EFiled: Jun 13 2022 05:01PM EDT
Filing ID 67721419
Case Number 109,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CorePower Yoga, LLC, CorePower Yoga Franchising LLC,	)	
	)	No. 109, 2022
Defendants Below/Appellants,	)	
	)	Case Below: Court of Chancery
v.	)	of the State of Delaware,
	)	C.A. No. 2020-0249-JRS
Level 4 Yoga, LLC,	)	
	)	
Plaintiff Below/Appellee.	)	

APPELLEE'S ANSWERING BRIEF

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Dated: June 13, 2022

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NATURE OF PROCEEDINGS

In May 2019, Appellants CorePower Yoga, LLC and CorePower Yoga Franchising, LLC (together, "CorePower") exercised a "call option" to require one of its franchisees, Appellee Level 4 Yoga, LLC ("Level 4"), to sell CorePower all of Level 4's assets at a formulaic price. Level 4 was to operate those assets and then transfer the assets to CorePower the following year in a transaction that had no closing conditions and no termination rights (the "Transaction").

The parties' Asset Purchase Agreement ("APA"), dated as of November 27, 2019, accommodated CorePower's desire to digest the assets in smaller bits by transferring the assets in three tranches, with the first tranche to close on April 1, 2020. But as April 1 approached, businesses throughout the country began to shut down, either voluntarily or in response to government mandates to manage exposure to COVID-19, and CorePower wanted to delay or terminate the Transaction. Level 4 refused.

As the first closing approached, CorePower directed its franchisees—including Level 4—to temporarily shut their studios, suspended all membership fees, and turned off the online system used to schedule classes. Having forced the temporary closure of all of Level 4's studios, on March 26, 2020, CorePower claimed that Level 4 had violated its APA obligation to operate the studios in the Ordinary Course of Business and had suffered a Material Adverse Effect ("MAE"),

even as CorePower simultaneously told its bankers that CorePower had not suffered and did not reasonably expect to suffer an MAE. In a posture reminiscent of the Prefect of Police closing Rick's *Café Americain* for gambling while being handed his winnings, CorePower claimed that the actions that it caused Level 4 to take amounted to a repudiation of the APA and that the APA was no longer valid.

This litigation followed. After a five-day trial with 15 witnesses and 209 exhibits, the Court of Chancery found that the APA was structured as a "one-way gate" to inevitable closings, even if either party was in breach of the APA prior to the staggered closings. The Court of Chancery also found that (1) Level 4 had not failed to operate its yoga studios in the Ordinary Course of Business because it was following its franchisor's directions, (2) the temporary studio closures did not cause an MAE, (3) Level 4 had neither breached nor repudiated the APA before CorePower refused to move forward with the Transaction, and (4) Level 4 stands ready to deliver the assets it agreed to deliver to CorePower. As a result, in an 87-page Memorandum Opinion ("Mem.") and Final Order and Judgment ("Order"), the Court of Chancery found that Level 4 was entitled to the benefits of its bargain with CorePower and ordered specific performance and damages for Level 4's costs stewarding the assets so they could be delivered following judgment.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly ruled that Level 4 was entitled to specific performance.

2. Denied. The Court of Chancery correctly ruled that the APA was a "one-way gate" to closing and that the APA's bring-down provision did not create closing conditions.

3. Denied. The Court of Chancery correctly ruled that Level 4 did not materially breach the APA.

4. Denied. The Court of Chancery correctly dismissed CorePower's counterclaim.

5. Denied. The Court of Chancery correctly ruled that Level 4 was entitled to damages.

STATEMENT OF FACTS

A. The Franchise Relationship Between the Parties

CorePower operates the largest chain of yoga studios in the country. A569-A570 ¶¶ 29-30, 32. CorePower's network consists of both corporate- and franchisee-owned studios. A570 ¶ 32. TSG Consumer Partners LLC ("TSG") is a private equity firm and the majority owner of CorePower. A570 ¶ 31. TSG principals, including Edward Wong and Michael Layman, occupied all but one seat on the CorePower Yoga, LLC board of directors at the time that CorePower called off the Transaction. B8.

Level 4 became a CorePower franchisee in 2007 and grew into the largest franchisee of CorePower-branded yoga studios. A569-A570 ¶¶ 28, 33. It operates studios across five states. A570 ¶ 34, A571 ¶ 42. Christopher Kenny, a co-founder and principal of Level 4, served as Level 4's principal negotiator in the Transaction. A588 ¶ 80(a).

B. The Franchise Agreements Governing the Parties' Relationship

The relationship between CorePower and Level 4 was governed by a series of "nearly identical" franchise agreements that all franchisees must accept to operate CorePower-branded yoga studios (collectively, the "Franchise Agreements"). B134. The Franchise Agreements require that all franchisees—including Level 4—follow certain operational standards, called "System Standards." *See* A2116-A2117 § 4.4.1, A2123 § 8.1.3; B280; B32; B79-B80. The System Standards are "standards,

specifications, operating procedures, and rules that [CorePower] periodically prescribe[s] for operating a Studio," (A2116 § 4.4.1) in the Franchise Agreements, in CorePower's "Operations Manual," in guidance on CorePower's website, in bulletins, and in other written material. B280. A franchisee, including Level 4, must adhere to the Standards even when it "believe[s] that a System Standard is not in the Franchise System's or [its own] best interests." A2122 § 8.1.1.

The Franchise Agreements are specific about the things that CorePower may dictate to its franchisees about day-to-day studio operations:

- The days and hours of operation. A2123 § 8.1.2.7.
- Membership terms, including payment terms. A2123 § 8.1.2.3, A2124 § 8.4.
- CorePower may contact franchisee members directly to inform them of studio closures and changes to payment terms. A2125 § 8.4.4.
- Franchisees must "at all times operate [their] Studio[s] in full compliance with all applicable laws," adopt good business practices, and "refrain from any business . . . practice which may injure [CorePower's] business and the goodwill associated with the [CorePower brand] and other [CorePower studios]." A2127 §§ 8.7.1, 8.7.2.

There are a number of other ways that CorePower promotes brand

consistency:

- CorePower monitors franchisee operations and notifies franchisees when practices deviate from expectations. *See* B18-B19; B198.
- CorePower maintains and controls the only website—www.corepoweryoga.com—and mobile application where members can learn about studio happenings. B30-B31; B81-B82; B265. Franchisees may not have their own websites or apps to maintain a presence on the Internet, to promote their instructors, or to schedule classes. B31. CorePower can modify the franchised studios' information on the CorePower website and app. B73-B74. If CorePower makes an announcement on the website about all CorePower studios, *e.g.*, that the studios are closed, franchisees must conform to CorePower's announcement. B82.

