EFiled: Jul 09 2021 04:05PM EDT
Filing ID 66751072
Case Number 160,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TOMER HERZOG and DANIEL KLEINBERG, Defendants Below, Appellants/Cross-Appellees, v. GREAT HILL EQUITY PARTNERS IV, LP, GREAT HILL INVESTORS LLC, FREMONT HOLDCO, INC., and BLUESNAP, INC. (F/K/A PLIMUS), Plaintiffs Below, Appellees/Cross-Appellants.	No. 160,2021 Case Below: Court of Chancery for the State of Delaware C.A. No. 7906-VCG

DEFENDANTS BELOW, APPELLANTS/CROSS-APPELLEES' OPENING BRIEF

Of Counsel:

K&L GATES LLP
Joanna A. Diakos
599 Lexington Avenue
New York, NY 10022-6030

David R. Fine
Market Square Plaza
17 North Second Street
18th Floor
Harrisburg, PA 17101

Dated: July 9, 2021

MORRIS JAMES LLP

Lewis H. Lazarus (#2374)
Bryan Townsend (#5538)
500 Delaware Avenue, Suite 1500
P. O. Box 2306
Wilmington, DE 19801-1494
302.888.6800
llazarus@morrisjames.com
btownsend@morrisjames.com

Attorneys for Defendants Below, Appellants/Cross-Appellees Tomer Herzog and Daniel Kleinberg

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

NATURE OF PROCEEDINGS

This is a simple, narrow appeal from a distinct issue arising at the conclusion of a complex case.

Appellee/Cross-Appellant Great Hill alleged that Appellants Tomer Herzog and Daniel Kleinberg (the "Founders") aided and abetted an extensive fraud related to the sale of a business they founded that was then known as Plimus.[1] While Great Hill levied a host of allegations against the defendants, the gravamen of their complaint and their focus in the litigation was on Great Hill's claim that several defendants defrauded it and that the Founders aided and abetted and conspired in that fraud by allegedly promising to pay Plimus' then-CEO, Hagai Tal, "hush money" to rollover his equity and hide his alleged lack of confidence in Plimus' future.

After nearly a decade of hard-fought, expensive litigation culminating in a 10-day trial in which Great Hill sought more than $122 million in damages, the Court of Chancery rejected Great Hill's claims against the Founders (and most of the other selling stockholders) and determined that the Founders were only liable to pay their

[1] There are actually a number of appellees/cross-appellants: Great Hill Equity Partners IV, LP; Great Hill Investors LLC; Fremont Holdco, Inc.; and BlueSnap, Inc. (f/k/a Plimus). This brief will refer to them collectively as "Great Hill."

pro rata share of credit card excessive chargeback fines totaling $12,255.74, plus prejudgment interest.

The parties' Merger Agreement (and Amended Merger Agreement) included a fee-shifting provision in favor of parties prevailing in litigation such as this:

> **Section 12.10** ***Prevailing Party***. If any litigation or other court action, arbitration or similar adjudicatory proceeding is commenced by any party hereto to enforce its rights under this Agreement against any other party, all fees, costs and expenses, including, without limitation, reasonable attorneys' fees and court costs, incurred by the prevailing party in such litigation, action, arbitration or proceeding shall be reimbursed by the losing party; provided, that if a party to such litigation, action, arbitration or proceeding prevails in part, and loses in part, the court, arbitrator or other adjudicator presiding over such litigation, action, arbitration or proceeding shall award a reimbursement of the fees, costs and expenses incurred by such party on an equitable basis.[2]

In context and read as a reasonable, objective third party would read it, the fee provision requires a court to award attorneys' fees, costs and expenses to a prevailing party and, if that party does not prevail on every point, the court is required to award attorneys' fees, costs and expenses on an equitable basis. To read the provision

[2] Merger Agreement § 12.10, A193. Because parts of the Merger Agreement are subject to a confidentiality agreement, the Founders include in the appendix only the page that contains the prevailing-party provision. The Merger Agreement and the Amended Merger Agreement ("AMA") contain the identical prevailing party provision. *Compare* Merger Agreement § 12.10, A195 to AMA § 12.10, A193. The Founders refer to the Merger Agreement and the Amended Merger Agreement interchangeably in this brief, as did the trial court.

otherwise is to ignore the parties' repeated use of the word "shall" and meaning of "prevailing party" both in common parlance and under Delaware law.

But when the Founders (and other prevailing defendants) filed a post-trial motion for awards of fees, costs and expenses, the Court of Chancery misinterpreted the provision and, believing itself authorized to decide the fee issue with broad discretion, refused to award any fees, costs or expenses to the Founders. That was error.

The Founders ask this Court to vacate the Court of Chancery's December 31, 2020, judgment with respect to attorneys' fees, costs and expenses and enter an award in the Founders' favor or remand the case to the Court of Chancery with instructions for that court to award the Founders their fees, costs and expenses reasonably calculated in light of the significant extent of the Founders' success. In addition, the Founders should also be awarded the reasonable attorneys' fees, costs and expenses they incurred following the court's fee decision, including those incurred in connection with this appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred when it interpreted Section 12.10 of the Amended Merger Agreement's reference to "on an equitable basis" to allow it broad discretion to refuse to award attorneys' fees, costs and expenses to the Founders when—

a. the Founders were plainly prevailing parties both as a matter of common understanding of that term and under Delaware law in that they prevailed on the chief claims Great Hill raised against them, particularly when the record is reviewed on a party-specific basis, as the Court of Chancery was required to do;

b. the Amended Merger Agreement mandates that the court "shall" award attorneys' fees, costs and expenses to a prevailing party, even one that did not prevail on every issue;

c. in context, the requirement that the court award fees, costs and expenses to a party that did not prevail on all issues "on an equitable basis" means that the award is mandatory but the amount should reflect the extent of the party's success.

2. In light of its own determinations regarding liability and damages, the Court of Chancery should have awarded the Founders their attorneys' fees, costs and expenses on an equitable basis that reflected their overwhelming success in the case.

3. Even if the Court of Chancery had discretion to deny fees, it abused its discretion in doing so given the Founders' overwhelming success on the principal claims in the case.

STATEMENT OF FACTS

A. Factual Background

Because this appeal focuses on the Court of Chancery's attorneys' fee determination rather than on its merits or damages decisions, the Founders will draw most of the following background from the Court of Chancery's opinions on liability and on damages and assume as correct its findings and legal conclusions. In its 153-page decision on liability issues, the Court of Chancery described its findings as "a full plate of facts."[3] While the Court of Chancery's lengthy recitation was necessary to its resolution of the plaintiffs' many claims, the Founders below provide only the necessary highlights.

