EFiled: Feb 08 2024 12:01PM EST
Filing ID 71990386
Case Number 465,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTHERN GOLD HOLDINGS, LLC, Defendant Below, Appellant, v. REM OA HOLDINGS, LLC and SIFT FIXED US002, LLC, Plaintiffs Below, Appellees, -and- REM EQ HOLDINGS, LLC, Nominal Defendant Below, Appellee	)	No. 465, 2023 Court Below: Court of Chancery of the State of Delaware C.A. No. 2022-0582-LWW

CORRECTED OPENING BRIEF OF DEFENDANT-BELOW/APPELLANT NORTHERN GOLD HOLDINGS, LLC

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Martin S. Lessner (No. 3109)
Elisabeth S. Bradley (No. 5459)
M. Paige Valeski (No. 6336)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for Defendant-Below/Appellant Northern Gold Holdings, LLC

Dated: February 8, 2024

TABLE OF CONTENTS

Page

Exhibits

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

This is an appeal from an action under 6 *Del. C.* § 18-110 in which the Court of Chancery (the "trial court") erred as a matter of law by issuing a judgment declaring that the membership of Nominal Defendant (Appellee) REM EQ Holdings, LLC ("REM EQ" or the "Company") was no longer 50/50 between member Plaintiff-Below (Appellee) REM OA Holdings, LLC ("REM OA") and member Defendant-Below (Appellant) Northern Gold Holdings, LLC ("Northern Gold").[1]

The trial court held that the May 14, 2021 Written Consent of the Members of REM EQ Holdings LLC (the "Written Consent") signed by the 50/50 members authorizing the Company to execute "the Commitment Letter" "to provide financing to the Company" secretly gave Scott Soura ("Soura") (the manager of Plaintiff REM OA) the "sole discretion" to dilute Northern Gold below 50%. More than eight months after Northern Gold signed the Written Consent, REM OA secretly (to Northern Gold) caused the Company to issue dilutive Warrants to Plaintiff-Below (Appellee) SIFT Fixed US002 ("SIFT Fixed").

Soura never gave Northern Gold a copy of the Commitment Letter between SIFT Capital Partners Limited and the Company (the "Commitment Letter") before

[1] Northern Gold does not appeal any of the factual findings of the trial court.

(or after) he asked Northern Gold to sign the Written Consent. The trial court held that Soura repeatedly lied in testimony and representations to the trial court when he contended that he gave Northern Gold a copy of the Commitment Letter, when in fact he did not. Nevertheless, the trial court said Soura's repeated perjury was a "minor" matter, and failed to apply equitable principles to determine that the dilutive terms of the unseen Commitment Letter were not validly approved.

Instead, the trial court held that the Written Consent was a "contract" and that Northern Gold was on inquiry notice of the undisclosed terms of the Commitment Letter. The trial court issued a judgment that, pursuant to the terms of the Commitment Letter, Northern Gold had been validly diluted from 50% to 48.75%.

Northern Gold could have appealed on many issues, but for the sake of brevity, it raises just two. The trial court committed reversible error by (1) failing to apply long-established equitable principles which mandate a judgment that Northern Gold did not validly authorize the Commitment Letter's terms diluting Northern Gold's membership interest in the Company to below 50%, and (2) holding that the issuance of dilutive Warrants pursuant to the Commitment Letter was valid under contract law even though the unambiguous contractual terms in the Commitment Letter conditioned any such issuance upon Northern Gold's entry into a pre-emptive rights agreement, which condition undisputedly never occurred.

SUMMARY OF ARGUMENT

1. The trial court erred as a matter of law by failing to consider or apply equitable principles in determining the validity of the members' Written Consent authorizing the Company to execute the terms of the Commitment Letter. The trial court determined that Soura repeatedly lied to the Court when he testified that he provided Italia a copy of the Commitment Letter and, therefore, Italia did not receive, review or have actual notice of dilutive terms of the Commitment Letter prior to signing the Written Consent. Instead of applying equitable principles to determine that Northern Gold did not validly authorize the Company to enter into the Commitment Letter, the Court erred in holding that the Written Consent was a "contract" governed exclusively by Delaware contract law, and that under Delaware contract law, Northern Gold had "bore responsibility for making further inquiries" to uncover the undisclosed dilutive terms of the Commitment Letter.

