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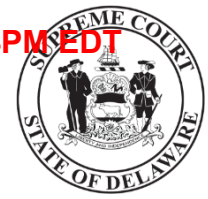

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 Court Below: Court of Chancery of the State of Delaware C.A. No. 7906-VCG

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

OF COUNSEL

Adam Slutsky
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

Dated: August 9, 2021

Rudolf Koch (#4947)
Robert L. Burns (#5314)
Megan E. O'Connor (#6569)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, DE 19801

Attorneys for the Plaintiffs Great Hill Equity Partners IV, LP, Great Hill Investors LLC, Fremont Holdco, Inc., and BlueSnap (f/k/a Plimus)

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NATURE OF PROCEEDINGS[1]

Before the Court are two questions of contract interpretation regarding fee-shifting provisions that arise from lengthy, hard-fought litigation. Great Hill asks the Court to interpret the Merger Agreement to determine whether the Court of Chancery erred in denying Great Hill its reasonable attorneys' fees, expenses and costs pursuant to Section 10.02's indemnification provision and Section 12.10's prevailing-party provision. Great Hill also asks the Court to affirm the denial of the Founders' unsupported request for attorneys' fees, costs and expenses under Section 12.10.

The litigation was dramatically prolonged, and Great Hill's costs were drastically increased, by the Defendants' highly-coordinated delay tactics at every turn. From the start, the Founders closely aligned themselves with their co-defendants to put up roadblocks to trial, ultimately racking up almost $40 million in legal fees among them.[2] Despite their carefully orchestrated defense, the case proceeded to a ten-day bench trial where the facts were laid bare.

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[1] Unless otherwise noted in the Table of Defined Terms, terms retain the meaning ascribed to them in the Merger Agreement.

[2] While this case involved several co-defendants, only the Founders appeal here. Regardless, the Founders remained in lockstep with their co-defendants throughout the litigation—even jointly moving for a fee award that they now appeal.

Great Hill alleged that it was defrauded and that the contractual representations in the Merger Agreement were breached when Great Hill acquired a payment-processing company, Plimus, from the Defendants in September 2011. Plimus relied on its critical relationships with payment processors, specifically with PayPal, to conduct its business. Just eight days after close, PayPal terminated its relationship with Plimus, causing a major disruption. After a lengthy trial and post-trial record, the Court of Chancery found fraud and contractual breaches of the representations relating to the chief issue—Plimus's relationship with its key supplier, PayPal. As a result, the Court held that the Founders were liable for contractual breaches up to their *pro rata* share of the indemnification funds plus prejudgment interest.

The parties each sought their attorneys' fees, costs and expenses pursuant to the Merger Agreement's fee-shifting provisions. Great Hill requested its fees under Section 10.02's indemnification provision and Section 12.10's prevailing-party provision. Under the plain language of Section 10.02, the Founders agreed to indemnify Great Hill for "any actual loss . . . whether or not arising out of third party claims (including . . . reasonable legal fees and expenses)" in connection with claims for contractual breaches. The Court erred in interpreting this language and applied an unwarranted presumption that indemnification provisions do not apply to first-party claims when denying Great Hill a fee award. Even applying

the Court's incorrect presumption, the plain language of Section 10.02 provides a sufficiently "clear and unequivocal articulation" of the parties' intent to cover first-party claims to overcome that presumption.

Separately, Great Hill sought its fees under Section 12.10, which provides for fee shifting "on an equitable basis" where the party seeking fees "prevails in part and loses in part." Great Hill proposed an equitable approach to awarding fees based on Delaware's "predominance-in-the-litigation" standard—arguing that an award of fees for the stages of the litigation where Great Hill prevailed would be equitable given that Great Hill prevailed on the chief issue in the case. The Court's denial of Great Hill's fees under Section 12.10 was an abuse of discretion.

The Founders also sought to recover their fees under Section 12.10. In doing so, the Founders offered no methodology to support the fee award requested. Thus, the Court properly exercised its discretion when it rejected the Founders' unsupported request for fees. Even if the Court did abuse its discretion as to the Founders, that error was harmless because the application of the proper standard produces the same result. Having lost on the chief issue in the case and having failed to provide any methodology to support their request for 95% of their fees, the Founders are not entitled to a fee award on an equitable basis.

Great Hill asks that this Court (1) affirm the Court of Chancery's ruling in part as to the denial of the Founder's request for fees and (2) vacate the Court's ruling in part as to Great Hill's request for fees with instructions to enter an award of fees pursuant to the Merger Agreement's indemnification provision under Section 10.02 and the prevailing-party provision under Section 12.10. Furthermore, if the Court finds the Founders are entitled to some amount of fees, Great Hill asks that this Court remand for a determination of the reasonableness of the fees sought.[3]

[3] Even if the Court finds the Founders' request for fees has merit, it is the Court of Chancery's role to determine the reasonableness of the fees in the first instance.

SUMMARY OF ARGUMENTS

Answer to Founders' Summary of Arguments

1. Denied. The Court of Chancery properly interpreted Section 12.10 of the Merger Agreement to allow it to exercise its broad discretion to award attorneys' fees, costs and expenses "on an equitable basis" because—

   a. the Founders were found liable for contractual breaches of the Merger Agreement related to the chief issue in the case;

   b. the Merger Agreement does not mandate an award of fees where the parties prevail in part and lose in part; and

   c. any error was harmless where the Founders did not prevail on the chief issue and are not entitled to an award of fees on an equitable basis.

2. Denied. Any error by the Court of Chancery was harmless because the Founders did not prevail on the chief issue in the case and are, therefore, not entitled to an award of fees on an equitable basis.

3. Denied. While the Court of Chancery abused its discretion in failing to consider the "predominance-in-the-litigation" standard, that error was harmless. The Founders did not prevail on the chief issue in the case and, therefore, are not entitled to an award of fees on an equitable basis.

Great Hill's Summary of Arguments on Cross-Appeal

4. The Court of Chancery erred when it found that Section 10.02 did not apply to first-party claims like those brought by Great Hill because: (1) the indemnification provision clearly and unequivocally expresses the parties' intent to indemnify attorneys' fees, costs and expenses for all claims, and (2) Section 10.02 does not conflict with the prevailing-party provision under Section 12.10, which addresses recovery of fees beyond the $9.2 million indemnification obligation under Article 10.

5. The Court of Chancery abused its discretion when it summarily denied Great Hill its attorneys' fees, costs and expenses on an equitable basis under Section 12.10 because it prevailed on the chief issue in the case.

