



IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                      |   |                                |
|----------------------|---|--------------------------------|
| CROWN BANK,          | ) |                                |
|                      | ) |                                |
| Appellant,           | ) | No. 213, 2022                  |
|                      | ) |                                |
| v.                   | ) | Court Below: Superior Court of |
|                      | ) | the State of Delaware          |
|                      | ) |                                |
| BCD ASSOCIATES, LLC, | ) | C.A. No. N15C-11-062 EMD       |
|                      | ) |                                |
| Appellee.            | ) |                                |

**[CORRECTED] APPELLANT CROWN BANK'S OPENING BRIEF ON APPEAL**

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## NATURE OF PROCEEDINGS

This appeal stems from the second of two bench trials before the Superior Court arising out of a single series of events. Those events concerned the renovation of a hotel and the large cost overruns that ensued. The first trial was the hotel owner's case against its lender, *MRPC Christiana LLC, et al. v. Crown Bank*, Del. Super., C.A. No. N15C-02-010 EMD (the "MRPC Case"). That lender, Crown Bank ("Crown"), is the appellant here. Crown prevailed in that trial and won a judgment. The second trial was BCD Associates', the general contractor, case against Crown and is the subject of this appeal.

The MRPC Case was initiated in January 2015 and this matter was initiated in November 2015. Given the common facts in the two cases, this matter remained dormant until the MRPC Case was resolved. The Superior Court issued its Decision After Trial in the MRPC Case in December 2017, finding that Crown had not committed a material breach of contract and awarded it money damages.<sup>1</sup>

As a result of that decision, BCD Associates ("BCD") moved to amend its complaint to add new factual allegations and new causes of action against Crown.

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<sup>1</sup> The Superior Court made its findings of fact in the decision after trial in *MRPC Christiana LLC v. Crown Bank*, N15C-02-010 EMD, 2017 WL 6606587 (Del. Super. Dec. 26, 2017). Crown adopts and incorporates the Court's findings of fact in the decision. The decision is attached at A183–A248. Joint Exhibits for the MRPC Case trial were identified with the prefix "JX\_." Where applicable, Crown refers to the Joint Exhibits by their exhibit number in the interest of brevity and clarity.

Crown opposed that motion on the grounds that BCD's new claims were time-barred. The Superior Court granted BCD's motion to amend on June 25, 2018, finding that its claims "shall relate back to the date of the filing of the Complaint on November 6, 2015."<sup>2</sup>

In response to BCD's Amended Complaint, Crown filed an Answer and Counterclaim.<sup>3</sup> That Counterclaim included six causes of action, including two for breach of contract and four sounding in tort. BCD moved to dismiss the Counterclaim for a variety of reasons, including that the breach of contract claims were time-barred. Crown opposed the motion and argued, *inter alia*, that it would be inappropriate to permit BCD's claims to relate back, but for Crown's related counterclaims to be dismissed as time-barred.

The Superior Court granted BCD's motion with respect to Crown's breach of contract, tortious interference and misrepresentation claims.<sup>4</sup> The Court permitted Crown's fraud and civil conspiracy claims to proceed.

A bench trial was held in August 2021 and the Court entered its Decision After Trial on May 2, 2022. The Court found in favor of BCD on three of its counts and

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<sup>2</sup> June 25, 2018 Order, A1077.

<sup>3</sup> Crown Bank's Answer to Amended Complaint and Counterclaim, A1078–A1190.

<sup>4</sup> See Oral Argument Transcript and Order attached as Exhibits "A" and "B," as well as at A1222–85 and A1286, respectively.



on Crown's counterclaims and entered a judgment in BCD's favor in the amount of \$1,083,677.91 plus prejudgment interest and costs.<sup>5</sup>

Crown filed a timely notice of appeal and respectfully submits this Opening Brief.

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<sup>5</sup> See "Decision After Trial" and Judgment, attached as Exhibits "C" and "D," as well as at A1469–1511 and A1512–13, respectively.

## **SUMMARY OF ARGUMENT**

1. The Superior Court's dismissal of Crown's counterclaims for breach of contract constituted reversible error. Those counterclaims were supported by detailed factual allegations and evidence of BCD's fraudulent concealment of its misconduct, thereby tolling the statute of limitations. In addition, the Superior Court erred by not applying the relation back doctrine to Crown's counterclaims after it did apply that doctrine to resuscitate BCD's amended complaint. Accordingly, the Superior Court's decision was contrary to Rule 12(b)(6) and Delaware law.

2. The Superior Court misapplied New Jersey law with respect to BCD's status as a third party beneficiary. The parties to the contract at issue expressly negated third party beneficiaries. The weight of New Jersey authority honors that expression and the Superior Court's contrary analysis was erroneous as a matter of law.

3. The Superior Court erroneously found against Crown on its fraud and civil conspiracy counterclaims. The documentary evidence—supplemented and corroborated by testimonial evidence—firmly establishes all the elements of Crown's counterclaims. This Court can make an active review of the Superior Court's findings as they contradict the documentary evidence.

## **STATEMENT OF FACTS**

MRPC Christiana LLC (“MRPC”) owned and operated a 65-unit Comfort Suites hotel (hereinafter the “Hotel”) located at 56 S. Old Baltimore Pike, Newark, Delaware. In 2011, MRPC decided to close the Hotel and re-brand it as a Four Points by Sheraton, which required MRPC to add three floors to the existing building, among other renovations.<sup>6</sup>

MRPC sought a lender to finance the renovation and re-branding. Ultimately, it entered into a loan commitment letter with Crown. Crown agreed to lend MRPC nearly \$13,000,000 to purchase the Comfort Suites from an affiliated company and renovate the Hotel for re-branding.<sup>7</sup>

On December 19, 2012, Crown and MRPC entered into a Construction Loan Agreement for the financing of the Hotel renovation and re-branding (the “Agreement”)<sup>8</sup>. The Agreement provides that it will be “governed and construed and interpreted in accordance” with New Jersey law.<sup>9</sup> The Agreement set forth how \$9,250,220 of the loan was to be allocated. Specifically, it provided for a maximum

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<sup>6</sup> JX 954 at A254 and A279.

