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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LONG DENG AND MARK FANG, Defendants/Counterclaim and Third-Party Claim Plaintiffs Below, Appellants, v. DENGRONG ZHOU, Plaintiff/Counterclaim Defendant Below, Appellee.	)	No. 152,2022 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2021-0026-JRS

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Defendants appeal from a detailed Post-Trial Memorandum Opinion ("Op.") which determined – after a two-day trial and extensive pre- and post-trial briefing – that Defendants were properly removed from the Board of Directors of iFresh pursuant to a Written Consent executed by the Consenting Shareholders.[1] There is no dispute about the facial validity of the Written Consent, and the Chancery Court held that "Defendants' attempt to prove that the shares voted in the Consent were obtained by breach of contract, fraud or other wrongdoing failed for want of adequate proof or failure properly to preserve and present the arguments." Op. 10-12, 45-46. The Chancery Court committed no legal error that would change the outcome of the case – and Defendants do not identify one. Instead, what Defendants are really asking this Court to do is to substitute their judgment for the judgment of the trial court as to the weight and credibility of evidence. But "[t]he fact that the [an] appellant disagrees with the court's factual determinations is not a basis for reversal." *Brennan v. Abrams*, 215 A.3d 1283, 1283 (Del. 2019).

[1] The Memorandum Opinion is attached to Appellants' Opening Brief as Exhibit A.

SUMMARY OF ARGUMENT

1. Denied. The Chancery Court properly applied New York law with respect to the element of justifiable reliance, including the "peculiar knowledge" exception to the general rule that sophisticated parties – two members of the iFresh board, advised by sophisticated counsel, Loeb & Loeb – cannot show justifiable reliance where (a) the facts allegedly withheld are a matter of public record, (b) they admittedly did not use the means of verification available to them, and (c) they failed to negotiate contractual protections for themselves and iFresh. In addition, the argument is futile because justifiable reliance is just *one* of the elements of fraud Defendants failed to prove by clear and convincing evidence.

   a. Denied. The trial court properly applied the "peculiar knowledge" exception to the facts of this case and did not rely solely on the sophistication of the Defendants in reaching its decision.

   b. Denied. Defendants did not prove by clear and convincing evidence that Zhou was operating any ongoing "Xiangtian pyramid scheme," and in any event failed to establish any nexus between Zhou's alleged intent to incorporate iFresh into any such "scheme" and any duties Zhou owed under Delaware law. Op. 21-22. The Chancery Court also considered Defendants' factual allegations regarding the ongoing "scheme" but

held that "[t]his argument fails." Op. 28 n.109 (citing to Defendants' Post-Trial Brief (A1571-75)).

c. Denied. The trial court recognized that, in certain circumstances, "a general integration clause will not bar a fraud claim" (Op. 29, n.115), but considered the integration clause as part of the totality of the circumstances in this case. Separately, the trial court found that, even without the integration clause, Defendants failed to prove "by clear and convincing evidence that Zhou defrauded them in a manner that would justify a declaration that his attempt to vote his iFresh shares was void" and that "Zhou's supposed extra-contractual denial of his association with the pyramid scheme … as a matter of persuasive evidence, does not rise to that level, regardless of the specificity, or not, of the integration clause." Op. 29-30.

2. Denied. Defendants argue – for the first time on appeal – that *Zhou* breached a "contractual warranty" that Ou was investing for his own account. In fact, Defendants didn't even raise the argument that *Ou* breached such a warranty until post-trial briefing. The only contractual breaches alleged in the Amended Counterclaim were with respect to (a) representations in the RET Wine and Jiuxiang SPAs, and (b) HK XD's failure to pay Deng for his shares in full. A0951-59. The argument is waived. Defendants also conceded at post-trial argument that only a

fraudulent representation giving rise to rescission – not a simple contractual breach – could strip Ou of his right to vote his shares. A1720-25. Therefore, the trial court properly considered – and rejected – those allegations in the context of a fraud claim. Finally, the argument is a red herring because Ou's shares are not necessary for the Written Consent to be effective. A1035-36.

a. Denied. The trial court found that "Ou testified repeatedly and credibly that he was the controller of his shares, not Zhou." Op. 24. Defendants attempt to recharacterize this credibility assessment as a "legal error" is unavailing.

3. Denied. The trial court properly found that the unpleaded "aiding and abetting breach of fiduciary duty" claim was waived. Non-party Amy Xue ("Xue") was mentioned only twice in the Counterclaim that was in place from February 2021 to January 2022 (the period during which all discovery was taken). A0583-84. Even after amendment, the trial court observed that "[t]he breach of fiduciary duty and aiding and abetting arguments were not introduced as grounds to invalidate the Consent until after trial in Defendants' post-trial brief. That is 'too late to argue a new claim.' Defendants' pretrial brief mentions Ms. Xue's involvement in this case in its recitation of the background facts. But neither the Amended Counterclaim, the pretrial order nor the pretrial briefing provided Zhou with *any* notice of a breach of fiduciary duty or aiding and abetting claim." Op. 16 ("Indeed, the phrases 'aiding

and abetting' and 'fiduciary duty' do not appear a *single time* in the Amended Counterclaim, the pretrial order, or the pretrial briefs.") (emphasis in original).

STATEMENT OF FACTS

A. Procedural History

On January 12, 2021, the Consenting Shareholders executed a Written Consent (A0539-551) removing Defendants from the Board of Directors of iFresh, replacing them with Qiang Ou and Jiandong Xu. A0539-52. Plaintiff, one of the Consenting Shareholders, then filed the Complaint in this case requesting the Chancery Court declare the Written Consent valid pursuant to 8 *Del. C.* § 225. A0553-61. Defendants filed an Answer and Verified Counterclaim on February 12, 2021, which alleged that the Consenting Shareholders obtained their iFresh shares by fraud and that their votes should be invalidated. A0562-606. Discovery proceeded until December 17, 2021, and, on the eve of trial, Defendants moved to file an "Amended Counterclaim," which significantly expanded the allegations and theories. A0921-61. The trial court granted leave to amend, over Plaintiff's objection. Op. 14. At the conclusion of a two-day trial, and after extensive pre- and post-trial briefing and argument, the Chancery Court issued a 46-page Opinion, finding that Defendants' claims "failed for want of adequate proof or failure properly to preserve and present the arguments." Op. 45-46.