STATEMENT OF FACTS

The issues before this Court are only the tip of the iceberg with respect to the voluminous factual and legal issues presented in this case. Given the nature of the issues presented on appeal, Great Hill provides the facts relevant to adjudicate those issues and relies primarily on the Court of Chancery's findings of fact at the liability stage of the case, as detailed below.

A. Plimus Was An E-Commerce Company That Depended On Its Vital Relationships With Payment Processors.

Defendants Tomer Herzog and Daniel Kleinberg founded Plimus in 2002, and initially ran the company before bringing in Defendant Hagai Tal in 2008 to manage and sell it. *Liability*, 2018 WL 6311829, at *2. At the time Great Hill acquired Plimus on September 29, 2011, Plimus provided payment solutions that allowed online merchants to sell digital products to consumers. *Id*. Plimus operated as a "reseller," taking title to goods and acting as the merchant of record with the payment processors, such as PayPal. *Id*. at *1. These payment processors in turn provided access to payment options such as the Card Networks (*e.g.*, Visa), that Plimus then offered to its clients. *Id*. at *2. As a result, Plimus's model was wholly reliant on having successful relationships with payment processors in order to process credit card transactions for its clients. *See id*. at *2. As the Court recognized, "[w]ithout such relationships, the reseller cannot exist." *Id*. at *1. Indeed, during the sales

process, Tal wrote that "[p]ayment [p]rocessors are one of the most significant and material [r]elationships our Company has." B98.

Issues would arise if the customer disputed a charge on her credit card directly with her card issuer, and the card issuer charged back the transaction to the acquiring bank. *Liability*, 2018 WL 6311829, at *3. The credit card associations maintained limits on the number of "chargebacks" a merchant or reseller, like Plimus, could have over a certain time period. *Id*. at *3, *13. To the extent the threshold was exceeded for a specific period of time, the credit card associations could fine the acquiring bank or payment processor—like PayPal—who would in turn pass that on to Plimus or terminate the account rather than risk their relationship with the card associations. *Id*.

Before closing, Great Hill submitted due-diligence requests to Plimus specifically targeting any compliance issues for Plimus. Great Hill requested any communications received from credit card associations reporting any noncompliance, fines or penalties in order to assess the risk to Plimus's critical payment-processor relationships. *Id*. at *12, *15. In particular, PayPal was a key payment processor for Plimus because it was Plimus's top payment processor by volume and the only U.S.-based processor, processing most of Plimus's United States transactions during the period before closing. *Id*. at *15, *22. However, in the months leading up to close, PayPal notified Plimus of successive months of

excessive chargebacks and a fine in connection with a particular vendor. *Id*. at *43-*44. In addition, beginning in August 2011, PayPal began to threaten termination of its relationship with Plimus and continued to make such threats into September 2011. *Id*. at *43. The Court ultimately found that Tal not only concealed this information but made false representations to Great Hill regarding PayPal's notices of noncompliance and its threatened termination in the months leading up to close. *Id*. at *43-44.

B. Eight Days After Great Hill Acquired Plimus, PayPal Terminated Its Relationship, Causing A "Major Disruption To Plimus's Business."

Just eight days after the sale of Plimus to Great Hill closed in September 2011, PayPal terminated its relationship with Plimus. *Id*. at *28. "The loss of PayPal as a processor and the temporary loss of PayPal wallet as a payment method affected Plimus's ability to do business" and "hurt Plimus's reputation, as it followed on the heels of the loss of Paymentech." *Id*. at *30. In light of the "major disruption to Plimus's business" (*id.* at *44) resulting from previously undisclosed information about the Plimus–PayPal relationship, Great Hill investigated the circumstances leading to PayPal's termination, which resulted in filing the original complaint on September 27, 2012. Trans. ID 46681472.

C. Great Hill Files This Lawsuit And Defendants, Including The Founders, Launch A Carefully Coordinated Defense Aimed To Delay Trial At All Cost.

Great Hill asserted claims for fraudulent inducement (Count I), fraud (Count II), aiding and abetting (Count III), civil conspiracy (Count IV), indemnification (Count V), and unjust enrichment (Count VI). Trans. ID 55264142.4. Counts III-VI were asserted against the Founders, among other Defendants.

From the filing of the original complaint in September 2012 until trial in late-November 2017, Great Hill successfully fended off every carefully orchestrated attempt by Defendants—represented by five law firms, including some of the largest and most prominent firms in this country—to end or gut the case before trial:

1. September 2012 – November 2013*:* Great Hill prevailed in a privilege dispute after Defendants belatedly asserted privilege over their pre-merger communications with counsel. The Court rejected Defendants' privilege assertion under Delaware General Corporation Law Section 259: Defendants' position that "all" privileges meant something other than "all" privileges was "not a plausible interpretation," and to "indulge" that position "would conflict with the only reasonable interpretation of the statute, which is that *all* means *all*." *Privilege*, 80 A.3d at 157-58. Before the Court reached this straightforward decision, Defendants forced Great Hill to (i) engage in a burdensome process to collect and review

potentially privileged pre-Merger communications;[4] and (ii) file multiple briefs and prepare for argument to resolve the privilege dispute.

2. November 2013 – November 2014: Great Hill went on to review the previously withheld documents and collected additional documents from Plimus's deal counsel. B205 ¶ 6(D). On April 7, 2014, Great Hill filed an Amended Complaint that incorporated those documents. Trans. ID 55264142.

On May 27, 2014, all Defendants other than Tal and Itshayek filed a motion to dismiss the Amended Complaint. Following briefing and argument on August 13, 2014, the Court of Chancery "largely denied" the motion to dismiss. *Motion to Dismiss*, 2014 WL 6703980, at *1. The Court declined to dismiss, among others, Great Hill's claims for fraud against the Founders:

> [A]s directors, it strikes me as unlikely that they were unaware of the impending and allegedly catastrophic loss of the relationship with PayPal. . . .
>
> I can infer that Herzog and Kleinberg, together with Goldman and Klahr, as Plimus directors, collectively had control over the Company's CEO, the apparent ringleader of the alleged fraud relating to payment processors. As large blockholders within the Company, they also had a financial motive not to exercise that control to stop him.

[4] Although Defendants initially claimed privilege over approximately 3,000 communications, they retreated from the bulk of their privilege claims—ultimately claiming privilege over only 214 pre-Merger communications—in response to Great Hill's challenges to their overbroad privilege log. B205 ¶ 6(C).