2. Even if Northern Gold signing the Written Consent was deemed to have validly authorized the Company to execute the terms of the Commitment Letter, the trial court erred as a matter of contract law in finding that the dilutive issuance of a 2.5% membership interest to SIFT Fixed was valid because the Commitment Letter unambiguously provided that material terms and conditions for issuing the dilutive Warrants exercised by SIFT Fixed required that North Gold "shall" be a party to a

pre-emptive rights agreement, and Northern Gold never entered into such an agreement.

STATEMENT OF FACTS

On June 30, 2022, REM OA and SIFT Fixed filed a Verified Complaint against Northern Gold. (Dkt.1 (A0128-0333).) The Verified Complaint also named the Company as a nominal defendant. (Dkt.1 (A0128-0333).)

The Verified Complaint stated: "This summary proceeding seeks to establish the proper composition of the membership of the Company pursuant to 6 *Del. C.* § 18-110." (Dkt.1 at ¶1 (A0129) (emphasis added).)

The Verified Complaint was verified under oath by Soura, as Manager of Plaintiff REM OA. (Dkt.1 (A0148-49).) The Verified Complaint alleged the following 50/50 ownership and manager structure, which was not disputed by Defendant Northern Gold:[2]

- "Nominal Defendant REM EQ Holdings LLC [the 'Company'] is a member-managed Delaware limited liability company." (Dkt.1 at ¶6 (A0130).)
- "As set forth in the LLC Agreement [effective January 15, 2021], REM OA and Northern Gold (the 'Initial Members') each held a 50% membership interest in the Company." (Dkt.1 at ¶11 (A0131) (emphasis added added).)

[2] *See also* Granted Joint Pre-Trial Stipulation and Order ("PTO") (Dkt.160) at ¶ 27 (A0764-65).

- "On May 14, 2021, and again on June 2, 2021, Soura emailed a set of materials to Italia [manager of Northern Gold], including (a) the existing and proposed amended and restated LLC agreements for the Company and its subsidiaries, and (b) written consents for the Company and its subsidiaries. The proposed amended and restated LLC agreement for the Company provided, *inter alia*, that both Italia and Soura had 50% managerial rights…." (Dkt.1 at ¶16 (A0133) (emphasis added).)
- "[O]n June 3, 2021, both of the Initial Members executed (a) the Amended and Restated Limited Liability Company Agreement dated as of May 14, 2021 (the 'Amended LLC Agreement'), (b) the amended and restated operating limited liability operating agreements for the Company's subsidiaries, and (c) the written consents, dated May 14, 2021…." (Dkt.1 at ¶18 (A0134) (emphasis added).)
- "The Amended LLC Agreement reaffirmed that, as of the date thereof [May 14, 2021], REM OA and Northern Gold were each 50% members of the Company, with each holding 50 Units in the Company, for a total of 100 Units issued and outstanding." (Dkt.1 at ¶20 (A0134) (emphasis added).)
- "Among other things, the Amended LLC Agreement modified the managerial structure of the Company. Specifically, it removed Soura as

the sole manager, instead instituting a member-managed structure in which 'any action taken by the Members shall require Members holding a majority of the issued and outstanding Units to authorize such action....' Am. LLC Agmt. § 4.1(A)." (Dkt.1 at ¶21 (A0134) (emphasis added).)

The Verified Complaint goes on to allege that Northern Gold is no longer a 50% member of the Company, and seeks a declaration under Section 18-110 that, as of the filing of the Verified Complaint, Northern Gold is only a 48.75% member of the Company. (Dkt.1 at ¶64 (A0144).)

The Verified Complaint's allegation that Northern Gold is no longer a 50% member rests on the validity (or invalidity) of the two Members' alleged approval of a "Commitment Letter." The Verified Complaint alleged that Northern Gold's execution of the Written Consent approving the Amended LLC Agreement with Northern Gold as a 50% member of the Company also validly approved and authorized the Company to "execute, deliver and perform its obligations under the Commitment Letter." (Dkt.1 at ¶28 (A0136) (internal quotation mark omitted).)

The issue of whether or not the Commitment Letter was validly approved by the two Members is the lynchpin of Plaintiffs' Verified Complaint alleging that

Northern Gold is no longer a 50% Member. (*See* Dkt.1 at ¶¶28, 45, 46, 64 (A0134, A0141, A0144).)[3]

Regarding the issue of the validity or invalidity of the approval of the Commitment Letter, there is no allegation in the Verified Complaint (nor could there have been) that the Commitment Letter or its specific terms was ever emailed to Northern Gold or included in the set of materials provided by Soura to Northern Gold prior to the June 3, 2021 execution of the Amended LLC Agreement and written consent. (PTO (Dkt.160) at ¶31 (A0770) ("These materials did not include a copy of the Commitment Letter.").)