<sup>7</sup> *Id.* at A255 and A259.

<sup>8</sup> *Id.* at A259.

<sup>9</sup> *Id.* at A260.

of \$7,350,000 for construction costs.<sup>10</sup> There were also contingency and interest reserve allocations.<sup>11</sup>

The Agreement between MRPC and Crown required that any changes to the Construction Agreement between MRPC and its contractor be approved by Crown. It also prohibited the Loan proceeds from being used for restoration as a result of a casualty.<sup>12</sup>

MRPC engaged BCD as its general contractor for the project.<sup>13</sup> The Construction Agreement between MRPC and BDC set the price for the project at \$7,315,665.00.<sup>14</sup> The date of commencement of construction under the Construction Agreement was thirty days post-settlement or January 19, 2013. BCD projected that it would take eight months for construction, with a project completion date in September 2013.<sup>15</sup>

On December 19, 2012, MRPC and Crown entered into an Assignment of Contracts, Licenses and Permits (the “Assignment Contract”). Under the

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<sup>10</sup> JX 954 at A279.

<sup>11</sup> JX 84, A45–A66.

<sup>12</sup> JX 84, A45–A66; Trial Transcript (“TT”): 8/17/2021 A618:17–19, A619:2–8 (J. Rodrigues).

<sup>13</sup> JX 954 at A278.

<sup>14</sup> *Id.* at A263.

<sup>15</sup> *Id.* at A279.

Assignment Contract, in the event of a default by MRPC, Crown assumed all rights under the Construction Management Agreement.<sup>16</sup>

Under the Agreement between MRPC and Crown, MRPC would submit a draw request to Crown for the loan proceeds to pay construction invoices it received. Crown would then send an inspector to the site to confirm, among other things, that the work was being done in conformance with the construction plans and was adding value to the project. After a favorable inspection, Crown would disburse the funds, less 10% that Crown kept as a retainage only to be remitted upon receipt of a permanent Certificate of Occupancy.<sup>17</sup>

On January 24, 2013, a pipe connected to the Hotel sprinkler system froze and burst, causing extensive damage to the Hotel. The damage from the sprinkler expanded the scope of construction work by BCD considerably.<sup>18</sup> BCD refused to wait to be paid for the additional work from the insurance proceeds.<sup>19</sup> Instead, MRPC and BCD agreed, without informing Crown, that BCD would submit change orders for the additional construction work necessitated by the burst pipe.<sup>20</sup> Crown was not informed of MRPC and BCD's side deal and plan to address damage from the burst pipe by change orders to the Construction Agreement. Construction costs

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<sup>16</sup> JX 130 at A68 and A77.

<sup>17</sup> JX 954 at A262.

<sup>18</sup> *Id.* at A280.

<sup>19</sup> JX 481 at A78–79, TT:8/16/2021 A383:21 – A384:8 (T. Deignan).

<sup>20</sup> TT: 8/16/2021 A334:8 – 9 (T. Deignan).

resulting from the repairs needed due to the burst pipe increased by \$4,369,944.00, of which \$2,219,944.00 Crown funded.<sup>21</sup>

As a result of the burst pipe and change orders being billed under the Construction Agreement, the contingency allocation under the Loan was exhausted by November 2013.<sup>22</sup> MRPC proposed that Crown release funds allocated in the Agreement for furniture, fixtures and equipment (“FF&E”) to use for the change orders. MRPC would then obtain a third-party lender to fund the FF&E.<sup>23</sup>

MRPC and Crown reached an agreement (the “May Modification”) to extend the Loan and allow MRPC to obtain a loan from a third-party lender, Access Point Financial, for the FF&E.<sup>24</sup> The May Modification required Crown to release its secured interest in the FF&E to Access Point Financial. In doing so, Crown lost a lien on all collateral of the project, increasing its risk in case of MRPC’s default.<sup>25</sup> (Indeed, Crown was damaged by having a lower recovery when the project failed and MRPC defaulted.<sup>26</sup>)

MRPC provided the May Modification to BCD.<sup>27</sup> The May Modification did not increase the amount Crown loaned to MRPC; instead, it allowed funds allocated

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<sup>21</sup> JX 954 at A282.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> TT: 8/17/2021, A630:14 – 17 (J. Rodrigues).

<sup>26</sup> TT: 8/18/2021, A796:5 – 11 (J. Rodrigues).

<sup>27</sup> JX 538, A80–85.

for FF&E to be used to cover the outstanding change orders and cost overruns.<sup>28</sup> Crown made it clear to MRPC that it would not fund any further change orders.<sup>29</sup> BCD assumed that insurance proceeds from the claim for the burst pipe was funding all the damage repairs that it was invoicing as change orders.<sup>30</sup>

On or about May 28, 2018, BCD and MRPC entered into a second Standard Form of Agreement Between Owner and Contractor (“Second Construction Agreement”) to fund certain construction projects allegedly outside the scope of the Construction Agreement.<sup>31</sup> The Second Construction Agreement was to cover shower doors, light fixtures, plumbing fixtures and other costs that were supposed to be funded as FF&E by the loan from Access Point Financial.<sup>32</sup>

Immediately following the May Modification, BCD presented changes to MRPC from DelDot that required expensive change orders and an increase to the project costs.<sup>33</sup> MRPC and BCD then conspired to use funds from the Crown loan to fund the DelDot work, in direct violation of the Agreement between Crown and MRPC. Chirag Patel, the manager of MRPC, and Kevin Crumlish, Field Operations Manager for BCD, agreed to fund the work required by DelDot with the excess in

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<sup>28</sup> *Id.*

<sup>29</sup> TT: 8/17/2021, A629:5 – 8 (J. Rodrigues).

