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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

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This case involves fraud in a major corporate acquisition of privately owned companies. Facchina victimized ICATech by intentionally concealing facts that would have revealed the falsity of Representations and Warranties (hereinafter "Representations") that were central to ICATech's decision to acquire the Facchina Companies.[1] Events at the Grove, the Companies' most costly and structurally challenging project, rendered these Representations false, and Facchina hid those events from ICATech.

The Trial Judge ignored the indisputable falsity of three bedrock corporate representations (Business in the Ordinary Course and Consistent with Past Practice, Suffered No MAE,[2] and Listed All Material Contracts) made in the Purchase and Sale Agreement ("PSA") and allowed Facchina to evade liability through findings of fact based on Facchina's self-serving and false testimony. The Trial Judge failed to reconcile the inconsistencies between (1) his own findings and Facchina's

[1] "Facchina Companies" refers to the companies purchased by ICATech from Facchina. All undefined terms have the same meaning as defined in Appellants' Opening Brief (ID 66667269) ("OB").

[2] The PSA's definition of a Material Adverse Effect MAE lists two distinct MAE categories. Facchina's Answering Brief complains that ICATech left out the second category that addresses effects that impair the ability to timely consummate a transaction. But the second category did not figure into Facchina's fraud. It was the first prong that triggered an obligation to report Vazquez's breaking up the concrete at the Grove.

testimony, (2) Facchina's testimony and the factual statements made to the court by his counsel, and (3) the documentary evidence and Facchina's testimony.

Facchina made virtually no effort at trial or here to establish that his Representations were actually true, even though he had agreed that the truthfulness of his Representations was a condition precedent to the purchase of his companies by ICATech. The Trial Judge simply ignored the falsity of Facchina's Representations and failed to make any finding as to their truthfulness. Such an approach to the falsity of representations that resulted in a $56.4 million loss cannot be sanctioned under Delaware law.

Delaware law imposes an absolute requirement of truthfulness in representations on which the business community relies. The Trial Judge's decision threatens the sanctity of this protection and falls far short of meeting the logical, deductive process standard applied by the Supreme Court in reviewing findings after a nonjury trial.

II. ARGUMENT

A. *Falsus in uno, falsus in omnibus*: Facchina's Answering Brief Repeatedly Misrepresents the Record.

On matters large and small, the Answering Brief[3] includes demonstrably untrue statements. We address these below.

1. Facchina tells the Court that FCF[4] routinely broke up its concrete work. (AB at 31). This is the same lie Facchina told repeatedly at trial. (A1527 at 54:5-13; A1582 at 23:9-18; A1617 at 164:22-A1618 at 165:3).

The Trial Judge found FCF consistently awarded the concrete work to a single subcontractor because that was FCF's operational policy, adopted at its creation. (Opinion 21). The Grove was the exception. Tellingly, Facchina never identified any other project where FCF awarded the concrete work to more than one subcontractor. In contrast, as shown by ICATech, the documentary evidence proved that, after the Grove, FCF never took another project where the concrete work was awarded to more than a single contractor. (OB at 18). ICATech called out Facchina's false testimony in this regard in its post-trial briefs, but the Trial Judge ignored that fact, allowing Facchina to persist in making this false statement here. (A1989-90). Instead of acknowledging that Facchina did not testify truthfully, the Trial Judge credited Facchina's misrepresentation by finding that the three concrete

[3] Appellee's Answering Brief (ID 66751421) ("AB").

[4] "FCF" refers to Facchina Construction of Florida.

subcontracts awarded at the Grove was fewer than had been awarded in previous FCF projects that were comparable to the Grove. (Opinion 24). This finding is contradicted by the Trial Judge's earlier finding that FCF "consistently followed this policy of assigning the concrete work to a single subcontractor until the Grove project" and the substantial evidence compelling that finding. (Opinion 21).

Facchina made essentially the same false statements in his post-trial briefing. (AR0022-24; AR0112).[5]

2. Facchina falsely states that ICATech presented no evidence to contradict his testimony that the Facchina Companies commonly broke up their concrete packages on projects in Maryland, Northern Virginia, and Washington D.C. (AB at 8).