In 2002, Messrs. Herzog and Kleinberg founded Plimus, a company that facilitated transactions between online retailers of digital goods and credit card holders.[4] Plimus acted as an online reseller. It had a group of online merchants it worked with and, when a retail buyer made an online purchase from one of those merchants, Plimus would constructively "acquire" the product from the merchant and then receive payment for the merchant from one of a group of payment processors with whom Plimus had contracts.[5] Plimus did not physically acquire the

---

[3] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829 at *1 (Del. Ch. Dec. 3, 2018) (the "Liability Opinion").

[4] Liability Opinion, 2018 WL 6311829 at *2-*3.

[5] Liability Opinion, 2018 WL 6311829 at *1.

product; the online merchant would actually deliver the product to the retail buyer.[6] The payment processors would then obtain payment from credit-card companies and banks with whom they had contracts.[7] Plimus' business model was attractive to online merchants, who gained access to payment processors and credit-card companies, and to the payment processors, who gained access to a large number of retailers but only had to deal with a single reseller: Plimus.[8]

Plimus' business required that the merchants it dealt with provide satisfactory products. If they did not, buyers would make claims to their credit-card companies for "chargebacks," a form of cancellation of debt for fraudulent or misrepresented products.[9] The credit-card companies would then assess contractual "fines" on the payment processors, and the payment processors would look unfavorably on the resellers who connected them with merchants who engendered those chargebacks.[10]

Plimus was initially successful. Between its founding in 2002 and 2010, it had significant revenue growth.[11]

---

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.,* 2018 WL 6311829 at *2.

In November 2010, Plimus' CEO and board of directors decided to engage an investment banker to assist with a formal process to sell the business.[12] Plimus engaged Raymond James, who worked with Plimus management to prepare "marketing" materials, including what is known as a "confidential information memorandum" that provided, among other things, financial information about Plimus.[13]

Great Hill, a private equity firm that managed billions of dollars in capital, showed interest in Plimus, as did a number of other potential buyers.[14] After a lengthy process in which it obtained significant information about Plimus, Great Hill was the only suitor to make a final bid to acquire Plimus, and it valued Plimus at $115 million.[15] After conducting due diligence, Great Hill agreed to purchase Plimus for the bid amount, and the Plimus board of directors approved the merger on August 2, 2011.[16]

---

[12] *Id.*, 2018 WL 6311829 at *4.

[13] *Id.*, 2018 WL 6311829 at *5.

[14] *Id.*

[15] Liability Opinion, 2018 WL 6311829 at *5.

[16] *Id.*, 2018 WL 6311829 at *21.

The parties closed on the merger transaction on September 29, 2011.[17] The Amended Merger Agreement included two provisions relevant to this appeal. First, it included a provision by which $9.2 million of the purchase price was held in escrow principally to cover any indemnification claims.[18] Plimus shareholders funded the escrow *pro rata*.[19] Second, the Amended Merger Agreement included a fee-shifting provision:

> **Section 12.10** ***Prevailing Party***. If any litigation or other court action, arbitration or similar adjudicatory proceeding is commenced by any party hereto to enforce its rights under this Agreement against any other party, all fees, costs and expenses, including, without limitation, reasonable attorneys' fees and court costs, incurred by the prevailing party in such litigation, action, arbitration or proceeding shall be reimbursed by the losing party; provided, that if a party to such litigation, action, arbitration or proceeding prevails in part, and loses in part, the court, arbitrator or other adjudicator presiding over such litigation, action, arbitration or proceeding shall award a reimbursement of the fees, costs and expenses incurred by such party on an equitable basis.

After the closing, Great Hill believed Plimus' financial performance was disappointing due to a number of factors, including Plimus' loss of its business relationship with a major payment processor and Plimus' chargeback rate.[20]

---

[17] *Id.*, 2018 WL 6311829 at *22. Great Hill renamed Plimus "BlueSnap" after the transaction closed. *Id.*, 2018 WL 6311829 at *28. The court continued to refer to the company as "Plimus" for simplicity's sake, and the Founders do likewise here.

[18] *Id.*, 2018 WL 6311829 at *27.

[19] *Id.*

[20] Liability Opinion, 2018 WL 6311829 at *7, *17, *29-*30.

B. Procedural Background

1. Great Hill files suit.

Great Hill filed suit in the Court of Chancery on September 27, 2012.[21] Great Hill named a number of defendants and set out a range of allegations centered on the Plimus merger:

- Great Hill alleged that Hagai Tal, Amir Goldman, Jonathan Klahr and Irit Segal Itshayek (the "Fraud Defendants") committed fraud and fraudulent inducement in selling Plimus to Great Hill.[22] Mr. Tal was Plimus' CEO and a member of its board of directors from July 2008 through the merger.[23] Messrs. Goldman and Klahr were also members of the Plimus board.[24] Ms. Itshayek was Plimus' Vice President of Financial Strategy and Payment Solutions.[25]

- Great Hill alleged that the Founders, SIG Growth Equity Fund I, LLLP (the "SIG Fund") and SIG Growth Equity Management, LLC ("SGE"), aided and abetted the fraud alleged against the Fraud Defendants.[26] The SIG Fund had

[21] *Id.*, 2018 WL 6311829 at *31.

[22] *Id.*

[23] *Id.,* 2018 WL 6311829 at *3.

[24] *Id.*

[25] *Id.*, 2018 WL 6311829 at *6.

[26] *Id.*, 2018 WL 6311829 at *31.

purchased a 45 percent stake in Plimus in 2008.[27] SGE managed the SIG Fund and also invested in Plimus through a participating preferred security.[28] In support of the aiding and abetting fraud claim (and conspiracy to commit fraud claim), Great Hill alleged that the Founders had agreed to pay Mr. Tal "blackmail money" to rollover his equity and thereby hide his purported lack of confidence in Plimus' future.[29]

- Great Hill alleged that all defendants, except Donors Capital Fund, Inc. and Kids Connect Charitable Fund (collectively, the "Charities"), were liable for civil conspiracy.[30] SGE had donated preferred shares in Plimus to the Charities.[31]

- Great Hill alleged that all defendants except Messrs. Goldman and Klahr owed Great Hill indemnification for losses related to breaches of certain representations and warranties in the Merger Agreement.[32] The indemnification provision in the Merger Agreement defined Plimus shareholders as "Effective Time Holders" who might be responsible for indemnifying Great Hill.[33] The Effective

---

[27] *Id.*, 2018 WL 6311829 at *2.

[28] *Id.* and n.24.

[29] Plaintiffs' Opening Post-Trial Brief at 67-86, A429-448; Plaintiffs' Post-Trial Reply Brief at 91-102, A679-690; Amended Complaint ¶ 68, A239-240.

[30] *Id.*, 2018 WL 6311829 at *31.

[31] *Id.*, 2018 WL 6311829 at *27.

[32] *Id.*, 2018 WL 6311829 at *31.

[33] *Id.*, 2018 WL 6311829 at *26.