<sup>30</sup> TT: 8/16/2021, A396:2 – 11 (T. Deignan).

<sup>31</sup> JX 539 at A86–93.

<sup>32</sup> *Id.*

<sup>33</sup> JX 540, A94–96.

the Crown loan until the funds from the Access Point Financial loan were received. James DiPaolantonio, VP of Operations for BCD, responded in the same e-mail chain with his agreement that the funds “[come] out of contingency built from change orders already signed.”<sup>34</sup>

BCD and MRPC conspired to manipulate the remaining payment application being sent to Crown “in lieu of issuing a new change order.”<sup>35</sup> In a June 11, 2014 email sent only to BCD employees, Mr. Crumlish explained step-by-step how BCD planned to manipulate the payment application so that the increases would be hidden from Crown until the end of the project.<sup>36</sup>

Specifically, BCD would credit change orders for four vendors from the original Construction Agreement related to the FF&E to the new loan (the “Transferred Costs”). The four vendors for which “new” purchase orders would issue would request identical amounts under the FF&E loan. Negative change orders, or orders reducing the amount owed, would be hidden from Crown and used as a kind of float.<sup>37</sup> The FF&E Transferred Costs that should have been shown as a reduction in the construction costs and a reduction to the contract sum under the Construction Agreement would not be billed or shown to Crown.<sup>38</sup> The Transferred

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<sup>34</sup> JX 540, A94–96.

<sup>35</sup> JX 870, A235–237.

<sup>36</sup> JX 870; TT: 8/16/2021, A484:7 – 14 (T. Deignan).

<sup>37</sup> JX 870.

<sup>38</sup> JX 870; TT: 8/16/2021 A485:9 – 20 (T. Deignan).



Costs would be held by BCD in “Owner Contingency” and used when MRPC approved new change order requests “in lieu” of issuing a new change order to Crown.<sup>39</sup> The intention of BCD and MRPC in using the Transferred Costs to float other change orders was to hide increases in project costs from Crown until the end of the project.

Thomas Deignan, the co-managing member of BCD, acknowledged at trial that MRPC and BCD entered into an agreement to withhold the change orders from Crown until the end of the project.<sup>40</sup> BCD agreed with MRPC to approve change orders, apply them to a fictitious contingency and then bill Crown at the end of the project.<sup>41</sup> BCD knowingly used the contingency for things unrelated to FF&E, such as site work and wood ceilings.<sup>42</sup> BCD did not inform Crown that it was increasing the amount of the Construction Agreement for the additional change orders.<sup>43</sup> Crown continued to disburse funds pursuant to the Loan Agreement, unaware that MRPC was submitting pay applications based on manipulated invoices from BCD. Crown advanced an additional \$2,483,215.53 in disbursements to MRPC after the May Modification for a project that ultimately failed. If Crown had known about

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<sup>39</sup> JX 870; TT: 8/16/2021 A485:9 – 20 (T. Deignan).

<sup>40</sup> TT: 8/17/2021 A537:9 – 17 (T. Deignan).

<sup>41</sup> TT: 8/17/2021 A537:9 – 15:21 (T. Deignan).

<sup>42</sup> TT: 8/17/2021 A544:8 – 11 (T. Deignan).

<sup>43</sup> TT: 8/17/2021 A545:1 (T. Deignan).

the additional change orders, it would not have been obligated under the Agreement to disburse the additional funds.<sup>44</sup>

On July 1, 2014, July 31, 2014 and August 29, 2014, Mr. Crumlish executed Payment Applications 016, 017 and 018, respectively, on behalf of BCD.<sup>45,46,47</sup> Each of these three payment applications showed a total Construction Agreement sum of \$9,326,559.62. Payment Applications 016, 017 and 018 were all transmitted directly to Crown by BCD.<sup>48</sup> BCD knew at the time of executing and transmitting each of the three Payment Applications that the Construction Agreement sum was incorrect and that change orders had been executed that would increase the Construction Agreement sum. Crown was not informed of the negative adjustments for the Transferred Costs.

In September 2014, MRPC and Crown negotiated an extension of the Agreement (“September Modification”).<sup>49</sup> Had Crown been aware of the additional construction costs and its negative effect on the project, Crown would not have entered into the September Modification.<sup>50</sup> Crown was harmed by entering into the September Modification. BCD, however, was aware of the

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<sup>44</sup> TT: 8/17/2021 A633:2 – 9 (J. Rodrigues).

<sup>45</sup> JX 554, A98–109.

<sup>46</sup> JX 565, A110–124.

<sup>47</sup> JX 588, A125–136.

<sup>48</sup> JX 553, A97.

<sup>49</sup> JX 595, A137–139.