C. CorePower's Call Option and the Call Option Agreement

From the outset, CorePower retained the right to purchase the franchised yoga studios upon certain events (the "Call Option"). A2148-A2150 § 15.5; B36-B38; A2090-A2099. But if CorePower could exercise an option for fewer than all of its studios, Level 4 would lose the scale it had worked hard to achieve, so Level 4 bargained for and obtained a "blanket document," the "Call Option Agreement," making the Call Option an all-or-nothing proposition. A2090-A2099; B38.

The Call Option Agreement gave CorePower the option to stop franchising and roll up the studios in a simple and quick asset transfer. B39. Upon a Control Event, CorePower had thirty days to exercise its purchase option; if CorePower exercised, the purchase price would be set formulaically and the transfer would occur. A2092-A2095 §§ 3, 5. Exercising the Call Option therefore opened a one-way gate forcing CorePower to take the studio assets because the exercise also terminated Level 4's franchise expansion rights. B224-B225.

Once the Call Option Agreement was signed in 2017, Level 4 embarked on an aggressive expansion plan approved by CorePower to develop at least eleven additional studios in other markets, all subject to the Call Option (the "Franchise Expansion Plan Agreement"). B252 § 3.

D. CorePower's Exercise of the Call Option

On April 2, 2019, TSG purchased CorePower. A571 ¶ 37. This triggered CorePower's Call Option. A571 ¶ 38. TSG quickly determined that it wanted CorePower to exercise the Call Option, but did not want to take all of Level 4's studios at once because that presented serious integration problems for CorePower. B126.

Two of the newly appointed CorePower directors, Messrs. Wong and Layman, asked Level 4 for accommodations: (1) delayed and staggered closings; (2) cancellation of certain studios in development pipeline (the "Cancelled Studios");

(3) a promise by Level 4 to continue to "build out" and operate other "Development Studios" before transferring them to CorePower; and (4) a definitive acquisition agreement even though the Call Option Agreement did not require one. A1295-A1296, B129-B130; B40-B46.

Level 4 was reluctant to amend the Call Option Agreement it had bargained hard to secure. B40-B41; B126. The "one-way gate" was effectively self-executing upon exercise, (B40-B41), and CorePower's proposed changes meant delay and risk. B45-B46. Level 4 expressed these concerns, and CorePower agreed to make concessions to address them. B40-B41.

These were memorialized in the Call Option Exercise Agreement (A2191-A2221), modifying the Call Option Agreement in the following ways: (1) there would be a "definitive agreement in respect of the acquisition" which would not contain closing conditions or express rights to terminate but would have a post-closing indemnification regime; (2) the Franchise Expansion Plan Agreement would be cancelled; (3) CorePower would pay for not acquiring the Cancelled Studios; (4) CorePower would reimburse Level 4 for operating losses at the Development Studios; and (5) the parties would agree to revised valuations for other Development Studios to incentivize Level 4 to develop them well. B41, B46-B48, B50, B53-B56, B57-B58; B126, B128-B130, B131, B132.

E. The APA

After several months, CorePower and Level 4 entered into the APA fixing the terms of the Transaction. A2222-A2337. CorePower would acquire the assets of thirty-four CorePower-branded yoga studios, four of which had negative EBITDA and were included to lower CorePower's purchase price. A563 ¶ 2; A2462. The closing on those studio assets was scheduled as follows:

Tranche	Region	Number of Studios	Transfer Date
Tranche 1	Colorado	8	April 1, 2020
Tranche 2	Arizona & North Carolina	6	July 1, 2020
Development	South Carolina, Arizona & North Carolina	5	July 1, 2020
Tranche 1	Illinois	15	October 1, 2020

A571-A572 ¶ 43.

The APA had no express conditions to either party's obligation to close. B133. The APA also did not contain a provision allowing for termination of the agreement, a *force majeure* clause, or a provision permitting unilateral postponement of closing. *See generally*, A2222-A2337; B155-B156. To reinforce that the parties would close, Section 8.11 of the APA expressly provided that the parties may seek "to enforce specifically this Agreement." A2269.

The APA contained other features effecting the one-way gate: (1) the immediate termination of Level 4's franchise expansion rights and cancellation of

the Franchise Agreements on each "Closing Date," as opposed to each "Closing"; (2) a pre-closing acceleration right and a post-closing indemnification scheme to cover any non-compliance with the APA's representations and warranties; (3) a buy-side representation and warranty insurance policy; (4) the absence of any anti-sandbagging provisions that prevented a party from seeking post-closing indemnification for closing into a breach; and (5) the absence of a pre-closing notice and cure process. A2228-A2229; A2261-A2264; B158; *see generally*, A2222-A2337.

The APA contained representations and warranties (together, "Representations") that the Court of Chancery described as "typical." Those Representations included a representation that Level 4's Business—defined as "the CorePower Yoga business conducted by the Seller"—had been and would be conducted in the "Ordinary Course of Business" between January 1, 2019 and the closing dates in the APA. A2236 § 3.6. The APA defined "Ordinary Course of Business" to mean "an action taken by any Person in the ordinary course of such Person's business which is consistent with the past customs and practices of such Person." A2280.

The Representations also included the following statements about operations between January 1, 2019 and closing:

- "There has been no material loss, destruction, damage or eminent domain taking (in each case, whether or not insured) affecting the Business or any Acquired Asset with a value in excess of $50,000;
- "[Level 4] has not terminated or closed any facility, business or operation";
- "[Level 4] has not entered into, amended or terminated any lease or sublease of real property or any renewals thereof";
- "[Level 4] has not accelerated any accounts receivable or delayed any accounts payable, except in the Ordinary Course of Business;" and
- "No event or circumstance has occurred which constitutes a Material Adverse Effect."

A2236-A2237. The Representations also included (1) a representation that Level 4 was in compliance and would comply in all material respects with "any Legal Requirement," including any Government Order and (2) that Level was not in breach of and would not breach its Franchise Agreements. A2242, A2248.

The APA did not contain any Representations that Level 4 would deliver at closing a certain level of revenue, EBITDA, employees, members, or retail inventory. *See generally*, A2236-A2237. The APA also made clear that Level 4 was not warranting "probable success or future profitability of the Business" and that Level 4 was going to deliver the studio assets "as is" and "where is." A2250.

F. Events Following Execution of the APA

After entering into the APA, Level 4 continued to operate the studios in conformity with its Franchise Agreements. B83-B84. In the fourth quarter of 2019, Level 4's revenue increased 12% on a year-over-year basis. B1238. EBITDA increased even more during the same period. *Id*. In the first quarter of 2020, revenue and EBITDA continued to improve on a year-over-year basis. B1238; B101-B102.

Level 4's performance was such that CorePower thought about accelerating the transfer dates of Level 4's studio assets to allow CorePower to capture that enhanced value and achieve operational efficiency. B135; A1344-A1345; B58; B719-B720. As late as March 10, 2020, CorePower was ready to accelerate the transfer dates and did not believe that Level 4 was in breach of any provision in the APA. A1396-A1397.

