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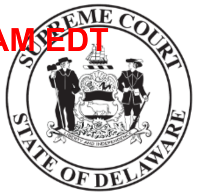

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DSG ENTERTAINMENT SERVICES, INC. (f/k/a Deluxe Entertainment Services Inc.),	)	No. 185, 2021
Plaintiff Below-Appellant,	)	Court Below: Court of Chancery of the State of Delaware, C.A. No. 2020-0618-MTZ
v.	)	
DLX ACQUISITION CORPORATION and DELUXE MEDIA INC.	)	**REDACTED PUBLIC VERSION**
Defendants Below-Appellees.	)	**Filed: September 7, 2021**

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Allen M. Gardner
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004

Dated: August 26, 2021

Srinivas M. Raju (#3313)
Angela Lam (#6431)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendants Below-Appellees DLX Acquisition Corporation and Deluxe Media Inc.

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NATURE OF PROCEEDINGS

This case arises out of a straightforward contract dispute. Plaintiff-Appellant Deluxe Entertainment Services ("Plaintiff") sold Defendant Deluxe Media Inc. and its subsidiaries ("Deluxe Media," the "Company Group," or the "Target") to Defendant DLX Acquisition Corp. ("DLX") (together, Defendants-Appellants, or "Defendants") via a stock purchase agreement for . Consistent with common practice for the sale of a company via a stock purchase, the Purchase Agreement negotiated between the parties transferred all assets and liabilities of the Company Group to DLX, except those assets and liabilities specifically identified on the schedules of "Excluded Assets" and "Excluded Liabilities." Plaintiff now claims that somewhere between dollars' worth of cash assets—Plaintiff cannot identify an exact amount[1]—belonging to the purchased entities and remaining in the purchased entities at closing, were not included in the sale, and demands the assets' return.

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[1] Plaintiff has taken inconsistent positions on the amount of cash assets that were left in the Company Group, alleging in its complaint that the amount was , but later asserting that the amount was closer to . *Compare* A8 ¶ 1 ( ), *with* A426 ("nearly ") *and* Amended Appellant's Opening Brief ("Op. Br.") at 7 ("around "). Defendants dispute both amounts. *See* B3-5 ¶ 1 (denying Plaintiff's allegation regarding the amount of cash assets in the Company Group at closing). Because Plaintiff's claims fail as a matter of law, however, *see infra*, the exact amount in dispute is ultimately irrelevant.

Defendants refused Plaintiff's demand, having purchased the cash assets, along with all other assets belonging to Company Group, except those assets specifically identified as being excluded from the sale. The disputed cash assets are not listed among these "Excluded Assets," nor is there any other provision in the Purchase Agreement that provides for a post-close transfer of the cash assets to Plaintiff. Plaintiff cannot identify any provision of the Purchase Agreement that Defendants breached.

In light of this, Plaintiff resorts to claiming that the parties' negotiating history indicates that Defendants are not entitled to the disputed cash assets. But the Purchase Agreement is unambiguous, and thus its clear terms must control this case. The Purchase Agreement, moreover, clearly anticipates the possibility that certain assets may inadvertently be transferred during the sale, and provides for their return. These provisions, however, do not cover the disputed cash, further indicating that the cash was intended to transfer with the sale. For these reasons and for the reasons explained herein, the judgment of the Court of Chancery should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly entered judgment on the pleadings in favor of Defendants on Plaintiff's breach of contract claim, because Plaintiff cannot identify a single provision of the Purchase Agreement that Defendants have breached. The Purchase Agreement provides for the transfer of all assets of the purchased entities with the sale, except for those assets specifically excluded from the sale. The disputed cash assets are not identified as "Excluded Assets" in the Purchase Agreement, and therefore transferred with the sale. No provision in the Purchase Agreement provides for the return of the cash assets to Plaintiff. The Court of Chancery also correctly ruled that Plaintiff waived its argument that cash is not a "Company Asset," as defined in the Purchase Agreement, by raising this argument for the first time in its Motion for Reargument. Even if this argument is not waived, under the plain terms of the Purchase Agreement, the disputed cash constitutes a "Company Asset" because it is undisputed that it belonged to the purchased entities. The Court's ruling is therefore entirely consistent with the unambiguous terms of the parties' agreement.

2. Denied. The Court of Chancery correctly entered judgment on the pleadings in favor of Defendants on Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, because the Purchase Agreement is

unambiguous and Plaintiff cannot identify a "gap" in the terms of the Agreement to be filled. The Court of Chancery did not find that the Purchase Agreement inadvertently failed to address cash assets at closing. Rather, the Court below found that the Purchase Agreement provided for the unintentional transfer of certain assets, and deliberately did not do so for the cash assets, because the disputed cash was intended to transfer with the sale. Because the Purchase Agreement specifically addresses the issue, the implied covenant cannot operate here to contradict the terms of the parties' negotiated agreement.

3. Denied. The Court of Chancery correctly entered judgment on the pleadings in favor of Defendants on Plaintiff's reformation claim, because Plaintiff failed to plead with particularity a mistake for which reformation is available. As the Court found, Plaintiff cannot identify a definite agreement between the parties that is not represented in the Purchase Agreement.

STATEMENT OF FACTS[2]

A. The Entities Involved in the Sale

This action arises out of a stock purchase agreement between Plaintiff and Defendant DLX, for the purchase of the Company Group—Deluxe Media and its subsidiaries. *See* A8 ¶ 1; A13 ¶ 15. Prior to the sale, Plaintiff was the "world's leading video creation to distribution company." A10 ¶ 4. Defendant Deluxe Media is a former subsidiary of Plaintiff through which Plaintiff operated its distribution business. A10 ¶ 6. Non-party Platinum Equity ("Platinum"), a private equity firm, formed Defendant DLX to be the acquisition entity of the Company Group. A10 ¶¶ 5, 7; B6-8 ¶¶ 5, 7. On June 30, 2020, Plaintiff and Defendant DLX entered into a stock purchase agreement whereby DLX purchased from Plaintiff all outstanding shares of the Company Group for [REDACTED]. A8 ¶ 1; A13 ¶ 15.

B. The Sale of the Company Group

In February 2020 Plaintiff began looking for potential buyers for the Company Group—Deluxe Media and its subsidiaries. A11 ¶ 9. On February 10, 2020,

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[2] The facts discussed in this brief are taken from the Complaint, the Answer, and the documents attached as exhibits to the Answer and referenced in the Complaint, including the Purchase Agreement. The allegations in the Complaint were taken as true only for purposes of the briefing on the motion for judgment on the pleadings below and this appeal. *See W. Coast Mgmt. & Cap., LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006). Defendants do not concede their accuracy or completeness.