<sup>50</sup> TT: 8/17, A633:2-9 (J. Rodrigues).

unapproved change orders and on October 7, 2014 BCD demanded additional assurance from MRPC that it would have funds to pay for the change orders not being billed until the end of the Project.<sup>51</sup> MRPC responded on October 10 asking BCD to keep issuing change orders to only MRPC for approval.<sup>52</sup> MRPC, through Mr. Patel, stated “I promise I’ll get the money part figured out. Even if it means it comes out of my 1.5MM CD...”<sup>53</sup>

Several days after MRPC promised to “figure out the money part,” Mr. Crumlish executed a fourth payment application, Payment Application 019, on behalf of BCD.<sup>54</sup> Like the previous three payment applications, Payment Application 019 showed a total Construction Agreement contract sum of \$9,326,559.62. Payment Application 019 was transmitted directly to Crown by BCD.<sup>55</sup> BCD knew at the time of executing and transmitting Payment Application 019 that the Construction Agreement sum was incorrect and that change orders had been prepared by BCD and approved by MRPC that would increase the Construction Agreement sum, yet not provided to Crown.

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<sup>51</sup> JX 605, A140–141.

<sup>52</sup> JX 608, A142–143.

<sup>53</sup> *Id.*

<sup>54</sup> JX 612, A145-171; TT: 8/17, A545:20-2:9 (T. Deignan).

<sup>55</sup> JX 609, A144.

On October 15, 2014, MRPC proposed to BCD using the \$1,500,000.00 of loan collateral if they were to run into “issues” with Crown.<sup>56</sup> MRPC stated to BCD using the collateral would cause issues with Crown.<sup>57</sup> In response, BCD had a Guaranty Agreement (“Guaranty”) prepared for Mr. Patel to sign in his individual capacity, because BCD was aware of additional change orders that Crown had not approved.<sup>58</sup> In the Guaranty, Mr. Patel agreed to unconditionally guarantee certain change orders. Also, in October, MRPC and BCD exchanged a letter discussing how best to invoice the change orders to Crown in order to “bill as aggressive as possible.”<sup>59</sup> Toward that end, on October 15, 2014, BCD and MRPC exchanged drafts of an agreement whereby MRPC would promise to pay BCD from the cash collateral being held by Crown.<sup>60</sup> This agreement was intended to confirm that MRPC was responsible for additional change order costs even if Crown could not be convinced to absorb the extra costs.<sup>61</sup>

Despite the receipt of funding from Crown under the Payment Applications and the utilization of same for hidden change orders, BCD did not advise Crown that the Construction Agreement sum had been increased beyond the amount

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<sup>56</sup> JX 614, A172–176.

<sup>57</sup> JX 614 at A176.

<sup>58</sup> JX 615, A177–184; TT: 8/17, A555:11–556:7 (T. Deignan).

<sup>59</sup> JX 616, A185–190.

<sup>60</sup> JX 615, A177–184.

<sup>61</sup> TT: 8/17, A563:10–13 (T. Deignan).

allowed under the May Modification. Instead, BCD tracked the hidden change order costs in a spreadsheet called “Contingency Report” (“Contingency Report”).<sup>62</sup> The Contingency Report, only shared between BCD and MRPC, tracked the proceeds from the Transferred Costs being used for non-FF&E expenses such as DeIDOT site work, millwork, tile work and various other expenses that were also being billed to MRPC under the Construction Agreement.<sup>63</sup> This double billing was hidden and concealed from Crown.

As planned, MRPC and BCD prepared a final significant change order, which was delivered to Crown for funding in the amount of \$403,440.38, all related to the hidden costs accumulated in the Contingency Report.<sup>64</sup> This final change order, COR 91 (“COR 91”), was discussed at length between MRPC and BCD as to how best to present it to Crown to avoid Crown questioning the calculation.<sup>65</sup> For example, on November 10, 2014, Mr. Crumlish of BCD sent an e-mail to Mr. Patel of MRPC stating that the numbers do not match but “as long as no one looks for backup to your sub numbers ... the bottom line works for me.”<sup>66</sup> On November 13, 2014, COR 91 was provided by BCD directly to Crown.<sup>67</sup> As shown on

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<sup>62</sup> JX 685, A231–234.

<sup>63</sup> *Id.*

<sup>64</sup> JX 628, A191–200; TT 8/17, A546:14-21 (T. Deignan).

<sup>65</sup> JX 628, A191–200.

<sup>66</sup> JX 628, A191–200.

<sup>67</sup> JX 631, A201.

Payment Application 020, COR 91 caused the final contract prices to be \$9,550,000.00, for the first-time putting Crown on notice of the hidden costs and that the Construction Agreement sum between MRPC and BCD had changed.<sup>68</sup> In total, the project cost increased by \$4,369,944.00 or 54.87%.<sup>69</sup> COR 91 failed to show any negative changes for FF&E related to the Transferred Costs, instead hiding additional change orders not shown to Crown.<sup>70</sup>

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<sup>68</sup> JX 633, A202–230.

<sup>69</sup> JX 955, A304–307.

<sup>70</sup> TT: 8/17/2016, A552:18–554:8 (T. Deignan).

## ARGUMENT

### I. THE SUPERIOR COURT ERRONEOUSLY DISMISSED CROWN'S COUNTERCLAIMS FOR BREACH OF CONTRACT.

#### A. Question Presented

Did the Superior Court err when it dismissed Crown's counterclaims for breach of contract as time-barred after it permitted Plaintiff's associated claims to relate back to an earlier filing? *See* Crown Bank's Opposition to Plaintiff BCD Associates, LLC's Motion to Dismiss at A1208–14; Joint Pretrial Stipulation and Order at A1288–1309.

#### B. Scope of Review

This appeal challenges the Superior Court's dismissal of two counts of Crown's Counterclaim under Superior Court Civil Rule 12(b)(6). The scope of review of that issue is well-established.