Time Holders' liability was limited by the amount held in the escrow account described above.[34] Great Hill claimed, however, "that, given the alleged fraud, indemnification should not be limited to the escrow fund established by the Merger Agreement, and that liability should attach to all indemnifying defendant[s] regardless of their participation in or knowledge of the alleged fraud."[35]

- Finally, Great Hill asserted an unjust enrichment claim against the Founders, Mr. Tal and Ms. Itshayek, the SIG Fund and the Charities.[36]

As the Court of Chancery noted, what followed was "a large litigation; generous in the scope of its allegations of fraud and contractual breach; broad in its cast of Defendants; deep in its damages claims; extensive in its discovery and preparation; and lengthy in its trial presentation and briefing."[37] In the six-year pretrial period, Great Hill served 354 document requests (excluding subparts) and 690 interrogatories (excluding subparts). The parties retained numerous experts, and there were 59 depositions of fact and expert witnesses. In late 2017, the Court of

---

[34] *Id.*

[35] *Id.*, 2018 WL 6311829 at *31.

[36] *Id.*

[37] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 948513 at *1 (Del. Ch. Feb. 27, 2020) (the "Damages Opinion").

Chancery held a 10-day trial during which 13 witnesses testified and the parties offered more than 2,000 exhibits.[38] Great Hill demanded $122 million in damages.[39]

2. The Court of Chancery rejects almost all of Great Hills' claims and awards only modest damages.

The final results in the Court of Chancery overwhelmingly favored the defendants, particularly the Founders. While Great Hill made extensive allegations of fraud and aiding and abetting fraud and conspiracy to commit fraud, the Court of Chancery's Liability Opinion rejected all fraud-related claims except for one finding of fraud against Hagai Tal, the former Plimus CEO—who was not one of the Founders.[40] The court assessed $200,000 in damages against Mr. Tal for one aspect of that fraud.[41] The Court of Chancery held that Great Hill had not met its burden to prove that the Founders had aided and abetted and/or conspired to commit any fraud.[42] The court first held that most of Great Hill's fraud allegations were unfounded and then held that the Founders did not know or have reason to know of the one instance in which Mr. Tal engaged in fraud.[43] The court rejected Great Hill's

[38] Damages Opinion, 2020 WL 948513 at *2.

[39] *Id.*, 2020 WL 948513 at *14.

[40] Liability Opinion, 2018 WL 6311829 at *51.

[41] Damages Opinion, 2020 WL 948513 at *24.

[42] Liability Opinion, 2018 WL 6311829 at *45.

[43] *Id.*

civil-conspiracy claims for the same reason it rejected the aiding-and-abetting claims.[44] Notably, with respect to the alleged "hush money" or "blackmail payments," the court found that Great Hill "was aware of the Founders Earn-Out dispute and its relationship to Tal's Roll-Over prior to entering into the initial Merger Agreement" and rejected Great Hill's senior executive's testimony to the contrary as "not credible."[45] The court also rejected Great Hill's unjust enrichment claim.[46]

Great Hill alleged that the Founders and other former Plimus shareholders (the "Effective Time Holders") were liable to indemnify Great Hill for four breaches of the representations and warranties in the Merger Agreement.[47] Great Hill argued that, although Section 10.03 of the Merger Agreement capped damages for breaches of representations and warranties at the amount of the $9.2 million escrow fund, they should be able to seek uncapped damages because they alleged fraud.[48] The court

---

[44] *Id.*, 2018 WL 6311829 at *45.

[45] Liability Opinion, 2018 WL 6311829, at *24. Great Hill's senior executive, Matthew Vettel, testified at trial (and in an affidavit he submitted in opposing the Founders' summary-judgment motion) that he had never discussed the earn-out dispute between Mr. Tal and the Founders with SGE's Mr. Goldman and had no knowledge of any such dispute. *See* Defendants' Opening Brief in Support of their Joint Motion for Awards of Fees, Costs, and Expenses ("Defendants' Fee Brief") at 6, n.4, A747; Defendants Tomer Herzog and Daniel Kleinberg's Brief in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs at 2, A833.

[46] Damages Opinion, 2020 WL 948513 at *24.

[47] Damages Opinion, 2020 WL 948513 at *11.

[48] Liability Opinion, 2018 WL 6311829 at *47-*48.

rejected Great Hill's argument.[49] The court held that the Effective Time Holders were liable for only two erroneous representations: one related to credit-card company fines for excessive chargebacks and the other related to a failure to disclose that a payment processor, PayPal, had threatened to end its relationship with Plimus.[50] The court noted that the Founders and the other Effective Time Holders conceded the first point,[51] and also found that the Founders (and other Effective Time Holders) did not even know of the events that gave rise to those breaches.[52] The Effective Time Holders also did not dispute the amount of the excessive chargeback fines, which all agreed was $12,255.74, and which the court ordered to be paid from the escrow account created by the Merger Agreement.[53] The court held that Great Hill's damages evidence regarding the PayPal disclosure was speculative, and it awarded no damages for that claim.[54]

Great Hill levied a host of serious allegations against a number of defendants. After lengthy, hard-fought litigation, it lost almost all of its claims and received a total of less than one percent of the damages it sought. Great Hill's prosecution of

---

[49] Liability Opinion, 2018 WL 6311829 at *48.

[50] Liability Opinion, 2018 WL 6311829 at *47.

[51] *Id.*, 2018 WL 6311829 at *47.

[52] *Id.*, 2018 WL 6311829 at *25.

[53] Damages Opinion, 2020 WL 948513 at *17.

[54] Damages Opinion, 2020 WL 948513 at *20.

its claims against the Founders was even less successful. It alleged that the Founders aided and abetted fraud, that they engaged in a civil conspiracy and that they were liable for uncapped indemnification for breaches of representations and warranties and should disgorge their merger proceeds under an unjust enrichment theory. At the end of the day, the Court of Chancery rejected Great Hill's aiding-and-abetting, civil-conspiracy and unjust-enrichment claims, certain of the breach of representations and warranties claim, and the demand for uncapped indemnification, and imposed on the Founders only their *pro rata* share of the $12,255.74 in excessive chargeback fines, plus prejudgment interest on that amount—an award the Founders conceded and that flowed not from a finding of any wrongful intent but merely from their status as former Plimus shareholders.[55]

3. The parties seek attorneys' fees.

To no surprise, the defendants availed themselves of the Amended Merger Agreement's fee-shifting provision. After the Court of Chancery issued its Damages Opinion, the defendants filed a joint motion for an award of fees under Section 12.10

[55] Damages Opinion, 2020 WL 948513 at *24. In its Damages Opinion, the court noted that the Founders had expressed their intent to move for an award of attorneys' fees and costs under Section 12.10 of the AMA. *Id.* The court invited "any Defendant" who "wishes to move for fees and/or costs under the Merger Agreement" to do so. *Id.* at *24, n.293. The court noted that for "efficiency's sake" it would hold Great Hill's claims for fees and costs in abeyance (under the indemnification provision) and would consider it concurrently with any application by defendants for fees and costs. *Id.* at *24.

of the Amended Merger Agreement.[56] Although the motion was jointly filed, the supporting brief (and declarations) addressed the status of the defendants individually.[57] Thus, the Founders explained that they prevailed on all of the fraud-based claims, unjust enrichment, uncapped indemnification, and claim for breaches of representations in Sections 3.09 and 3.16 of the Merger Agreement and ultimately had to pay only their *pro rata* share of the $12,255.74 indemnification award (plus prejudgment interest) related to chargebacks.[58] The Founders, who are individuals, incurred more than $4 million in legal fees, the vast majority of which went to successfully defending against the fraud-related claims Great Hill asserted.[59] In light of these facts and the Court of Chancery's modest indemnity award, the Founders

[56] Defendants' Fee Brief, A737-A760.