G. The COVID-19 Pandemic and CorePower's Response

In January 2020, COVID-19 began to spread rapidly in the United States. A574 ¶ 52.

As COVID-19 swept across the country, Level 4 contacted CorePower to discuss protocols related to COVID-19. A921. Level 4 did this so that it could follow CorePower's operational lead as franchisor—consistent with Level 4's past practice—in responding to COVID-19. B85-B86. It was especially important to

Level 4 to have CorePower's guidance because CorePower would be the owner of Level 4's studio assets in just a few weeks. B86-B90.

In early March 2020, CorePower provided Level 4 with studio cleaning protocols related to COVID-19, and Level 4 implemented those protocols. B715; B88. On March 10, 2020, Level 4's CEO, Sara Otepka, asked CorePower to let Level 4 know directly if CorePower decided to close its studios so that Level 4 could follow CorePower's lead in any closing decision. B715; B90-B91.

On March 13, 2020, the United States declared the COVID-19 pandemic a national emergency. A574 ¶ 52. CorePower's board of directors met by telephone the following weekend to consider CorePower's response to the pandemic. A1384-A1386.

On March 15, 2020, to manage the risk of COVID-19 exposure, CorePower announced that ***all*** CorePower-branded yoga studios, including those operated by Level 4, would close for two weeks beginning on March 16, 2020. A574 ¶¶ 53, 55. That evening, CorePower emailed Level 4's CorePower members directly about the temporary closures. A574 ¶ 53. CorePower posted the same announcement on CorePower's website, mobile app, Facebook page, Twitter feed, and Instagram feed. B91-B92, B93; A764-A765; B721; B722; B726; B723; B724.

CorePower did not seek Level 4's consent to the closures because, under the Franchise Agreements, CorePower was not required to do so. *See* A2122-A2123 §

8.1. CorePower expected its actions to force Level 4 to close temporarily; had Level 4 not temporarily closed its studios and frozen memberships, CorePower would have considered Level 4 in breach of its Franchise Agreements. B142-B143, B137-B138. Level 4 temporarily closed its studios as part of the systemwide shutdown. A574 ¶ 56; B94-B95 ("[Y]ou can't tell your customer one thing and then do something else. So, in this case, you know, the CEO of CorePower said, we're closing all our studios. It was not a decision for me to be made to say, Nope. I'm Sara. I'm doing something different."). Had Level 4 tried to remain open, members could not attend classes because CorePower erased the class schedules and caused the CorePower website to display the message "Temporarily Closed" for all Level 4 studios. B68-B74. Days later, CorePower emailed Level 4's members telling them that CorePower was proactively freezing memberships, cutting off Level 4's revenue. B775; B96-B98.

The temporary closure of CorePower's studios meant that CorePower would have less money to fund its operations. A1402. As a result, CorePower was closely monitoring its liquidity. A1403. On the day that CorePower closed its studios, CorePower management prepared a set of slides that assumed the studio closure would last two weeks. B732. One slide forecast a negative $52 million ending cash balance at year-end 2020, with the Level 4 acquisition contributing approximately $25 million to that net loss. B739; A1405-A1406. CorePower management identified available sources of cash to address the projected liquidity problem. B741.

Through two debt instruments—a delayed draw term loan ("DDTL") and a revolver—CorePower had enough available cash to cover the shortfall. A1406-A1407.

On March 16, 2020, CorePower advised its bank that CorePower would draw $36.5 million on its DDTL facility. B742; A575 ¶ 58. As a condition to obtaining the loan, CorePower certified to its lenders that, as of March 19, 2020, its business had not experienced and was not reasonably expected to experience an MAE. *See* B743; B567 § 5.04(c); B21-B22; B148-B149; B168-B171. CorePower's lenders loaned CorePower the requested $36.5 million on March 19, 2020. A1409. According to its Chief Financial Officer, CorePower believed on that day that the loan would provide a sufficient cash cushion to address COVID-19 losses and still complete the Level 4 acquisition. B20.

H. CorePower's "Business Decision" Not To Proceed with the Transaction

CorePower Yoga, LLC's board met the following morning, March 20, 2020, and CorePower management forecast that CorePower's COVID-19-related studio closures would last six weeks instead of the two weeks originally anticipated. B754. This meant that CorePower had an additional period when it believed that it would not be generating revenue. A1411. CorePower's forecast showed a year-end negative cash balance of approximately $39 million, even with the $36.5 million draw on its DDTL. A1411-A1412; B754. CorePower could access an additional $15

million in revolver debt to cover this cash shortfall, but that still left CorePower $24 million short. A1412-A1413.

The solution was obvious: delay or cancel the Level 4 acquisition and save $25 million. At the conclusion of its March 20 meeting, the CorePower Yoga, LLC board decided to try to delay the Level 4 acquisition. A1412-A1414.

A few hours after the meeting, Mr. Wong sent an email to Mr. Kenny stating that CorePower and TSG believed Level 4 was not operating in the Ordinary Course of Business, as required by the APA, because Level 4 had temporarily closed its yoga studios in response to COVID-19. A2405. Mr. Wong ended his email by proposing that the parties consider adjourning the closing dates under the APA. *Id.*

On March 22, 2020, Mr. Kenny responded to Mr. Wong's email, disagreeing that Level 4 was operating outside the Ordinary Course of Business. A2404-A2405. Mr. Kenny reminded Mr. Wong that the "APA contains no conditions to Closing" or any "mechanism . . . that would allow [CorePower] to delay the closing for any purpose." A2405. Mr. Kenny also assured Mr. Wong that Level 4 was ready to transfer its assets on the schedule agreed in the APA and expected CorePower to consummate the Transaction. *Id.*

On March 26, 2020, CorePower decided to tell Level 4 of CorePower's decision six days earlier not to move forward with the closings scheduled in the APA. A2413; B144-B145. Mr. Layman emailed Mr. Kenny that CorePower and

TSG believed Level 4 had "disavow[ed]" the following Representations in the APA: (1) that there had been no loss or taking with a value in excess of $50,000; (2) that Level 4 had not "terminated or closed any facility, business or operation"; (3) that Level 4 had not experienced an MAE; and (4) that Level 4 would operate in the Ordinary Course of Business. A2413. CorePower and TSG asserted that Level 4 had "repudiat[ed]" its obligations under the APA and that CorePower's contractual performance had been discharged. *Id.*; B9.

During a brief conference call held shortly after Mr. Layman sent his email, TSG and CorePower declared that CorePower would not close the Transaction. B144-B145. Level 4 asked if CorePower and TSG had a proposal in lieu of moving forward on the schedule in the APA and was told there was no proposal; the transaction was not going to proceed. B60-B62. When asked if Level 4 could have done anything to cure the asserted violation, Mr. Layman testified, "[w]e believed the contract had probably been repudiated, so I don't -- I don't know how you would cure that at that point." B10.