This Court reviews a motion to dismiss *de novo* and examines whether the trial judge erred as a matter of law in formulating or applying legal principles. In ruling upon a motion to dismiss a complaint for failure to state a claim, pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded allegations must be accepted as true. The legal issue to be decided is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.

*Stayton v. Clariant Corp.*, 10 A.3d 597 (Del. 2010) (citations omitted). The Superior Court must also have drawn all reasonable inferences in favor of the non-moving party. *Ramunno v. Cawley*, 705 A.2d 1029 (Del. 1998).

### C. Merits of the Argument

After the Superior Court found in Crown's favor in the MRPC Case, BCD found that it needed to amend its complaint against Crown if it hoped to prevail. The new facts and claims that it sought to raise in its amended complaint had become time-barred while this case remained dormant during the pendency of the MRPC Case. Crown accordingly opposed BCD's motion to amend.

The Superior Court, however, held that BCD's claims could relate back to its original complaint. The Court granted BCD's motion to amend and BCD's new causes of action and factual claims were permitted to proceed. In response, Crown filed an answer to the amended complaint and added counterclaims related to BCD's new pleading and based upon information that it learned in the course of the MRPC Case. Many of those facts concerned BCD's concealment of critical events from Crown and BCD's side deals with MRPC catalogued above. Indeed, at the time that Crown answered BCD's original complaint, those facts were completely unknown to Crown, largely because BCD concealed them from Crown.

The Counterclaim's introductory allegations make clear that Crown was unaware of BCD's breaches of contract because of BCD's fraudulent concealment:

BCD, as the general contractor, was privy to a significant amount of information and communications that Crown, as the lender for the Construction Project, was not. This includes intimate and informal conversations with MRPC's principals, as well as communications with other third-parties and additional vendors. BCD, boasting experienced and business savvy representatives, was the beneficiary of material



information that would affect the balance of the Construction Project to the detriment of Crown Bank.

Counterclaim at ¶ 2. The Counterclaim goes on:

As described in detail below, BCD, despite receiving payment from a third-party lender for certain work completed, knowingly concealed change orders and information from Crown and submitted invoices to Crown in an effort to receive a second payment for the same work.... Ultimately, it is BCD that breached the several agreements that it entered into related to the Construction Project.

*Id.* at ¶¶ 4–5.

The Counterclaim sets forth over the course of 113 paragraphs the factual and legal foundation for the causes of actions it asserts. It explains that Crown stands in the position of assignee of contracts that BCD made with MRPC and that Crown has assumed all rights under the Construction Agreement. *Id.* at ¶¶22–24; 61. It alleges in detail the manner in which BCD concealed its breaches of contract. *See e.g. id.* at ¶¶38–41 and 48. And Crown’s Counterclaim presents plain statements as to the manner in which BCD breached the contracts and that Crown sustained damages as a result. *Id.* at ¶¶ 62–67; 70–80. Crown respectfully submits that the facts alleged in the Counterclaim, when taken as true as they must be, present a more than reasonably conceivable set of circumstances susceptible of proof that entitle Crown to recover.

Accordingly, the Superior Court erred as a matter of law when it dismissed Crown’s counterclaims for breach of contract. BCD moved to dismiss Crown’s

counterclaims on a variety of bases. Important for the purposes of this appeal, BCD argued that Crown's breach of contract claims were time-barred. While the Superior Court's decision is not supported by a written opinion and the transcript of the hearing at which the decision was made is not entirely clear, it appears that the Superior Court agreed with BCD that the claims were time-barred and ineligible for treatment under the relation back doctrine.<sup>71</sup> Both findings were incorrect.

The Superior Court's ruling was erroneous for three reasons: (1) the statute of limitations should have been tolled due to BCD's concealment of its misconduct; (2) Crown's claims should have related back; and (3) the Court's dismissal of the counterclaims while permitting BCD to amend its complaint was erroneous and inequitable.

Delaware law tolls statutes of limitations for fraudulent concealment where "an affirmative act of concealment by a defendant – an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry." *Ryan v. Gifford*, 918 A.2d 341, 360 (Del. Ch. 2007) (internal quotes and footnote omitted). The statute of limitations

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<sup>71</sup> At that hearing, the Superior Court ventured to express doubt as to whether Crown could ultimately present sufficient facts to prevail in its breach of contract claims. It appears that those doubts influenced the Court's decision to dismiss those claims. The Superior Court was bound, however, to accept Crown's allegations as true and to draw all reasonable inferences in Crown's favor. It seems to have done the opposite.

is tolled where a plaintiff – or here, a counterclaiming defendant – shows that the defendant “knowingly acted to prevent [the] plaintiff from learning facts or otherwise made misrepresentations intended to ‘put the plaintiff off the trail of inquiry.’” *Assured Partners of Virginia, LLC v. Sheehan*, 2020 WL 2789706 (Del. Super. 5/29/20) (internal citations and footnotes omitted).

The Counterclaim amply sets forth BCD’s active concealment of its breaches of contract and other misconduct. It was only in the course of the litigation of the MRPC Case that BCD’s breaches of contract and torts fully came to Crown’s attention. The statute of limitations should, therefore, have been tolled. Crown’s contract claims would then have been the subject of the discovery process and Crown’s trial presentation. Instead, the Superior Court dismissed those claims on a Rule 12(b)(6) record without assuming the facts alleged in the Counterclaim to have been true and without drawing all reasonable inferences in Crown’s favor.

Rather oddly, the Superior Court permitted Crown’s fraud claim to proceed, apparently recognizing that Crown (after filing an amended counterclaim) set forth facts sufficient to establish the conceivability of its contentions that BCD had concealed information and misled Crown. It is inconsistent, therefore, for the Court to hold at the same time that the statute of limitations for breach of contract was not tolled as a result of the exact same fraudulent misconduct.