Id. at *21 (footnote omitted). Defendants filed five counterclaims—for declaratory judgment regarding indemnification obligations under the Merger Agreement—each of which Great Hill answered. Trans. IDs 55504510, 56644737, 56645267, 56649900, 56650528, 55651879, 56829106.

***3. November 2014 – July 2017**:* Great Hill incurred fees in connection with discovery and opposing Defendants' five motions for summary judgment. Discovery was extensive, with the burden falling disproportionately on Great Hill as Plimus's principal owner. Between February 2015 and January 2016, Defendants served 486 document requests and 279 interrogatories. B206 ¶ 7(A). Great Hill conferred with Defendants eighteen times about the scope and burden of these requests. *Id*. Great Hill ultimately produced more than 750,000 pages of documents. *Id*. From June 2016 to December 2016 (and in August 2017), the parties completed fifty-eight depositions of fact witnesses around the world. *Id*.

After the close of discovery in December 2016, Defendants filed five motions for summary judgment on fewer than all claims. Trans. IDs 59987835, 59988506, 59990343, 59988870, 59990960. In all, Defendants submitted 409 pages of briefing and 478 exhibits in support of summary judgment (B207 ¶ 7(B)) despite the fact that trial was imminent and inevitable, regardless of the Court's ruling on the motions. *Summary Judgment*, 2017 WL 3168966, at *2. The Court denied each Defendant's motion. *Id.* at *3.

4. July 2017 – November 2019: Great Hill then prepared and presented a ten-day trial in which it ultimately proved fraud and breach of contract. Great Hill prepared for trial during the summer of 2017 and had to repeat certain pre-trial activities, such as meetings with witnesses, in the fall of 2017 after the trial date was moved at Defendants' request. B207 ¶ 8(A). Great Hill also was forced to oppose four motions in limine, all of which involved issues that the Court could—and did—address at and after trial. B207 ¶ 8(A-B). As the Court observed in denying one of the motions, "the importance of addressing issues raised under *Daubert* and Rule 702 before an expert testifies is more attenuated in a bench trial." Trans. ID 61351656.

Following a ten-day bench trial and briefing and argument on liability, the Court issued its ruling on liability on December 3, 2018. The Court found that the Founders, as Indemnification Defendants, breached two provisions of the Merger Agreement relating to Plimus's relationship with PayPal. *Liability*, 2018 WL 6311829, at *47. Specifically, the Founders "breached Section 3.23 of the Merger Agreement" when they falsely represented that Plimus "is and has been in compliance with the bylaws and operating rules of any Card System(s)" because the Company had received "numerous violation notices" from their payment processors Paymentech and PayPal. *Id*. The Court also found that the Founders "breached Section 3.26(b)" when they falsely represented that "[n]o supplier of products or

services [including PayPal] has notified the Company . . . that it intends to terminate its business relationship with the Company." *Id*. The Court found that "PayPal representatives expressed such an intent to terminate in e-mails and calls to Plimus in August and September 2011," resulting in a breach. *Id*.

In addition, Tal was found liable for fraudulent inducement and fraud because he concealed from Great Hill "PayPal's credible threats of termination" and a fine from PayPal arising from a significant violation of card-industry rules. *Id*. at *43. "Goldman and Klahr were at least recklessly indifferent" in connection with a disclosure to Great Hill about Paymentech's termination of Plimus that was "too far from the truth to be accidental; rather it is an attempt to frame the end of the relationship in a misleading way." *Id*. at *35. Itshayek misrepresented Plimus's history of violations through conduct that "belies innocent mistake." *Id*. at *39. She and Tal "had a duty to share the notices [from Paymentech], which they disregarded, and they falsely represented that no such documents existed with the intent that Great Hill consummate the transaction." *Id*.

After finding various Defendants liable for breach of contract and fraud, the Court awarded damages for concealed fines and, while acknowledging again the existence of harm from failing to disclose PayPal's termination threats, did not award additional damages. *Damages*, 2020 WL 948513, at *16-23.

D. The Parties Seek Their Respective Attorneys' Fees And Costs.

Following the Court's ruling on damages, Great Hill moved to recover its attorneys' fees, costs and expenses pursuant to the Merger Agreement's indemnification provision under Section 10.02 and the prevailing-party provision under Section 12.10. A730-35. The Founders moved to recover their fees under Section 12.10. A753-56.

The Court previously held that Section 10.02 of the Merger Agreement provides that the Indemnification Defendants, including the Founders, "agreed to indemnify the buyer for the pro rata amount of all losses, as defined in the Section." *Liability*, 2018 WL 6311829, at *49. Specifically, Section 10.02(a) states:

> each Effective Time Holder [including the Founders] . . . ***shall indemnify*** Parent and the Surviving Corporation . . . against such Effective Time Holder's Pro Rata Share of ***any*** actual loss, liability, damage, obligation, cost, deficiency, Tax, penalty, fine or expense, ***whether or not arising out of third party claims*** (***including*** interest, penalties, ***reasonable legal fees and expenses***, court costs and all amounts paid in investigation, defense or settlement of any of the foregoing) (collectively, "Losses") . . .

B176 (emphasis added). The parties reserved approximately $9.2 million in indemnification funds for this purpose, $3,945,222 of which was the Founders' *pro rata* share at closing. *See Liability*, 2018 WL 6311829, at *27-28.

The Merger Agreement also included a "Prevailing Party" provision under Section 12.10:

> [i]f any litigation . . . is commenced by any party . . . to enforce its rights under th[e Merger] 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 . . . shall be reimbursed by the losing party; provided, that if a party to such litigation . . . 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.

B189. Because "the result was not a distinct victory for either side" (*Fees*, 2020 WL 7861336, at *7) and each party prevailed in part and lost in part, the Court was tasked with determining an award of fees "on an equitable basis."

Great Hill requested an award of $18,704,516.68, which consisted of its fees only for those stages of the litigation in which it was successful. A734-35. In light of the Court's rulings on liability (which are not the subject of this appeal), Great Hill requested that Tal bear responsibility for one half of the fees (as the defrauding party), and the Indemnification Defendants, including the Founders, bear responsibility for the other half of the fees (in a proportion equal to their Pro Rata Share) for their breach of contract. A735.

On the other hand, the Defendants sought to recover more than double the fees sought by Great Hill, totaling almost $40 million, despite the Court's findings of liability against them. B218. For their part, the Founders sought to recover $3,891,155.28, amounting to 95% of their fees. A856-57. The Founders offered no

methodology for arriving at the proposed 95% figure nor did they submit invoices to substantiate that amount or allow the Court to assess its reasonableness.