[57] Defendants' Fee Brief, A737-760; Declaration of Joanna A. Diakos in Support of the Founders' Motion for an Award of Fees, Costs, and Expenses (the "Fee Motion"), A761-779; Declaration of Julie Anne Halter in Support of the Fee Motion, A780-790; Declaration of Lewis H. Lazarus in Support of the Fee Motion, A791-807; Declaration of Tomer Herzog in Support of the Fee Motion, A808-817; Declaration of Daniel Kleinberg in Support of the Fee Motion, A818-826.

[58] Defendants' Fee Brief at 9-10, 14-15, A750-751, A755-756; Diakos Decl. ¶¶ 13-14, 21-23, A767-771, A778; Lazarus Decl. ¶¶ 10-11, 17-19, A796-799, A806-807.

[59] *Id.* at 15, A756.

suggested the court award them 95 percent of their fees and costs.[60] The Defendants' Fee Brief relied on Section 12.10 of the Amended Merger Agreement.[61]

Great Hill, despite its manifest loss at trial, also moved for attorneys' fees. In support of its motion, Great Hill relied on two provisions in the Amended Merger Agreement. Great Hill first pointed to Section 10.02(a) of that agreement, a part of the indemnification provision.[62] Great Hill relied as well on Section 12.10.[63] It focused on the proviso to argue that it "prevailed in part" such that the court should award it some part of its fees "on an equitable basis."[64] In its supporting memorandum, Great Hill made no effort to address its success vis-à-vis each defendant. Instead, it lumped them together and included in its fee request what it alleged it spent investigating its claims, opposing pretrial motions, engaging in discovery and participating in the liability phase of the trial—even though Great Hill ultimately lost most of the claims it accrued those fees pursuing.[65] Great Hill asked

---

[60] *Id.* The supporting brief addressed the statuses of the other defendants as well. Since those defendants are not parties to this appeal, the Founders will not discuss their assertions.

[61] AMA § 12.10, A195.

[62] Plaintiffs' Memorandum in Support of Motion for Attorneys' Fees and Costs ("Plaintiffs' Fee Brief") at 7-8, A730-731.

[63] Plaintiffs' Fee Brief at 9, A732.

[64] *Id.*

[65] *Id.* at 11, A734.

the court to award it $18,704,516.68 in fees with half assessed against Mr. Tal (the only defendant who was found to have committed fraud) and the rest divided *pro rata* among the former Plimus shareholders, including the Founders.[66]

4. Despite the requirements of the Amended Merger Agreement, the Court of Chancery refuses to award any fees.

In its opinion resolving the motions, the Court of Chancery first described just how extensive and vigorously litigated this case was.[67] It noted that the docket included more than 600 entries that reflected "enormous effort," significant pretrial motion practice, extensive discovery, a 10-day trial and considerable post-trial briefing.[68] The court compared the litigation to the Battle of Passchendaele in World War I, an engagement in which both sides suffered grievous losses such that it would be hard to conclude that either side "won,"[69] and the court summarized the case as follows:

---

[66] *Id.* at 12, A735.

[67] *See Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 7861336 at *1 (Del. Ch. Dec. 31, 2020) (the "Fee Opinion").

[68] Fee Opinion, 2020 WL 7861336 at *2-*3.

[69] Fee Opinion, 2020 WL 7861336 at *1.

> The litigation itself, involving sale of a business, has been complex, involving a multi-year struggle with multiple motions trivial and profound. It resulted in a finding of fraud against one defendant, but the related damages went largely unproven. It resulted in findings of breaches of warranty, but the resulting contractual damages were far less than the Plaintiffs had sought. Other substantive claims survived motions to dismiss and for summary judgement, but were unproven after trial. The legal fees involved in obtaining these results run to multiple millions of dollars.[70]

The court nonetheless concluded that there was no "identifiable prevailing party" because "each party received a mixed result."[71] Notably, although the defendants' joint fee motion discussed each defendant's circumstance individually, the Court of Chancery did not. Instead, the court lumped together the defendants—indeed, in its Fee Opinion, it repeatedly referred to "neither party" or "either side" as though there were only two parties.[72]

In its legal analysis, the court first considered and rejected Great Hill's suggestion that it had a right to recover fees under the indemnification provision of the Merger Agreement, Section 10.02. After surveying Delaware cases, the court

---

[70] *Id.*

[71] *Id.*

[72] Fee Opinion, 2020 WL 7861336 at *1, *4, *6. In a footnote, the court wrote that it used the terms "Plaintiffs" and "Defendants" in a general way because "the equitable considerations I am to bring to bear under the Agreement would not change in a party-specific context." *Id.* at *6 n.72. As the Founders will discuss below, it is difficult to reconcile the Court of Chancery's statement with the significant difference in results between the Founders and, for example, Mr. Tal, the defendant who was found liable for fraud and ordered to pay $200,000.

concluded that "purely contractual indemnification provisions only shift first-party claims if the contract explicitly so provides."[73] The court then concluded that Section 10.02 does not expressly provide for fee shifting for first-party litigation.[74] The court found additional support for that conclusion from the fact that the parties included an express fee-shifting provision in Section 12.10 such that Great Hill's interpretation of Section 10.02 would make Section 12.10 surplusage.[75]

The court then turned to the express fee-shifting provision. Regarding the issue before it as "novel," the court interpreted Section 12.10 of the Merger Agreement—the express fee-shifting provision—to require it "to apply equity, presumably to achieve a fair result, in light of the circumstances extant in the litigation, and in light of its results."[76] Since it had concluded that "neither party has truly prevailed," the court held that no party was entitled to fees "as a matter of course under Section 12.10."[77] The court held that, in the event that a party prevails in part and loses in part, it was to award fees on an equitable basis.[78]

---

[73] *Id.* at 13 (citing *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525 (Del. Super. Ct. Nov. 22, 2016)).

[74] Fee Opinion, 2020 WL 7861336 at *5.

[75] *Id.,* at *6.

[76] *Id.,* at *2.

[77] Fee Opinion, 2020 WL 7861336 at *6.