Four days later, on March 30, 2020, CorePower's CEO sent a letter to Mr. Kenny reiterating CorePower and TSG's position: "Level 4 Yoga, LLC has repudiated multiple material obligations embodied in the Asset Purchase Agreement thereby . . . discharging our obligations thereunder." B787; A578 ¶ 65. When the time came to close on the first tranche on April 1, 2020, only Level 4 showed up to

the virtual closing table, ready, willing, and able to transfer the first group of studio assets to CorePower. A578 ¶ 66; B15-B16; B777; B59; B63; A912.

Neither CorePower nor TSG did any assessment of Level 4's business when deciding not to move forward with the Transaction. B162-B167; B141; B5-B6; B27. CorePower and TSG did not assess whether Level 4's temporary studio closures were consistent with past custom or practice and did not assess whether Level 4's business had experienced an MAE. *Id*. Indeed, CorePower's CEO testified that Level 4's past practices were irrelevant to CorePower in determining whether CorePower's obligations were discharged under the APA. A1420. CorePower characterized it as a "business decision" to preserve cash in the face of uncertainty surrounding the pandemic. B12-B13; B24-B26; B28. When CorePower made this "business decision," it took the entire Transaction off its books because CorePower had no intention of closing on any of the dates in the APA. B146-B147.

I. Level 4's Post-April 1 Stewardship of the Assets Pending Specific Performance

After the failed closing on April 1, 2020, Level 4 took a number of cost-saving measures as steward of CorePower's assets and to mitigate damages. A779. Each of these measures followed CorePower's operational lead and paralleled measures that CorePower was taking in response to COVID-19. B174-B182; B185-B197. These measures included (1) extending temporary studio closures, (2) laying off or furloughing a majority of its workforce, and (3) restructuring its leases. B103-B106.

CorePower's CEO testified that each of Level 4's measures was a reasonable response to COVID-19 to preserve the yoga assets. B173-B174. To this day, CorePower has neither sent Level 4 a notice of default under its Franchise Agreements nor claimed that these measures were inconsistent with CorePower's System Standards. B174.

Level 4 continued to satisfy the APA requirement to send estimated balance sheets for each of the subsequent scheduled closings. *See* A2231 § 2.5.1; B102-B103; B777; B803; B809. CorePower never responded to Level 4's emails transmitting the estimated balance sheets, nor did CorePower attend any of the subsequent virtual closings. B64-B65.

Level 4 experienced operating losses while stewarding the assets that should have transferred to CorePower despite Level 4's efforts to save cost. B110-B111; B854; B1030; B1085. After CorePower permanently closed several studios, and after the last scheduled Closing Date, Level 4 proposed to CorePower to permanently close the four studios with negative EBITDA. B817; A2461. CorePower refused to give direction. B820. The studio assets and leases for the four studios were still available to be transferred at trial but CorePower refused to tell Level 4 whether to keep the studios open. B199-B228.

In total, Level 4 incurred a total of $6,763,780 in operating losses related to studios that should have transferred to CorePower on the scheduled transfer dates in the APA. A2039-A2043, B240; OB, Ex. B at 3.

Level 4's principals meanwhile cannot embark on new ventures. Had CorePower consummated the acquisition, the two-year restrictive covenants in the Franchise Agreements would have commenced and Level 4 soon would be free to re-enter the yoga business as a CorePower competitor. CorePower's refusal to complete the asset acquisition, however, effectively extended the non-competition period while simultaneously preventing Level 4 from expanding its CorePower franchises. B209-B211; B224-B225. The Court of Chancery directed that the two-year restricted period begin on March 1, 2022, which is 23 months longer than the parties envisioned when they executed the APA in November 2019. B250; A2255.

CorePower's initial avowed goal was to avoid completing the acquisition during the period of COVID-19-related uncertainty. B24-B25. The evidence at trial showed that CorePower's expectations for the recovery of the CorePower business are bullish. In a presentation to potential investors in spring 2021, CorePower said "COVID-19 is a transitory disruption, not a permanent brand issue" and that "90+% of [CorePower's] customer[s] intend to return to CPY." B1143. CorePower believes the expected recovery of the CorePower business supports a pre-COVID valuation. *See* B1164. Based on these expectations, CorePower attracted a $100 million

investment in 2021. B150. At the valuations used by CorePower in 2021, the Level 4 assets are worth $94 million, nearly four times what CorePower has been ordered to pay for them. B223-B224; Mem. 82-86; OB, Ex. B at 2-3.

The word "credible" appears eight times in the Court of Chancery's Memorandum Opinion. None describes the evidence on which CorePower relied. *See e.g.*, Mem. 50 n.182 ("CorePower's refrain that Level 4 promised to deliver 'well-run' and 'well-operated' studios is nowhere supported by the language of the APA or any other credible evidence."), 61 ("CorePower presented no credible evidence to explain how the COVID-19 pandemic purportedly disrupted Level 4's business to a degree that would qualify as an MAE while CorePower's business was able to rise above the MAE mark."), 73 ("CorePower presented no credible evidence that Level 4 had sustained a 'material loss . . . affecting the Business or any Acquired Asset with a value in excess of $50,000' at the time CorePower declared it would not close the Transaction."). Level 4's evidence was repeatedly described as credible and corroborated. *See, e.g.*, Mem. 36, 41-42, 76, 82, 85. The evidence also demonstrates that Level 4 stands ready, willing, and able to deliver to CorePower the assets it agreed to deliver in the APA. B77; B226-B228; A1043-A1046; B112-B115; B1168; B1180; B1239; A2727-A2729.

ARGUMENT

I. THE COURT OF CHANCERY APPROPRIATELY CONCLUDED THAT LEVEL 4 IS ENTITLED TO SPECIFIC PERFORMANCE

A. Question Presented

Did the Court of Chancery abuse its discretion by ordering specific performance?

B. Scope of Review

The Court reviews the Court of Chancery's order of specific performance for an "abuse of discretion." *Peden v. Gray*, 886 A.2d 1278, at *3 (Del. 2005) (TABLE); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (affirming the Court of Chancery's order for specific performance). The Court has declined to substitute its judgment for that of the trial court when the "judgment was based on conscience and reason." *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968).

C. Merits of the Argument

The parties agreed that specific performance would be an appropriate remedy for breach of the APA. The Court of Chancery concluded that CorePower breached the APA "when it refused to close on April 1, 2020, and then fully abandoned the Transaction that it had agreed to consummate" while Level 4 stood ready, willing, and able to deliver the studio assets it contracted to deliver.

According to CorePower, a party can agree that specific performance is a remedy for breach, walk away from all of its own contractual obligations, and still

avoid an order of specific performance if its counterparty does not continue to perform every condition of the APA until judgment. This is not, and never has been, the law in Delaware. CorePower walked away from a willing and able seller who had not breached the APA. The appropriate remedy is to compel the closing.