Plaintiff sent a letter to interested buyers inviting them to "indicate[] the cash purchase price in U.S. Dollars you are proposing to pay for 100% of Deluxe Distribution on a cash-free, debt-free basis (the 'Enterprise Value')." A11 ¶ 9. On March 5, 2020, Platinum submitted an indication of interest in the sale, in which Platinum estimated the value of the Company Group between [redacted] [redacted]. A11-12 ¶ 10. Two months later, on May 1, 2020, Plaintiff sent a second letter to potential buyers inviting them to submit proposals to acquire Deluxe Media "on a cash-free, debt-free basis (the 'Enterprise Value')." A12 ¶ 11. Plaintiff and Platinum began negotiating the potential sale of the Company Group, and on May 22, 2020, Platinum submitted a proposal for the purchase of the Company Group for [redacted] A11-14 ¶¶ 10-16. Thereafter, Plaintiff counter-proposed a purchase price of [redacted], and DLX ultimately agreed. A13-14 ¶¶ 15-16. After Plaintiff and Platinum "heavily negotiated the terms of their agreement throughout the month of June 2020," Plaintiff and DLX closed the transaction for the sale of the Company Group for [redacted] on June 30, 2020. A8 ¶ 1; A13-14 ¶¶ 15-16. The sale of the Company Group was executed through the parties' Purchase Agreement. A8 ¶ 1.

C. The Purchase Agreement

1. "Excluded Assets" and "Excluded Liabilities"

The Purchase Agreement provides for DLX's acquisition of the Company Group through the purchase of all outstanding stock of the Company Group. A8 ¶ 1.

It further provides that the acquisition included all of the Company Group's assets and liabilities except those that were expressly excluded, which were identified in the Agreement as "Excluded Assets" or "Excluded Liabilities." A37, A40-41 § 1.2 (definitions of "Company Assets," "Company Group," "Excluded Assets," and "Excluded Liabilities").

The Purchase Agreement defines "Company Assets" as follows:

> "Company Assets" means all assets, properties or rights of any kind or nature of any member of the Company Group or solely or primarily used by the Company Group in the conduct its business (i) including the Deluxe name and brand and all other company names and brands used by the Company Group, and (ii) excluding, for the avoidance of doubt, assets, properties or rights transferred out of the Company Group pursuant to the Restructuring.

A37 § 1.2.

Disclosure Schedule 1.2 of the Purchase Agreement lists the specific assets and liabilities that the parties agreed would be excluded from the sale. *See* A213-16 Schedule 1.2. Three sets of assets were excluded from the sale as "Excluded Assets":

A213 ("Excluded Assets"). Cash assets are not identified as "Excluded Assets." *Id.*

2. "Net Working Capital"

The parties extensively negotiated the calculation of Net Working Capital. A13-17 ¶¶ 16-23. The Purchase Agreement defines "Net Work Capital" as:

> (a) the sum of the current assets of the Company Group set forth on the line items and subject to the adjustments set forth on Schedule 2.4; *minus* (b) the sum of the current liabilities of the Company Group set forth on the line items and subject to the adjustments set forth on Schedule 2.4 (which schedule shall not include any Transaction Bonuses), in each case, calculated in accordance with the Accounting Principles. An illustrative example of the calculation of Net Working Capital is set forth on Schedule 2.4.

A16 ¶ 22; A45-46 § 1.2 (definition of "Net Working Capital"). Disclosure Schedule 2.4 illustrates how Net Working Capital was to be calculated, including identifying assets and liabilities to be adjusted out of the calculation to arrive at the agreed-upon Net Working Capital amount. *See* A218-20 Schedule 2.4. Cash assets,

[redacted] were among the assets and liabilities excluded from the calculation of Net Working Capital. *Id.*; A45-46 § 1.2. Neither the definition of Net Working Capital in the Purchase Agreement, nor the Disclosure Schedule, states that assets excluded from Net Working Capital are also excluded from the sale of the Company Group. *See* A45-46 § 1.2; A218-20.

3. "Wrong Pockets" provisions

The Purchase Agreement also delineates certain limited circumstances where assets can be returned to Plaintiff after the close of the transaction; neither provision provides for the return of cash assets left in the Company Group. The first of these "wrong pockets" provisions provides for the return of "any right, property or asset solely or primarily related to the Designated Services, the Excluded Business or any obligation, liability or commitment not forming part of the Company Liabilities … transferred to a member of the Company Group in error." A93 § 6.14(b). The second "wrong pockets" provision provides, following the closing of the transaction, for payment to Plaintiff of "any payment received by any member of the Company Group from any customer or other counterparty of the Business to the extent that such payment constitutes an Excluded Asset." A93 § 6.14(c).

These "wrong pockets" provisions are the only mechanism in the Purchase Agreement that provide for the return of assets to Plaintiff post-close. The

Agreement contains no provisions that provide for a post-close adjustment of the purchase price based on cash assets left in the Company Group at closing, or [redacted]

[redacted]

[redacted]. *See generally* A29-209.

4. Integration and non-reliance provisions

The Purchase Agreement also states that it represents the entirety of the parties' agreement regarding the sale, irrespective of any prior representation or understandings of the parties. Section 11.5, titled "Entire Agreement," provides:

> This Agreement together with the Services Agreement, the Escrow Agreement, the Confidentiality Agreement and any annexes, exhibits and schedules to any of the foregoing **constitute the entire agreement** by and among the parties and their respective Affiliates relating to the Transactions and **supersede any and all prior agreements, understandings, negotiations and communications**, whether oral or written, that may have been made or entered into by or among any of the parties or any of their respective Affiliates relating to the Transactions.

A120 § 11.5 (emphases added). Additionally, Section 11.1 of the Agreement contains a non-reliance provision that states: "Buyer acknowledges and agrees that it is not relying on any representations, warranties or statements, whether express or implied, made by any member of the Company Group or any other Person that are not expressly set forth in Article III or Article IV (including the related portions of the Disclosure Schedules)." A117 § 11.1. It further adds: "Each of the Company Parties and their respective Affiliates disclaims any and all other representations and

warranties, whether express or implied." A117 § 11.1; *see also* A34, Preamble (defining "Company Parties" as Plaintiff and Deluxe Media).