Defendants previewed their appellate arguments during briefing of their Motion for a Stay. B402-16. The Chancery Court rejected those arguments in a detailed 18-page Order Denying Stay. B417-34. It held that the peculiar knowledge

exception was inapplicable not only because of "the (correct) legal observation that the peculiar-knowledge exception has been rejected by courts when sophisticated parties could have negotiated contractual protections for themselves, but also [because of] the Court's factual findings regarding the accessibility of information, lack of any meaningful diligence and the parties' sophistication, among others." B429. It also reiterated that Defendants failed to prove the shares voted in favor of the Written Consent were obtained by fraud "on *several* levels," and that even if the peculiar knowledge exception applies, it "does not remedy these deeper flaws." B429-30 (emphasis in original).

The Chancery Court also addressed the waiver argument. B430-32. It rejected Defendants' analysis of *Bäcker v. Palisades Growth Capital II, L.P.*, the same case cited by Defendants in the Appellants' Opening Brief ("AOB"). It held that the fact that some of Xue's alleged conduct was the subject of discovery in the context of other claims was not enough because her alleged breach of a fiduciary duty was not "consistently argued" and courts have previously "rejected arguments that a party failed to raise before …. [because] the opposing party may have tried the case differently given notice of the new argument." *Id.* (citing *Bäcker*, 246 A.3d 81, 103 (Del. 2021)). Defendants sought review of that decision by the Supreme Court, which also denied the motion on June 27, 2022. B435-37.

Defendants filed the AOB on June 17, 2022.

B. Zhou's Alleged Misstatements and Omissions

Defendants argue that the Chancery Court misapplied the "peculiar knowledge" exception to justifiable reliance with respect to Zhou's conviction in China – which they concede was a matter of public record – because it "ignored facts adduced at trial that were in Zhou's *peculiar* knowledge, including that Zhou was continuing to operate the Xiangtian pyramid scheme and that his very purpose in transacting with iFresh was to absorb it into that scheme." AOB, 4. But as the trial court held, Defendants *did not* prove their case.

First, Defendants allege that the trial court ignored that "Zhou was indisputably investigated, detained and sentenced for criminal activity in China in connection with Xiangtian and a multi-level 'pyramid' scheme." AOB, 4 (citing Op. 28). However, the full quote from the Opinion is "**Defendants argue these representations were false and misleading because** Zhou was indisputably investigated, detained and sentenced for criminal activity in China in connection with Xiangtian and a multi-level 'pyramid' scheme. **The argument is not persuasive.**" Op. 28 (emphasis added).

The focus of the Counterclaim in place from the filing of the case until shortly before trial was a 2013 conviction that was indisputably a matter of public record – and the SEC filing disclosing it was quoted in that Counterclaim. A0576-77. Defendants then shifted theories, shortly before trial, to argue that the real

"omission" was the intent to incorporate iFresh into an ongoing "scheme." The Court of Chancery, after considering all of the evidence, concluded that the argument that Zhou made false and misleading statements to Deng about his criminal conviction was "not persuasive." Op. 28.

C. Ou As Zhou's Alleged Agent or Nominee

Zhou and Ou obtained their shares pursuant to the SPA executed on March 25, 2020. A0315-21. Section 3(c) of the SPA states that "The Investor is purchasing Shares for its own account for investment, not as a nominee or agent. . ." A0317. Zhou signed the SPA as Investor, and Ou as Co-Investor – each making his own set of representations. While Defendants generally alleged that "Ou was and is operating as an agent of Dengrong Zhou and the Zhou family" (A0929) they never alleged Ou breached Section 3(c), or any other section, of the SPA. Instead, they focused on the source of Ou's funds. A0951-54.

iFresh required a $2.5 million investment to stay compliant with NASDAQ. Zhou testified at trial that he did not have enough US dollars for the entire $2.5 million investment that iFresh needed, so Ou was brought in as a co-investor. Tr. 54:12-55:11 (A1263-64); A0321 (listing Ou as "Co-Investor"). Ou testified that he personally owns the iFresh shares, is not under the control of Zhou or any other person, and is not holding the shares for Zhou or any other person. Ou Dep. 121:15-122:25 (A0760-61).

Zhou further testified at trial that he did not have agreements in place with Ou, or any other Consenting Shareholder, about how to vote their shares. Tr. 26:20-27:3 (A1235-36). Defendants failed to rebut this in any way. The Chancery Court, summarizing the facts relevant to whether Ou was a "nominee or agent" of Zhou, held as follows: "[s]etting aside materiality, to prove that a misrepresentation occurred, Defendants must convince the Court by clear and convincing evidence that Ou did not invest on his own account but rather as an 'agent or nominee' of Zhou. **They have not done so.**" Op. 24 (emphasis added).

Defendants also argue that "the trial court's factual conclusion that there was no fraud was based solely on evidence regarding Ou's *source* of funds [and] the warranty at hand is not about Ou's *source* of funds per se, but about his *agency relationship with Zhou*." AOB, 39. But, in fact, the trial court specifically determined that "Ou testified repeatedly and credibly that he was the controller of his shares, not Zhou." Op. 24. As the finder of fact, the trial court was in the best position to evaluate the evidence in finding that Ou's testimony that he was not Zhou's agent to be credible and reliable.

D. Xue's Alleged Breach of Fiduciary Duty

Xue was mentioned only three times in the Counterclaim that was in place until shortly before trial. A0583-84. In the Amended Counterclaim, she is mentioned only in reference to communications she had with Zhou and the iFresh

Board. *See, generally* A0921-61; Op. 16 (the "phrases 'aiding and abetting' and 'fiduciary duty' do not appear a *single time* in the Amended Counterclaim, the pretrial order or the pretrial briefs."). The single reference to "fiduciary misconduct" in the Pre-Trial brief is the statement that "[f]raud or fiduciary misconduct bear upon the validity of shares voted in a Section 225 contest." A1020. As the Chancery Court observed, the "aiding and abetting" theory "may have sprouted from Defendant Deng's testimony, offered for the first time at trial, that Amy Xue was 'engaging in criminal act of violating her fiduciary duty.'" B432, n.51.

Consequently, it was not until the Post-Trial Brief that Defendants argued, for the first time, that Zhou caused Xue "to breach her fiduciary duties to iFresh in aid of his scheme to garner more shares." A1565. In turn Plaintiff argued that this new theory – one of several – was waived. A1606-07. It was also unsupported by the trial record. *See, e.g.*, Tr. 53:22-56:17 (A1262-65); 58:14-59:23 (A1267-68); 156:20-157:2 (A1365-66); 157:19-158:1 (A1366-67); 202:10-203:3 (A1411-12); 210:6-19 (A1419). In fact, the only "evidence" of Xue's supposed breach is Deng's vague statement that Xue was "not acting on the perspective of iFresh." Tr. 308:18-309:9 (A1517-18); B432, n.51. On that basis, the trial court found the theory waived. Op. 15-16.