1. The Court of Chancery Applied the Proper Standard

CorePower does not dispute that the Court of Chancery applied the right standard in awarding specific performance. *Compare* Mem. 80 *with* OB 20. CorePower, instead, says that the Court of Chancery misapplied the standard by not requiring Level 4 to adhere to each and every obligation in the APA *through the date of judgment*, arguing that Level 4 was not in substantial compliance with its pre-breach obligations in the years *after* CorePower's breach. OB 20-27.

As CorePower acknowledges, the contractual compliance requirement is meant to ensure that the party ordered to perform receives "substantially the agreed exchange from [the party seeking specific performance]." OB 21 This principle was on full display in *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010). There, in a dispute over the purchase of a beach house, the buyer sought specific performance. *Id.* at 1155. The seller countered that an order of specific performance was improper because the buyer had failed to secure the financing necessary to purchase the house as required by the contract. *Id.* at 1161.

In affirming an order of specific performance, this Court noted that the buyer could still obtain financing and be ready, willing, and able to perform at the time of judgment. *Id.* Specific performance was appropriate, therefore, even though the buyer historically had not performed all of its obligations under the contract, because both parties could—and presumably would—be ready to deliver and receive at judgment what they had agreed to deliver in the contract. *Id.*

Faithfully adhering to the reasoning in *Kemp*, the Court of Chancery reasoned that the fact that a party "was not able to perform at some historical point in time [does] not preclude [an] order for specific performance when [the] party st[ands] ready and willing to perform at the time of judgment." Mem. 81 n.282. The Court found that Level 4 stands ready, willing, and able "to deliver to CorePower the studio assets it contracted to deliver in the APA," and there was no contrary evidence at trial (as discussed below). Mem. 81. As the parties had agreed, following an order of specific performance, CorePower would receive the assets and Level 4 would receive the purchase price, albeit more than two years after the Transaction should have taken place. Mem. 80-82.

The Court of Chancery's decision not to measure Level 4's compliance with the APA at points in time *after* CorePower's breach was consistent this Court's decision in *Peden v. Grey*, a case cited by CorePower. There, this Court made clear that specific performance can be appropriate even when the party requesting specific

performance is in default of a material obligation under a contract when "that party is excused from performance of that obligation." *Peden v. Gray*, 886 A.2d 1278 at *3 (Del. 2005); *see also* OB 20. This principle echoes in a number of Court of Chancery cases, including many cited by CorePower. *See, e.g.*, *Twin Willows, LLC v. Prtizkur, Tr. for Gibbs*, 2021 WL 3172828, at *4-5 (Del. Ch. July 27, 2021) (permitting specific performance claim to proceed when evidence showed that defendants' conduct excused continued contractual performance); *Alexander v. Petrey*, 2005 WL 1413303, at *1 (Del. Ch. June 7, 2005) (same); *Morgan v. Wells*, 80 A.2d 504, 506 (1951) ("The requirement of performance on the part of a plaintiff as a condition precedent to the granting of specific performance is modified … when there has been a repudiation by the defendant of the contract, or when the defendant has prevented the plaintiff from performing his obligations.").

As the Court of Chancery recognized, "Delaware law firmly supports the principle that a party to a contract is excused from performance if the other party is in material breach of his contractual obligations." Mem. 71 (quoting *Brasby v. Morris*, 2007 WL 949485, at *4 (Del. Super. Ct. March 29, 2007) (cleaned up)). After weighing the evidence at trial, the Court of Chancery found that CorePower materially breached the APA on April 1. Mem. 70-79. This breach excused Level 4's obligations to continue to perform under the APA and turned it into a steward of the assets while this lawsuit was pending. The Court of Chancery also found Level

4's performance was excused because CorePower caused the condition—the closure of Level 4's studios and a termination of its revenue—on which CorePower relied to walk away on April 1. *See* Mem. 44-45; *see also Pritzkur*, 2021 WL 3172828, at *4-5 (finding that defendants' conduct causing noncompliance excuses performance).

The two cases on which CorePower relies—*West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779 (Del. Ch. Feb. 23, 2009) and *Carteret Bancorp, Inc. v. Home Group, Inc.*, 1988 WL 3010 (Del. Ch. Jan. 13, 1988)—dealt with a different problem: repudiation of a *future* contractual obligation. *See W. Willow-Bay*, 2009 WL 458779 at *4-6; *Carteret*, 1988 WL 3010 at *5-7.

As the Court of Chancery found, the facts here are different. The parties agreed in November 2019 that Level 4 would operate the assets being sold for a brief period, then CorePower would take the assets. On April 1, 2020, CorePower walked away from the first tranche and made clear it would not close on anything in 2020 because Level 4 had "repudiated" the APA by following CorePower's instructions to close its studios. A2413; B9.

CorePower later tried to justify its actions by saying that Level 4 had stewarded the assets rather than continued to operate the assets on the APA pre-closing terms following CorePower's breach. Those facts do not correspond to the future contractual obligations in *West Willow-Bay* and *Carteret.* Rather, the teaching

of *Peden, Kemp*, and their progeny is that Level 4 was excused from its obligations under the APA on the next two closing dates when CorePower walked away on April 1. As long as Level 4 could show (as it did) that it was ready, willing, and able to deliver at the time of judgment, specific performance was appropriate.

After all, Delaware law prohibits "[t]he party first guilty of a material breach of contract [from] complain[ing] if the other party subsequently [does not] perform." *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, 2013 WL 3934992, at *11 (Del. Ch. July 24, 2013)*, aff'd*, 108 A.3d 1225 (Del. 2015) (TABLE). The better rule—and the one that the Court of Chancery applied—is to choose specific performance if the party seeking it can show that it is ready, willing, and able to deliver at the time of judgment.

2. The Court of Chancery Appropriately Ordered Specific Performance

The Court of Chancery concluded based on the evidence at trial that Level 4 stands "ready to deliver to CorePower the studio assets it contracted deliver in the APA." Mem. 81. This finding is entitled to "great deference" because it was well supported by the evidence presented at trial. *Winward v. David R. Wilkinson Assoc.*, 586 A.2d 1203 (Del. 1990) (TABLE). Multiple Level 4 witnesses testified that Level 4 is prepared to deliver the studio assets and presented documents to back up their assertions. *See, e.g.*, B77; A1043-A1046; *see also* B1168; B1180; B1239; A2727.

CorePower put on absolutely no evidence that the assets that Level 4 is prepared to deliver are any different from what Level 4 contracted to deliver. CorePower points to four studios that Level 4 closed six months after CorePower's breach, but the assets associated with those studios—including the leases—were still available at the time of trial. B226-B228. All CorePower had to do was agree to take them; CorePower refused. All four studios were included in the Transaction because they had negative EBITDA and reduced the purchase price, (B66-B67), so not taking those studios makes the Transaction more—not less—valuable to CorePower. B106-B107. While the APA did not guarantee the value of the assets (Mem. 49-50 n.182), if anything, CorePower's own documents show that the assets are worth nearly four times the Purchase Price in the APA. B1140.