E. The Court Denies The Parties' Respective Motions For Fees.

On December 31, 2020, the Court issued its order on the parties' respective motions, denying each party's request for fees. *Fees*, 2020 WL 7861336, at *5-6.

The Court first addressed Great Hill's request for fees pursuant to the Merger Agreement's indemnification provisions under Section 10.02. Great Hill argued that Section 10.02 required that the Indemnification Defendants hold Great Hill harmless for their reasonable legal fees in connection with bringing this lawsuit. A730-31. The Court applied a presumption that broad indemnification provisions do not encompass first-party claims absent a "clear and unequivocal articulation" of the parties' intent to do so. The Court then interpreted Section 10.02 to limit indemnification to third-party claims, finding that the parties' inclusion of the phrase "whether or not arising out of third-party claims" excluded first-party claims. *Fees*, 2020 WL 7861336, at *6. The Court reasoned that the language of 10.02 did not provide the "clear and unequivocal articulation" of the parties' intent necessary to cover first-party claims. *Id*. at *5-6.

Next, the Court addressed the parties' requests for fees under Section 12.10. At the outset, the Court correctly held that "neither party has truly prevailed,"

therefore, "I cannot find that either party 'prevailed' and should be awarded fees as a matter of course under Section 12.10." *Id*. at *6.

The Court then addressed the application of Section 12.10's award of fees on an equitable basis where a party prevails in part and loses in part. First, Great Hill argued that the Court should award fees on an equitable basis by applying Delaware's standard for determining which party prevailed. A731-34. Applying the "predominance-in-the-litigation" standard, which focuses on the chief issue in the case rather than a claim-by-claim analysis of wins and losses, Great Hill proposed an award of fees that reflected each of the stages of the litigation in which it prevailed. A734.

The Founders offered no methodology for determining an equitable award of fees. Instead, they asserted that they were entitled to 95% of their fees based on their counsel's estimate of the fees allocated to the claims on which they prevailed in the litigation. A736.

The Court denied the parties' respective requests for fees on an equitable basis without addressing either parties' arguments regarding their proposed fee award. *Fees*, 2020 WL 7861336, at *7. In response to Section 12.10's provision where a party "prevails in part, and loses in part," the Court held that "nothing is more equitable than to leave the fees in repose." *Id*. The Court did not address Great Hill's arguments regarding its proposed equitable approach to awarding fees.

F. The Parties Other Than The Founders Settle The Remaining Claims.

Following the Court's order regarding the parties' request for attorneys' fees, Great Hill and Defendants other than the Founders agreed to settle any remaining claims between them and directed the Escrow Agent to release the Escrow Amount. Regardless of the release, the Founders are still liable for their *pro rata* share of the $9.2 million indemnification obligation for any Losses, including reasonable attorneys' fees, costs and expenses. The Merger Agreement contemplates circumstances where the Buyer can make a claim to recover the Escrow Amount even after the expiration of the Escrow Period (twelve months after Closing) and the release of the funds. B129. Therefore, Great Hill may make a claim and seek indemnification from the $9.2 million Escrow Amount even after the expiration of the Escrow Period and the release of the funds from the Escrow Account. Consequently, the release of the Escrow Amount from the Escrow Account has no bearing on whether the Founders remain liable for their *pro rata* share of the $9.2 million indemnification obligation.

G. The Final Judgment Enters And The Parties Appeal.

On April 7, 2021, the Court entered a Final Order and Judgment. A877.1-877.6. On April 22, 2021, the Court entered an Amended Final Order and Judgment. Op. Br. Ex. B. On May 19, 2021, the Founders filed a notice of appeal to contest

the Court's ruling on fees. Trans. ID 66615161. On June 2, 2021, Great Hill filed a notice of cross-appeal also challenging the Court's ruling on fees.

ARGUMENT

I. The Court Below Erred When It Held That Section 10.02 Did Not Apply To An Award Of Fees For First-Party Claims.

A. Questions Presented

Whether the Court of Chancery erred as a matter of law when it: first, applied the presumption that broad indemnification provisions do not cover first-party claims and interpreted Section 10.02, which by its plain language applies to "any actual loss . . . whether or not arising out of third party claims," not to apply to Great Hill's claim against the Founders; and second, held that the plain text of Section 10.02 does not overcome that presumption. Great Hill preserved this argument in Plaintiffs' Memorandum in Support of Motion for Attorneys' Fees and Costs. A730-31.

B. Scope of Review

This Court reviews issues of contract interpretation *de novo*. *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014). "Delaware adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). "When interpreting a contract, this Court will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *Salamone*, 106 A.3d at 368 (quoting *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*,

36 A.3d 776, 779 (Del. 2012)). "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). "Under standard rules of contract interpretation, a court must determine the intent of the parties from the language of the contract." *Twin City Fire Ins. Co. v. Del. Racing Ass'n,* 840 A2d 624, 628 (Del. 2003).

C. Merits Argument

1. Section 10.02 Requires The Indemnification Defendants To Indemnify Great Hill For Any Losses, Including Reasonable Legal Fees, For All Claims, "Whether Or Not Arising Out Of Third Party Claims."

"[A]n indemnification and hold harmless provision . . . requires an indemnitor to make its indemnitee whole with regard to matters covered by the indemnity and . . . in many circumstances, that will require reimbursement of the reasonable attorneys' fees expended in the matter." *Cobalt Op., LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, *32 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE). Article 10 of the Merger Agreement does just that. As the Court previously held (and the Founders do not dispute), Article 10 is a "carefully thought-out liability scheme" through which the Indemnification Defendants "agreed to indemnify the buyer for the pro rata amount of all losses, as defined in the Section." *Liability*, 2018 WL 6311829, at *49. The definition of "Losses" is expansive:

> ***any*** actual loss, liability, damage, obligation, cost, deficiency, Tax, penalty, fine or expense, ***whether or not arising out of third party claims*** (***including*** interest, penalties, ***reasonable legal fees*** and expenses, court costs ***and all*** amounts paid in investigation, defense or settlement of any of the foregoing).

B176 § 10.02(a) (emphasis added). The plain language of Section 10.02 reflects the parties' intent to provide broad indemnification remedies to Great Hill in the event of *any* loss, which expressly includes reasonable legal fees, expenses and costs. Article 10's broad indemnification language directs the allocation of $9.2 million in indemnification funds, the "Escrow Amount," where indemnification for "Losses" is required under Section 10.02. B178 § 10.03. Specifically, each Indemnification Defendant is liable for Losses up to their *pro rata* share of $9.2 million. B176 § 10.02(a).