ARGUMENT

I. DEFENDANTS FAILED TO PROVE FRAUD, INCLUDING THE ELEMENT OF JUSTIFABLE RELIANCE, BY CLEAR AND CONVINCING EVIDENCE

A. Question Presented.

Is there a basis to reverse the Chancery Court's determination that Defendants "have failed to prove fraud by clear and convincing evidence, such that the consent should be set aside"? Op. 21. No.

B. Scope of Review.

The Chancery Court's finding that Defendants failed to prove fraud in connection with Zhou's acquisition of iFresh shares, and that the Written Consent was valid and effective, is a mixed question of law and fact. While its legal conclusions are reviewed *de novo*, its factual findings are afforded a "high level of deference" and disregarded only where there is clear error. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi., Ill.*, 75 A.3d 101, 108 (Del. 2013). "The factual findings of a trial judge can be based upon physical evidence, documentary evidence, testimonial evidence, or inferences from those sources jointly or severally." *Cede & Co., v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000). "The fact that the appellant disagrees with the court's factual determinations is not a basis for reversal. Factual findings will not be disturbed on appeal unless they are clearly erroneous." *Brennan*, 215 A.3d at 1283. Under this standard, a trial

court's factual findings may not be reversed so long as they are plausible in light of the record viewed in its entirety. *Banther v. State*, 823 A.2d 467, 483 (Del. 2003).

C. Merits of Argument

1. Defendants' Justifiable Reliance Argument Is Futile

To prevail under New York law, Defendants had to "prove *by clear and convincing evidence* a material misrepresentation of fact, knowledge of its falsity, and intent to induce reliance, justifiable reliance [by Defendants], and damages." Op. 21 (collecting authorities). After trial the Chancery Court found that Defendants "failed to prove fraud by clear and convincing evidence, such that the Consent should be set aside." *Id*. The "peculiar knowledge" exception on which Defendants base their appeal is relevant to a single element of a single transaction: justifiable reliance on Zhou's alleged extracontractual statement regarding his conviction.[2]

Defendants are not appealing the trial court's determinations with respect to other elements of the fraud claim, which separately bar it. Crucially, the trial court held that Zhou had no duty to speak with respect to his alleged plans for iFresh. Op. 22 (there is a "fundamental flaw in the assumption underlying each of Defendants'

[2] In this appeal, Defendants are not arguing the peculiar knowledge exception with respect to Ou's investment, or the RET Wine and Jiuxiang transactions. AOB, 4-5, 24-33. Those arguments are waived. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1226, n.16 (Del. 1999) ("[Appellant] did not challenge the Court of Chancery's rulings based on authentication and hearsay grounds. Therefore these arguments are deemed waived.").

fraud theories – that a party seeking to buy a company's stock has a common law duty … to disclose when doing so that he ultimately intends to take control of the company. That is not the law of Delaware and, as best I can discern, it is not the law in New York either.") (citing *Bachmann v. Ontell*, 1984 WL 21204, at *1 (Del. Ch. Nov. 7, 1984) (holding that preventing an attempt to take control of a company for the purpose of liquidating it is not an affirmative defense in a Section 225 proceeding)). Defendants do not challenge this holding, which is fatal to their argument that the real "peculiar knowledge" was "Zhou's *ongoing* operation of [a criminal pyramid scheme] – and plan to make iFresh a part of it." AOB, 30.

Defendants also failed to prove the existence of any ongoing "scheme" or material misrepresentation by Zhou. Op. 30 ("Zhou's supposed extra-contractual denial of his association with the pyramid scheme, in my view, as a matter of persuasive evidence, does not rise to [the level of a taint by fraud to a degree that is reasonable to conclude the transaction would not have been consummated] regardless of the specificity, or not, of the integration clause."); 22, n.85 ("Setting aside that the argument comes far too late, it also assumes, wrongly, that Defendants proved Zhou controlled the other stockholders who comprised the Control Group at the time they acquired their iFresh shares[.]"); 27-28 and n.109 ("Zhou's statements to unrelated parties have [nothing] to do with his or his supposed allies' acquisition of iFresh shares" and finding Defendants' entire argument "not persuasive.").

Defendants' argument can be fairly characterized as merely disagreeing with the trial court's factual findings, which is not a basis for reversal. AOB, 30-31; *Brennan*, 215 A.3d at 1283 ("The fact that the appellant disagrees with the court's factual determinations is not a basis for reversal.").

Because there was no material misstatement or omission on which Defendants could have justifiably relied this Court need not reach Defendants' "peculiar knowledge" argument.

2. The Chancery Court Did Not Fail to Consider Defendants' Arguments and Evidence Regarding an Alleged Continuing Pyramid Scheme Involving iFresh, Which Was Not Proven and Is Irrelevant

The trial court gave Defendants wide latitude to present their case at trial. Op. 14. After trial it rendered a detailed Opinion going through Defendants' presentation in painstaking detail. In that Opinion, it explained that "Defendants would need to point to something that caused [the Zhou and Ou SPA] transaction . . . to be tainted by fraud to a degree that it is reasonable to conclude that the transaction would not have been consummated had the fraud been detected pre-closing." Op. 30. It then correctly determined that they failed to do so.

The Chancery Court specifically held that Zhou's "supposed extra-contractual denial of his association with the pyramid scheme . . . does not rise to that level." *Id*. It also held, with citation to the evidence, that Zhou's past criminal conviction in China was a "matter of public record," that Deng "did not ask Zhou about his

conviction" in China prior to Zhou's investment, and that, "at Deng's express direction, no formal due diligence was performed [by iFresh] on Zhou or Ou" before their purchase of iFresh shares. Op. 30-31 and n.116-19 (citing the trial transcript and documentary evidence, such as JX2 (B001-05), JX6 (B0016-39), JX17 (B040-246), Tr. 322:5-8 (A1531), and JX84 (B265-66), A0238-39). It also determined that "credible evidence revealed that iFresh needed investors and that it likely would have accepted Zhou's investment regardless of his criminal conviction in China." Op. 31 and n.121. Defendants' trial presentation did not rebut this. Op. 24 and n.94-95.

Defendants' claim that the Chancery Court did not consider Zhou's alleged involvement in an ongoing pyramid scheme – and his alleged intent to incorporate iFresh into it – is incorrect. AOB, 15. Defendants made these arguments in their Post-Trial Brief under the heading "Zhou Hid His *Continued* Operation of the Xiangtian Scheme." (A1571-75). The trial court considered the entirety of Defendants' presentation – including "evidence" consisting of a strained translation of WeChat messages between Zhou and a third-party who was not an investor in iFresh – and found it unconvincing. Op. 28, n.109 (citing Defendants Post-Trial Brief, 7-11 (A1571-75)). With respect to the various WeChat messages "Zhou made to unrelated parties, such as investors discovered after the stock sale," it held they do not "have anything to do with [Zhou's] or his supposed allies' acquisition of

iFresh shares." *Id.* Defendants' disagreement with the trial court's factual determinations is not a basis for reversal. *Brennan*, 215 A.3d at 1283.