In addition, the Superior Court erred by not applying the relation back doctrine to Crown's breach of contract claims. Though—again inconsistently—It did apply that doctrine in BCD's favor when it moved to amend its complaint, the Superior Court denied Crown that same treatment. Indeed, it was BCD's amendments to its original complaint that triggered Crown's counterclaims. Refusal to treat the parties similarly and permitting BCD to assert its new claims that would otherwise have been time-barred, while dismissing Crown's related counterclaims is patently unfair and erroneous.

The seminal Delaware case on the relation back doctrine is *Chaplake Holdings, Ltd. v. Chrysler Corporation*, 766 A.2d 1 (Del. 2001). This Court explained there that the doctrine is used primarily to add defendants or, in that case a plaintiff, to a case after the expiration of a statute of limitations. BCD's amended complaint did not seek to add a party, but to add new facts and causes of action. The Superior Court permitted BCD to do so and thereby exposed Crown to claims it had not seen before the statute of limitations expired. In response, Crown asserted counterclaims arising from the same facts and transactions as those described in the amended complaint. Without providing a comprehensive explanation of its analysis, the Superior Court held the counterclaims to be time-barred.

If the relation back doctrine applied to BCD's amended claims, it must certainly apply to Crown's related counterclaims. The Superior Court's failure to apply the relation back doctrine consistently was erroneous as a matter of law.

## II. THE SUPERIOR COURT INCORRECTLY APPLIED NEW JERSEY LAW REGARDING THE THIRD-PARTY BENEFICIARY DOCTRINE.

### A. Question Presented.

Did the Superior Court err by ruling in favor of Plaintiff on Count I and, in the process, misapply the third-party beneficiary doctrine under New Jersey law? Joint Pretrial Stipulation and Order; Crown's Response to BCD's Opening Post-Trial Brief.

### B. Scope of Review.

This appeal challenges the Superior Court's application of New Jersey law. Of course, Delaware Courts frequently decide legal issues under the law of other jurisdictions. *Berger v. Intelident Sols., Inc.*, 906 A.2d 134, 137 (Del. 2006); *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1200 (Del.1997). This Court's review of the Superior Court's formulation or application of those legal principles is *de novo*. *Fiduciary Trust Co. v. Fiduciary Trust Co.*, Del. Supr., 445 A.2d 927, 936 (1982).

### C. Merits of Argument.

When the Superior Court ruled in favor of BCD, the court misapplied New Jersey third-party beneficiary doctrine by solely relying on a single case precedent. In doing so, the court overlooked precedents which align more closely with the present facts. More specifically, the court did not consider case law addressing

agreements containing express negations of third-party beneficiary rights or cases dealing with sequential chains of payment in construction contexts.

Relying solely on *Broadway Maint. Corp v. Rutgers, State Univ.*, the court applied a fact-based analysis to the agreement terms to discern whether the contracting parties “intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement.” *Id.* at 909. Absent such intent, a third party is merely an incidental beneficiary with no contractual standing. *Id.* (citing *Standard Gas Power Corp. v. New England Cas. Co.*, 101 A. 281 at 283 (N.J. 1917)); *See Restatement (Second) of Contracts* § 302 (1981). New Jersey statutory law provides that “a person for whose benefit a contract is made may sue on the contract in any court.” N.J.S.A. 2A:15-2. This statute effectively restates the third-party beneficiary common law doctrine. *Rieder Communities, Inc. v. Twp. of N. Brunswick*, 227 N.J. Super. 214, 546 A.2d 563, 566-67 (App. Div. 1988).

Consistent with *Broadway Maint. Corp*, the Superior Court applied a fact-specific analysis to the case. 90 N.J. 253, at 909. The Superior Court acknowledged that BCD “was not a named party” in the Loan Commitment or Loan Agreement and that the latter provides that there were no third-party beneficiaries. The court nevertheless concluded that BCD was the intended third-party beneficiary to the

Loan Commitment and the Loan Agreement “contractually, factually and practically” based on the remaining terms and conditions in both documents.

The Superior Court first noted that the Loan Agreement and the Loan Commitment stated that MRPC was to retain a contractor. The court then considered the Construction Addendum which provided that a construction manager would review progress, stated that disbursements would be made, referenced “retainage” and its release upon project completion, and “expressly recognized payment of the Retainage to BCD.” The court then looked to Article IV of the Loan Agreement which addressed the funding of construction costs, disbursement and retainage. Article IV “also provides that Crown can make disbursements to MRPC or directly to the contractor or suppliers.” The court held that when Crown decided to pay BCD directly, MRPC and Crown made BCD an intended third-party to the Loan Commitment and Loan Agreement.

The Superior Court reached this conclusion by weighing these terms as stronger indicators of the contracting parties’ intent than the express negation of third-party beneficiary rights. The court did so without justification, despite the abundance of case law demonstrating the weight of express negations by contracting parties. The court also erred in identifying Crown’s direct payment to BCD as a transformative moment in this transaction by overlooking case law concerning the sequential chain of payment in construction contexts.



While the Superior Court relied heavily on *Broadway Maint. Corp.*, it overlooked the assertion in that opinion that “parties may expressly negate any legally enforceable right in a third party.” *Broadway Maint. Corp.*, 90 N.J. 253, at 909.