D. The Disputed Cash Assets in the Company Group

Shortly after the close of the sale, Plaintiff claimed that cash funds, amounting to [redacted], were present in the Company Group at closing and "should be transferred immediately" to Plaintiff. A18 ¶ 26; A21 ¶ 34. Plaintiff stated that it had left the funds in the Company Group "for various practical and technical reasons." A18 ¶ 26. Defendants rejected Plaintiff's request to transfer the cash to Plaintiff, on the basis that the cash assets were included in the sale under the terms of the Purchase Agreement. A20 ¶ 32; B22-23 ¶ 32. Plaintiff filed this suit shortly thereafter.

E. Proceedings Below

On July 24, 2020, Plaintiff filed its Verified Complaint in the Delaware Court of Chancery asserting breach of contract, breach of the implied covenant of good faith and fair dealing, and a claim for reformation against Defendants DLX and Deluxe Media, seeking to obtain the cash assets in the Company Group that now belonged to Defendants. *See generally* A7-26; B2-3; B3-5 ¶¶ 1-3. Plaintiff also filed a motion to expedite the proceedings, which the Court of Chancery denied following briefing from the parties. Defendants answered the complaint on August 18, 2020, B1-33, and moved for judgment on the pleadings on October 2, 2020. On

March 29, 2021, the Court granted Defendants' motion for judgment on the pleadings on all three of Plaintiff's claims. Op. Br. Ex. A at 34 ("Opinion"). Plaintiff then filed a motion for reargument, *see generally* A496-502, which the Court denied on May 19, 2021, *see generally* Op. Br. Ex. B ("Order"). On June 8, 2021, Plaintiff filed its notice of appeal.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT DEFENDANTS ARE ENTITLED TO JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM

A. Question Presented

Whether the Court of Chancery correctly held that Defendants are entitled to judgment on Plaintiff's breach of contract claim, where the Purchase Agreement unambiguously transferred all assets of the Company Group to Defendant DLX, except those specifically identified as "Excluded Assets" on the Purchase Agreement's Disclosure Schedule 1.2, and where the disputed cash assets are not identified as "Excluded Assets." Opinion 6-18; Order 2.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's grant of a motion for judgment on the pleadings. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993).

C. Merits of Argument

Plaintiff claims that Defendants committed a breach of contract when they declined to transfer the disputed cash assets back to Plaintiff. A22-23 ¶¶ 37-44. Courts interpret a contract's terms according to the ordinary meaning that would be ascribed to them by a reasonable third party. *See Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014); *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch.

2003). "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract[,] or to create an ambiguity." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). The presumption that parties are bound by the language of the agreement they negotiated is even stronger where, as here, the parties are sophisticated entities. *See W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007), *aff'd*, 985 A.2d 391 (Del. 2009) (TABLE). Disputes over unambiguous contracts are appropriately resolved on a motion for judgment on the pleadings. *See, e.g.*, *Chi. Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 925 (Del. 2017).

Under Delaware law,[3] to allege a breach of contract, a plaintiff must allege "(1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages." *See Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. Ct. 2005), *aff'd*, 886 A.2d 1278 (Del. 2005) (TABLE). Here, Plaintiff cannot identify even a single provision of the Purchase Agreement that Defendants have breached. *See* A22-23 ¶¶ 37-44. As the Court below correctly found, the disputed cash assets transferred with the sale of the Company Group, based on the

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[3] The Purchase Agreement provides that any disputes arising out of the agreement are governed by Delaware law. *See* A121 § 11.10(a).

unambiguous terms of the Purchase Agreement negotiated between the parties. Opinion 6-18. Plaintiff cannot rely on the definition of Net Working Capital or the parties' negotiating history to manufacture ambiguity in the Purchase Agreement when the Purchase Agreement is clear that cash assets are not excluded from the sale of the Company Group. Nor can Plaintiff rely on an argument about the definition of "Company Assets" that it failed to properly raise below. For the reasons explained below, the Court of Chancery correctly held that Defendants are entitled to judgment on the pleadings on Plaintiff's breach of contract claim.

1. The Purchase Agreement transfers all Company Group assets except "Excluded Assets"

a. Cash is not an "Excluded Asset"

As the Court below found, the terms of the Purchase Agreement are quite clear: Defendant DLX acquired the Company Group via a stock purchase, whereby Plaintiff agreed "to sell and assign to Buyer [DLX] and for Buyer to purchase and pay" the Company Group's shares for a purchase price of [redacted]. Opinion 9 (quoting A34); A37 § 1.2 (definitions of "Company Assets" and "Company Group"); A52 § 2.1. "[I]t is a general principle of corporate law that all assets and liabilities are transferred in the sale of a company effected by a sale of stock …." *In re KB Toys Inc.*, 340 B.R. 726, 728 (D. Del. 2006); *see also US Ecology, Inc. v. Allstate Power Vac, Inc.*, 2018 WL 3025418, at *6 (Del. Ch. June 18, 2018), *aff'd*,

202 A.3d 510 (Del. 2019) (TABLE); *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 99 & n.72 (Del. Ch. 2009) ("The familiar default rule in stock sales is that a change in the ownership of a company does not affect the rights and liabilities of the company."). Thus, when Plaintiff sold its shares in the Company Group to DLX, DLX acquired all assets and liabilities of the purchased entity "by default," except where the Purchase Agreement specified otherwise. Opinion 10; *US Ecology*, 2018 WL 3025418, at *6; *see also TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *3 (Del. Super. Ct. Sept. 25, 2015) (noting same). Plaintiff is a sophisticated corporate entity represented by experienced transactional counsel, and is well aware of this rule.

Cash is an asset like any other. The Purchase Agreement defines "Company Assets" as "all assets, properties or rights of any kind or nature of any member of the Company Group or solely or primarily used by the Company Group in the conduct of its business," not including assets, properties, or rights transferred out of the Company Group pursuant to the restructuring that the Purchase Agreement required prior to closing. *See* Opinion 10 n.38; A37 § 1.2 (definition of "Company Assets"). It is undisputed that the cash at issue was located in and belonged to the purchased entities at the time of the sale, A8 ¶ 1; A18 ¶ 26, making the cash an "asset" or "propert[y]" of the Company Group. Plaintiff does not allege that cash

was related to the restructuring. As the Court of Chancery found, the cash therefore constitutes a "Company Asset" eligible for transfer with the sale. Opinion 10 n.38.