Defendants' argument also proceeds from the mistaken premise that Zhou had a legal duty to disclose a "scheme" to take over iFresh and incorporate it into a "pyramid scheme." Op. 22 and n.85 (noting the "fundamental flaw" in Defendants' fraud theories — "that a party seeking to buy a company's stock has a common law duty (as opposed to a statutory duty) to disclose" his intentions with respect to the company, which is not the law). It is well settled under New York and Delaware law that, absent an affirmative duty to disclose, failure to volunteer information is not actionable. *See Jana L. v. W. 129th St. Realty Corp*., 22 A.D.3d 274, 277-78 (N.Y. App. Div. 1st Dep't 2005) (no duty to disclose under New York law "absent a fiduciary relationship between the parties" or where "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair") (internal citation omitted); *Trusa v. Nepo*, 2017 Del. Ch. LEXIS 57, at *28-29 (Del. Ch. Apr. 13, 2017) ("In an arm's length negotiation, where no special relationship between the parties exists, a party has no affirmative duty to speak and is under no duty to disclose facts of which he knows the other is ignorant even if he further knows the other, if he knew of them, would regard them as material in determining his course of action in the transaction in question.") (internal citation omitted). Defendants did not prove that such a duty existed.

3. The Chancery Court Did Not Misapply New York Law In Finding the Peculiar Knowledge Exception Inapplicable In this Case

Separately, the Chancery Court properly determined that Defendants failed to prove justifiable reliance, including the "peculiar knowledge" exception.

The trial court correctly determined that Defendants, advised by sophisticated transaction lawyers (Loeb & Loeb), did not and cannot show justifiable reliance with respect to Zhou's legal trouble in China (which was a matter of public disclosure). This was especially true because *no* due diligence was done at Deng's specific direction. The trial court properly rejected Defendants' argument that their claim was saved by the "peculiar knowledge" exception under the specific circumstances of this case.

In reaching this conclusion, the Chancery Court properly applied New York law holding that a sophisticated party in an arms-length transaction cannot claim justifiable reliance on alleged misrepresentations in situations in which it "failed to make use of the means of verification that were available to it." *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 195 (N.Y. App. Div. 1st Dep't 2012) (rejecting a fraud claim by plaintiff sophisticated bank against another bank in connection with a credit default swap transaction, holding that the plaintiff could have conducted its own diligence and research). *HSH* cited *Centro Empresarial Cempresa S.A. v Am. Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 278-79 (N.Y. 2011), a decision by New York's

highest court, for the well-settled legal principle that "[i]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." Further, in such circumstances, a counterparty has no obligation to disclose information that it is not contractually obligated to disclose or that is not requested. *Id.* at 197, 202.

Contrary to Defendants' suggestion, the Chancery Court did not hold that sophisticated parties can *never* claim justifiable reliance under the "peculiar knowledge" exception. Instead, the court held that the exception was inapplicable under factual circumstances here, where (1) "Defendants and iFresh are sophisticated parties who were represented by counsel," (2) "could have negotiated contractual protections for themselves," and (3) did not conduct adequate due diligence. Op. 31-32, n.122. This is consistent with New York law.

Defendants made this exact argument – with the same case citations – in seeking a stay of the Judgment. In rejecting it, the trial court explained why it had "correctly interpreted New York's 'peculiar knowledge' exception which can be held inapplicable in certain circumstances" like those in this case. B427, n.38 (collecting cases). And, importantly, the Chancery Court reiterated that its

"determination that the peculiar knowledge exception was inapplicable stemmed not only from the (correct) legal observation that 'the peculiar-knowledge exception has been rejected by courts when sophisticated parties could have negotiated contractual protections for themselves,' *but also from the Court's factual findings* regarding the accessibility of information, lack of any meaningful diligence [by iFresh and Defendants] and the parties' sophistication, among others." B429 (emphasis added). The trial court's extensive factual analysis and findings should not be disturbed on appeal.

In rejecting Defendants' argument, the Chancery Court cited *Psenicska v. Twentieth Century Fox Film Corp.*, 409 F. App'x 368, 371 (2d Cir. 2009) and *RAA Mgmt., LLC v. Savage Sports Hldgs., Inc.*, 45 A.3d 107, 115 (Del. 2012),[3] for the uncontroversial proposition that the peculiar knowledge exception is inapplicable in certain factual scenarios in which sophisticated parties could have protected themselves or conducted reasonable due diligence. Op. 29-32 and n.122. Defendants suggest that these cases are outdated and no longer good law, however they provide no support for this premise. On the contrary, these cases apply well-settled principles of New York law.

[3] Defendants' suggestion that the trial court's holding on New York law was erroneous because the court mistakenly identified the *RAA* decision as 2021 (instead of 2012) is unavailing. Defendants point to no cases repudiating the principles set forth in *Psenicska*, *RAA*, *HSH*, *Centro*, or their progeny.

For example, as recently as 2021, the New York Appellate Division, First Department, in S*ilver Point Cap. Fund, L.P. v. Riviera Res., Inc.*, relied on this exact principle in holding that the peculiar knowledge exception is not applicable in situations involving sophisticated parties that fail to request information or seek additional contractual representations or warranties. 198 A.D.3d 432, 433 (N.Y. App. Div. 1st Dep't 2021) (collecting cases as far back as 1990, including *Centro*).

In denying Defendants' motion for a stay, the trial court correctly reiterated that its holding was grounded in well-settled New York law. B427-28, n.38-39, citing *O.F.I. Imps. Inc. v. Gen. Elec. Cap. Corp.*, 2016 U.S. Dist. LEXIS 131565, at *20 (S.D.N.Y. Sept. 26, 2016) (peculiar knowledge exception does not apply in situations in which a sophisticated entity could have bargained for contractual protections or taken reasonable due diligence steps); *RAA Mgmt.*, 45 A.3d at 115 (same); *Silver Point*, 198 A.D.3d at 433 (same); *HSH*, 95 A.D.3d at 188-89, 195 (same).