Specifically, the Indemnification Defendants agreed to indemnify Great Hill for such Losses that are "as a result of, ***in connection with or relating to*** . . . any breach . . . of any representation or warranty." *Id.* (emphasis added). The Court found (and the Founders concede) that they breached two representations, Sections 3.23 and 3.26(b), *Liability*, 2018 WL 6311829, at *47, and are therefore liable for Great Hill's reasonable legal fees.

The release of the Escrow Amount has no bearing on the Founders' indemnification obligations under Section 10.02, and the Founders are still liable for their *pro rata* share of the $9.2 million indemnification obligation for any Losses,

including reasonable attorneys' fees, costs and expenses. The Merger Agreement contemplates circumstances where the Buyer can make a claim to recover the Escrow Amount even after the expiration of the Escrow Period (twelve months after Closing) and the release of the funds. B129 § 2.08. For example, claims under Section 10.02(a), like those here, generally apply "after the Effective Time" subject to a Survival Period defined in Section 10.01. *Id*., B175-76. The Survival Period can be longer than the one-year Escrow Period for certain claims. *See* B175 (Section 10.01(i) and (ii) applying the applicable statute of limitations for claims). Therefore, Great Hill may make a claim and seek indemnification from the $9.2 million Escrow Amount even after the expiration of the Escrow Period and the release of the funds from the Escrow Account. Consequently, the release of the Escrow Amount from the Escrow Account has no bearing on whether the Founders remain liable for their *pro rata* share of the $9.2 million indemnification obligation.

2. The Court Erred When It Applied A Presumption That Section 10.02 Did Not Apply To First-Party Claims Like Those Brought By Great Hill.

The Court acknowledged that indemnification provisions "may be interpreted broadly to include fee shifting," but held that they are "presumed *not* to require reimbursement for attorneys' fees incurred as a result of substantive litigation between the parties to an agreement absent a clear and unequivocal articulation of that intent." *Fees*, 2020 WL 7861336, *at* *5 (quoting *Senior Hous. Capital, LLC v.*

SHP Senior Hous. Fund, LLC, 2013 WL1955012, *44 (Del. Ch. May 13, 2013)). The Court erred as a matter of law when it found that the parties' use of the phrase "whether or not arising out of third party claims" in Section 10.02 did not "explicitly state that this provision was meant to shift fees in disputes between the parties." *Fees*, 2020 WL 7861336, *5-6. This holding contravenes this Court's decisions allowing fee shifting for even less specific indemnification provisions. *See LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009); *see also Cobalt*, 2007 WL 2142926, *31-32; *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1256 (Del. 2004). Even if the presumption applied, the Court did not follow the plain language of the ***entire*** provision, which captures first-party claims and, therefore, failed to "give priority to the parties' intentions as reflected in the four corners of the agreement." *Salamone*, 106 A.3d at 367 (quoting *GMG Capital Inv.*, 36 A.3d at 779).

Section 10.02 states in relevant part:

> each Effective Time Holder. . . ***shall indemnify*** Parent and the Surviving Corporation . . . against such Effective Time Holder's Pro Rata Share of ***any*** actual loss, liability, damage, obligation, cost, deficiency, Tax, penalty, fine or expense, ***whether or not arising out of third party claims*** (***including*** interest, penalties, ***reasonable legal fees and expenses***, court costs and all amounts paid in investigation, defense or settlement of any of the foregoing) (collectively, "Losses")…

B176 (emphasis added). A reading of the plain language makes clear that the parties intended an expansive indemnification obligation that extended to ***any*** Losses. The

phrase "whether or not arising out of third party claims" modifies the prior clause to provide further explanation of this expansive approach—namely that regardless of whether the claim was a third-party claim ***or not***, any related Losses would be subject to indemnification. *See Delle Donne*, 840 A.2d at 1256 (provision requiring indemnification for "all" losses was "very broad in scope," warranting reimbursement of "fees incurred to enforce the contractual indemnity provision").[5] Essentially, the Court read "whether or not" out of Section 10.02, thereby making third-party claims the sole focus of the indemnification obligations. An objective, reasonable third party would interpret Section 10.02 to shift fees for ***all*** claims, including the first-party claims litigated here. *Salamone*, 106 A.3d at 367-68 ("[A] contract's construction should be that which would be understood by an objective, reasonable third party.").

Moreover, reading Section 10.02(a) to apply only to third-party claims renders other provisions of the Merger Agreement meaningless. For example, Section 10.02(c) and (d) provide separate instructions for notifying the Indemnifying Party of specific claims—subsection (c) addresses notices of claims under 10.02(a) or (b) while subsection (d) provides unique instructions for notice of any Third Party

[5] *See Barker Capital LLC v. Rebus LLC*, 2006 WL 246572, *9-10 (Del. Super. Ct. Jan. 12, 2006) (awarding "fees incurred in prosecuting [plaintiff's] breach of contract claim" where indemnification provision covered "any" loss, including fees for "investigating, preparing or defending" claims).

Claim. B177-78. Section 10.02(a) cannot reasonably be interpreted to be limited to third-party claims in light of these additional provisions addressing third-party claims separately. To hold otherwise would render Section 10.02(a) and (c) surplusage. *Kuhn Const., Inc. v. Diamond State Port Corp*., 990 A.2d 393, 396–97 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

Courts, including this Court, have also consistently awarded legal fees for "first-party" claims under indemnification provisions with less "clear and unequivocal" language than Section 10.02(a) has here. *See Cobalt*, 2007 WL 2142926, *31-32 (awarding plaintiff "the substantial fees it expended in enforcing its fraud and breach of contract claims" even though the indemnification provision lacked Section 10.02(a)'s "whether or not arising out of third party claims" clause); *see also LaPoint*, 970 A.2d at 197 (indemnification provision without Section 10.02(a)'s language "unambiguously provides that [defendant] is required to indemnify [plaintiffs] for attorneys' fees and expenses").

Declining to follow this precedent, the Court relied on *Senior Housing Capital, LLC v. SHP Senior Housing Fund, LLC*, 2013 WL 1955012 (Del. Ch. May 13, 2013), to support its interpretation of Section 10.02, finding that the provision must include a "clear and unequivocal articulation" of the parties' intent to cover first-party claims. *Fees*, 2020 WL 7861336, at *5. The Court even noted that then-

Chancellor Strine in *Senior Housing* applied New York's approach to interpreting indemnification provisions, which required a clear expression of the parties' intent. *Fees*, 2020 WL 7861336, at *5; *Senior Housing*, 2013 WL 1955012, at *44. Yet, even under New York law, a "provision, which states that indemnification applies to any loss 'whether or not arising out of any claims by or on behalf of any third party,' and includes a distinct section referencing third-party claims, clearly implies that the parties intended the provision to apply to certain intra-party claims." *Abax Lotus Ltd. v. China Mobile Media Tech. Inc.*, 53 N.Y.S.3d 29, 31 (N.Y. App. Civ. 2017). As a result, the Court should have found the language sufficient here.