Consistent with the default rule that all of a corporation's assets transfer with a stock sale, and with common deal practice, the Purchase Agreement does not list the assets transferred with the sale; rather, it identifies those assets that are specifically excluded from the sale. *See* Opinion 10; A40 § 1.2 (defining "Excluded Assets" as "the assets, properties or rights, as applicable, set forth on Schedule 1.2"); A213 Schedule 1.2 (identifying three categories of "Excluded Assets"). It is undisputed that cash assets are not identified as an "Excluded Asset" on the relevant Disclosure Schedule in the Purchase Agreement. A213. Nor has Plaintiff alleged that the cash assets in dispute derive from an Excluded Asset identified on Disclosure Schedule 1.2. *Id.*; Opinion 11 (recognizing that "Seller does not advance any argument that the Disputed Cash is an Excluded Asset").

That should be the end of the matter. The Purchase Agreement transferred all assets of the Company Group to Defendant DLX except those specifically identified as being excluded from the sale. Cash was not identified as an Excluded Asset. The only reasonable conclusion is that cash assets were not identified as "Excluded Assets" because cash assets were not actually excluded from the deal. *See Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at

*11 (Del. Ch. Sept. 10, 1999) (the omission of a term in a contract "speaks volumes" when compared to included terms). To conclude otherwise would be to ignore the clear language of the Agreement. *See Salamone*, 106 A.3d at 368 ("[A] court must determine the intent of the parties from the language of the contract." (citation omitted)).[4]

b. No provision in the Purchase Agreement provides for the return of cash assets to Plaintiff

Further undermining Plaintiff's claim that cash assets were excluded from the sale is the fact that there is no provision in the Purchase Agreement that provides for the transfer of cash assets located in the Company Group to Plaintiff following the close of the transaction. In order for Plaintiff's theory of this case to be correct, cash assets must be identified as "Excluded Assets" in the Purchase Agreement, or alternatively, some provision of the Purchase Agreement must require Defendants to return the disputed cash assets to Plaintiff or adjust the cash assets out of the purchase price. Again, that is not the case.

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[4] Plaintiff also claims that Defendants' retention of the disputed cash assets, which Plaintiff claims (and Defendants dispute) amounted to nearly [REDACTED], "effectively reduced the purchase price by more than 30%." Op. Br. 19; *see also id.* at 23. Plaintiff provides no calculation for this figure. Defendants dispute this statement, however, as the purchase price was [REDACTED], of which [REDACTED] represents 5.12%. Even factoring out the [REDACTED] Net Working Capital shortfall from the sale price, [REDACTED] still represents only 5.71% of [REDACTED].

The Court of Chancery correctly noted that the Purchase Agreement contains "two 'wrong pocket' provisions to correct certain erroneous transfers after closing." Opinion 11. In its Complaint, Plaintiff briefly claims that it is entitled to transfer of the cash under the "wrong pocket" provisions in the Agreement, but as the Court below found, neither of these provisions applies—which is, presumably, why Plaintiff cites neither in its Complaint. *See* Opinion 11-13; A8 ¶ 1; A18 ¶ 26. As noted, *supra* at 9, the first "wrong pocket" provision provides for the return of "any right, property or asset solely or primarily related to the Designated Services, the Excluded Business or any obligation, liability or commitment not forming part of the Company Liabilities … transferred to a member of the Company Group in error." A93 § 6.14(b). Plaintiff has not alleged that the cash it seeks is either (i) "solely or primarily related to the Designated Services" or the "Excluded Business," or (ii) "transferred to … the Company Group … in error." Opinion 11-13. Indeed, Plaintiff contends it failed to "sweep the funds from Target and its subsidiaries before Closing for various practical and technical reasons"—effectively conceding that the requisite error (an erroneous transfer *to* the Company Group) did not occur. A18 ¶ 26; *see also* A39-40 § 1.2 (definitions of "Excluded Businesses" and "Designated Services").

Likewise, Plaintiff has not alleged that the cash in dispute falls within the second "wrong pocket" provision, Opinion 13, which provides for the transfer of "any payment received by any member of the Company Group from any customer or other counterparty of the Business to the extent that such payment constitutes an Excluded Asset," A93 § 6.14(c). However, as noted above, cash is not an "Excluded Asset[]," nor does Plaintiff allege that it is. *See* A40 § 1.2 (definition of "Excluded Assets"); A213 Schedule 1.2. This provision is likewise inapplicable by its plain terms. Plaintiff does not allege that any other provision of the Purchase Agreement would permit it to "claw[] back" the disputed cash. Opinion 13.

In short, the plain terms of the Purchase Agreement indicate that cash assets were not excluded from the sale of the Company Group, and that there is no mechanism by which Plaintiff may demand that the cash assets be returned, or the purchase price adjusted based on those cash assets. Plaintiff has not identified any provision of the Purchase Agreement that Defendants breached. *Id.* For these reasons alone, Plaintiff's breach of contract claim fails, and the Court of Chancery correctly entered judgment on the pleadings for Defendants on this claim.

2. Plaintiff's arguments to the contrary are unavailing

In a futile attempt to circumvent the plain terms of the Purchase Agreement, which unambiguously provide that the disputed cash was properly transferred with

the sale of the Company Group, Plaintiff essentially raises two overlapping arguments. First, Plaintiff raises the new argument that the disputed cash was not a "Company Asset." Op. Br. 19-20. Second, Plaintiff reiterates its argument that the definition of "Net Working Capital" in the Purchase Agreement is somehow indicative of the assets that transferred with the sale. Op. Br. 21-23. For the reasons explained below, both of these arguments fail.

a. Cash is a "Company Asset"

Plaintiff claims, for the first time in a principal brief, that the disputed cash was not, in fact, a "Company Asset," as that term is defined in the Purchase Agreement. Op. Br. 19-20. In the first place, as the Court of Chancery found, this argument was waived below. Order 2. Plaintiff first raised this argument in a motion for reargument claiming that the Court had "overlooked Seller's argument that the Disputed Cash was not a Company Asset."[5] *Id.* Arguments that are not raised in a party's principal brief are waived. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224

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[5] As the Court below recognized, Plaintiff "only cursorily" made this argument at the hearing on Defendants' motion, in response to the Court's question at oral argument as to whether the cash constituted a "Company Asset." Order 2. Plaintiff's counsel initially responded that, "I think the answer is that it could." A482:13-20. It was only at the very end of the argument that Plaintiff's counsel tried to partially walk back the admission, stating that, "simply because cash was there wouldn't necessarily mean it would be a 'Company Asset' as defined by the agreement." A493:5-7.