Defendants rely on cases allowing claims to proceed past the pleading stage to argue that the peculiar knowledge exception applies regardless of the level of sophistication of the parties. None of the cases on which Defendants rely support this broad proposition nor did they involve post-trial factual findings as to actual sophistication and the nature of the information (which is to be expected because at the pleading stage all allegations are presumed true). *See* AOB, 25-27, citing, *e.g.*,

TIAA Global Invs., LLC v. One Astoria Square LLC, 127 A.D.3d 75, 79-82, 91 (N.Y. App. Div. 1st Dep't 2015) (affirming denial of motion to dismiss fraud claim, and emphasizing the procedural posture in which the court construed all allegations liberally, "assumed [alleged facts] to be true, and "afforded [plaintiff] the benefit of every possible favorable inference"); *Loreley Fin. (Jersey) No. 3 Ltd. v. Citigroup Global Mkts Inc.*, 987 N.Y.S.2d 299, 307 (N.Y. App. Div. 1st Dep't 2014) (allowing fraud claim to be pursued at the motion to dismiss stage where the issue was merely the sufficiency of the allegations); *Basis Yield Alpha Fund (Master) v. Stanley*, 115 A.D.3d 128 (N.Y. App. Div. 1st Dep't 2014) ("Basis Yield I") (assessing the sufficiency of the pleadings only); *Basis Yield Alpha Fund Master v. Stanley*, 136 A.D.3d 136, 145 (N.Y. App. Div. 1st Dep't 2015) ("Basis Yield II") (affirming denial of motion to dismiss, "[t]aking the allegations of the amended complaint as true, and drawing all favorable inferences in favor of the pleader"); *LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 519 (S.D.N.Y. 2014) (denying motion to dismiss based only on the pleadings and noting the "fact-specific nature of this inquiry" which the court did not undertake). As articulated by one of Defendants' cited cases, *Allstate Ins. Co. v. Ace Sec. Corp.*, the "pleading requirements for reliance are minimal on a motion to dismiss, and it is generally premature to decide the question at the pleading stage"—which is why these cases

are not applicable here. 2013 N.Y. Misc. LEXIS 3531, at *33 (N.Y. Sup. Ct. N.Y. County 2013).

Defendants cite to *Basis Yield I* and *Basis Yield II* as examples of the peculiar knowledge rule being applied in situations involving sophisticated parties, but, in both decisions, the New York courts reiterated that *HSH* was still good law and instead merely distinguished the pleaded allegations. *Basis Yield I*, 136 A.D.3d at 139-40 (holding that *HSH* "is inapposite" because of the factual differences between the cases); *Basis Yield II*, 136 A.D.3d at 144 (finding that certain facts "serve[d] to distinguish *HSH*"). Those 2013-2015 cases were also decided in the context of the 2008 financial crisis and involved allegations about complex financial products, and a disparity in the information available to different kinds of market participants. None of that is at issue here.

Defendants cite to *Rekor Sys. Inc. v. Loughlin*, 2022 U.S. Dist. LEXIS 45284 (S.D.N.Y. Mar. 14, 2022) as an example of a case in which a New York federal court applied the peculiar knowledge exception even though a sophisticated party had not done adequate due diligence. That case does not stand for the proposition for which it is cited. The *Rekor* court did not find that the plaintiff "failed to conduct minimal due diligence"—that was simply what the *Rekor* defendants argued; in fact, the *Rekor* plaintiff had presented evidence that "it exercised due diligence." *Id.* at 21, 28. Here, on the other hand, the Chancery Court determined, after trial, that "no

formal due diligence was performed on Zhou or Ou" by iFresh, Deng, or their sophisticated lawyers, at Deng's direction. Op. 30-31.

The *Rekor* court, in holding that there were genuine issues of material fact as to the party's reasonable reliance, also reinforced that "reasonable reliance is often a question of fact" to be decided at trial and that evidence that a party is "sophisticated" or "represented by counsel" is "relevant to the issue of reasonable reliance." 2022 U.S. Dist. LEXIS 45284, at *23-24. Defendants cite to *Dandong v. Pinnacle Performance Ltd.*, which similarly reinforces this principle. 2011 U.S. Dist. LEXIS 126552, at *36-37 (holding that reliance is "intensely fact-specific" in which New York courts take a "contextual view" in "looking at a parties' sophistication and the information that was available"). This is consistent with the trial court's factual and legal findings.

Defendants' reliance on a quote from *TIAA*, that the "'special facts doctrine' applies regardless of the level of the sophistication of the parties" (127 A.D.3d at 87), is misplaced. First, Defendants did not articulate (or prove) any "special facts" to fit within this exception. Second, the Chancery Court did not merely rely on the sophistication of the parties in holding the peculiar knowledge rule to be inapplicable – it was part of the totality of the circumstances the court examined. Op. 28-33 (finding that Zhou's extra-contractual statements to unrelated parties about some unproven pyramid scheme did not have anything to do with his purchase of iFresh

shares, that Zhou's past conviction was public record, that Deng never asked about the conviction, and that Deng and iFresh decided to not do any due diligence notwithstanding that they were represented by sophisticated corporate counsel).

In short, Defendants' interpretation would turn the rule – that peculiar knowledge is a narrow exception to a presumption that a sophisticated party must do its due diligence – on its head. There is no basis for reversal here.

4. The Chancery Court Did Not Err in Considering the Integration Clause, Which Was Not Determinative of the Justifiable Reliance Holding

Zhou's SPA included an integration clause, stating that it "constitute[d] and contain[ed] the entire agreement" between the parties thereto and "supersede[d] any and all prior agreements, negotiations, correspondence, understandings and communications" relating to the subject matter thereof. JX85 at §4(e) ("Entire Agreement") (A0318).[4] The SPA also contained certain affirmative representations and warranties that are not at issue on appeal. *Id.* at §§ 2-3 (A0315-17).

Defendants claim the trial court committed reversible error by applying that clause to bar justifiable reliance on alleged extra-contractual misstatements or omissions by Zhou that were not encompassed by the affirmative representations and warranties in the agreement. Defendants are wrong.

[4] The other agreements in this case, which are not the focus of this appeal, also had similar merger (or integration) clauses. *See* JX88 at §9.9 (RET Wine SPA) (A0325-52); JX111 at §9.9 (Jiuxiang SPA) (A0486-512).

a. The Integration Clause Could Bar Defendants' Claim

New York law recognizes that a merger (or integration) clause can bar a fraud claim either when (a) it addresses the "very matter as to which [the party] now claims it was defrauded" or (b) in certain circumstances such as when it is the product of an arms-length negotiation between sophisticated parties and the agreement included other specific recitals and representations. *PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 488 (S.D.N.Y. 2017) (collecting cases); *see also Emergent Capital Inv. Mgmt. LLC v. Stonepath Grp., Inc.*, 165 F. Supp. 2d 615, 622 (S.D.N.Y. 2001) ("Even if an integration clause is general, a fraud claim will not stand where the clause was included in a multi-million dollar transaction that was executed following negotiations between sophisticated business people and a fraud defense is inconsistent with other specific recitals in the contract."); *Chappo & Co., Inc. v. Ion Geophysical Corp.*, 83 A.D.3d 499, 500 (1st Dep't 2011) ("The cause of action alleging fraud in the inducement is barred by the merger clause").