The Court also erred as a matter of law when it held that Section 10.02 would be "little more than surplusage" if it applied to first-party claims because Section 12.10 "directly addresses the fee shifting sought here," noting that the purportedly more specific language of 12.10 controls over the seemingly general language of 10.02. *Fees*, 2020 WL 7861336, at *6. First, Section 10.02 does not conflict with Section 12.10 or render it meaningless. Section 10.02 addresses the disbursement of a defined amount of indemnification funds while Section 12.10 extends to recovery of reasonable attorneys' fees beyond those reserved funds. In fact, Section 10.02(a) is "bolstered" by the separate fee-shifting provision in Section 12.10 because it reflects the parties' intent to shift fees. *Cobalt*, 2007 WL 2142926, at *32 (fee-shifting provision "bolstered" the "correctness of . . . interpretation" that

indemnification provision covered attorneys' fees). Each provision addresses the recovery of attorneys' fees but in distinct contexts—thereby making both terms specific and allowing them to coexist without rendering either duplicative or meaningless.

For all of these reasons, Great Hill respectfully requests that this Court interpret Section 10.02 to require the Founders to indemnify Great Hill for their *pro rata* share of the $9.2 million indemnification obligation for attorneys' fees, costs and expenses incurred to litigate this matter.

II. The Court Of Chancery Properly Interpreted Section 12.10 To Award Fees "On An Equitable Basis" Where Each Party Prevailed In Part And Lost In Part, But Erred In Denying Fees To Great Hill, Which Prevailed On The Chief Issue In The Case.

A. Questions Presented

Whether the Court of Chancery: first, erred as a matter of law when it interpreted Section 12.10 to allow it to award no fees, costs or expenses on an equitable basis to Great Hill, the party who prevailed on the chief issue in the case; second, properly exercised its discretion to award no fees, costs or expenses on an equitable basis to the Founders, the party who lost on the chief issue in the case; and third, even if the Court abused its discretion as to the Founders, whether that error was harmless as to them. Great Hill preserved this argument in Plaintiffs' Memorandum in Support of Motion for Attorneys' Fees and Costs and Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion for Awards of Fees, Costs, and Expenses. A731-36; B218.

B. Scope of Review

"This Court reviews the Court of Chancery's interpretation of a contractual fee-shifting provision *de novo*, but reviews its decision to deny awarding attorneys' fees and costs for an abuse of discretion. 'When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.'" *Marina View Condo. Ass'n of Unit*

Owners v. Rehoboth Marina Ventures, LLC, 2020 WL7861342, *3 (Del. Dec. 31, 2020) (ORDER) (footnote omitted); *see also RBC Capital Mkts. LLC v. Jervis,* 129 A.3d 816, 876 (Del. 2015) (same).

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) (citations omitted). This Court will also "set aside or overturn the Court of Chancery's factual findings" if "they are not the product of an orderly and logical deductive process." *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 432 (Del. 2012).

C. Merits of the Argument

1. Section 12.10 Provides For An Award Of Fees On An Equitable Basis Where A Party Prevails In Part And Loses In Part.

The Merger Agreement expressly provides for fee shifting under the circumstances presented here. Section 12.10 of the Merger Agreement states:

> If any litigation . . . is commenced by any party . . . to enforce its rights under th[e Merger] 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 . . . shall be reimbursed by the losing party; ***provided***, that if a party to such litigation . . . ***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***."

B189 (emphasis added). Thus, the parties agreed to a fee-shifting arrangement where a prevailing party may be entitled to reasonable attorneys' fees under two separate scenarios: (1) where the party seeking fees is the sole prevailing party in the litigation, and (2) where a party seeking fees prevails in part, and loses in part.

The parties agree that the Court properly concluded that the first clause of Section 12.10 requires an award of fees as a matter of course where a single party prevailed in the litigation in its entirety. *Fees*, 2020 WL 7861336, at *6; Founders-Br. 27-28; A731-32. Rightly concluding that this case presented a "mixed result," the Court held that the first clause of Section 12.10 does not apply here. *Fees*, 2020 WL 7861336, at *6.[6]

The Court then proceeded to properly interpret Section 12.10 to allow the court to award fees "on an equitable basis" if the party seeking fees "prevails in part, and loses in part." *Id*. at *7. Awarding fees on an equitable basis could, in fact, result in an award of no fees whatsoever. *Kaung v. Cole Nat'l Corp*., 884 A.2d 500, 506 (Del. 2005) ("The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded."). Great Hill submits that the Court failed to

[6] The Founders argue that the "Court could not have concluded that no party prevailed" (at 28), while also admitting they lost in part "[a]s parties who prevailed on most ***but not all*** claims" (at 38 (emphasis added)). *See also infra*, at 33. They cannot have it both ways.

properly weigh the equities when it declined to award fees to either party. For their part, the Founders insist (incorrectly) that some measure of fees ***must*** be awarded to them on an equitable basis (Founders-Br. 35-36), despite having been found liable for contractual breaches.

2. The Court Properly Considered An Award Of Fees On An Equitable Basis Where The Founders And Great Hill Each Prevailed In Part And Lost In Part.

The Court properly found "that neither party has truly prevailed." *Fees*, 2020 WL 7861336, at *6 ("[I]t can be said that the Plaintiffs prevailed in proving some liability, but the Defendants prevailed in limiting the amount of damages."). As a result, Great Hill only moved for fees on an equitable basis under the second clause of Section 12.10. A732.

Ignoring reality (and their own admissions), the Founders contend that they "predominated on ***almost*** all the claims asserted against them" and therefore should be entitled to a mandatory award of their fees. Founders-Br. 28 (emphasis added).[7] In one breath they prove the opposite. "***Almost*** all the claims" does not mean ***all*** the claims. In fact, the Court found that the Founders had breached the representations in Sections 3.23 and 3.26(b) of the Merger Agreement related to Plimus's

[7] Moreover, the court in *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, the case the Founders rely on, rejects this claim-by-claim approach to determining which party prevailed. *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2018 WL 300454, *2 (Del. Ch. Jan. 5, 2018); *see infra*, at 35-36.

relationship to its key payment processor PayPal. *Liability*, 2018 WL 6311829, at *47.