(Del. 1999); *Oliver v. Bos. Univ.*, 2006 WL 4782232, at *1 (Del. Ch. Dec. 8, 2006) (arguments may not be raised for the first time in a motion to reargue); Order 2. Plaintiff made no allegation in the Complaint that the cash was not a "Company Asset"—indeed, the Complaint suggests the opposite, specifically noting that the cash was located in the purchased entities. Order 2; A8 ¶ 1; A18 ¶ 26. Nor did Plaintiff raise this argument in its brief in opposition to Defendants' motion for judgment on the pleadings. Order 2; *see generally* A401-41.

Plaintiff also states briefly that it was not obligated to raise this argument in its opposition below because Defendants did not raise it in their motion for judgment on the pleadings. Op. Br. 21. Plaintiff cites no authority for this proposition, and it is not clear why Defendants would have had to raise arguments for Plaintiff in their motion. If Plaintiff thought the definition of "Company Assets" precluded Defendants' success on the motion, Plaintiff was obligated to raise that argument in its opposition brief. *See Emerald Partners*, 726 A.2d at 1224. The Court of Chancery thus correctly found that Plaintiff waived this argument by failing to properly raise it. Order 2.

Even assuming the argument was not waived, however, Plaintiff's argument is simply incorrect, under the plain terms of the Purchase Agreement. As discussed above, the Court properly found that the disputed cash was a "Company Asset,"

because it was an "asset … of any kind or nature of any member of the Company Group." Opinion 10 n.38; *see* Order 2 (noting same). Again, it is undisputed that the cash was located in and belonged to the purchased entities at closing. *See supra* at 16.

Plaintiff claims, however, that in order to be a "Company Asset," an asset must also be used "solely or primarily … by the Company Group in the conduct of its business." Op. Br. 20 (citation omitted). But this argument misinterprets the relevant language in the Purchase Agreement, which provides: "'Company Assets' means all assets, properties or rights of any kind or nature of any member of the Company Group *or* solely or primarily used by the Company Group in the conduct of its business." A37 § 1.2 (emphasis added). Plaintiff ignores the use of the disjunctive "or" in this definition. *See IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *9 (Del. Super. Ct. Feb. 15, 2019) (finding that use of "or" in insurance policy was disjunctive); *id.* at *9 n.100 ("The ordinary use of 'or' is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'" (alterations omitted) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)). The phrase "solely or primarily used by the Company Group" does not modify the preceding category of assets ("all assets, properties or rights of any kind or nature"); it identifies a second category of assets. A37; *IDT Corp.*, 2019 WL

413692, at *9. In other words, an asset is a "Company Asset[]" if it either (1) belongs to a member of the Company Group; or (2) is "solely or primarily" used by the Company Group in its business. Because the cash belonged to the purchased entities, the Court of Chancery properly focused on the first part of the definition, finding, "by its plain meaning, 'all assets … of any kind or nature of any member of the 'Company Group' includes the Disputed Cash, owned by the Target." Opinion 10 n.38 (citing A37 § 1.2).[6]

b. "Net Working Capital" does not affect the definition of "Company Assets" or the assets that transfer with the sale

Plaintiff next argues that the exclusion of cash from the calculation of "Net Working Capital" in the Purchase Agreement indicates that cash was not a "Company Asset" and was not intended to transfer with the sale of the Company Group. Op. Br. 21-23. But Plaintiff points to no term in the Purchase Agreement—either in the definition of "Net Working Capital" or elsewhere—that indicates the definition of Net Working Capital also defines the scope of the transaction, and what assets and liabilities transfer with the sale. *See* Opinion 16; A45-46 § 1.2 (definition

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[6] Plaintiff disingenuously claims that the Court of Chancery's finding improperly cited the definition of "Company Asset" because it "excised" the "solely or primarily used" phrase from the definition. Op. Br. 20. Plaintiff ignores the fact that the Court block quoted the complete definition of "Company Asset" in the preceding sentence.

of "Net Working Capital"); A54-56 § 2.4; A218-20 Schedule 2.4. Net working capital is a highly negotiated accounting construct used to determine the purchase price by ensuring a minimum level of net assets are within a business at close, through comparison to a "target" net working capital amount. It has nothing to do with what assets and liabilities *transfer* with the sale—unless the parties specify otherwise in their agreement, which here, they did not. As the Court below noted when it rejected Plaintiff's argument, "Seller asks too much of these provisions." Opinion 16. "The purchase price adjustments are just that: adjustments to how much Buyer paid, not to what assets the Buyer purchased." *Id.* In other words, the exclusion of cash from Net Working Capital simply excludes cash from the calculation of the purchase price, and nothing else. *Id.* (citing A37, A45-46 § 1.2 (definitions of "Net Working Capital" and "Closing Date Purchase Price")). No reasonable third party, reading the Purchase Agreement, would understand its plain terms to equate the agreed-upon calculation of Net Working Capital with the assets and liabilities excluded from the sale—particularly not when there is a separate schedule of "Excluded Assets" and "Excluded Liabilities." *See Comrie*, 837 A.2d at 13.

Plaintiff makes the convoluted argument that, if cash "was not an excluded asset, then it should have been included on the Net Working Capital worksheet."

Op. Br. 22. According to Plaintiff, because cash was not included as part of Net Working Capital, "the only way to explain its absence is if it is not a Company Asset." *Id.* But as noted above, nothing in the Purchase Agreement equates Net Working Capital with the definition of "Company Assets" or the assets transferred with the sale. Were Plaintiff's theory correct, not only cash assets, but presumably *all other* assets and liabilities adjusted out of the calculation of Net Working Capital would be excluded from the sale as well—and apparently would not be considered "Company Assets" either. Thus, in addition to cash assets, [REDACTED], would all be excluded from the sale—despite the fact that none of these items are listed on the schedule of Excluded Assets and Excluded Liabilities. *Compare* A218-20 Schedule 2.4, *with* A213 Schedule 1.2. Such an interpretation would be absurd, and would render the contract internally contradictory by undermining the carefully crafted schedule of excluded assets and liabilities. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract."); *id.* at 1160-61 (rejecting a contract interpretation that was "contrary to both the plain meaning of the document and logic" and that would have led to "an

absurd, unfounded result"); *see also Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 388-89 (Del. 2012) (rejecting a contract interpretation that would "do violence to the plain language and the underlying intent" of certain provisions in the agreement). As the Court of Chancery recognized, these provisions make clear that "the parties knew how to exclude assets from the Transaction" when they chose to do so. Opinion 17; *see Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 463 (Del. Ch. 2008). The fact that they did not with respect to cash is indicative of their intent. *See Active Asset Recovery*, 1999 WL 743479, at *11 (the omission of a term in a contract "speaks volumes" when compared to included terms).