The integration clause here is relevant to the second part of the test as part of the totality of the circumstances, namely: the presence of a merger clause; the sophistication of Defendants, iFresh, and their counsel (Loeb & Loeb); the fact that the SPA was negotiated at arms-length; the failure to do any due diligence or to ask questions; the other representations included in the agreement; and the strong desire for Zhou's investment. Op. 29. *See also* A0316-17; Tr. 61:15-20 (A1270); Fang

Dep. 217:11-218:5 (B295-96). Indeed, Defendants failed to prove that there were any extra-contractual misrepresentations or omissions that could substantiate their fraud claims. The cases Defendants cite do not warrant a different result.

Defendants cite *FIH, LLC v. Found Cap. Partners LLC*, 920 F.3d 134, 140-41 (2d Cir. 2019) and argue that "*normally*, general disclaimers are insufficient to defeat reasonable reliance on material misrepresentations as a matter of law." But, as noted above, that is only part of the analysis. In fact, the *FIH* court clarified that it did "not suggest in any way that general disclaimers or merger clauses, the sophistication of [the parties], or the presence of various promises or representations in a written agreement are irrelevant to the reasonableness of a party's reliance on pre-contract factual misrepresentations." *Id.* at 144-45.[5]

Defendants also argue that New York law does not impose a duty on parties to insist on contractual protections against omissions within the peculiar knowledge of another party. However, these cases are inapposite. *See, e.g., ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (N.Y. 2015) (noting that, unlike other cases in which parties could have negotiated contractual protections and

[5] The *FIH* court noted that "as *Emergent Capital* demonstrates, there may be circumstances where a general disclaimer or merger clause, together with an extensive roster of specifically negotiated factual warranties and representations, can lead to a conclusion that, in the particular circumstances of a case, no reasonable jury could find reasonable reliance on a representation not inserted into the written contract." *Id.* at 145. In other words, even at the summary judgment phase, reliance can be precluded based on a merger clause.

thus could not claim justifiable reliance, in this case "there was no written agreement between plaintiff and defendant in which a 'prophylactic provision' could have been inserted"). It is also not clear why law standing for the proposition that peculiar knowledge can be imputed when a party would face high costs in determining the truth or falsity of representations (such as with respect to proprietary information) is relevant. *See, e.g., Solutia Inc. v. FMC Corp.*, 385 F. Supp. 2d 324, 340 (S.D.N.Y. 2005) (noting that the alleged misrepresentations related to "the capability of proprietary technology, which is necessarily in the peculiar knowledge of its owner"). The information alleged to be concealed here is qualitatively different – and was in fact a matter of public disclosure in the very kinds of public filings that Defendant Fang would have expected Loeb & Loeb to review. Tr. 261:11-262:17 (A1470-71). In fact, Defendants presented no evidence at trial about the costs of confirming any alleged misrepresentations or omissions.

In short, none of these exceptions are applicable.

b. The Chancery Court Did Not Rely Solely On The Integration Clause

Crucially, the Chancery Court did not rely solely on the integration clause to bar Defendants' fraud claim. Op. 29 n.115. It went on to hold that "[*e*]*ven accepting Defendants' argument* that the integration clause was not specific enough to disclaim reliance, *the fraud claim still fails*" because Defendants did not prove by "clear and convincing evidence that Zhou defrauded them in a manner that would justify a

declaration that his attempt to vote his iFresh shares was void." Op. 29-30 (emphasis added). Further, the trial court held that Defendants' evidence of fraud was not persuasive enough and did "not rise to [the] level" or "degree that it is reasonable to conclude the transaction would not have been consummated had the fraud been detected pre-closing." Op. 30.

At trial, Defendants failed to present evidence of misrepresentations or omissions that would constitute fraud, nor did they prove materiality or justifiable reliance. The Chancery Court, in addition to finding that Defendants conducted no due diligence and did not prove any misrepresentations or omissions, also held that "the credible evidence revealed that iFresh needed investors and that it likely would have accepted Zhou's investment regardless of his criminal conviction in China" (referencing the fact that iFresh needed a new investment to re-establish compliance with NASDAQ listing rules, and Deng's related testimony). Op. 31 and n.119, 121.

Defendants' disagreement with the trial court's factual determinations is not a basis for reversal.

II. THERE IS NO BASIS TO REVERSE THE TRIAL COURT'S DETERMINATION THAT DEFENDANTS FAILED TO PROVE A "CONTRACTUAL WARRANTY" WAS BREACHED WITH RESPECT TO OU'S INVESTMENT SUFFICIENT TO INVALIDATE HIS VOTE

A. Question Presented.

Did the Chancery Court commit reversible error in determining – after considering evidentiary material and testimony – that Defendants failed to prove that "Ou did not invest on his own account but rather as an 'agent or nominee' of Zhou." Op. 24. No.

B. Scope of Review.

The Chancery Court's determination that Defendants failed to prove Ou is a nominee or agent of Zhou is a mixed question of law and fact. While the Court's legal conclusions are reviewed *de novo*, its factual findings are afforded a "high level of deference" and disregarded only where there is clear error. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi., Ill.*, 75 A.3d 101, 108 (Del. 2013). "The fact that the appellant disagrees with the court's factual determinations is not a basis for reversal. Factual findings will not be disturbed on appeal unless they are clearly erroneous." *Brennan*, 215 A.3d at 1283. Under that standard, a trial court's factual findings may not be reversed so long as they are plausible in light of the record viewed in its entirety. *Banther v. State*, 823 A.2d 467, 483 (Del. 2003).

C. Merits of Argument.

1. The Argument Is Not Outcome Determinative

As a threshold matter, the argument that Ou should not be able to vote his shares because of a purported misrepresentation about not being the actual "controller" – even if correct – is not outcome determinative. That is because Ou only owned 2.07% of the outstanding iFresh shares at the time of the vote. A1035-1036. Yet more than 52.29% of the outstanding shares were voted in favor of the Written Consent. *Id*. Thus, even without Ou's shares, the Consenting Shareholders would have voted 50.22% of the outstanding shares of iFresh, which would be sufficient votes under its Bylaws for the Written Consent to be effective. 8 *Del. C.* § 228; PTO, ¶¶ 29-31 (A1035); iFresh Bylaws, Article II, Section 6 and Article III, Section 12 (B008-09). This would be an alternative basis for affirming the decision.