ICATech's post-trial briefs cited substantial evidence contradicting Facchina's testimony (A1988-89; A2035-36; A2058-59 and A2083) which revealed that Facchina intentionally misled the Trial Judge.

Facchina made essentially the same false statement in his post-trial briefing. (AR0130).

Facchina compares FCF to FCCI to support his argument that the concrete work could be broken up. But this is sleight-of-hand because FCCI[6] was not a ***general*** contractor. When it broke up concrete work, it did so as a ***sub***contractor,

[5] "AR__" references are to the Appendix to Appellants' Reply Brief filed herewith.

[6] "FCCI" refers to Facchina Construction Company, Inc.

meaning it served as the sole point of contact for a general contractor and then hired ***third-tier*** subcontractors for various purposes. (A0706 and A1652 at 70:1-11). FCF was the only Facchina Company that was a general contractor. (A0706). The other four Facchina Companies were not contractors at all. One provided management services for other Facchina Companies; the other three rented equipment to FCCI. (A0706).

3. Facchina falsely states ICATech presented no evidence controverting that, by "one-stop shopping," he meant that Vazquez should purchase the concrete work in chunks rather than in numerous individual piecemeal packages. (AB at 11).

ICATech pointed to substantial evidence in its post-trial briefs to controvert Facchina's trial testimony. That evidence included Facchina's own deposition testimony, wherein he explained that he told Vazquez to "buy one package, one package, not multiple, one . . . to perform the concrete portion of the contract" because it was Facchina's position that he wanted "one package, just one guy to manage, not two or three or five, whatever it may be, one." (A0173 at 250:19-25; 251:16-19 and A1989-92). The very construct used by Facchina "not two or three or five" demonstrates the vehemence of his instruction and directly contradicts Facchina's argument that "one package" really meant more than one package.[7]

[7] Also, McPherson testified that Facchina was "adamant that all the concrete work should be performed by one subcontractor, not different segments parceled out to various subcontractors" (A1651) and that what Vazquez did was "shocking." (A1681 at 188 11-16).

Facchina made essentially the same false statement in his post-trial briefing. (AR0020, AR0024 and AR0064).

4. Facchina falsely states that ICATech presented no evidence to refute that he knew nothing about the manner in which the concrete packages had been procured on the Grove project prior to 2015. (AB at 13).

ICATech pointed to voluminous evidence proving that Facchina knew how the concrete packages had been procured prior to the PSA's closing in 2014. (*See* OB at 13-15, 21-22, 30-34 and ICATech's post-trial briefs: A1993-94; A2029-30; A2036; A2058-60; A2079-80 and A2083). Facchina's purported reliance on McPherson's belief that Facchina did not know about the various concrete packages is unpersuasive and misplaced. On cross-examination McPherson acknowledged that he did not know when or what Facchina knew about the key events. (A1682).

Facchina made essentially the same false statement in his post-trial briefing. (AR0019, AR0024 and AR0061).

5. Facchina falsely states that ICATech failed to present testimony to establish that Vazquez disobeyed an instruction from Facchina. (AB at 29).

ICATech pointed to Facchina's "not two or three or five, whatever it may be" deposition testimony (A0173), Facchina's counsel's unequivocal statements,[8] and

[8] "[Facchina] and McPherson expressly instructed Vazquez not to break up the concrete work. Nonetheless, Vasquez, behind their backs and without their knowledge, did precisely that. Vasquez proceeded to break up the concrete work. Breaking up

the testimony of McPherson who testified that he and Facchina "had been adamant that all the concrete work should be performed by one subcontractor, not different segments parceled out to various subcontractors" and described Vazquez's actions in breaking up the concrete work as "shocking." (A1651; A1681 at 188:11-16). Facchina made essentially the same false statement in his post-trial briefing. (AR0020, AR0024, AR0027 and AR0064).

6. Facchina falsely states, in bold print, that ICATech presented no evidence whatsoever to rebut his testimony that he had zero involvement in the creation or preparation of the GMP estimates or the GMP Amendment and only reviewed them for the first time just prior to the trial. (AB at 24).

The Trial Court found that Facchina reviewed and commented on the GMP estimates and approved the GMP Amendment. Evidence cited by the Trial Judge and in ICATech's post-trial briefs supports these findings. (A1993-94). Facchina made essentially the same false statement in his post-trial briefing. (AR0023-24; AR0119 and AR0128-29).