The Court below also rejected Plaintiff's argument that, "at worst," the exclusion of cash from Net Working Capital renders the contract ambiguous, and properly refused to consider Plaintiff's proffered extrinsic evidence about the parties' negotiating history. Opinion 17-18. To the extent Plaintiff raises a similar argument here, or attempts to rely on the parties' negotiating history, the same reasoning applies: because the Purchase Agreement is unambiguous, Plaintiff cannot rely on extrinsic evidence to attempt to contradict the Agreement's plain terms. *Interim Healthcare*, 884 A.2d at 546; *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007). "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction." *Rhone-Poulenc Basic*

Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992). It is only where "[the] contract's plain meaning, in the context of the overall structure of the contract, is susceptible to more than one reasonable interpretation, [that] courts may consider extrinsic evidence to resolve the ambiguity." *Salamone*, 106 A.3d at 374. As explained above, and as the Court of Chancery properly found, there is simply no such ambiguity here. Plaintiff therefore cannot resort to extrinsic evidence as a means of interpreting the Purchasing Agreement.

The Court of Chancery also recognized that the Purchase Agreement contained an integration clause, making it clear that the Purchase Agreement reflects every aspect of the parties' deal, and that the parties could not expect to rely on any pre-closing discussions. *See* Opinion 18 n.64 (citing A120 § 11.5); *see Am. Cap. Acquisition Partners, LLC v. LPL Holdings, Inc.*, 2014 WL 354496, at *6 (Del. Ch. Feb. 3, 2014) (noting that the purchase agreement at issue contained an integration clause, and that it was therefore clear that the parties anticipated the issue in dispute, and chose not to address it in the agreement). In short, "[e]xtrinsic evidence about the parties' negotiations—over the definition of Net Working Capital or otherwise—cannot alter the conclusion that the Purchase Agreement transferred all of Target's assets to Buyer," including the disputed cash. Opinion 18.

*   *   *

Accordingly, because the disputed cash assets constitute a "Company Asset" that unambiguously transferred with the sale of the Company Group, and because Plaintiff failed to identify a single provision of the Purchase Agreement that Defendants breached, the court below correctly held that Defendants were entitled to judgment on the pleadings of Plaintiff's breach of contract claim.

II. THE COURT OF CHANCERY CORRECTLY ENTERED JUDGMENT ON THE PLEADINGS ON PLAINTIFF'S BREACH OF THE IMPLIED COVENANT OF GOOD FAITH CLAIM

A. Question Presented

Whether the Court of Chancery correctly entered judgment in favor of Defendants on Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, where the Purchase Agreement is unambiguous and Plaintiff failed to identify a gap in the terms of the Agreement where the covenant would operate. Opinion 18-21.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's grant of a motion for judgment on the pleadings. *Desert Equities*, 624 A.2d at 1204.

C. Merits of Argument

In addition to its breach of contract claim, Plaintiff also argues in the alternative that Defendants breached the implied covenant of good faith and fair dealing. Plaintiff claims that Defendants violated the spirit of the parties' bargain and its "cash-free, debt-free" nature when Defendants refused to return the disputed cash back over to Plaintiff. Op. Br. 24-28. Courts have consistently recognized that "[t]he covenant of good faith and fair dealing is implied in every contract, and 'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the

contract from receiving the fruits of the bargain.'" *Am. Cap. Acquisition*, 2014 WL 354496, at *5 (quoting *Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 636 (Del. Ch. 2011)). However, this doctrine "is not a license to rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal." *Id.* (quoting *Winshall*, 55 A.3d at 637). As the Court of Chancery correctly recognized, "[a]n essential predicate for the application of the implied covenant is the existence of a 'gap' in the relevant agreement." Opinion 20 (citing *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *4 (Del. Ch. Jan. 30, 2015)); *see also Am. Cap. Acquisition*, 2014 WL 354496, at *5; *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009). Where "the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play." *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992), *aff'd*, 609 A.2d 668 (Del. 1992) (TABLE); *see* Opinion 20. Thus, the doctrine "operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer." *Airborne Health*, 984 A.2d at 146. Accordingly, the covenant is "only rarely

invoked successfully." *Kuroda v. SPJS Holdings*, *LLC*, 971 A.2d 872, 888 (Del. Ch. 2008).

Here, Plaintiff claims that Defendants cannot identify a provision of the Purchase Agreement that specifically entitles them to the disputed cash assets, and argues that this creates a gap to be filled. Op. Br. 25. This argument ignores the structure of the Purchase Agreement. As the Court of Chancery found, there is no such "gap" to fill because the Purchase Agreement provides for the exclusion of certain specified assets from the transaction, and likewise "contemplated the possibility that an asset could be inadvertently transferred at closing." Opinion 20. In other words, Defendants do not need to identify a provision in the Agreement specifically *including* the cash assets in the sale; rather, Plaintiff needs to identify a provision *excluding* the cash from the sale. But Plaintiff cannot do so, because cash assets are not among those assets specifically excluded from the sale—meaning that cash assets left in the Company Group at closing, along with all other assets not specifically excluded, transferred with the sale. *See* A34; A40 § 1.2 (definition of "Excluded Assets"); A52 § 2.1; A213 Schedule 1.2; *TrueBlue, Inc.*, 2015 WL 5968726, at *3 (assets and liabilities transfer with a stock purchase).

Accordingly, there is no gap in the Agreement to be filled. The "subject at issue," *i.e.*, excluded assets, "is expressly covered by the contract," and the contract

is "intentionally silent" as to cash assets, because they were not excluded from the sale. *See Dave Greytak Enters*., 622 A.2d at 23; *see also Airborne Health*, 984 A.2d at 146 (noting that plaintiff's claim was "easily addressed" because the parties had agreed upon a specific representation relating to litigation in the asset purchase agreement); *Kuroda*, 971 A.2d at 888 (noting that plaintiff's claim "must fail because the express terms of the contract will control such a claim"); *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 993 (Del. 1998) (finding that "[t]he unambiguous terms of the Agreement ultimately defeat the plaintiff's case").