Regarding the issue of the validity or invalidity of the approval of the Commitment Letter, Plaintiffs alleged in the Verified Complaint that prior to Northern Gold executing the written consent, Soura (on behalf of 50% member REM

---

[3] *See* Dkt.1 at ¶28 (A0136) ("[T]he May 14 Written Consent … authorized the Company to 'execute, deliver and perform its obligations under the Commitment Letter', as well as 'any other agreement or documents relating thereto or contemplated thereby.'" (emphasis added)); *id.* at ¶45 (A0141) ("As consideration for the financing – and as required by the Commitment Letter and authorized by the May 14 Written Consent – the Company issued a Warrant to Purchase Units, entitling SIFT Capital's designee, Plaintiff SIFT Fixed US002, LLC to purchase 2.565 membership Units (or 2.5% of outstanding Units) of the Company (the 'Warrant')." (emphasis added)); *id.* at ¶46 (A0141) ("On March 21, 2022, in accordance with the Commitment Letter, SIFT delivered a Notice of Exercise/Conversion, pursuant to which SIFT elected to convert the Warrant into 2.565 Units in the Company (the 'Exercise Notice')." (emphasis added)); *id.* at ¶64 (A0144) ("SIFT is therefore a 2.50% member in the Company, and each of Northern Gold and REM OA are 48.75% members of the Company.").

OA) personally provided Italia (on behalf of 50% member Northern Gold) with a physical copy of the Commitment Letter:

> On May 10, 2021, Soura and Italia met at the Company's factory in Ilion, New York, to discuss, *inter alia*, the proposed financing transaction from SIFT Capital. At this meeting, Soura provided Italia with a copy of the Commitment Letter and they discussed the proposed transaction at length. At this meeting, both Soura and Italia agreed that the terms of the proposed financing were very favorable and that it was in the best interest of the Company to proceed with the financing as outlined in the Commitment Letter.

(Dkt.1 at ¶15 (A0132-33) (emphasis added).)

On August 1, 2022, Northern Gold filed its Answer and Counterclaim denying that it had ever been provided a copy of the Commitment Letter until "the Company filed it as Exhibit F to its June 13, 2022 Status Quo Opposition in the Books Records Action." (Dkt.18 at Counterclaim ¶¶89, 90, 93 (A0384-85).)

In its August 1, 2022 filing with the Court, Defendant Northern Gold stated:

> This deliberate and duplicitous failure to ever provide Northern Gold with the so-called Commitment Letter, drafts of the Warrants, the name of SIFT as a potential member, or anything about SIFT, and only telling Northern Gold about SIFT alleged membership interests after litigation was filed, invalidates any claim that SIFT is a member or that Northern Gold is anything other than a 50% member. ***See Adlerstein v. Wertheimer***, 2002 WL 205684, at *12 (Del. Ch. Jan. 25, 2002) (board's approval of the investment proposal "must be undone" because the failure to give Adlerstein advance notice of the investment proposal amounted to "trickery"); ***VGS, Inc. v. Castiel***, 2000 WL 1277372, at *5 (Del. Ch. Aug. 31, 2000) (board

> effected transaction without giving advance notice to controlling member (who could have removed one of the managers approving the merger); the managers violated their duty of loyalty to controlling member, and the merger was therefore invalid).

(Dkt.18 at Counterclaim ¶106 (A0391) (emphasis added).)

On August 4, 2022, the Company (now controlled by Soura) represented to the Court:

> Plaintiffs allege that Northern Gold's principal, Richmond Italia, received a copy of a proposed commitment letter between SIFT's affiliate and the Company, Complaint Ex. 2, at a meeting in Ilion, New York, on May 10, 2021, and that Northern Gold subsequently executed several consents that on their face approve of the commitment letter and the transactions contemplated thereby, and authorized any member or officer of the Company to undertake such other actions as necessary to fulfill that agreement.
>
> ****
>
> Northern Gold's principal theory appears to be that Plaintiffs tricked Northern Gold into consenting to the dilutive issuance. *See* Counterclaim ¶¶ 105-06. Northern Gold [] seeks to have the warrant and units issued to SIFT voided…. Whether a factual and equitable basis exists for such relief appears to be the key question that the Court must resolve in this matter, and on that question, the Company stands neutral.

