. 616, 619 (Del. Ch. 1932).

While there are a multitude of reasons why FCCI is now defunct, none have anything whatsoever to do with any alleged misrepresentation relating to the Grove Project, which was the sole basis for ICATech's fraud claim. ICATech now resorts to claiming that the Grove Project was "irrelevant" to its claim for damages. (Opening Brief at 39). However, it is absolutely clear that the lynchpin of ICATech's entire fraud claim was the alleged "concealed risks" relating to Vazquez having broken up the concrete work on the Grove Project. Therefore, establishing

causally related damages resulting from this alleged conduct was not only relevant, but absolutely required.[3]

Under Delaware law, a plaintiff must prove that its damages were both factually and proximately caused by the fraudulent misrepresentation or omission. *Vichi,* 85 A.3d at 815-16. In nondisclosure or omission cases, the losses must ultimately be caused by the "materialization of the concealed risks." *Vichi,* 85 A.3d at 816 (citations omitted) .

According to ICATech, the "concealed risks" which it claims were intentionally hidden by Facchina were those associated with Vazquez having "broken up" the concrete work at the Grove Project. However, the trial court found on the undisputed evidence that Vazquez did not subcontract the concrete work contrary to Facchina's direction or in any manner to cause concern. (Opinion at 33, 40, 42 & 44). Moreover, the trial court did not find that the Grove Project suffered because of the manner that Vazquez subcontracted the concrete work.

Indeed, the trial court made extensive factual findings detailing the multitude of financial challenges and operational difficulties plaguing FCCI, which were

[3] ICATech itself recognized as much when it argued its damages claim to the trial court, focusing heavily on attempting to demonstrate that the Grove Project was a "financial disaster" and the Facchina Companies' "largest problem", which ultimately "doomed" the Facchina Companies as a whole to complete financial ruin. (A2085-A2087). Even in ICATech's Opening Brief, it asserts a "straight descending red line of losses connecting the financial disaster at the Grove" with the "collapse of the Companies". (Opening Brief at 8).

completely unrelated to any issues with the Grove Project. These included: a financial audit finding deficiencies in FCCI's internal controls, (Opinion, at 30); serious cash flow issues caused by a $5 million loss on a National Park job, a $4.3 million earnout payment that ICATech never reimbursed, and a $6 million dollar investment that was also supposed to be reimbursed by ICATech, but was not (Opinion at 33); huge decreases in revenues in 2015 and 2016 caused by a 53% drop in site work and a 39% drop in heavy construction work for those years, (Opinion at 33); the lack of civil work in Maryland, and an excessive amount of overhead caused by the increased number of individuals FCCI was required to retain in order to transition from a private company to a public company, (Opinion at 34); a massive default by ICATech's parent company, Empresas, on a more than billion-dollar bond, (Opinion at 35) and FCCI's inability to obtain surety bonds. (*Id.*)

Again, these are ***unchallenged*** factual findings made by the trial court based upon ***the undisputed evidence of record***. These findings fully support the trial court's rejection of ICATech's damages argument.

III. The trial court properly declined to treat statements made by Facchina's counsel in summary judgment filings as judicial or evidentiary admissions.

A. Question Presented

Whether the trial court's refusal to accept statements made by counsel in a prior summary judgment brief as judicial or evidentiary admissions was proper? (A0287-A0288).

B. Standard of Review

Evidentiary rulings by the trial judge are reviewed under an abuse of discretion standard. *Barrow v. Abramowicz*, 931 A.2d 424, 429 (Del. 2007).

C. Merits of Argument

ICATech persists in its attempt to pluck statements presented in Facchina's Motion for Partial Summary Judgment and have them treated as incontrovertible judicial admissions on the merits of the case. The trial court properly denied ICATech's pre-trial motion *in limine* regarding these statements, explaining that statements made in summary judgment motions are necessarily tempered by the standard for ruling on such motions: that is, viewing the facts in the light most favorable to the non-moving party. (A0287); *see also*, *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991). As the trial court properly noted, "the Court does not, and should not, pluck those statements from earlier filings and deem them judicial admissions

for the purpose of the trial evidence at this point, and the Court will not." (A0287-A0288).