Moreover, the parties clearly anticipated scenarios in which certain assets or payments would need to be transferred back to Plaintiff following the closing—hence, the "wrong pocket" provisions, which do not cover the cash assets at issue. *See* A93 § 6.14 (b), (c); Opinion 20-21; *supra* at 9, 19-20. Plaintiff makes the vague argument that the "wrong pocket" provisions are irrelevant and do not address the issue in dispute because the cash "is not an asset … nor was it transferred." Op. Br. 26. Presumably, when Plaintiff states that cash is not an asset, it means that cash is not a "Company Asset." Op. Br. 19-23. As explained above, this argument is incorrect. With respect to whether the assets were "transferred," Plaintiff appears to be arguing that the "wrong pocket" provisions are irrelevant because the alleged

error here is that the cash assets were not transferred *out* of the Company Group. Op. Br. 4, 26. But the "wrong pocket" provisions do not have to be directly applicable to the disputed cash in order to defeat Plaintiff's argument. The presence of the "wrong pocket" provisions, and the corresponding absence of similar provisions addressing cash assets, indicates that the parties considered the problem Plaintiff claims is at hand: that the wrong assets ended up in the wrong pocket at the close of the sale. As evidenced by the Purchase Agreement, however, the parties intentionally declined to identify cash as an "Excluded Asset," and intentionally declined to provide a post-close adjustment for cash assets, indicating that the parties did not intend for cash assets to be returned to Plaintiff following the sale. *See US Ecology*, 2018 WL 3025418, at *5-7 ("[T]he parties to the Purchase Agreement anticipated that there were circumstances under which Holdings would be obligated to reimburse [plaintiff] for certain Allstate-related insurance payments. They chose not to do so, however, with respect to the Non-Covered Payments." (footnote omitted)); *Am. Cap. Acquisition*, 2014 WL 354496, at *6 (dismissing a claim where the parties' agreement made clear they had anticipated an issue and declined to bargain for specific language addressing it in the agreement); Opinion 21 (citing *US Ecology*). This leaves no gap in the contract's terms for the implied covenant to fill.

Again, the fact that the parties included an integration clause in the Purchase Agreement further undermines Plaintiff's argument, as courts have found that an integration clause may be further evidence of a contract's intentional silence, where it is clear the parties anticipated a particular issue and chose not to address it in the contract. *Am. Cap. Acquisition*, 2014 WL 354496, at *6 (noting that the purchase agreement at issue contained an integration clause, and that it was therefore clear the parties anticipated the issue in dispute, and chose not to address it in the agreement). Had the parties intended to exclude cash from the sale, they could have done so easily and explicitly, as they did for other excluded assets—but they did not. This silence in the Agreement "speaks volumes" to the parties' intent. *See Active Asset Recovery*, 1999 WL 743479, at *11.

Plaintiff next argues that the fact that Defendants agreed that some of the disputed cash could have been swept from the purchased entities prior to closing indicates that the cash was never intended to be transferred in the first instance. *See* Op. Br. 26; Opinion 3 n.7; A468:9-13 (agreeing that Plaintiff could have swept cash from the purchased entities "to some degree. Now, how much, I have no idea."). This argument, too, fails. It is typical in deal practice for some amount of cash to be left behind in purchased entities; Defendants therefore expected some amount of cash would remain, but were uncertain as to how much. As noted, *supra*, the parties

disagree about how much cash is actually in dispute in this case, because it is unclear how much cash Plaintiff could have swept from the accounts consistent with the Purchase Agreement. It is possible the disputed cash, or some portion of it, would still have been an asset, property, or right "solely or primarily used by the Company Group in the conduct of its business" to which Defendants would have been entitled even if it had been transferred out of the entities prior to closing. *See* A37 § 1.2. But this is irrelevant, because it is undisputed that the cash assets were still owned by the Company Group at closing. Under the terms of the Purchase Agreement, Defendants were entitled to all assets owned by the Company Group at the time of closing, including any cash assets left in the purchased entities.

Finally, Plaintiff claims in closing its argument on this claim that the Court of Chancery "did not examine or discuss the evidence under the standards applicable to an implied covenant claim," but does not elaborate further. Op. Br. 28. The Court devoted nearly two pages of its opinion to discussing (correctly) the applicable standards for a breach of the implied covenant of good faith, and then applied those standards to Plaintiff's claim. *See* Opinion 19-21. As Plaintiff appears to be in accord with these legal standards elsewhere in its brief, Op. Br. 24-25, this appears to be merely a generalized statement that the court below reached the wrong

conclusion, rather than an argument that the court applied the wrong legal standard. As explained above, however, the Court's conclusion was entirely sound.

* * *

In short, the Court of Chancery correctly held that Plaintiff's claim for breach of the implied covenant of good faith and fair dealing fails, because Plaintiff could not identify a gap in the terms of the Purchase Agreement. The Purchase Agreement clearly contemplates the possibility that certain assets might be mistakenly transferred to Defendants in the sale and would need to be returned, but deliberately did not include cash assets in these "wrong pocket" protections. "To use the implied covenant to add the Disputed Cash to the list of Excluded Assets would be 'to create a free-floating duty unattached to the underlying legal documents.'" Opinion 21 (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)). The Court properly rejected Plaintiff's invitation to do so.

III. THE COURT OF CHANCERY CORRECTLY ENTERED JUDGMENT ON PLAINTIFF'S REFORMATION CLAIM

A. Question Presented

Whether the Court of Chancery erred in entering judgment in favor of Defendants on Plaintiff's reformation claim, where Plaintiff failed to allege a mistake that would entitle it to reformation. Opinion 21-33.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's grant of a motion for judgment on the pleadings. *Desert Equities*, 624 A.2d at 1204.

C. Merits of Argument

In granting judgment on the pleadings on Plaintiff's reformation claim, the Court of Chancery correctly held that Plaintiff's "allegations fall well short of pleading an actionable mistake for the purposes of a reformation claim." Opinion 30. Plaintiff contends that in so holding, the Court erred first "in concluding that the parties did not reach a definite agreement that Target's cash would not be included as part of the transaction," and second "in concluding that the 'mistake' was an operational mistake by Plaintiff …, and not a failure to memorialize properly the parties' agreement." Op. Br. 4. Plaintiff is wrong on both points.