[78] *Id.*

> As I detailed above, the parties, represented by excellent counsel, have litigated vigorously over non-frivolous claims for over eight years. They have filed numerous motions, endured with longanimity 10 days of trial, undergone both a liability and damages determination, and now seek fees. And yet the result was not a distinct victory for either side. Under such circumstances, I find that nothing is more equitable than to leave the fees in repose. An award of fees may be seen as a penalty for the party from which the fees must be paid. I find here that it would be inequitable to impose such a penalty, given the efforts of counsel on both sides and the results achieved.[79]

With that, the court denied all pending fee motions.[80]

5. The Court of Chancery makes its determinations final and the parties appeal and cross-appeal.

The court entered a final order on April 7, 2021.[81] At the Founders' request, it entered an amended final order on April 22, 2021.[82] On May 19, 2021, the Founders filed a notice of appeal challenging the amended final order and underlying Fee Opinion. On June 2, 2021, Great Hill filed a notice of cross-appeal likewise challenging the amended final order and the Fee Opinion.

As no one has taken an appeal regarding the merits of the Liability Opinion or the Damages Opinion, this appeal and the cross-appeal focus solely on the Court of Chancery's interpretation of the Amended Merger Agreement in its Fee Opinion.

---

[79] *Id.,* at *6-*7.

[80] *Id.*

[81] A877.1-877.6.

[82] Defendants' Motion to Alter or Amend Final Judgment, A878-A907; Exhibit B.

ARGUMENT

I. AS PREVAILING PARTIES, THE FOUNDERS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES, AND THE COURT OF CHANCERY ERRED IN DENYING THE FOUNDERS' FEE MOTION IN ITS ENTIRETY.

A. Question Presented

Whether the Court of Chancery erred as a matter of law in construing the Amended Merger Agreement to allow it to award no fees, costs or expenses to a party that undeniably prevailed on the vast majority of the claims asserted against it, including the chief claims asserted against it. The Founders preserved this argument in Defendants' Opening Brief in Support of Their Joint Motion for Awards of Fees, Costs, and Expenses[83] and in Defendants Tomer Herzog's and Daniel Kleinberg's Brief in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs.[84]

B. Scope of Review

The issue is one of contract interpretation, which is a matter of law that this Court reviews *de novo*. *See Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

[83] Defendants' Fee Brief at 2, A743.

[84] Founder's Brief in Opposition to Plaintiffs' Fee Motion at 7, A838.

C. Merits of Argument

1. In interpreting a contract, a court is to determine the parties' intent and to interpret the agreement as would an objective, reasonable third party.

The Founders' claim for attorneys' fees is based on a contract. When interpreting a contract, a court's mission is to determine the parties' intent from the language of the contract. *See Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003). The focus is on the parties' shared expectations when they entered into the contract but, because Delaware adheres to an objective theory of contracts, the "contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone*, 106 A.3d at 367-68 (*quoting Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)). As this Court explained in *Salamone*:

> [w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. Our focus on the actual language agreed to and used by the parties to a contract best promotes parties' ability to negotiate and shape commercial agreements, in keeping with the goal of Delaware law to ensure freedom of contract and promote clarity in the law [and thus] facilitate commerce.

2. The parties to the Merger Agreement intended that a prevailing party—even one that prevailed in part and lost in part—would necessarily receive an award of attorneys' fees, costs and expenses.

As part of their arms'-length negotiation of a complex transaction, the parties agreed to a provision that provides that "all fees, costs and expenses, including, without limitation, reasonable attorneys' fees and court costs, incurred by the prevailing party" in the litigation "shall be reimbursed by the losing party" except that if the party "prevails in part, and loses in part" the court "shall award a reimbursement of the fees, costs and expenses incurred by such party on an equitable basis."[85]

The Merger Agreement clearly contemplates a winner and a loser at the end of litigation and leaves no doubt about the loser's obligation to pay. The only limit it places is that, if the prevailing party "loses in part," the court "shall award a reimbursement of the fees, costs and expenses incurred by such party on an equitable basis."

It is helpful to consider each relevant term or phrase in turn and in light of the rules by which Delaware courts interpret contract language.

[85] AMA § 12.10; A195.

a. "Shall"

The parties' use of the word "shall" in Section 12.10 is critical. This Court has noted that "it is generally presumed that the word 'shall' indicates a mandatory requirement." *Elf Atochem North Am., Inc. v. Jaffari*, 727 A.2d 286, 296 n.54 (Del. 1999) (quotation omitted). In *City of Lewes v. Nepa*, 212 A.3d 270, 279 n.37 (Del. 2019), the Court cited with approval the Delaware Legislative Drafting Manual, which indicates that "'Shall' means that a person has a duty." Delaware Legislative Drafting Manual at 84 (2019). Other authorities agree. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("The Panel's instruction comes in terms of the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion"); Black's Law Dictionary (online) (when someone "shall" do something, that party "has a duty to; more broadly, is required to ..." to that thing.).

By way of example of the mandatory nature of the word "shall," consider this Court's procedural rules. Rule 13 requires that "[a]ll text, including text in footnotes, *shall* be in Times New Roman 14-point typeface." Del. Supr. Ct. R. 13(a)(i) (emphasis added). By using the word "shall," the Court indicated that the choice of font is mandatory and not subject to the lawyer or litigant's discretion.

Simply stated, a reasonable, objective third party would understand the use of the word "shall" as indicating that something is mandatory and not discretionary.

Thus, when the parties agreed in Section 12.10 of the Merger Agreement that a prevailing party "shall" receive an award of fees and that, if that party did not prevail in full, the court or other tribunal "shall" award fees "on an equitable basis," they made clear their intention that it would be mandatory for a prevailing party to receive an award of fees in either circumstance.

b. "Prevailing party"

In its Fee Opinion, the court wrote that "I find that neither party has truly prevailed."[86] In context, the court meant that no party prevailed in full. That interpretation of the opinion is necessarily correct since, in the same paragraph, the court described the results and concluded that "[g]iven such results, I cannot find that either party 'prevailed' and should be awarded fees *as a matter of course under Section 12.10*."[87] In other words, the court decided that no party prevailed *in toto* and would be entitled to recover all of its fees under the part of Section 12.10 preceding the word "provided." There is additional support for that understanding since, in the next paragraph of the Fee Opinion, the court turned to discuss its application of the part of Section 12.10 that begins with "provided" and that calls for awarding fees "on an equitable basis."[88] That demonstrates that the court's

[86] Fee Opinion, 2020 WL 7861336 at *6.

[87] *Id.* (emphasis added).

[88] *Id.* at *6-*7.

statement that no party had "truly prevailed" related only to the first clause of Section 12.10 rather than to all of Section 12.10 since, if the court's statement applied to all of Section 12.10, there would have been no reason for the court to go on to discuss what would be "equitable" in the event parties prevailed on some issues and lost on others.