2. The Argument Was Waived

The trial court did not have occasion to pass upon Defendants' argument that *Zhou* breached a "contractual warranty" that *Ou* made – namely that Ou was investing for his own account. This is an entirely new argument, presented for the first time on appeal. It is therefore waived. Del. Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review."); *see also Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806, 812, n.13 (Del. 2016) ("[A]n appellant cannot present an argument for the first time on appeal."); *Shawe v. Elting*, 157 A.3d 152, 155 (Del. 2017) ("Under this Court's long-standing rules and the important

policy reasons guiding them, we do not consider arguments raised by the Shawes for the first time on appeal.").

To the extent that Defendants argue that it was Ou – not Zhou – who breached this "contractual warranty," that argument was also waived. Breach of warranty with respect to the Section 3(c) of the Ou SPA, concerning purchasing the securities for his own account, never appears in the pleading. Breaches of the SPAs are only asserted with respect to the RET Wine and Jiuxiang transactions – not the Ou private placement. A0951-59. The only misstatement alleged with respect to Ou is that he failed to disclose his source of funds, an entirely different theory. *Id*. It was only post-trial that Defendants argued Ou made "misrepresentations" in the SPA as to whether he purchased the shares for his own account. A1581 ("Ou, in describing himself as a purported 'co-investor,' investing for his 'own account [and] not as a nominee or agent,' did not disclose that he was simply doing Zhou's bidding."); A1644 ("Ou specifically represented that he was an accredited investor, investing for his own account."). That is too late to assert a new claim. *See Snow Phipps Group, LLC v. KCAKE Acq., Inc.*, 2021 Del. Ch. LEXIS 84, at *92 (Del. Ch. Apr. 30, 2021) ("When an argument is first raised in a pretrial brief after the parties already have shaped their trial plans, it is simply too late and deemed waived.").

3. The Trial Court Considered, And Rejected, Defendants' Claim That Ou Did Not Invest For His Own Account

Setting aside waiver, and futility, Defendants' argument is simply a collateral attack on credibility determinations the trial court made. Op. 24 ("Ou testified repeatedly and credibly that he was the controller of his shares, not Zhou."). This determination was made in the context of a fraud claim because Defendants conceded at post-trial oral argument that it was the only way such a representation could be used to invalidate Ou's vote. In fact, Defendants affirmatively conceded that "clear and convincing" is the appropriate standard because only a fraudulent misstatement sufficient to invalidate a contract could preclude the voting of shares. A1720-1725 ("**THE COURT**: […] We're now in the territory where the claim is a fraudulent misrepresentation within the contract. What is the standard of proof or the burden of proof you bear to prove that? **ATTORNEY NI**: Your Honor, I'm – I don't know. But I think -- **THE COURT**: Isn't that important, since you're the one prosecuting the claim? And we're at the closing argument, and you're telling the jury what it is that they've got to find or not find by what measure or quantum of proof. Isn't it important for you to know that now? **ATTORNEY NI**: Your Honor, I know that fraud claims in and of themselves are all subject to a clear and convincing standard. **THE COURT**: Wouldn't it make sense that that is true as well for a contractual fraud claim? **ATTORNEY NI**: Yes, Your Honor. We're only focusing in on just the statement, and we're saying this statement is fraudulent.").

In rendering its decision, the trial court also specifically considered the evidence Defendants argue was overlooked or misapprehended with respect to the nature of the investment by Zhou and Ou. *Compare* AOB, 37 and Op. 23-24. After weighing the evidence the trial court determined that "Ou testified repeatedly and credibly that he was the controller of his shares, not Zhou." Op. 24. The court also held that – notwithstanding Defendants "muddl[ing] the distinction between fraud reliance and breach of warranty reliance" – the argument was inconsequential because "it hinges on the assumption that Zhou provided a false representation or warranty, which also was not proven." Op. 33 n.127. "The fact that the [Defendants] disagre[e] with the court's factual determinations is not a basis for reversal." *Brennan*, 215 A.3d at 1283.

III. THE CHANCERY COURT PROPERLY HELD THAT DEFENDANTS WAIVED ANY BREACH OF FIDUCIARY DUTY ARGUMENT

A. Question Presented.

Did the Chancery Court err in finding that Defendants waived their breach of fiduciary duty claim? No.

B. Scope of Review.

The Chancery Court's determination that Defendants waived their claim of aiding and abetting breach of a fiduciary duty by Xue is a mixed question of law and fact. While the Court's legal conclusions are reviewed *de novo*, its factual findings are afforded a "high level of deference" and disregarded only where there is clear error. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi., Ill.*, 75 A.3d 101, 108 (Del. 2013). "When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 95 (Del. 2021) (citations omitted).

C. Merits of Argument

1. Defendants Waived The Aiding And Abetting Breach of Fiduciary Duty Argument

Defendants argue that the trial court "misapplied the law governing waiver" when it held that Defendants waived their arguments about Plaintiff allegedly aiding and abetting breaches of fiduciary duty by Xue. AOB, 42-48. The crux of their argument on appeal is that Plaintiff had notice of the argument such that he could

take discovery and have a fair opportunity to respond. *Id*. 43. There is not much Plaintiff can do to improve on the trial court's waiver analysis, as set forth in the Opinion and Stay Order, rejecting this contention. Op. 15-16; B430-32 and n.51 ("The breach of fiduciary duty and aiding and abetting arguments were not introduced as grounds to invalidate the Consent until after trial in Defendants' post-trial brief. That is 'too late to argue a new claim.' Defendants' pretrial brief mentions Amy Xue's involvement in this case in its recitation of the background facts. But neither the Amended Counterclaim, the pretrial order nor the pretrial briefing provided Zhou with *any* indication that a breach of fiduciary duty or aiding and abetting claim was on the table for trial. Indeed, the phrases 'aiding and abetting' and 'fiduciary duty' do not appear a *single time* in the Amended Counterclaim, the pretrial order or the pretrial briefs.").