As it did at trial, CorePower also makes arguments about goodwill without a basis in the APA or a shred of evidentiary support. Mr. Kenny thoroughly debunked the arguments at trial and the Court of Chancery disposed of them in a footnote. Mem. 49-50 n.182; B199-B225.

The Court of Chancery ordered specific performance because the "balance of the equities decidedly favors Level 4." Mem. 80. It also was the parties' contractual choice. *Id.* (Delaware courts have not "hesitated to order specific performance in cases of this nature, particularly where sophisticated parties represented by sophisticated counsel stipulate that specific performance would be an appropriate

remedy in the event of breach." (quoting *Snow Phipps Grp., LLC v. KCAKE Acq., Inc.*, 2021 WL 1714202, at *51 (Del. Ch. Apr. 30, 2021)); A2269. Finally, because the APA cancelled Level 4's franchises and expansion rights, specific performance is the only remedy that does not reward CorePower's breach.

II. THE COURT OF CHANCERY CORRECTLY INTERPRETED THE APA'S BRING-DOWN PROVISION

A. Question Presented

Did the Court of Chancery correctly decide that the bring-down provision that preceded the Representations did not independently operate as a closing condition or provide a contractual termination right?

B. Scope of Review

"The interpretation of contract language is reviewed by [the Supreme Court] *de novo*." *Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992).

C. Merits of the Argument

CorePower admits that the APA had no closing conditions so it asked the Court of Chancery to treat the bring-down provision *like* a closing condition and apply common law remedies. The Court of Chancery expressly found that the APA preserved common law rights but that CorePower failed to prove a material breach by Level 4 before April 1, 2020. Mem. 42.

1. The Court of Chancery Correctly Found that the Bring-Down Provision Did Not Create a Contractual Termination Right

The Court of Chancery's opinion reflects that it (1) applied this Court's precedent in *Chicago Bridge & Iron Co. N.V v. Westinghouse Electric Co. LLC*, 166 A.3d 912, 926–27 (Del. 2017), to assess evidence of the "basic business

relationship" between Level 4 and CorePower to "give sensible life" to the APA; (2) did a detailed review of the APA's terms; and (3) considered testimony from the parties about the APA and the Transaction. Mem. 27, 42. CorePower concedes that the Court of Chancery's opinion "was unquestionably correct" that the APA "did not contain closing conditions" and that the bring-down provision was not a closing condition. OB 28. And as the Court of Chancery recognized, the bring-down provision "is a far cry from the typical closing condition that this APA lacks." Mem. 33-34 n.136 (collecting cases). "A closing condition expressly makes the truth of the representation(s) a condition to close," and no such language appears in the APA's bring-down provision. *Id.*

CorePower says the bring-down provision was an inducement to close, (OB 28-30), and that it would not have closed if the bring-down provision did not create a termination right. A1307. This testimony, elicited through CorePower's "highly leading questions" was "not persuasive." Mem. 33-34 n.136. Persuasive or not, CorePower's argument is a sideshow because what was "important[ ]" to the Court of Chancery's conclusion was the text of the bring-down provision: "A closing condition expressly makes the truth of the representation(s) a condition to closing. [citations omitted] No such provision appears in the APA." Mem. 33-34 n.136. And even if that were not the case, it was, at most, harmless error. *See White v. Panic*, 783 A.2d 543, at 550 (Del. 2001); *see also Kroll v. City of Wilm.*, 2022 WL 1075399,

at *3 (Del. Apr. 11, 2022) (quoting *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) ("We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court.")).

2. The Court of Chancery Agreed that the APA Preserved Common Law Rights

CorePower also argues that the Court of Chancery's analysis of the bring-down provision was improper because it did not find that the APA preserved common law rights related to material breach. OB 30-31. But the Court of Chancery specifically concluded that "the parties did not disclaim common law rights in the APA," and as a result, it examined whether there was an "extra-contractual, common law" right that justified CorePower's "refusal to perform." Mem. 42. CorePower's disagreement with the Court's factual conclusion that Level 4 had not breached before April 1 is not a basis for reversal.

III. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT LEVEL 4 WAS NOT IN MATERIAL BREACH OF ITS ORDINARY COURSE REPRESENTATIONS

A. Question Presented

Did the Court of Chancery correctly determine that Level 4 was not in material breach of its Ordinary Course of Business representations when CorePower walked away from the Transaction, including because the evidence demonstrated that Level 4 as a CorePower franchisee was bound to follow the operational lead of its franchisor?

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's interpretation of the ordinary course provision, and reviews the Court of Chancery's application of the facts to the provision for clear error. *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, 268 A.3d 198, 209 (Del. 2021). This Court defers to the trial court's findings and conclusions if they "are supported by the record and the product of an orderly and logical deductive process." *SV Inc. P'rs, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 210 (Del. 2011).

C. Merits of the Argument

Each error that CorePower attempts to pin on the Court of Chancery—from its interpretation of the Representations to its assessment of breach—does not hold. There was no justification for CorePower to walk away from the Transaction.

1. The Court of Chancery Applied the Appropriate Legal Framework

CorePower is incorrect that the Court of Chancery (a) inappropriately considered CorePower's response to the pandemic when assessing Level 4's compliance with its Representations, (b) improperly limited its analysis to March 2020, (c) supposedly applied an efforts qualifier to measure Level 4's compliance with its Representations, and (d) improperly qualified—as only applicable to "temporary" actions—the Representations. OB 34-39. As the Court of Chancery found, Level 4's actions were dictated or led by CorePower itself as Level 4's franchisor.

a. The Court of Chancery Properly Considered CorePower's Response to the COVID-19 Pandemic

In line with the standard affirmed by this Court in *AB Stable*, the Court of Chancery noted that when "an ordinary course provision includes the phrase 'consistent with past practice' or a similar phrase," like this APA's, a court should look at how the specific seller has operated to determine consistency with past practice. Mem. 63-64 (quoting *Snow Phipps*, 2021 WL 1714202, at *38); *see also AB Stable VII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *70 (Del. Ch. Nov. 30, 2020)*, aff'd*, 268 A.3d 198 (Del. 2021); *AB Stable*, 268 A.3d at 212 (adopting Court of Chancery standard). The Court of Chancery properly

"train[ed its] sight on how Level 4 itself historically has operated, both generally and in similar circumstances." Mem. 64.

What makes this case different from *AB Stable* is that CorePower is both the buyer and Level 4's franchisor. This distinction was not lost on the Court of Chancery. Mem. 28 ("More so than usual, the pre-signing relationship between this buyer and this seller directly informs my analysis of the parties' competing claims of breach of contract."). From the inception of that franchise relationship, Level 4 followed CorePower's operational lead—and CorePower's brief does not suggest otherwise—because Level 4 had to do so. B99-B100. The Court of Chancery assessed whether Level 4's actions were in line with CorePower's actions, as they had been for 15 years. Mem. 64-68. The Court of Chancery did not, as CorePower wrongly suggests, measure Level 4's post-pandemic actions against "others in the industry," and CorePower identifies no instance where it did so. The Court of Chancery found as a matter of fact that Level 4's actions were completely consistent with *its* past practices. Mem. 66-68.