Moreover, the Court of Chancery could not have concluded that no party prevailed. A review of the record and the court's various opinions in this case demonstrates that the Founders predominated on almost all the claims asserted against them in the litigation.

As a threshold matter, it is important to look at the question of who was a prevailing party on a party-specific basis. In Section 12.10, the parties referred to "prevailing party" in the singular, thus signaling that the focus is on each specific party. That focus makes sense, of course, since any one party named as a defendant would have no control over whom else the plaintiff named as a defendant and how culpable other defendants might be. This case is a good example. The court found that Hagai Tal was liable for fraud for failing to disclose a fine and PayPal's threat of termination[89] but that the Founders neither aided and abetted that fraud nor

[89] While the court found that Tal did not disclose PayPal's threat of termination, it ultimately found that Plaintiffs failed to prove any damages related to this failure (both on the fraud claim and the breach of representation and warranty claim).

committed any other intentional, wrongful act.[90] As noted above, the court determined that the Founders were responsible for *pro rata* shares of $12,255.74 to be drawn from the escrow fund but that the Founders did not know of the incorrect representation at issue.[91] Put another way, the Founders were assessed those minimal damages in what amounts to a strict-liability determination based solely on their having been Plimus shareholders who had agreed to indemnify the buyer for breaches of representations and warranties made by the company, rather than on their having actively engaged in any wrongdoing.

The substance of the Fee Opinion suggests that the court did not consider prevailing-party status on a party-specific basis. The court never expressly did so, and it instead repeatedly referred to "both parties" and "neither party" as though there were only a single plaintiff and a single defendant.[92] The court referred to the results as "mixed" and wrote that "the result was not a distinct victory for either side."[93] Perhaps recognizing that its analysis might be faulted for painting with so broad a brush, the court wrote in a footnote that

> [t]here were, in fact, multiple parties involved in this litigation, each of which obtained idiosyncratic results—I refer to "Plaintiffs" and

[90] Liability Opinion, 2018 WL 6311829 at *45.

[91] Damages Opinion, 2020 WL 948513 at *24; Liability Opinion, 2018 WL 6311829 at *45.

[92] Fee Opinion, 2020 WL 7861336 at *1, *4, *6.

[93] *Id.,* at *1, *7.

> "Defendants" generally because the equitable considerations I am to bring to bear under the Agreement would not change in a party-specific context.[94]

It is difficult to reconcile that footnote with the court's actual analysis, which offers no hint that the court ever considered the extent to which the Founders specifically prevailed.

An objective and reasonable third party looking at this case—particularly with a party-specific focus—would conclude that the Founders overwhelmingly prevailed. As an initial matter, having read all of Section 12.10, that objective third party would have understood that a party need not win on every point to be considered a "prevailing party." After all, the second clause of the provision discusses what should happen if a party prevailed "in part," which means that the parties to the Merger Agreement intended that a party could be "prevailing" even if it were not totally victorious. Armed with that understanding, the objective third party would certainly conclude that the Founders prevailed. Great Hill accused the Founders of aiding and abetting fraud, civil conspiracy, unjust enrichment and breaches of contractual representations and warranties. After six years of vigorous litigation, which included significant pretrial motions practice, dozens of depositions, four *in limine* motions, and a lengthy trial with more than a dozen live

[94] *Id.,* at *6 n.72.

witnesses, the lodging of nearly 60 deposition transcripts and the submission of more than 2,000 exhibits, Great Hill lost on all of its claims against the Founders except two modest contractual claims for which the Court of Chancery determined that the Founders should be responsible for their *pro rata* share of $12,255.74 for breach for which there was no evidence of scienter on the Founders' part.[95] Great Hill demanded that the Founders share in paying uncapped damages of more than $122 million, and the Founders will in the end be responsible for less than one tenth of one percent of that amount. A reasonable, objective third party would look at what Great Hill alleged and demanded from the Founders and what the Court of Chancery ultimately decided, and that third party would conclude that the Founders plainly prevailed.

Delaware law tracks the common-sense conclusion that the Founders prevailed. The Court of Chancery has long used the "predominance-in-the-litigation" standard to determine which party should be considered the prevailing party if no party prevailed on all issues. *See Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454 at *2 (Del. Ch. Jan. 5, 2018). Under that standard, the prevailing party is the one that prevailed on the case's "chief issue." *Id.*

[95] To be precise and as noted in the statement of facts above, the court found two misstatements in the representations and warranties but only assessed damages based on one since Great Hill had offered only speculative evidence regarding the other.

In its Fee Opinion in this case, the court did not mention or purport to apply the predominance-in-the-litigation standard. Had the court applied the predominance-in-the-litigation standard in light of the record in the case and its own previous decisions, it would have had to conclude that Great Hill's chief issue was fraud, which in the case of the Founders was prosecuted as a claim of aiding and abetting fraud. Indeed, as addressed further below, Great Hill itself made clear to the court that fraud and aiding and abetting fraud were its central claims.

It is no surprise that Great Hill made fraud and fraud-related claims the central focus of its lawsuit. Great Hill sought $122 million in damages and the Merger Agreement capped indemnification claims to $9.2 million in escrow. In its fee request, Great Hill told the court it had spent $18.7 million in legal fees in the lawsuit.[96] Great Hill no doubt chose to invest in attorneys' fees more than double the amount in the escrow fund because it believed its chief claim—for fraud and fraud-related torts—would not be subject to the $9.2-million cap. Great Hill asked the court to allow it to seek uncapped damages for indemnification, but it could have no confidence the court would do so—and, indeed, the court ultimately rejected the request.

[96] Plaintiffs' Fee Brief at 11-12, A734-735.

Great Hill's representations to the Court of Chancery underscore the centrality of fraud to Great Hill's case. For example, at oral argument on the defendants' summary-judgment motions, Great Hill's counsel told the Vice Chancellor the following:

> It's interesting that the instant motions for summary judgment attempt to set aside the case as pled by the plaintiffs, which is this was a fraudulent transaction. There is a chain, a history, a unified sequence of events which demonstrate fraud, which demonstrate fraudulent inducement of the deal, which show aiding and abetting, which raise credibility issues which show intent to deceive.[97]

After the trial, Great Hill filed its opening post-trial brief and devoted 39 of the 56 pages in the argument section to arguing that various defendants were liable for fraud or aiding and abetting fraud.[98] In that filing, Great Hill asserted that

> [i]n the (far too many) pages that follow, we will demonstrate that Defendants: lied about Paymentech's terminating Plimus as a client, consciously failed to give Great Hill reams of correspondence with payment processors that were unequivocally requested, hid from Plaintiffs the nature of their dispute with Tal and their "schita" payment to procure his silence, and failed to provide notice of PayPal's impending termination of Plimus. We will show knowledge of these acts by former management, the Founders, and SGE's nominees to the Board and finally, we will put all of the foregoing in context by showing the motive that each Defendant had to defraud. The Court should grant judgment of liability to Plaintiffs and the parties should proceed to brief damages.[99]

---

[97] SJ Oral Argument Transcript at 136:1-9, A348.1.