Facchina remained involved and concerned about the concrete thereafter. In January of 2014, Facchina directed a review of the engineering involved with the concrete's interface with the steel structure. (A1589 at 50:6-52:23).

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the concrete work, all by itself, turned the job into a nightmare of huge delays and cost overruns." (A0086-87) (citations omitted).

7. Twice, Facchina falsely states that ICATech presented "no evidence whatsoever on [the] issue" of whether the Grove's concrete subcontracts were not in the data room and did not produce any evidence disputing the authenticity of the screenshots. (AB at 34-35).

ICATech's post-trial briefs pointed out that Carpenter personally prepared Supplemental Schedule 2.12(b) to list the contracts that were in the data room ***prior to Closing***; that none of the Grove's concrete subcontracts was on the Schedule; and that, if they had been in the data room, Carpenter would have listed them. (A2000, A2007-2010). Carpenter explained how she carefully listed all of the contracts in the data room prior to Closing, because she knew how important it was "to accurately reflect what was in the data room." (A0310 at 43:1-22 and A0315 at 64:2-19). All of this testimony was un-contradicted.

The evidence elicited on Laputka's cross examination (Facchina's lawyer, who sponsored the screenshots) established that she had neither the knowledge nor understanding required to authenticate them or to even establish that they reflected what was in the data room prior to closing. She admitted that the screenshots were taken years after the Closing and that the file folders shown in the screenshots had been modified years after the Closing, possibly by adding something to the folders. (A1936:15-A1937:13). It is hard to imagine more damning evidence than Laputka's testimony in regard to the exhibits' authenticity.

Facchina made essentially the same false statements in his post-trial briefing. (AR0032; AR0135).

8. Facchina falsely states that Vazquez awarded the concrete work to only three subcontractors. (AB at 29).

The concrete work was awarded to five subcontractors: Morrow, Capform, Cemex, C&C, and Titon. (A0526; A1994 and A2038). But whether the award was to "three or five, whatever it may be," the fact is that it violated Facchina's edict and FCF's policy. Facchina made the same false statement in his post-trial briefing. (AR0024-25, AR0061).

9. Facchina falsely states that ICATech failed to challenge the findings that the evidence does not show that the Grove concrete subcontracts were broken up in a concerning manner or that Vazquez did not follow Facchina's instructions regarding the Grove's concrete work. (AB at 27-28).

ICATech's Opening Brief challenges those findings and cites substantial evidence demonstrating their inaccuracy, including the trial testimony of McPherson, who witnessed and confirmed the instruction, and statements by Facchina's counsel that Facchina was "adamant that all the concrete work should be performed by one subcontractor, not different segments parceled out to various contractors," and that "breaking up the concrete, all by itself, turned the job into a nightmare of huge delays and cost overruns." (OB at 21-22 and 33). Facchina made essentially the same false statements in his post-trial briefing. (AR0020, AR0024, AR0027 and AR0061-62).

10. Facchina falsely states that ICATech called Charles McPherson to testify and that he should therefore be treated as ICATech's own witness, to discount the credibility of any testimony unfavorable to Facchina and enhance the credibility of any testimony unfavorable to ICATech. (AB at 9, 22, 23 and 31).

ICATech did not call McPherson. FCCI/Travelers called McPherson as its lead witness. (A1618 at 166:15-16). Ultimately, who called McPherson is of limited evidentiary value, but Facchina's pattern of falsehoods is clearly intentional. Facchina made the same false statements in his post trial briefing. (AR0115, AR0117-118, AR0142; AR0191).

11. Facchina falsely states that ICATech amended its original answer and counterclaim to Facchina's lawsuit eight months later to include the fraud claim at issue here, implying that ICATech's fraud claim was an afterthought. (AB at 7).

ICATech's original counterclaim pleaded fraud; ICATech later amended its counterclaim to claim entitlement to the escrow fund. (IDs 61292960 (A0002) and 62115135 (A0010)).