The Founders also waived any argument that they prevailed in full by their own admissions in their moving papers that "they prevailed on ***nearly*** all of Plaintiffs' claims," and therefore only sought a portion of their fees. A756 (emphasis added); *see also* Founders-Br. 38 ("As parties who prevailed on most ***but not all*** claims") (emphasis added), *id*. at 15 ("The court held that the Effective Time Holders [including the Founders] were liable for only two erroneous representations"), *id*. at 31 ("two modest contractual claims for which the Court of Chancery determined that the Founders should be responsible for their *pro rata* share. . .").

The question for the Court therefore was not to determine who prevailed (for the purpose of awarding that party ***all*** of its fees), but to determine an equitable basis for awarding fees to parties that prevailed in part, as the Court properly acknowledged. *Fees*, 2020 WL 7861336, at *6. Only Great Hill proposed a methodology for doing so, and the Court abused its discretion when it did not provide any reasoning for rejecting it. A732-35.

3. The Court Abused Its Discretion When It Denied Great Hill Fees And Failed To Apply The Chief Issue Standard, Which Should Govern An Equitable Award Where A Party Prevails In Part And Loses In Part.

The Court denied the parties' respective fee applications. *Fees*, 2020 WL 7861336, at *6. The entirety of the court's reasoning states:

> 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.

Id. at *7. The Court did not appear to consider Great Hill's proposed methodology for determining an "equitable" award under these circumstances.[8] *EMAK Worldwide*, 50 A.3d at 432 (stating this Court will overturn findings when "they are not the product of an orderly and logical deductive process"). Specifically, Great Hill proposed that the Court should apply Delaware's standard for determining which party "prevailed" in order to assess an equitable award of fees here.[9]

Delaware courts look to which party predominated in the litigation to determine who is the prevailing party. *Mrs. Fields*, 2018 WL 300454, at *2. Courts apply an "all or nothing approach" as opposed to a "claim-by-claim application." *Id*.

[8] The Founders offered no methodology whatsoever other than to say they "prevailed" (which they admit is wrong) and that they are entitled to an arbitrary award of 95% of their fees based on the unsupported say-so of counsel.

[9] The Founders waived any argument that the "predominance-in-the-litigation" standard should apply because they did not raise it below. Nevertheless, they now agree that this standard should apply. Founders-Br. 31-32. For all the reasons detailed below, *infra*, at 36-37, the Founders did not "predominate" in the litigation under that standard and are not entitled to fees.

at *3. Courts have expressly rejected a claim-by-claim tally like that proposed by the Founders (at 30-31), and instead "focus on what was the 'chief' issue in th[e] case." *Id*.; s*ee 2009 Caiola Family Tr. v. PWA, LLC*, 2015 WL 6007596, *33 (Del. Ch. Oct. 14, 2015) (holding plaintiffs prevailed on the "chief issue," although their success was limited to two of nine factual bases for claim).

This case focused on the "major disruption" to Plimus's business that was caused by the termination of Plimus's relationship with its critical payment processor, PayPal, and the Defendants' failure to disclose Plimus's pattern of rules violations that poisoned Plimus's relationship with its payment processors. Great Hill brought claims against the Defendants to prove that those problems were concealed in the sales process despite Great Hill's requests for such information. Before finding that Tal committed fraud, the Court explained that "[t]he ***most serious*** allegations of fraud involve PayPal's relationship with Plimus" because, "unlike with Paymentech, Plimus was not ambivalent to the PayPal relationship, and the loss of PayPal would mean a ***major disruption*** to Plimus's business." *Liability*, 2018 WL 6311829, at *43-44 (emphasis added). Great Hill prevailed on that chief issue when the Court found fraud and contractual breaches regarding Plimus's relationship with PayPal and the information concealed from Great Hill in the sales process. *Id*. at *43-45, *47. The Court found the Founders liable for contractual breaches for false representations in the Merger Agreement relating to Plimus's

relationship with PayPal. Because Great Hill prevailed on the chief issue, and thereby predominated in the litigation, Great Hill is entitled to an equitable award of its fees.

Having prevailed on the chief issue, Great Hill argued that it would be equitable to be awarded fees for those stages of the litigation in which it prevailed because it "prevailed on all pretrial motions and the substantive issue at trial." *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, *2-3 (Del. Ch. Apr. 27, 2004) (awarding fees to plaintiffs because they prevailed on "the main issue in th[e] case"); A732-35. Great Hill won every single pre-trial dispute that Defendants manufactured: Great Hill won the privilege dispute that Defendants created; Great Hill defeated a motion to dismiss; Great Hill successfully opposed Defendants' five separate motions for summary judgment; and Great Hill thwarted Defendants' four motions in limine. Great Hill then proved at trial both fraud and breach of contract in connection with PayPal's termination of Plimus—the "chief issue" in the case. *2009 Caiola Family Tr.*, 2015 WL 6007596, at *33 (awarding fees to plaintiffs because they prevailed on the "chief issue," even though their success was limited to two of nine bases for breach of contract); *W. Willow Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *9 (Del. Ch. Feb. 23, 2009) (awarding fees because plaintiff "prevailed on the litigation's chief issue"). Under these

circumstances, it is equitable to award Great Hill the fees for each stage at which it was successful.

The Founders focus on the damages award to support their argument that Great Hill did not predominate in the litigation (at 29), but "Delaware law is clear" that "the outcome of the substantive issues, not damages," is what matters. *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 WL 1111179, *14 (Del. Ch. Apr. 27, 2009) (awarding fees to plaintiff that proved breach of contract but received "nominal damages of one dollar"); *see also Comrie*, 2004 WL 936505, at *2-3 (awarding fees to plaintiffs because they prevailed on "the main issue in th[e] case," even though they received a small portion of the remedy sought; considering remedy to determine who prevailed "would lead to perverse results"); *ADI Techs., Inc. v. Milspray, LLC*, 2013 WL 12250012, *3 (E.D. Va. Jan. 16, 2013) ("[T]he amounts ultimately awarded, or denied, to each party . . . do not necessarily reflect the difficulty of issues involved or the relative merits of the parties' positions, and accordingly, an allocation of fees and costs on the basis of the amounts the parties won or lost in their claims is not an equitable basis.").