New Jersey courts give deference to express negations of third-party rights by contracting parties while determining intent. *See Labega v. Joshi*, 470 N.J. Super. 472, 270 A.3d 378 at \*487 (App. Div. 2022) (holding that clear language in the agreements expressly negated any intent to create third-party rights in anyone, while referencing a similar agreement section titled “No Third-Party Beneficiaries.”). New Jersey courts have also previously held that fact-specific analyses are less important when express negations are present. *See Stone & Magnanini, LLP v. United Airlines*, No. A-0657-18T2, 2021 WL 278365 at \*5 (N.J. Super. Ct. App. Div. Jan. 28, 2021) (holding that when an airline’s Contract of Carriage expressly negated third-party beneficiaries, third-party beneficiaries were not entitled to relief, and the trial court Judge was therefore “not required to analyze plaintiff’s status as a third-party beneficiary.”); *Raymond Urb. Renewal, LLC v. 1180 Astro Urb. Renewal Invs. LLC*, No. A-5074-12T3, 2014 WL 9913181 at \*4 (N.J. Super. Ct. App. Div. June 22, 2015), (holding that “no facts suggest, much less prove, the parties to the Loan Agreement intended to make [the plaintiff] a third-party beneficiary” when a loan agreement expressly stated that there were no third-party beneficiaries; and rejecting

the plaintiff's request for the court to rely on *Broadway Maint. Corp.* to justify its third-party beneficiary claims.")

The Superior Court provided no explanation why the conclusions it drew from the remaining terms of the agreement are stronger indicators of intent than is an explicit negation of third-party rights by the contracting parties. The court in *Broadway Maint. Corp.* stated, "When the contract is silent, it is necessary to examine the pertinent provisions in the agreement and the surrounding circumstances to ascertain that intent." 90 N.J. 253 at 260.

Here, the agreements are not silent. Unlike *Broadway Maint. Corp.* where there was no express negation by the parties, here the agreement clearly states that there are no intended third-party beneficiaries. The terms here are unambiguous, just as the terms were in *Stone* and *Raymond*. Because the terms in the Loan Agreement also permitted Crown to pay BCD directly, it is reasonable to conclude that Crown did not intend to elevate BCD to third-party status in electing to do so. Taken together, the inclusion of these two unambiguous terms demonstrate that it was not the parties' reasonable expectation that BCD might sue for breach of contract. Further, due to the clear and unambiguous nature of the terms, it may not have been necessary for the court to undertake a fact-specific analysis at all, as was the case in *Stone*.

Even if the Court were to assume that a fact-specific analysis was appropriate despite the parties' clear and unambiguous negation of third-party rights, it remains unclear whether the provisions the Superior Court relied upon demonstrate intent at all. The Superior Court incorrectly identified the moment Crown chose to pay BCD directly as the point at which "MRPC and Crown made BCD an intended beneficiary of a benefit of the Loan Commitment and Loan Agreement." The Superior Court did not present a sound basis under New Jersey law for that conclusion.

New Jersey courts have previously noted that it "is not the pattern or custom and usage within the building trade" for separate parties within "the sequential chain of payment in the construction industry" to have rights as third-party beneficiaries. *Insulation Contractor & Supply v. Kravco, Inc.*, 209 N.J.Super. 367, 375–76, 507 A.2d 754 (App.Div.1986). Additionally, "Each party in the chain fully realizes what business practice requires of him and business stability depends on conformity even when the going becomes rough" and that "the law should be framed accordingly." *Hiller & Skoglund, Inc. v. Atl. Creosoting Co.*, 190 A.2d 380 at \*24 (N.J. 1963). While industry standards may be probative and not dispositive of intent, the case law on this issue weakens the court's assertion that Crown Banks' direct payment to BCD was a transformative moment in this transaction.

Since the Superior Court misapplied New Jersey law, its findings with respect to BCD's status as a third party beneficiary should be reversed.

### **III. THE SUPERIOR COURT ERRONEOUSLY DECIDED CROWN'S FRAUD AND CONSPIRACY CLAIMS.**

#### **A. Question Presented**

Did the Superior Court err in finding that Crown did not establish a claim for fraud when Crown presented persuasive evidence that, despite its best efforts to monitor the project, Crown justifiably relied on the misrepresentations BCD made in furtherance of its scheme with MRPC to hide the cost overruns? Joint Pretrial Stipulation and Order at A1288–1309; Opening Post-Trial Brief in Support of Crown Bank's Counterclaim at A1310–1420.

#### **B. Scope of Review**

In reviewing the factual findings of a trial judge, this Court may review the entire record and, when the findings of the court below are “clearly wrong and the doing of justice requires their overturn,” this Court is free to make its own contradictory findings of fact. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). Where the trial judge draws factual findings from documentary evidence, this Court undertakes a more active review. *Levin v. Smith*, 513 A.2d 1292, 1301 (Del. 1986) (trial court's findings of fact, inferences and deductions held “clearly wrong”); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989) (the Court will review entire documentary record and reach its own conclusions with respect to the facts).

### C. Merits of the Argument

The counterclaims for fraud and conspiracy Crown asserted are amply supported by the evidence presented at trial and the MRPC case. They are also plainly supported by logic. Crown had a significant interest in making sure that the Hotel project stayed on budget. If the project went over budget, it would be more difficult for Crown to recover its investment and therefore its risk in the project would increase. BCD knew that it risked losing significant sums of money if it was not paid for its work performed on the project, including the 10% retainage Crown was holding until the permanent Certificate of Occupancy was delivered. Thus, BCD had a vested interest in making sure that Crown continued to disburse funds to fulfill BCD's invoices.