B. The Trial Judge's Opinion Does Not Meet the Supreme Court's Standards.

Appellee concedes, as he must, that a trial court's findings of fact and evidentiary rulings are not entitled to deference unless they are the result of an orderly, logical, deductive process and based on competent evidence. *See Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972); *see generally, duPont v. duPont*, 216 A.2d 674 (Del. 1966); *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255 (Del. 2007). "An appeal from a decision of the Superior Court sitting without a jury is an appeal upon both the law and the facts. [The Supreme Court has] the duty, not only to review the evidence in search of factual support for the findings below, but also for the purpose of testing the propriety of those findings." *duPont*, 216 A.2d at 680.

Here, the Trial Judge's failure to "assess or take into account the facts undercutting the conclusion that the court ultimately reached" and to provide reasons to support his findings, leaves the Supreme Court without any basis to conclude that the Trial Judge's findings were the product of an orderly, deductive process. *See Seaford Golf*, 925 A.2d at 1264. Under such circumstances, and when justice so requires, the Supreme Court has a duty to make its own factual findings based upon the actual evidence and set aside clearly erroneous findings.

C. Facchina Defends the Trial Judge's Opinion By Misrepresenting Delaware Law.

Despite having properly described the legal elements for proving fraud under Delaware law (AB at 17-18), Facchina begins his defense by misstating all but the last of those elements in the following description of what ICATech allegedly had to prove in order to prevail:

> (1) that Facchina knew prior to the ICATech Closing that the concrete work at the Grove 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 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.

(AB at 21-22).

Facchina again ignores, as did the Trial Judge, that the Representations were actually false. The accurate description of what ICATech had to, and ***did***, prove is:

(1) The representations made by Facchina in Section 2.6 (i) and (v) and Section 2.12 (b) of the PSA were false. (OB at 25-28).

(2) Facchina knew the representations were untrue or made them with a reckless indifference to the truth. (OB at 30-34).

(3) Facchina Intended for ICATech to rely on his representations. (OB at 35-36).

(4) ICATech justifiably relied on Facchina's representations. (OB at 37-38).

(5) ICATech suffered causally related damages as a result of being fraudulently induced by Facchina to buy his companies. (OB at 39-40).

D. Facchina Cannot Avoid the Adverse Impact of the Trial Judge's Findings That Facchina Reviewed the Grove's Estimates and Approved the GMP Amendment.

There are only two Grove estimates in the record, dated May 1, 2013 and May 15, 2013. (A0522-29). The Trial Judge found that "Mr. Facchina reviewed the estimates and made many comments about the structure. The steel and concrete portions of the structure were with[in] Mr. Facchina's area of expertise." (Opinion 22). The Trial Judge's finding (supported by two exhibits and McPherson's testimony) clearly referred to these two estimates. These facts are fatal to Facchina's feigned ignorance that the concrete work at the Grove had been broken up among multiple subcontractors because that fact was obvious from the estimates themselves.

Without record evidence to attack the Trial Judge's finding, Facchina contends that the finding referred to some documents that were not in the record. (AB at 24-27). But findings of fact must be based on evidence in the record. *See Nardo v. Nardo*, 209 A.2d 905, 911-12 (Del. 1965). Moreover, the Trial Judge could only have been referring to the estimates in the record since he could not know whether some other estimates contained steel and concrete portions, as described in the second sentence of the Trial Judge's finding about Facchina's review of the estimates, quoted above. Facchina omitted this sentence from his argument.

Finally, Facchina argues that the finding should be disregarded because the only evidence cited by the Trial Judge to support it was a March 4, 2016, email from McPherson. (AB at 25). However, McPherson was questioned about this email at trial. (AR0001-6). The relevant portion of McPherson's email stated: "He reviewed the estimate and made many comments about the structure, which was our primary problem on the job." (A1665 at 124:6-16; AR0003).

On direct examination, McPherson made clear that the "he" referred to in his email was Facchina. Significantly, on cross examination, counsel for Facchina asked McPherson many questions about this email, but none dealt with Facchina's review of the Grove estimate. Presumably counsel wanted to avoid further impairment of Facchina's trial strategy of denying he knew anything about the Grove's estimates since they showed the concrete work had been broken up. (A1678 at 173:14-1680 at 181:5).