For almost a decade, Great Hill successfully withstood the Defendants' extraordinary and highly-orchestrated tactical defense by three separate defendant groups aimed at delaying and preventing a final judgment no matter the cost. Tellingly, Defendants sought almost $40 million in legal fees, costs and expenses

(B218)—more than double Great Hill's request—thereby illustrating the lengths to which Defendants went to impede this litigation.[10]

Nevertheless, the Court's opinion does not specifically address Great Hill's proposal. Great Hill submits that the record is sufficient for this Court to "substitute its own notions of what is right" and order that Great Hill is entitled to an equitable award of its fees. *Marina View Condo. Ass'n of Unit Owners v. Rehoboth Marina Ventures, LLC*, 244 A.3d 1007, 2020 WL 7861342, *3 (Del. Dec. 31, 2020) (ORDER).

4. The Court Committed Harmless Error When It Failed To Apply The Chief Issue Standard To Deny An Equitable Award Of Fees To The Founders.

While the Court did not address the chief-issue standard when it denied the Founders' motion, the Court properly found that the Founders are not entitled to any fees on an equitable basis. As such, the Court's error is harmless and its decision should be affirmed.[11] *Walls v. Ford Motor Co.*, 160 A.3d 1135, 2017 WL 1422626,

[10] Defendants other than the Founders settled the remaining claims with Great Hill after the Court's order on their joint motion for fees. As a result, only the Founders' request for approximately $4 million (or one-tenth of the Defendants' overall fees) is before the Court. But the Founders cannot now seek to benefit from the absence of their co-defendants and minimize their role among them after years of choosing to proceed arm-in-arm in their attacks on Great Hill's claims.

[11] The Court did not reach the question of whether the parties' fees were reasonable. Great Hill challenged the reasonableness of the Founders' fees and their failure to provide any invoices to support their request. B226-30. Notably, the

*4 (Del. Apr. 21, 2017) (ORDER) (affirming trial court ruling despite legal error, noting that the "[e]rror is harmless if it would not substantively affect the outcome of the proceedings or a party's substantive rights").

On appeal, the Founders argue that they "predominated" in the litigation, and therefore are entitled to recover 95% of their fees. Founders-Br. 28-32. For all the reasons detailed in Section III.C., Great Hill, not the Founders, predominated in the litigation. The Founders attempt to minimize their liability by claiming that they were "assessed those minimal damages in what amounts to a strict liability determination" (at 29), but the Court found that the Founders were liable for contractual breaches relating to the chief issue in the case—their representation of Plimus's relationship with PayPal. *Liability*, 2018 WL 6311829, at *47. The Founders ignore this reality and instead revert to a claim-by-claim approach that has been rejected by the very case law the Founders rely on. Founders-Br. 30-31; *see Mrs. Fields Brand*, 2018 WL 300454, at *3 (courts apply an "all or nothing approach" as opposed to a "claim-by-claim application" and "focus on what was the 'chief' issue in th[e] case."). Even if a claim-by-claim approach were applied, the Founders offered no rational methodology whatsoever to support the award they

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Founders did not challenge the reasonableness of Great Hill's fees. To the extent the Court finds that the Founders are entitled to an award of fees (which they are not), Great Hill respectfully requests that the Court remand for a determination of reasonableness.

seek and to determine what fees should be apportioned to which claims. Instead, the Founders claim that they are entitled to an arbitrary 95% of their fees to reflect their "predominance" in the litigation because their counsel says so. Again, the Court's opinion is silent on those arguments.

The Founders also take issue with the Court's purported failure to parse each Defendant's request for fees individually (at 29-30). First, the Court noted that a party-specific analysis would yield the same result. *Fees*, 2020 WL 7861336, at *6 n.72. Second, the Court's approach was appropriate where the Founders' defense was highly coordinated with their co-defendants from day one. The Founders not only shared counsel with their co-defendants through the first years of the case, but they also remained in lockstep throughout discovery and trial. The Court was right to address the Defendants together where, as here, "there is no doubt that their defense was, by and large, jointly conducted." *Valeant Pharm. Int'l v. Jerney*, 2007 WL 2813789, *17 (Del. Ch. Mar. 1, 2007) (declining to parse each defendants' contribution obligations to reimburse their advanced attorneys' fees where a defendants' "defense rested importantly on the successful defense of [the other]").

The Founders also argue that Section 12.10 requires ***some*** award of fees and that the Court was not permitted to deny fees altogether. Founders-Br. 36 n.103. Not so. First and foremost, the Founders are not entitled to ***any*** fees. Regardless, the Court has the discretion to award no fees on an equitable basis. *See Est. of*

Proffitt v. Miles, 2012 WL 3542202, *3 (Del. Ch. Aug. 4, 2012) (exercising the court's discretion to award "zero dollars ($0)" on an equitable basis); *Kaung*, 884 A.2d at 506 ("The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded."). And it was right to do so here where the Founders did not prevail on the chief issue in the case. As a result, any error in failing to consider or apply the "predominance-in-the-litigation" standard was harmless. *Walls*, 2017 WL 1422626, at *4 (affirming trial court ruling despite legal error, noting that the "[e]rror is harmless if it would not substantively affect the outcome of the proceedings or a party's substantive rights"). Consequently, the decision to deny the Founders any fee award should be affirmed.

CONCLUSION

Great Hill respectfully asks the Court: (1) to vacate the Court's order below to the extent it improperly interpreted Section 10.02 and Section 12.10, and grant Great Hill's motion for attorneys' fees, costs and expenses; and (2) to affirm the Court's denial of the Founders' motion for attorneys' fees, costs and expenses on the basis that any abuse of discretion was harmless error.

/s/ Robert L. Burns
Rudolf Koch (#4947)
Robert L. Burns (#5314)
Megan E. O'Connor (#6569)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, DE 19801

Attorneys for the Plaintiffs Great Hill Equity Partners IV, LP, Great Hill Investors LLC, Fremont Holdco, Inc., and BlueSnap (f/k/a Plimus)

OF COUNSEL

Adam Slutsky
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000

Dated: August 9, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2021 true and correct copies of the foregoing were caused to be served by File & Serve*Xpress* on the following counsel of record:

William B. Chandler III, Esquire
Ian R. Liston, Esquire
Jessica A. Hartwell, Esquire
Wilson Sonsini Goodrich & Rosati, P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801

Lewis H. Lazarus, Esquire
Patricia A. Winston, Esquire
Bryan Townsend, Esquire|
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801

David S. Eagle, Esquire
Sean M. Brennecke, Esquire
Klehr, Harrison, Harvey, Branzburg LLP
919 Market Street, Suite 1000
Wilmington, Delaware 19801

/s/ Megan E. O'Connor
Megan E. O'Connor (#6569)