[98] Plaintiffs' Opening Post-Trial Brief, A350-A578.

[99] *Id.* at 6, A368.

Great Hill again underscored that fraud and aiding and abetting fraud were its chief claims in its post-trial reply brief, a filing that, like Great Hill's opening post-trial brief, was almost entirely devoted to the fraud and fraud-related claims:

> **This case was not brought to collect fines.** Rather, the fraud covered up Plimus's endless compliance violations that destroyed the business. Plaintiffs have demonstrated that Defendants committed fraud, of which these three fines were only a small part, and thus, Plaintiffs should be indemnified for the entire fraud that was committed against them. Plaintiffs will assert the amount of such damages in the damages briefing that the parties agreed would follow the liability briefing.[100] (Emphasis added.)

Great Hill's chief claims were fraud and aiding and abetting fraud and, with respect to the Founders, the court wholly rejected the fraud-based claims. Under the "predominance-in-the-litigation" theory, the Founders were prevailing parties.

Considered both as a matter of common understanding and of Delaware law, the Founders were "prevailing parties" in this action. The court rejected the principal claim Great Hill asserted against the Founders and the only claim on which Great Hill actually "prevailed" against the Founders was on a breach of representation and warranty claim related to excessive chargeback fines that was not Great Hill's principal focus.

c. "...on an equitable basis."

[100] Plaintiffs Post-Trial Reply Brief at 112 n.54, A700.

The Court of Chancery understood the phrase "on an equitable basis" to give it essentially unfettered discretion to award no fees at all even to a party that prevailed on the chief issue in the case. Thus, it wrote in its Fee Opinion, "And yet the result was not a distinct victory for either side. Under such circumstances, I find that nothing is more equitable than to leave the fees in repose."[101] In that opinion, the court discussed at some length the policy considerations attendant to fee shifting and the "American Rule," noting that the latter "has equitable and policy advantages" and that "[a]n award of fees may be seen as a penalty for the party from whom the fees must be paid."[102]

But, in drafting their Merger Agreement, the parties did not leave those broad policy considerations to the court's generalized sense of equity. In context, the parties to the Merger Agreement channeled the court's discretion more precisely. Whether a party prevailed in whole or only in part, the agreement provides that the party "shall" receive an award of fees. Had the parties wished to allow the court the sort of broad discretion it ultimately exercised, they would have said that "the court *may* award a reimbursement of the fees, costs and expenses incurred by such party on an equitable basis." *See Poe v. Poe*, 333 A.2d 403, 404 (Del. Super. 1975)

[101] Fee Opinion, 2020 WL 7861336 at *7.

[102] *Id.,* at *2, *7.

("'Shall' signifies a mandatory requirement, (quotation omitted), while 'may' evokes a discretionary reading."). Instead, the parties to the Merger Agreement chose mandatory language to indicate their intent that a prevailing party should receive an award of fees. Given that predicate and in that context, the reference to "on an equitable basis" was not a freewheeling grant of authority to the trial court to "do equity" as it saw fit, including to deny fees. It was, instead, a direction that, if a party "prevails in part, and loses in part," the court should calculate the fee award "on an equitable basis" to reflect the extent of the party's success.[103] The court should not have been concerned with broader issues such as whether an award of fees might seem "punitive," since the availability of such fees was part of a bargained-for exchange in an agreement among sophisticated parties. As such, it was up to those parties to decide in their contract whether and in what circumstances fees should be available, and the Court of Chancery was required to enforce the parties' choice rather than its own. *See Salamone*, 106 A.3d at 370 ("[w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is

[103] The court's Fee Opinion is at points inconsistent. For the most part—and as respects the result it reached—the court embraced a broad understanding that suggested it had largely unfettered discretion. However, at one point in its opinion, the court wrote that, if there is a "mixed result," "the contract directs that fees be apportioned on an 'equitable basis.'" Fee Opinion, 2020 WL 7861336 at *3. That fleeting language suggests an interpretation like the one the Founders urge in this brief, but the court did not, in fact, apportion fees in any respect.

strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."). By declining to award any fees whatsoever even though the Founders prevailed on the vast majority of claims, the court has effectively rendered the second portion of Section 12.10 meaningless. That is, if a party that prevailed in large part as the Founders did here is still not entitled to its fees, it is difficult to conceive of a scenario in which a partially prevailing party would ever be entitled to such fees. In effect, that would mean that a partially prevailing party would never be entitled to fees despite the fact that Section 12.10 clearly envisions such a result. This interpretation runs counter to black letter principles under Delaware law. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160-61 (Del. 2010) (rejecting proposed interpretation of contract because it would render a provision meaningless).

Finally, the parties themselves plainly understood the provision to mean what the Founders contend. When the defendants moved for fees, they recognized that they fell within the proviso as parties that had prevailed on most but not all claims and, so, they invoked the "on-an-equitable-basis" language to request awards of some part of their fees.[104] When Great Hill moved for fees, it argued that the proviso

[104] Defendants' Fee Brief at 15-16, A756-757.

language should allow it to recover some of its fees (although its suggested means for allocation is counter to Delaware law).[105]

Delaware law instructs that a court interpreting a contract should seek to understand the parties' intent. *See Twin City Fire Ins.*, 840 A.2d at 628. Here, the language of the provision compels the interpretation the Founders urge, and the parties themselves collectively demonstrated that they agree.

3. The Founders were prevailing parties, and the Court of Chancery should have awarded them their fees, costs and expenses on an equitable basis that, given their overwhelming success, should have resulted in their receiving a judgment for almost all of their fees, costs and expenses.

As they have demonstrated above, whether viewed colloquially or through the lens of the "predominance-in-the-litigation" analysis, the Founders were prevailing parties in this litigation. As parties who prevailed on most but not all claims, the Founders were entitled to an award of their fees calculated on an equitable basis, which, in context, means an award that reflects that the Founders defeated Great Hills' main claims against them. The Founders suggested to the court that they be awarded 95 percent of their fees, costs and expenses, and they continue to believe that to be a fair allocation in light of the overall result of the case.[106] While the Founders believe this Court could make that award and direct the Court of Chancery

[105] Plaintiffs' Fee Brief at 10-11, A733-734.

[106] *See* Defendants' Fee Brief at 15, A756.

to enter it as a judgment, they recognize that this Court might choose instead to remand the case for the Court of Chancery to decide on the amount of the fee award in the first instance. The Founders request that, if the Court does that, it do so with explicit instructions that the Court of Chancery *must* award the Founders fees and that the court's only task on remand is to decide how much to award in light of the Founders' overwhelming success.