The Trial Judge also found that Facchina approved the GMP Amendment, which itself was based on the same estimates that showed the various concrete packages and their respective costs. (Opinion 22). And McPherson's trial testimony explains the direct connection between the documents. (A1653 at 75:10-12) (McPherson confirmed "the estimate feeds into the guaranteed maximum price"). Facchina argues that this finding was based only on evidence related to his early consideration of allowing Vazquez to pursue the Grove. (AB at 26). However, the

estimates were from May of 2013, and there was no conditional bond to give Facchina "great comfort" until May 30, 2013, when the price was set and the bond was included in the GMP Amendment, as the Trial Judge found. (Opinion 22; A1322). McPherson testified that Vazquez had to provide the GMP Amendment to Facchina for his review and approval. (A1655 at 81:6-82:14) (McPherson confirmed "[we] weren't going to take a $130 million project without Paul [*i.e.*, Facchina] saying it was okay."). The Trial Judge clearly credited McPherson's testimony by finding that Facchina approved the GMP Amendment and rejected Facchina's testimony to the contrary.

E. Facchina's Argument That He Did Not Intend for ICATech to Rely on His Representations Has No Merit and the Trial Judge's Acceptance of Facchina's Argument Imperils Black Letter Delaware Law.

It is axiomatic that a seller's representations and warranties about his companies are intended to induce the purchaser to buy them. Accepting Facchina's illogical argument would turn decades of M&A law on its head and diminish Delaware's status as a staunch defender of the need for absolute candor in such dealings. Moreover, Facchina specifically recognized and agreed in the PSA that the truthfulness of his Representations was a ***condition precedent*** to ICATech's obligation to buy his companies. (A0656 § 5.1).

F. ICATech Justifiably Relied on the Representations Made by Facchina in the PSA.

In contending that ICATech did not justifiably rely on Facchina's Representations, Facchina ignores the language of the PSA memorializing Facchina's agreement that the truthfulness of his Representations was a condition precedent to ICATech's obligation to close. Quintana, the CFO of ICATech, also testified that ICATech relied on the truthfulness of Facchina's Representations to make its investment decision because the Facchina knew his companies far better than ICATech. (A1853-54; A1858).

Instead of explaining how the PSA's terms and Quintana's testimony failed to prove that ICATech relied on the truthfulness of Facchina's Representations, the Trial Judge simply stated that ICATech "has failed to prove its actual reliance on any false statement or any omissions made by Mr. Facchina." (Opinion 44). The Trial Judge made no finding regarding whether ICATech's reliance was justifiable, but it plainly was. As of Closing, ICATech had no reason to doubt Facchina's veracity. The Trial Judge's truncated finding is supported by no explanation or analysis showing that it was the product of a logical, deductive process. Accordingly, it is entitled to no deference.

Facchina's meandering argument about what ICATech would have done if it had known the truth about Facchina's false Representations has no relevance to whether or not ICATech justifiably relied on their truth. Moreover, the falsity of the

representation about Schedule 2.12(b) had little to do with the data room. Facchina represented that the Schedule was true and complete; the contents of the data room were not the subject of any representation. And Schedule 2.12(b), as supplemented prior to closing, was undisputedly false and incomplete.

The data room is only relevant to Facchina's effort to prove that ICATech knew that the Schedule was false, which rendered any reliance unjustified. The Trial Judge made no such finding. More importantly, no matter the content of the data room, there is ***no evidence*** that ICATech actually knew the Schedule to be false or that it was a piece of a larger fraudulent scheme.

Furthermore, even if Schedule 2.12(b) had been true, or there had been evidence that ICATech somehow knew how the concrete work had been awarded, ICATech still would not have known that the breaking up of the concrete work violated ***both*** FCF's own strict operational policy and its past practice ***as well as*** the express instructions of both Facchina and McPherson.[9] (*See* Opinion 22). Facchina's false Representations in Section 2.6(i) and (v) of the PSA concealed that knowledge from ICATech.

[9] Vazquez's malfeasance was itself a material fact that should have been disclosed, given his importance to the transaction.

Finally, in Section 11.4 of the PSA, Facchina agreed that no information obtained or obtainable from ICATech's due diligence review could limit, qualify, modify, or amend his representations. (A0667).