Defendants argue on appeal that Plaintiff had fair notice of the claim because their "pretrial brief expressly argued 'fiduciary misconduct' as a basis for invalidation." AOB, 45 (citing A1020). First, this is legally irrelevant because even "[w]hen an argument is first raised in a pretrial brief after the parties already have shaped their trial plans, it is simply too late and deemed waived." *Snow Phipps Group, LLC v. KCAKE Acq., Inc.*, 2021 Del. Ch. LEXIS 84, at *92 (Del. Ch. Apr. 30, 2021) (quoting *ABC Woodlands L.L.C. v. Schreppler*, 2012 Del. Ch. LEXIS 199, at *3 (Del. Ch. Aug. 15, 2012)). Second, Defendants pre-trial brief *did not* preview

this theory. The word "fiduciary" appeared once in the brief, in a section titled "*Zhou* Masterminded a Conspiracy to Defraud iFresh", which merely states (in general terms) that "[f]raud or fiduciary misconduct bear upon the validity of shares voted in a Section 225 contest." A1020. That is all. There is no mention of Xue in that section, and aiding and abetting breach of her fiduciary is never argued anywhere (nor is the law on breach of fiduciary duty, or aiding and abetting that breach, ever discussed). The Chancery Court correctly held that "merely alluding [to a claim] in [the] recitation of the background facts was not sufficient to put the opposing party on notice." Op. 16 and n.64.

Defendants' attempt to distinguish *Snow Phipps* and *ABC Woodland* as being a plenary proceeding, and not Section 225, is unavailing. AOB, 43. Defendants cite no case for the proposition that it is enough to plead a scattershot of facts – without tying them to a specific theory under which a vote can be invalidated – to avoid waiver in a Section 225 proceeding. *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 104 (Del. 2021) and *In re Cellular Tel. P'ship Litig.*, 2021 Del. Ch. LEXIS 224, at *173 (Del. Ch. Sept. 28, 2021) certainly do not stand for that proposition.

Vice Chancellor Slights, who presided below, also rendered the underlying decision in *Palisades Growth Capital II, L.P. v. Bäcker*, 2020 Del. Ch. LEXIS 108 (Del. Ch. Mar. 26, 2020), the appeal from which is Defendants' lead case. As he

explained in the Stay Order, unlike in this case, the *Bäcker* plaintiff had "'*consistently argued* that the Bäckers deceived their fellow directors by representing support for the board's original agenda while concealing a secret counter-agenda to seize control of the company" and thus gave the opposing party "ample notice" of the theory" and, moreover, "*Bäcker* explicitly recognized that this court 'has rejected arguments that a party failed to raise before trial on the basis that the opposing party may have tried the case differently given notice of the new argument.' For all the reasons stated in the Opinion, Defendants gave Plaintiff no such notice." B430-32.

Defendants' reliance on *In re Cellular* is also misplaced. The parties in *Cellular* were parties to multiple agreements and one party believed the breach claim was in regard to a partnership agreement, whereas the other party was actually claiming breach of a governance provision. The court found that the mistaken party was on notice of the true nature of the breach claim after a summary judgment motion, and subsequent trial testimony was specific to that breach. *See In re Cellular Tel. P'ship Litig.*, 2021 Del. Ch. LEXIS 224, at *183 ("AT&T thus knew the issues that were being litigated, and **AT&T succeeded in shaping the litigation environment to its advantage**. AT&T confronted difficulties at trial not because the plaintiffs surprised AT&T with a new issue, but rather because the record showed—and AT&T's key witness admitted—that AT&T had not complied with

the Management Agreement." (emphasis added)). Here, Defendants did not mention a breach of fiduciary claim until post-trial briefing, and the extent of testimony on point was Deng's throwaway line that he believed Xue was "engaging in criminal act of violating her fiduciary duty." Stay Order n.51 (citing Tr. 309:7–9 (A0309)).

It is unclear what the purpose of Defendants' inclusion of the *Genelux* complaint serves (AOB, Ex. B), but it is worth noting that in the ultimate decision from that case, the Chancery Court held that "[i]t is settled Delaware law that a party waives an argument by not including it in its brief." *Genelux Corp. v. Roeder*, 126 A.3d 644, 672 (Del. Ch. 2015). Most importantly, the *Genelux* court noted that "I consider it important that, had Plaintiffs put Defendants on notice of this argument in a timely manner, Defendants could have taken actions to meet it more effectively than they could post-trial." *Id*. The same logic applies to this case – while Plaintiff was able to present an argument on the breach of fiduciary argument in his reply post-trial brief (A1607-10), if he had been provided fair and adequate notice in the pleadings, appropriate discovery could have been taken and trial strategy may well have been adjusted.

Indeed, it is unclear how Defendants would have sought to tie such a breach – by someone not a party to the proceeding – to invalidate the voters' franchise without showing their purchases were invalid. A1692-1693 ("**THE COURT**: But isn't the whole premise of allowing a party to challenge a vote based on some

underlying actionable wrongdoing that that wrongdoing would actually result in a rescission of the transaction under which that party acquired their shares, such that they could not vote them? Not that there would be some damages remedy or something else, but that there would be a basis to say, look, you are not lawfully in possession of those shares such that you can lawfully vote them. Under what other -- if that is not the case, then under what theory could you possibly strip a stockholder of their right to vote, which is among the most protected rights in our law?").

2. Defendants Failed to Prove Any Alleged Breach of a Fiduciary Duty.

Defendants assert that they uncovered "unambiguous evidence" that Xue was disloyal to iFresh and worked for Zhou (AOB, 46), but that does not comport with findings made by the trial court. Defendants specifically refer to certain paragraphs in the Amended Counterclaim, including paragraph 49 which states that Xue misled iFresh in an email to the Board about audited financial statements as to the RET Wine transaction. AOB, 46 (citing A0931-33; 940-41). Although the trial court did not go through each and every allegation of the pleading in its decision, in the instances in which the court reviewed Xue's conduct relevant to theories Defendants didn't waive, it found that Defendants failed to prove their fraud theory. For instance, the trial court specifically held that the email from Xue to the iFresh board providing them with audited financials for the RET Wine transaction "cannot serve as the basis for a fraud claim for the simple reason that they were not

misrepresentations at all." Op. 39. The trial court did not "altogether ignor[e]" the allegedly deceptive acts by Xue, it simply did not agree with Defendants' interpretation of the evidence.

Defendants themselves admit that Zhou "testified about his conversations with Xue" and "offered explanations for his and Xue's private chats." AOB, 46. The trial court implicitly and explicitly credited those allegations in rejecting a fraud theory with respect to Zhou. And despite Defendants repeatedly trying to frame Plaintiff as "not credible" or a "master-fraudster," the simple fact is that the trial court disagreed and stated at least four times that Zhou testified "credibly." Op. 26, 37-38, 44; A1687. In short, the time for the type of hyperbole reserved for pleadings or pre-trial motions is done. Defendants must now accept the factual findings.

CONCLUSION

For the foregoing reasons, the Opinion of the Chancery Court should be sustained.

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