BCD was willing, as evidenced at both trial and in email correspondence, to falsely represent to Crown the nature of the Pay Applications it submitted for disbursement until the end of the project. Crown relied on the information provided to it by BCD to its detriment, and its reliance was justified. There was no evidence developed at trial that supported that Crown knew or should have known that BCD and MRPC had conspired to defraud it. In fact, the opposite is true: Mr. Deignan acknowledged at trial that he knew that the bank would not approve any further change orders, and that is why MRPC, through Mr. Patel, proposed holding off submitting any further change orders to Crown until the end of the project.

The elements for fraud are (1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance. *Gaffin v. Teledyne, Inc.* 611 A.2d 467 (Del. 1992) at 472.

Here, Crown established at trial all of the elements to support its fraud claim. BCD submitted four Payment Applications that falsely understated the Construction Agreement sum; at the time that it did so, BCD knew that the statements were false and it intended to submit an accurate one only after the project was completed; BCD submitted the false Payment Applications to induce Crown to disburse the Loan funds; Crown justifiably relied on the Payment Applications, because they appeared to be in conformance with the original Construction Agreement; and Crown was damaged because it disbursed Loan funds for work it contractually did not agree to for a project that it later learned exceeded the budget by over \$2,000,000.

The Superior Court failed to find for Crown for its fraud claim, and therefore its attendant conspiracy claim, because it concluded that Crown failed to establish "justifiable reliance" upon BCD's alleged misrepresentations. The Superior Court found that Crown could not have justifiably relied on BCD's alleged misrepresentations, because it was "a very active participant in the events

surrounding the Hotel” and pointed to Crown’s monitoring of the Hotel through the Draw Request process and its modifications of the Loan on two prior occasions. Contrary to the Superior Court’s finding, however, the diligence of Crown in monitoring the Hotel project and engaging in the Loan modifications to keep the project on track demonstrate that its reliance on the representations made to it by BCD, while misplaced, were nevertheless justified.

Under Delaware law, a plaintiff cannot justifiably rely on a defendant’s misrepresentation if the plaintiff knows that the representation is false. *Ward v. Hildebrand*, 1996 WL 422336, at \*4 (Del. Ch. July 8, 1996). Likewise, a plaintiff is generally not excused from failing to discover a fraud despite due diligence, however, “[a] plaintiff’s diligence efforts can be evidence that [its] reliance on a false representation was reasonable because [it] made efforts to verify the representation and discovered no reason to doubt its truth.” *Great Hill Equity Partners IV, LP v SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829 (Del. Ch. Dec. 3, 2018), at \*3. Delaware law does not require plaintiffs “to conduct perfect due diligence before their reliance can be said to be justified.” *Arwood v. AW Site Services, LLC*, 2022 WL 705841 (Del. Ch. Mar. 9, 2022), at \*24.

Crown was diligent in monitoring the Hotel project. It is true that an inspector visited the project site and submitted reports once Payment Applications were submitted to Crown by MRPC. What is also true, however, is that MRPC and BCD

intentionally undermined Crown's efforts to monitor the project by submitting misleading Payment Applications and withholding change orders until the end of the project. The evidence at trial clearly establishes that BCD and MRPC did this, because they knew that if Crown possessed knowledge of the full extent of the change orders and the ballooning construction costs, it would not have disbursed the Loan funds.

Mr. Crumlish's internal email setting forth the scheme to fund the construction costs evidences that BCD knew that Crown was relying on the Pay Applications, and that if Crown knew that the Pay Applications were for work outside of the scope of the original Construction Agreement and in excess of the Construction Agreement sum, it would not have funded them. While Crown's efforts to monitor the project were perhaps not perfect, they were reasonably diligent and only as good as the information that was – and in some cases, was not – provided to it by BCD and MRPC. Accordingly, Crown justifiably relied on BCD's misrepresentations.

The Superior Court further pointed to the May Modification and September Modification as proof that Crown had full knowledge that it was funding work outside the scope of the Agreement and in excess of the Construction Agreement sum, and therefore, did not justifiably rely on the misrepresentations from BCD and MRPC. However, the evidence at trial established that Crown did not know that



Loan funds were being used for work required by DelDot and the burst pipe damage that exceeded the original Construction Agreement sum. Indeed, had Crown known, there would have been no need to withhold change orders to the completion of the project or submit multiple Pay Applications with understated Construction sum amounts. The May Modification and September Modification demonstrate not a full knowledge of the facts BCD intentionally concealed, but rather a willingness by Crown to work with its Borrower to bring the project to completion so Crown could recoup its significant investment. That Crown may have been willing to modify the Agreement a third time when it was close to obtaining a certificate of occupancy is evidence that Crown was intent on recovering its significant investment in the project, particularly when it had an increased risk after losing the collateral for the FF&E in the Access Point Financial third-party loan.

Accordingly, the Trial Court's finding that Crown did not establish a claim for fraud against BCD, because it did not justifiably rely on BCD's misrepresentations is simply contradicted by the email correspondence by BCD and MRPC; the testimony of Mr. Deignan on behalf of BCD; and the actions of MRPC, BCD and Crown. Therefore, the Superior Court's finding should be reversed.

## CONCLUSION

The Superior Court erred when it dismissed Crown's counterclaims for breach of contract at the Rule 12 stage and Crown respectfully requests that the Court reverse that decision and remand this case for further proceedings. The Superior Court also erred when it misapplied New Jersey law with respect to its third party beneficiary findings. That error should be reversed and corrected on remand. Finally, the Superior Court's rejection of Crown's fraud and conspiracy claims is contradicted by clear documentary and corroborating testimonial evidence and should be reversed.

Respectfully submitted,

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WILKS LAW, LLC

*/s/ David E. Wilks*

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