(Company's Reply to the Cross-Motions for Entry Of a Status Quo Order (Dkt.25) at ¶¶6, 9 (A0468-70) (emphasis added) (footnote omitted).)

On August 22, 2022, the Plaintiff REM OA stated in its reply to Defendant's counterclaim:

> 90. Plaintiffs/Counterclaim Defendants allege only that Soura provided Italia a copy of the Commitment Letter in a face-to-face meeting in Ilion, NY on May 10, 2021, which Italia denies. (Answer ¶ 15.)
>
> **RESPONSE:** REM OA admits that Soura provided Italia a copy of the Commitment Letter at the May 10, 2021 face-to-face meeting, admits that Italia now denies this, and admits that Soura does not recall later providing Italia with duplicate copies of the already-provided Commitment Letter.

(REM OA Holdings, LLC's Reply To Verified Counterclaim (Dkt.41) at 31-32 (A0567-68) (emphasis added).)

On September 13, 2022, Plaintiff REM OA submitted Interrogatory responses verified by Soura:

> **INTERROGATORY NO. 38.** Identify and describe all communications between you and Northern Gold concerning SIFT.
>
> **RESPONSE**: An in-person meeting at the Ilion, NY facility. Italia informed Soura that he was traveling to Ilion and invited Soura to visit during that trip. Soura did so. The two had conversations regarding SIFT Capital, including at a meeting in a conference room. They also had further discussions as well as in the company's factory, museum and store. During the meeting, Soura gave Italia a copy of the Commitment Letter, and the two discussed the Commitment Letter and its terms, including the decision whether to enter into the Commitment Letter. Italia and Soura agreed that they were both in favor of entering into the Commitment Letter. Several days later, Soura emailed proposed written consent to Italia, which included a provision stating that each party had reviewed the Commitment Letter.

(Responses and Objections of Plaintiff REM OA to Northern Gold's First Interrogatories at 26-27 (A0605-06) (emphasis added).)

On January 13, 2023, Plaintiffs represented to the Court:

> The next day, May 10, 2021, Soura and Italia met at the Company's facility in Ilion, New York to discuss the Company and the proposed financing with SIFT Capital. By that time, Soura had told D'Arcy about SIFT, and mentioned to D'Arcy his intention to discuss the Commitment Letter with Italia at this meeting. At the meeting, Soura provided Italia with a printed copy of the Commitment Letter (including the accompanying term sheet), which the two reviewed and discussed…. As a result, coming out of their May 10, 2021 meeting, Soura and Italia agreed that the terms of the SIFT Transaction were very favorable, and that it was in the Company's best interest to proceed under the Commitment Letter.
>
> ****
>
> D'Arcy specifically recollects Soura telling him that he was going to Ilion specifically to meet with Italia to give him the Commitment Letter and discuss it with Italia.

(Plaintiffs' Pretrial Brief (Dkt.156) at 14-15 & 58 n.254 (A0639-40, A0683) (emphasis added) (footnotes omitted).)

On January 14, 2023, Northern Gold stated to the Court:

> Soura's deliberate and duplicitous failure to ever provide Northern Gold with the so-called Commitment Letter, drafts of the Warrants, the name of SIFT as a potential member, or anything about SIFT, and only telling Northern Gold about SIFT's alleged membership interests after the Books and Records litigation was filed, invalidates any claim that SIFT is a member or that Northern Gold is anything other than a 50% member. [citing ***Adlerstein***, ***VGS,*** and other cases]

(Northern Gold's Pretrial Brief (Dkt.157) at 43-44 (A0740-41) (emphasis added).)

On January 17, 2023, the Court entered a Pre-Trial Order with the following undisputed testimony under oath by Soura and Italia:

> On May 10, 2021, Soura and Italia met at the Company's factory in Ilion, New York. Soura alleges under oath that at this meeting, *inter alia*, Soura provided Italia with a copy of the Commitment Letter from SIFT Capital Partners (attached by Plaintiffs as Exhibit 2 to the Complaint) (the "Commitment Letter") and that Soura and Italia discussed the terms of the Commitment Letter at length. Italia denies under oath that Soura provided him with a copy of the Commitment Letter, then or ever, and states under oath that no copy of the Commitment Letter was ever provided to him prior to an attachment to a pleading of the Company on June 14, 2022. Italia denies under oath that Soura and Italia ever discussed the terms of the Commitment Letter.