"Reformation implies that judicial intervention is needed for the purpose of changing the written contract to reflect the true intent of the parties." *Duff v.*

Innovative Disc. LLC, 2012 WL 6096586, at *10 (Del. Ch. Dec. 7, 2012). Two doctrines allow for reformation. *See Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151-52 (Del. 2002). A claim for reformation may be asserted on the basis of a unilateral mistake, where a plaintiff must show that one party was mistaken and that the other party knew of the mistake but remained silent; or a mutual mistake, where a plaintiff must show that both parties were mistaken as to a material portion of the written agreement. *Id.* Under either approach, the plaintiff must show that the parties "came to a specific prior understanding that differed materially from the written agreement," and the plaintiff must prove those elements by clear and convincing evidence. *Id.* In other words, the mistake "must be one of expression, that is, 'one that relates to the contents or effect of the writing that is intended to express [the parties'] agreement.'" Opinion 23 (alteration in original) (quoting Restatement (Second) of Contracts § 155 cmt. a (1981)). At the pleading stage, a plaintiff must plead allegations of mistake with particularly. Ct. Ch. R. 9(b); *see also Duff*, 2012 WL 6096586, at *10 ("In order to gain reformation, the party seeking such form of relief must plead with particularity the ingredients on which it is based, namely mutual mistake or fraud, Rule 9(b)." (citation omitted)).

Plaintiff first contends that it sufficiently pled that "the parties reached an agreement that the Disputed Cash was not part of the Transaction." Op. Br. 31.

Despite Plaintiff's favorable characterization of its allegations, the allegations in the Complaint fall far short of indicating any mutual understanding between the parties about the disputed cash assets. Instead, as the Court below aptly put it, Plaintiff's allegations show that the parties reached an agreement, but that "agreement is reflected in the Purchase Agreement." Opinion 30.

In the Complaint, Plaintiff claimed that the "documents exchanged between the parties and their many discussions" relating to Net Working Capital indicated that the parties also intended to exclude cash from the sale. A18 ¶ 25; A25 ¶ 52. However, Plaintiff points to no facts indicating that the parties mutually understood that the exclusion of cash from the calculation of Net Working Capital was also an agreement to exclude cash from the sale. Nor does Plaintiff point to any facts indicating that DLX ever understood or agreed that the "cash-free, debt-free" language in the indication of interest letters meant that DLX's purchase of the Company Group would exclude any cash assets that remained in the Company Group at or after the time of close—particularly when the Agreement did not include cash assets as an "Excluded Asset." Along the same lines, the use of the phrase "cash-free, debt-free" in Plaintiff's letters concerned the "Enterprise Value"—that is, the value of the Company Group; it did not concern the assets that would be included or excluded at closing. *See* A11-12 ¶¶ 9, 11; Opinion 31.

Plaintiff similarly alleged no facts supporting the notion that Defendants were aware either of an alleged omission in the Purchase Agreement, or that Plaintiff was unaware of this "mistake," and that Defendants "remained silent." *Cerberus Int'l*, 794 A.2d at 1151-52. As a result, Plaintiff failed to plead the existence of any mistake that would support reformation of the "heavily negotiated" Purchase Agreement—an agreement that expressly provided for the exclusion of certain assets from the sale and did not identify cash assets as one of those "Excluded Assets."

The two cases Plaintiff cites in which the Court of Chancery permitted a reformation claim to proceed past the pleading stage only undermine its claim. Op. Br. 31. In *Joyce*, the "chief" and "principal" negotiators from *both* sides of a merger agreement believed that the written agreement was "incorrectly drafted" because it failed to include a provision that the parties had agreed to include. *See Joyce v. RCN Corp.*, 2003 WL 21517864, at *2-3 (Del. Ch. July 1, 2003). In *James River-Pennington*, the complaint alleged in detail "four inconsistencies between the written agreement and the prior oral agreement" between the parties where one party made false representations about actions it would not take following the agreement to fraudulently induce the other party into entering into the agreement. *See James River-Pennington Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *9-10 (Del. Ch. Mar. 6, 1995). Plaintiff alleges no comparable facts here.

Further, Plaintiff's reformation claim fails for a more fundamental reason. Any alleged "agreement [about] the Disputed Cash" is exactly the type of agreement that would have been included in the Purchase Agreement—a contract that embodies the parties' agreements on what assets were "not part of the Transaction." Op. Br. 31; *see* A213 Schedule 1.2 ("Excluded Assets"). Accordingly, the "agreement" about the Disputed Cash that Plaintiff alleges does not "differ[] materially from the written agreement." *See Cerberus Int'l*, 794 A.2d at 1151-52. And as a result, Plaintiff cannot state a claim for reformation as a matter of law. *Id.*

Plaintiff also contends that the Court of Chancery erred in holding that the mistake alleged by Plaintiff was "not the sort of mistake that supports reformation" but was, according to the Court, "an operational mistake by [Plaintiff] in preparing to perform." Opinion 25. Plaintiff's second argument fares no better than the first one. Plaintiff's pleadings make clear that any mistake related to the cash assets was a mistake of Plaintiff's own actions in failing to sweep—whether inadvertently or not—the cash assets from the Company Group at close. *See* A18 ¶ 26. Plaintiff cannot now seek to remedy that operational misstep through a cause of action created to remedy mistakes in drafting contracts. Put differently, reformation is a judicial remedy to reform a contract based on a mistake in the drafting of the contract, i.e., a mistake in expression. *See Cerberus Int'l*, 794 A.2d at 1151; *Waggoner v. Laster*,

581 A.2d 1127, 1135 (Del. 1990) ("Generally, reformation is appropriate[] when an agreement has been made … but in reducing such agreement or transaction to writing … the written instrument fails to express the real agreement or transaction." (quotation marks and alterations omitted)). It is not a fix-all for parties that make mistakes in carrying out (or failing to carry out) actions related to the performance of the contract.

Because Plaintiff failed to allege facts supporting a mistake in the drafting of the Purchase Agreement, Plaintiff has no legal basis for a claim for reformation of the Purchase Agreement. Based on that straightforward analysis, the Court of Chancery entered judgment in Defendants' favor on Plaintiff's reformation claim. This Court should affirm that ruling.

CONCLUSION

For the foregoing reasons, the decision of the Court of Chancery should be affirmed.

OF COUNSEL:

Allen M. Gardner
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004

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<u>/s/ Srinivas M. Raju</u>
Srinivas M. Raju (#3313)
Angela Lam (#6431)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendants Below-Appellees DLX Acquisition Corporation and Deluxe Media Inc.