Nor did the Court of Chancery view the ordinary course provision as "mere surplusage." The Court of Chancery treated the ordinary course provision as an additional obligation for Level 4, beyond Level 4's franchise obligations, to operate the Business consistent with past practice. After all, Level 4 could have had a history of not complying with its Franchise Agreements or CorePower's System Standards.

The Court of Chancery weighed the evidence of both parties' actions and found that Level 4 "historically and faithfully adhered to those standards" both pre- and post-pandemic. Mem. 64.

b. The Court of Chancery Properly Limited Its Analysis to Pre-April 1

CorePower takes issue with the Court of Chancery's decision "not [to] consider the full transactional period when analyzing L4's compliance with" the Representations. OB 36. But a long line of Delaware cases holds that a party in material breach, or who outright refuses to perform, cannot complain about its counterparty's subsequent non-performance. Mem. 44 n.164. Delaware law requires CorePower to establish the justification existed "at the time" it elected to not perform. *Id.* (quoting *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, 2021 WL 2886188, at *26 (Del. Ch. July 9, 2021)). It did not.

CorePower communicated its outright refusal to perform on March 26 and failed to perform on April 1, 2020. Mem. 44-45. At trial, CorePower failed to show that Level 4 was itself in breach of the APA on April 1. Mem. 72. The Court of Chancery accordingly concluded that when CorePower failed to close, "the bargained-for structure of the APA was lost, and when that was lost, so too was CorePower's justification for non-performance based on subsequent actions or omissions by Level 4." Mem. 44. This was the correct application of Delaware law.

c. The Court of Chancery Did Not Improperly Impute an Efforts Qualifier

CorePower condemns the Court of Chancery for imputing an efforts qualifier into the ordinary course representation. OB 34, 37-38. The Court of Chancery was clear:

> Level 4 did not argue, and the evidence did not prove, that Level did its best to operate in the ordinary course but fell short. Rather, Level 4 has maintained all along, and the preponderance of the evidence proves, that Level 4 was successful in its efforts to operate its yoga studios in the ordinary course during the pre-signing/post-closing period.

Mem. 64 n.236.

CorePower's "imputed qualifier" argument is just wrong.

d. The Court of Chancery Did Not Improperly Qualify the Representations

CorePower's argument about the Court of Chancery's supposed improper qualification of the Representations—as only applicable to "temporary" actions—is unsupported by reference to any section of the Opinion where this "error" occurred. OB 36-37. CorePower's failure to specify is enough to reject the argument. *See Dixon v. State*, 2014 WL 4952360, at *2 (Del. Oct. 1, 2014) ("[C]ursory treatment of an issue is insufficient to preserve an issue for appeal.").

At most, CorePower's argument is that the Court of Chancery was "implying terms" into the Representations when discussing the temporary nature of studio closures, lease amendments, and employee furloughs. OB 36-37. But the Court of

Chancery assessed the temporary character of the actions only to determine whether any deviation from those Representations was material on April 1. Mem. 73-76. Weighing the evidence, the Court of Chancery concluded that Level 4's temporary actions did not "defeat[ ] the object of the parties entering into contract." *Id.*

2. The Court of Chancery Correctly Determined that Level 4 Did Not Materially Breach the Representations

As discussed above, the appropriate time for the Court to consider whether Level 4 was in breach was when CorePower claimed its performance was excused. *See Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, 2021 WL 2886188, at *26 (Del. Ch. July 9, 2021; *Biolife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 281-82 (Del. Ch. 2003) (requiring material breach to be present at time of decision not to perform). Because CorePower did not establish that Level 4 was in material breach on April 1, CorePower's performance was not excused.

a. The Court of Chancery Correctly Determined That Level 4 Was Not in Breach in March 2020

CorePower's examples of Level 4 following CorePower's directions in March 2020 (OB 39-44), are not material breaches of the APA.

(1) Layoffs

As CorePower concedes (OB 39), CorePower's argument about Level 4 layoffs before April 1 was "not supported by the evidence." Mem. 74; A954; A970. Level 4's layoffs came after April 1 and a week after CorePower had laid off the vast majority of CorePower's staff. B174-B176; B785.

(2) Studio Closures

Level 4 temporarily closed its yoga studios in March 2020 after CorePower told Level 4's members that Level 4's studios were closed for two weeks. A574 ¶¶ 53, 55-56; A764-A765; B749. The evidence at trial supported that conclusion in spades: (a) CorePower emailed Level 4's members that Level 4's studios would be closed; (b) CorePower's website, app, Facebook, Twitter and Instagram pages announced that Level 4's studios would be closed; (c) CorePower prevented Level 4's members from booking classes; (d) only then did Level 4 follow CorePower's lead and close its yoga studios; and (e) CorePower then suspended Level 4's membership payments. *Id*; B91-B92; B93; B96-B98; B721; B722; B726; B723; B775; B724. CorePower director Ed Wong testified that had Level 4 not closed its studios, Level 4 would have breached the Franchise Agreements and the APA. B142-B143; B137-B138. Indeed, the evidence was so overwhelming at trial that CorePower's position that the studio closures excused its performance "was received by the Court with a sour taste of hypocrisy." Mem. 63 n.232.

(3) Curtailed Operations

The Court of Chancery correctly concluded any other steps taken before April 1 "were consistent with Level 4's ordinary course because, in each respect, Level 4 followed the example set by its franchisor." Mem. 67; B99-B100; B139-B140; B176-B178; B1940-B196; B963-B1029. No evidence suggests otherwise.

(4) MAE

CorePower chose not to put on any evidence that Level 4 experienced an MAE prior to April 1. CorePower's expert admitted that he had not studied and had no opinion on whether Level 4 had experienced an MAE before April 1. B160-B161. Understandably so: "the evidence of COVID-19's effects on Level 4's business as of the time CorePower declared the occurrence of an MAE falls well short of reaching the MAE mark." Mem. 60.

An MAE should be measured at the time that CorePower invoked the MAE clause and cancelled the Transaction. Mem. 58 (citing *Bardy*, 2021 WL 2886188 at *26 & *Channel Medsystems, Inc. v. Bos. Sci. Corp.*, 2019 WL 6896462, at *28 (Del. Ch. Dec. 18, 2019)). The Court of Chancery assessed whether, in March 2020, there was an expectation that the business effects of COVID-19 would persist over a commercially reasonable period of time, "which one would think would be measured in years rather than months." Mem. 58 (quoting *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 68 (Del. Ch. 2001)).