Instead, the trial court relied upon the direct evidence presented at trial that Facchina was unaware of how the subcontracts had been awarded until after the Closing and that Vazquez did not violate any order in subcontracting the work in any event. The fact finder gave credit to this live testimony over statements made by counsel in a summary judgment brief.

None of the cases cited by ICATech remotely support a contrary result. In *Merritt v. United Parcel Service*, 956 A.2d 1196 (Del. 2008), the statements at issue were formal factual admissions submitted to the fact finder in pre-trial submissions. In *LaRue v. Steel*, 2016 WL 537614 (Del. Super. Ct. Feb. 10, 2016), the statement at issue related to a post-trial admission by a party regarding the issues that were and were not challenged on appeal. In *One Virginia Ave. Condominium Assoc. Towers v. Reed*, 2005 WL 1924195 at *3-4 (Del. Ch. Aug. 8, 2005), the document was a letter by counsel specifically opining on legal matters such as the assessment of condominium association penalties.

Finally, in *EF Operating Corp. v. American Bldgs*., 993 F.2d 1046 (3rd Cir. 1993), the Third Circuit Court of Appeals reviewed the grant of a summary judgment motion that was based, in part, upon the non-moving's party factual admissions as part of the summary judgment proceedings. Even on appeal, the party represented

in its briefs that the fact was not in dispute, but then changed tactics at oral argument. The language quoted by ICATech from the *EF Operating* case stands for the unremarkable proposition that a party cannot essentially stipulate to a fact for purposes of summary judgment motions, persist in this stipulation on appeal and then, at the eleventh hour, attempt to repudiate the accuracy of that stipulated fact.

After the denial of its motion *in limine*, ICATech was given the full opportunity during the trial to question Facchina regarding the statements. (A1578-A1581). However, ICATech was unable to elicit the desired responses from Facchina, and the trial judge ultimately credited Facchina's actual trial testimony rather than any statements made by counsel in a summary judgment brief.

IV. There Is No Basis To Impose Punitive Damages Against Facchina.

A. Question Presented

Whether, given ICATech's complete failure to establish any element of its fraud claim, there was any basis for the trial court even to consider punitive damages? (Opinion at 20-44).

B. Standard of Review

Findings of fact are reviewed under the deferential clearly erroneous standard to determine "if they are 'sufficiently supported by the record and are the product of an orderly and logical deductive process'". *Backer, supra.* ICATech incorrectly seeks to apply a *de novo* standard of review in an effort to supplant the trial court's factual determinations.

C. Merits of Argument

ICATech failed to prove even a single element of its fraud claim. Accordingly, there is no basis for an award of any damages, much less punitive damages. ICATech's request for a remand on the issue of punitive damages is based solely on its assertions that Facchina intentionally engaged in an elaborate scheme to conceal information from ICATech and then gave false testimony at trial to cover up his actions. As the trial court concluded, ICATech failed to prove each element

of its fraud claim and ICATech presents no legal basis for revisiting this issue on appeal.

CONCLUSION

ICATech's appeal is nothing more than a veiled attempt to reargue the facts of the case under an improper *de novo* standard of review. The trial court's factual determinations are fully supported by the record and not clearly erroneous. Accordingly, for all the reasons set forth herein, ICATech's appeal should be denied and the judgment of the trial court affirmed.

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Dated: July 8, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ICATECH CORPORATION AND EMPRESAS ICA, S.A.B. DE. C.V. Defendants and Counterclaim Plaintiffs-Below, Appellants, v. PAUL V. FACCHINA, SR., individually and as Sellers' Representative, Plaintiff and Counterclaim Defendant-Below, Appellee.	No. 121, 2021 Court Below: Superior Court of the State of Delaware C.A. No. N17C-09-163 PRW CCLD CONSOLIDATED

CERTIFICATION OF WORD COUNT

Pursuant to Rules 13(a) and 14(d) of the Supreme Court of Delaware, I certify that the accompanying Appellee's Answering Brief of Counterclaim Defendant Below, Appellee Paul V. Facchina, Sr., which was prepared using Times New Roman 14-point typeface, contains 9,836 words. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 8th day of July 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellee's Answering Brief has been served upon the following counsel on via File & ServeXpress on July 8, 2021:

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