G. ICATech Proved That It Lost $56.4 Million As a Result of Having Been Fraudulently Induced by Facchina to Buy His Companies.

ICATech did not, as Facchina alleges, claim that the Grove project was irrelevant to its claim for damages. (AB at 38). Instead, ICATech pointed out that losses at the Grove were incurred by FCF, not ICATech, well ***after*** Facchina had defrauded ICATech into paying $56.4 million. That payment is the causally-related damage suffered by ICATech because of Facchina's fraud.

Facchina argues that ICATech failed to prove that its losses were "caused by the 'materialization of the concealed risks.'" (AB at 39). While beyond the standard,[10] that is exactly what ICATech did. ICATech demonstrated in its post-trial and opening briefs that Facchina knew when he approved the GMP Amendment that Vazquez had wrongfully broken up the concrete work at the Grove and that "Vazquez could not be trusted to follow company policy or to obey his employer's instructions, even on matters that would put the company at substantial risk of loss." (OB at 4; A2004). Nevertheless, Facchina "allowed Vazquez to continue as FCF's President, despite his disobedience, [knowing that it] could lead to financial disaster." Facchina concealed this information from ICATech until long after the Facchina Companies had become worthless. (A2004; A2085-86; OB at 27).

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[10] *See In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013), quoting Restatement (Second) of Torts § 549 (1977)) ("'The recipient of a fraudulent misrepresentation is entitled to recover as damages . . . pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.'").

Facchina faults ICATech for not having sought rescission. ICATech was deprived of the right to seek rescission because Facchina successfully concealed his fraud until after the Facchina Companies' assets had been seized by their creditors, rendering them worthless.

Facchina continued to conceal his fraud while serving as FCCI's Chairman even though the Grove became the biggest problem faced by the Facchina Companies. (OB at 19-20, 52-53). *See Bamford v. Penfold*, 2020 WL 967942, at *19 (Del. Ch. Feb. 28, 2020) ("A director or senior executive owes a duty to the corporation not only to avoid…misstatements and omissions, but affirmatively to disclose material facts known to the director or senior executive.").

Under these circumstances, justice and fairness require that Facchina be held liable for the damages sustained by ICATech as result of being fraudulently induced to pay Facchina $56.4 million. Anything less rewards Facchina for his fraud and concealment and does not fully compensate ICATech.

To defeat ICATech's entitlement to damages, Facchina lists a number of problems faced by the Facchina Companies in 2015 and 2016, arguing that they actually caused the Facchina Companies to become worthless. The Trial Judge made no such finding. The Facchina Companies undisputedly became defunct when they ran out of cash eight months later in August of 2016 and Travelers discovered a $41 million deficit on the companies' existing projects. The majority of this $41

million deficit related to FCF's projects, including the Grove. (A1827:18-1829:10; A1831:1-5). Both Facchina and the Trial Judge ignored this undisputed evidence.

There is no evidence in the record that ICATech wrongfully caused any damage to the Facchina Companies. ICATech had every incentive for the Companies to succeed. Nevertheless, Facchina asserts, as did the Trial Judge, that the default by ICATech's parent on a billion-dollar bond, which caused Travelers to stop providing new bonds for FCCI in November of 2015, was a death knell for the Facchina Companies. It was not. There is no record evidence showing that the default by ICATech's parent constituted a default with respect to the Facchina Companies' sureties or creditors. By March of 2016, the Facchina Companies had replaced Travelers with Berkshire Hathaway. There was no evidence of any lost business in the interim. (A1687 at 211:15-22). Indeed, FCCI obtained four new projects and additional financing of $4.5 million from SunTrust after Berkshire Hathaway replaced Travelers. (A1691 at 225:16-21; A1693 at 235: 7-9). Both Facchina and the Trial Judge ignored these facts.

The death knell for the Facchina Companies occurred when they ran out of cash in August of 2016, causing their sureties to seize their project revenues after discovering that the Facchina Companies faced a $41 million deficit on those projects. The majority of the $41 million deficit existed on projects for which Vazquez was responsible. Simply put, Vazquez's projects were the major reason

that the Facchina Companies were taken over by their sureties and became worthless.