The Court's conclusion there was no MAE on April 1 was supported by CorePower's CEO's testimony that Level 4's business and CorePower's business were the same business. B162-B165. With CorePower's forecasts predicting a six-week studio closure related to COVID-19, and CorePower's contemporaneous statement to its lenders that on March 19, 2020 "there ha[d] been no event or

circumstance, either individually or in the aggregate, that has had or would reasonably be expected to have a Material Adverse Effect" on CorePower's business, CorePower's MAE argument is in tatters.

b. CorePower Makes No Attempt To Demonstrate Any Breach Was Material

CorePower's assault on the Court of Chancery's material breach analysis fails for another reason, as demonstrated repeatedly above: none of the purported breaches at the time CorePower walked away was material. *See supra* at III.C.2. A breach will not excuse performance unless it is a material one. *DeMarie v. Neff*, 2005 WL 89403, at *3 (Del. Ch. Jan. 12, 2005).

IV. THE COURT OF CHANCERY APPROPRIATELY DISMISSED COREPOWER'S SPECIFIC PERFORMANCE COUNTERCLAIM

A. Question Presented

Did the Court of Chancery dismiss the counterclaim based on the post-closing remedy scheme in the APA?

B. Scope of Review

"The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed by this Court *de novo*." *Feldman v. Cutaia*, 951 A.2d 727, 730 (Del. 2008). With respect to the Court of Chancery's consideration of CorePower's counterclaim after trial, this Court defers to the trial court's findings and conclusions if they "are supported by the record and the product of an orderly and logical deductive process." *SV Inc. P'rs, LLC, Inc.*, 37 A.3d at 210.

C. Merits of the Argument

As CorePower acknowledges, its counterclaim was asserted in the alternative in the event CorePower was required to perform under the APA. OB 45. The premise of the counterclaim was that CorePower should not be required to pay the full amount it agreed to pay in the APA if the Court ordered it to perform because Level 4 did not live up to the Representations. *Id.* But CorePower never made those damage claims, either under Section 6.1.1(a) or in its counterclaim.

In Delaware, the "parties' contractual choices are [to be] respected." *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *12 (Del. Ch. July 11,

2011). To respect parties' contractual choices, a court should give priority to the parties' intentions as reflected in the four corners of a contract. *GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012). Where the parties have agreed to self-order their affairs through a contractual scheme, a court should enforce it. *Ascension Ins. Hldgs., LLC v. Underwood*, 2015 WL 356002, at *4 (Del. Ch. Jan. 28, 2015) (holding "our courts will enforce the contractual scheme that the parties have arrived at through their own self-ordering"); *AM Gen. Hldgs. LLC v. Renco Grp., LLC*, 2020 WL 3484069, at *5 (Del. Ch. June 26, 2020) ("To be sure, as noted, this Court ought to consider an agreement's overall scheme or purpose when construing it.").

The parties here agreed that the "sole and exclusive remedy" for "any breach of, or inaccuracy in, any representation or warranty made by" Level 4 would be post-closing by indemnity claims within 15 months of each closing. A2262-A2264. CorePower's well-pled allegations did not contradict the APA, leading the Court of Chancery to conclude that the parties intended the APA indemnification scheme as the only post-closing Representations remedy. A450-A453.

None of CorePower's arguments warrants reversing the Court of Chancery's decision. Section 6.8 does not allow CorePower to avoid the parties' contractual scheme by avoiding closing. The parties set forth a detailed indemnification process that CorePower could have invoked within 15 months of the scheduled closings (and

could have included as an alternative damages counterclaim) but it elected not to do so. Nor does the preservation of equitable relief "supplant the indemnification scheme the parties bargained for" on a Representations claim. A452-A453. To find otherwise, the Court correctly concluded, would be an unreasonable construction of the APA because it would allow CorePower to end-run around the exclusive indemnification scheme by attaching a different label to its damages claim. *Id.*

Though CorePower now argues that the Court of Chancery wrongly ignored the different materiality standard governing the warranty provisions and post-closing indemnity, CorePower did not raise this argument below. *See generally*, A1449, A1677; *see also Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017). Even had CorePower done so, CorePower does not explain why its observation makes the Court of Chancery's decision wrong. Arguments not fully articulated in an appellant's opening brief are waived. *In re Nat'l City Corp. S'holders Litig.*, 998 A.2d 851 (Del. 2010) (TABLE).

Nor has the post-closing indemnification remedy been read out of existence. OB 46. The Court of Chancery specifically rejected the post-Closing adjustments that CorePower requested because CorePower did not seek purchase price relief after each scheduled closing under Section 6.1.1(a) or litigate the issue. OB, Ex. B at 4 n.5. The Court of Chancery concluded that "[t]he time to dispute the Final Purchase Price . . . has come and gone." *Id.* This Court should not read a second chance

provision and another round of litigation into the APA. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (court should "not rewrite the contract to appease a party").

V. THE COURT OF CHANCERY PROPERLY AWARDED STEWARDSHIP DAMAGES

A. Question Presented

Did the Court of Chancery properly award Level 4 the stewardship damages it requested, especially when CorePower did not offer any evidence at trial that Level 4's damage calculation was wrong and did not contest Level 4's damage calculation in its post-trial briefing?

B. Scope of Review

"This Court reviews the Court of Chancery's fashioning of remedies for abuse of discretion." *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 175 (Del. 2002). Accordingly, this Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy." *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 438-39 (Del. 2000).

C. Merits of the Argument

Level 4's expert witness, Jeffrey Mordaunt, opined on Level 4's damages, including losses from operating the yoga studios after CorePower was meant to take possession of them, its "stewardship losses." B116-B121. CorePower did not put on any evidence that contradicted Mr. Mordaunt's calculations. The Court of Chancery found Mr. Mordaunt's testimony credible. Mem. 85.

The Court of Chancery directed the parties to confer on the calculation of additional damages between trial and judgment following the methodology Mr.

Mordaunt used at trial. Mem. 86 n.300. The Court of Chancery made clear that "this [was] a mathematical exercise only" and that it did not want to hear late-breaking arguments that the methodology was wrong. *Id.*

Despite the Court of Chancery's admonition, CorePower contested Mr. Mordaunt's subsequent calculations in a letter brief to the Court. A2047-A2048. The Court rejected CorePower's argument—presumably as untimely—and entered judgment as calculated because there were no mathematical problems with the numbers. CorePower's belated criticism of the calculated damages, unsupported by any trial evidence, should be rejected as waived. *Stephenson v. Comonwealth & S. Corp.*, 19 Del. Ch. 447, 451 (1933); *see also Hines v. State*, 248 A.3d 92, 99 (Del. 2021) ("We generally decline to review contentions not raised below and not fairly presented to the trial court for decision." (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010)).

CONCLUSION

For the reasons stated above, the Court should affirm the Court of Chancery's Opinion and Order.

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Dated: June 13, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2022, true and correct copies of *Appellee's Answering Brief* were caused to be served by File & Serve*Xpress* on the following counsel of record:

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