(PTO (Dkt.160) at ¶29 (A0765) (emphasis added).)

On February 24, 2023, citing the trial testimony of Soura, Plaintiffs represented to the Court:

> Soura and Italia met privately in a conference room, during which Soura provided Italia with the Commitment Letter, including the term sheet, and walked through the general parameters of the financing, including the loan amount and warrant.[78] As in their prior conversation, Italia seemed pleased, and agreed the Company should proceed.[79]
>
> ****
>
> Collectively, these considerations overwhelmingly support Soura's testimony that Italia reviewed the Commitment Letter before executing the Consents. Italia's self-serving claim that he never received the

> Commitment Letter is implausible and certainly does not provide a basis to undo the authorization that NGH clearly gave for the SIFT Transaction.

(Plaintiff's Opening Post-Trial Brief (Dkt.179) at 13-14 & 14 n.78&79 (citing trial testimony of Soura), 50 (A1469, A1505) (emphasis added).)

On March 24, 2023, Northern Gold stated to the Court:

> Further, the contemporaneous evidence demonstrates that Soura and the Company's counsel intentionally led Italia to believe that the documents he was signing protected Northern Gold's 50% membership interest. *See Kotler v. Shipman Assocs., LLC*, 2019 WL 4025634, at *17 (Del. Ch. Aug. 21, 2019) ("At first glance, a wet ink, signed version of a contract looks to be solid evidence of a meeting of minds. But it is not evidence so powerful that it negates all other evidence to the contrary. Put another way, even if a purported agreement is executed by both parties, when the parties' 'understandings of [a contractual] prohibition or permission are incompatible,' and where the plaintiff 'offered no further evidence indicating' a meeting of the minds, 'no enforceable agreement [is] created.'") (alteration in original); *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 115 (Del. Ch. 2006) ("Eureka should not be bound to manage and operate an LLC with a co-member with which it never intended or agreed to go into business."); ***Adlerstein v. Wertheimer***, 2002 WL 205684, at *10-12 (Del. Ch. Jan. 25, 2002) (holding board's approval of the investment proposal "must be undone" because failure to give advance notice of the investment proposal amounted to "trickery"); ***VGS, Inc. v. Castiel***, 2000 WL 1277372, at *5 (Del. Ch. Aug. 31, 2000) (finding merger invalid where board failed to give advance notice to controlling member); *see also* ***Mills Acquisition Co. v. MacMillan, Inc.***, 559 A.2d 1261, 1264-65 (Del. 1989) (holding that a lockup agreement must be enjoined because of, among other things, a breach of fiduciary duty by inside director

> to mislead other directors); ***RBC Capital Mkts., LLC v. Jervis***, 129 A.3d 816, 863 (Del. 2015) (holding that the advisor committed fraud on the board when advisor did not disclose its self-interest to board approving transaction).

(Defendant/Counterclaim Plaintiff Northern Gold Holdings, LLC's Post-Trial Answering Brief (Dkt.183) at 40-41 (A1577) (emphasis added).)

On April 7, 2023, Plaintiffs represented to the Court: "D'Arcy testified that Soura told him he intended to provide Italia a copy of the Commitment Letter during their meeting in Ilion." (Plaintiff's Post-Trial Reply Brief (Dkt.186) at 13 (A1665) (emphasis added).)

On May 10, 2023, at post-trial argument, Plaintiffs stated to the Court:

> Mr. Soura's credible testimony in this case is that he provided Mr. Italia with a commitment letter on May 10th [in person in Ilion, New York].
>
> ****
>
> Your Honor, we submit, of course, that the **only reason Mr. Italia was able to understand the commitment letter and what it entailed is because he had received it and reviewed it and understood its terms.**
>
> ****
>
> THE COURT: He gave it [the Commitment Letter] to Mr. Italia [in person at Ilion NY on May 10, 2021].
>
> ATTORNEY FRIEDENBERG: He gave it to Mr. Italia in the room. They discussed it. In fact, they had previously discussed it on a conversation earlier in May. Not it, but the SIFT financing itself, where they had gone over some of the terms. But there is no question in Mr. Soura's mind,

> and his testimony was clear, they went over the commitment letter and the term sheet.

(Transcript of Post-Trial Oral Argument at 19:23-20:10; 21:1-5, 26:10-18 (A1722-23, A1728) (emphasis added).)