H. Statements of Fact by Facchina's Counsel to the Trial Court Were Judicial Admissions.

Facchina seeks to avoid the Delaware authorities cited by ICATech because those authorities did not involve statements of fact made by counsel in seeking summary judgment, but the Supreme Court's principle is clear: "Voluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g.,* statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; ***counsel's statements to the court***) are termed "judicial admissions." *Merritt v. United Parcel Serv.,* 956 A.2d 1196, 1201 (Del. 2008) (emphasis added; citation omitted). And judicial admissions are "considered conclusive and binding both upon the party against whom they operate, and upon the court." *Id.* at 1201–02.

Notably, Facchina does not deny that his counsel made statements of fact in summary judgment briefing that he completely controverted at trial. He did so even though his counsel had represented, in effect, to the Trial Judge and ICATech that these material statements of fact could not be genuinely disputed. Rather, Facchina argues that the Trial Judge was entitled to credit his self-serving trial testimony over his counsel's prior factual statements to the court (statements of fact that ICATech relied on) because, on summary judgment, facts must be viewed in the light most favorable to the non-moving party. This makes no sense, and the sole case Facchina cited in support of its point simply confirms that Delaware courts adopted the

summary judgment standard in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). (AB at 41). Moreover, the Trial Judge provided no explanation or rationale for not treating these knowing voluntary concessions of fact made in the statements of fact by Facchina's counsel to the court during this judicial proceeding as judicial admissions pursuant to *Merritt. See Merritt,* 956 A.2d at 1201.

Not surprisingly, Facchina cites no authority holding that unequivocal factual statements made by counsel in a summary judgment brief should not or cannot be judicial admissions. Where, as here, Facchina's counsel's statements were based on Facchina's and McPherson's sworn deposition testimony to define the facts in this litigation, the court must treat them as judicial admissions to protect the integrity and efficiency of the judicial process in Delaware. A judicial admission is "'not merely another layer of evidence, upon which the . . . court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case.'" *BE & K Eng'g Co., LLC v. RockTenn CP, LLC*, 2014 WL 186835, at *7 (Del. Ch. Jan. 15, 2014) (citations omitted).

Moreover, Facchina's statement that "ICATech was given the full opportunity during the trial to question Facchina regarding the statements" (AB at 43) is not true. The Trial Judge cut off counsel for ICATech shortly after he began questioning Facchina about the divergence of his testimony from his counsel's prior factual

representations on the grounds that Facchina did not write the statements of fact submitted by his counsel. (A1583 at 28:4-14).

The Trial Judge's acceptance of Facchina's self-serving trial testimony, and his failure to treat his counsel's statements of fact as judicial admissions or even to ***consider*** those factual statements as evidence that contradicted Facchina's testimony, were abuses of discretion and legal errors materially affecting the result.

III. CONCLUSION

This case centers on false Representations made in the sale of a business. The truthfulness of those Representations was a condition precedent to closing the sale. Facchina's failure to tell the truth about the breaking up of the concrete work at the Grove by Vazquez caused multiple Representations to be false because they concealed that (1) Vazquez violated the operational policy consistently followed by FCF on every project, except the Grove, of awarding its concrete work to a single subcontractor; (2) Vazquez disregarded the conditions established by Facchina when he authorized pursuit of the project; and (3) breaking up of the concrete work under these circumstances on FCF's most costly and structurally challenging project resulted in FCF suffering an MAE. Facchina made virtually no effort to show that his Representations were true, and the Trial Judge ignored the evidence proving they were false. As pointed out in ICATech's Opening Brief and herein, the Trial Judge's key findings were not supported by any logical deductive analysis of the evidence, as required by the Supreme Court. Consequently, they are entitled to no deference.

Allowing the Trial Judge's Opinion to stand would provide a pernicious precedent undermining the sanctity of the truthfulness of representations in corporate acquisitions and violating the standards to which trial judges are held with respect to their opinions in Delaware.

The judgment of the Trial Judge against ICATech should, therefore, be vacated and judgment entered in favor of ICATech for $56.4 million and the case remanded to the Trial Judge for further proceedings, consistent with the decision herein, for the assessment of pre- and post-judgment interest, costs, and appropriate punitive damages in favor of ICATech.

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