II. THE COURT ABUSED ITS DISCRETION IN DENYING THE FOUNDERS' FEE MOTION IN ITS ENTIRETY.

A. Question Presented

If, notwithstanding its plain language, Section 12.10 of the Amended Merger Agreement gave the Court of Chancery discretion to award no fees, whether the court still erred in doing so in this case and, accordingly, abused its discretion. The Founders preserved this argument in Defendants' Fee Brief.[107]

B. Scope of Review

Generally, this Court reviews the Court of Chancery's interpretation of a fee-shifting provision *de novo* and the decision to award or deny attorneys' fees for abuse of discretion. *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 210 (2005). An abuse of discretion can occur in "three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Homestore Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) (internal quotations omitted). This Court will also "set aside or overturn" a trial judge's factual findings regarding a motion for attorneys' fees if "they are not the product of an orderly and logical deductive

[107] Defendants' Fee Brief at 13-15, A754-A756.

process." *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 432 (2012).

C. Merits of Argument

1. The Court of Chancery abused its discretion in denying the Founders' Fee Motion.

As noted, the plain language of Section 12.10 requires an award of fees to prevailing party such as the Founders. However, even if the Court were to interpret the language to allow the Court of Chancery greater discretion, the result in this case should be no different because the Court of Chancery abused that discretion.

Although the abuse-of-discretion standard sets a high bar, this Court has reversed a trial court's fee decision on many occasions. In *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1, 44-47 (Del. 2017), the Court remanded to the Court of Chancery after an initial, inequitable determination as to fees in a statutory appraisal action. The Court of Chancery had opted to require just the appraisal class to cover all the expenses of lead counsel, notwithstanding that other shares, initially part of the appraisal proceeding (and represented by lead counsel), had gained settlement leverage from the litigation result, and notwithstanding the Court of Chancery's statutory authority to craft a fee award to account for these dynamics. This Court found such a result inequitable and unreasonable, and an abuse of the Court of Chancery's discretion.

Similarly, in *Montgomery Cellular Holding Co., Inc. v. Dobler,* this Court reversed the Court of Chancery's refusal to award fees under the bad-faith exception

to the American Rule that each party bear its own attorneys' fees. There, this Court concluded that the "overwhelming evidence" demonstrated that the respondents had acted in bad faith and that the Court of Chancery abused its discretion by declining to award attorneys' and expert witness fees in favor of the minority shareholders. 880 A.2d at 229.

Such inequity and unreasonableness exist even more starkly here. The Court of Chancery's own decisions and the Amended Final Order and Judgment make clear that the Founders are prevailing parties in this action. Even though the Founders defeated the chief claims asserted against them and were ultimately found liable for only their *pro rata* share of $12,255.74 in excessive chargeback fines (plus prejudgment interest), the Court of Chancery deemed it equitable to deny them the benefit of a bargained-for fee-shifting provision, which provides that the court "shall award" the prevailing party its fees on an "equitable basis." In addition to clear inequities that cannot stand under *Dell*, the Court of Chancery failed to specify the factors that rendered it equitable to deny the Founders their fees despite their having successfully defended against the spurious claims asserted against them, which were largely founded on testimony that the Court found to be "not credible."[108] Indeed, in one single footnote after eight years of intense litigation, the Court of Chancery

[108] Liability Opinion, 2018 WL 6311829, at *24.

opined, with no explanation or reasoning, that a party-specific analysis of the claims against the Founders would not change its equitable consideration.

Put simply: this is not equity, neither as the product of an orderly and logical deductive process nor in result. Under an abuse-of-discretion standard, this Court does not substitute its judgment for that of the Court of Chancery if the latter's judgment was based on conscience and reason, including clear detailing of reasons, rather than capriciousness or arbitrariness. *See Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1220-21 (Del. 2012). The Fee Opinion fails to meet these requirements.

* * *

The parties to the Merger Agreement chose to include a provision that makes an award of fees to a prevailing party mandatory. Recognizing that a party might prevail in the main but not on every issue, they included a proviso that such a party should receive a fee award equitably calculated to account for the extent of the party's success. The plain language of the fee-shifting provision supports that interpretation. The rules by which Delaware courts interpret contracts support that interpretation. The parties' filings underscore that they share that understanding—and presumably did when they entered into the Merger Agreement.

When Great Hill launched this expansive lawsuit and made its sweeping claims, it knew that it was subject to paying the defendants' fees if it lost or

substantially lost. But it went ahead anyway. Because of the nature of the claims and the number of defendants, Great Hill can hardly claim to be surprised that the litigation was extensive and expensive for all concerned. And Great Hill lost all but a small subset of its claims.

Focus then on the Founders. Great Hill made reputation-damaging allegations against them and entangled them in bruising litigation that imposed on them seven-figure attorneys' fees. In the end, the Court of Chancery concluded that the Founders did nothing wrong. They were held responsible to pay their *pro rata* share of $12,255.74, plus prejudgment interest in indemnification obligations, but that was solely because of their status as former Plimus shareholders rather than because of any active wrongdoing. When the Founders sought to mitigate at least some of the harm Great Hill's crusade imposed, the court interpreted the fee-shifting provision in a way at odds with its text and with the parties' understanding and refused to make any fee award at all.

Section 12.10 of the Merger Agreement did not grant the Court of Chancery the sort of broad discretion to "do equity" by denying the Founders' fee request without a party-specific analysis and eschewing an orderly and logical deductive process. And, even if it had, there is nothing equitable in leaving the Founders to bear the financial burden of successfully defending themselves from Great Hill's unfounded and wholly rejected allegations.

CONCLUSION

Defendants Below, Appellants/Cross-Appellees Tomer Herzog and Daniel Kleinberg ask the Court to (1) vacate the judgment below to the extent it denied their motion for an award of attorneys' fees, costs and expenses and award the Founders the reasonable attorneys' fees, costs, and expenses they incurred in successfully defending against Plaintiffs' claims; or (2) remand the matter to the Court of Chancery with instructions for that court to make an award of attorneys' fees, costs and expenses to the Founders equitably calculated to reflect the extent of their success in the litigation. In addition, the Founders request that the Court remand the matter to the Court of Chancery with instructions to award them the reasonable attorneys' fees, costs and expenses they incurred following the court's fee decision, including those incurred in connection with this appeal.

Of Counsel

K&L GATES LLP

Joanna A. Diakos
599 Lexington Avenue
New York, NY 10022-6030

David R. Fine
Market Square Plaza
17 North Second Street
18th Floor
Harrisburg, PA 17101

Dated: July 9, 2021

MORRIS JAMES LLP

/s/ Lewis H. Lazarus
Lewis H. Lazarus (#2374)
Bryan Townsend (#5538)
500 Delaware Avenue, Suite 1500
P. O. Box 2306
Wilmington, DE 19801-1494
302.888.6800
llazarus@morrisjames.com
btownsend@morrisjames.com

Attorneys for Defendants Below, Appellants/Cross-Appellees Tomer Herzog and Daniel Kleinberg