On May 18, 2023, Plaintiffs wrote a letter to the Court and stated:

> Mr. Soura testified he received [the Commitment Letter] from SIFT Capital on May 9, 2021 (Trial Tr. 39:3-22), and showed it to Mr. Italia on May 10, 2021 in Ilion (*id.* 44:15-49:1).

(Plaintiffs' letter to The Honorable Lori. W. Will from Alexandra M. Cummings in rebuttal to Northern Gold's Claims at Post-Trial Argument (Dkt.190) at 2 n.2. (A1853) (emphasis added).)

On September 20, 2023, the Court of Chancery issued its Memorandum Opinion, finding that Soura had lied to the Court when he repeatedly stated in his pleadings and testimony (as detailed, *supra*) that he had given Italia a copy of the Commitment Letter:

> Soura and Italia adamantly stick to their stories, but one of them is lying. The May 10 meeting was not Schrödinger's cat: either Soura gave Italia the Commitment Letter in Ilion, or he did not. The timing generally supports Soura's account since the Ilion meeting came a few days after the Commitment Letter was signed and before Italia was given documents to authorize the Commitment Letter. Yet Soura's version of the day's events is both illogical and inconsistent. Thus, I cannot find that Soura gave Italia a printed copy of the Commitment Letter during the Ilion meeting. On balance, Italia's account seems (slightly)

> more plausible, consistent, and in line with the meeting's overall purpose.

REM OA Holdings, LLC v. N. Gold Holdings, LLC, 2023 WL 6143042, at *8 (Del. Ch. Sept. 20, 2023) (the "Opinion") (emphasis added) (footnotes omitted), Ex. A.

Even though the trial court found that Plaintiffs had lied to the Court on the key issue of the case, the Court nevertheless found that the Written Consent of the members was a "contract," and governed not by equitable principles, but solely by Delaware contract law. The trial court held that under contract law Northern Gold's bare signature on the Written Consent constituted valid approval for the Company to enter into the undisclosed dilutive terms of the Commitment Letter:

> The plaintiffs did not prove that Northern Gold was shown the Commitment Letter before Italia signed the May 2021 Consent. But Italia was admittedly aware that he was signing a document authorizing a Commitment Letter for SIFT Fixed to provide a $10 million loan to the Company…. The fact that the warrant was unmentioned in the May 2021 Consent does not require a different outcome. The May 2021 Consent referenced the Commitment Letter that, in turn, addressed the warrant. "The obligation of a contracting party to read any contract it signs extends to documents incorporated by reference, which become part of the terms of the parties' agreement at the time of execution." Northern Gold "bore responsibility for making further inquiries before it agreed to assume obligations defined in a separate document." It chose not to inquire.

Opinion at *20-21 (emphasis added) (footnotes omitted).

The trial court entered judgment that Northern Gold's membership interest had been validly diluted from 50% to 48.75%. Opinion at *32 ("Judgment is entered for the plaintiffs under 6 *Del. C.* § 18-110.").

On September 21, 2023 Northern Gold filed a Motion for Reargument arguing that even if Northern Gold was deemed to have validly authorized the Company to execute the terms of the Commitment Letter, under Delaware contract law, the Commitment Letter unambiguously provided a material term and condition for issuing the dilutive Warrants was that North Gold "shall" be a party to a pre-emptive rights agreement, and because Northern Gold did not enter into such an agreement, the Court erred in finding that the dilutive issuance of a 2.5% membership interest to SIFT Fixed was valid. (Northern Gold's Motion for Reargument (Dkt.199) at 3-4 (A1865-66).)

On October 19, 2023, the trial court denied Northern Gold's Motion for Reargument holding that none of the arguments raised in the motion demonstrated a misapprehension of the facts or law. *REM OA Holdings, LLC v. N. Gold Holdings, LLC*, 2023 WL 6884845, at *3 (Del. Ch. Oct. 19, 2023) (the "Letter Decision"), Ex. B.

On November 17, 2023, the trial court entered an "Order and Partial Final Judgment Pursuant to Rule 54(b)" in favor of Plaintiffs. (Dkt.206.), Ex. C[4]

On December 19, 2023, Northern Gold filed this appeal. (No. 465, 2023, Dkt.1.)

On January 8, 2024 trial counsel for Plaintiffs withdrew and new counsel substituted in for purposes of this appeal. (No. 465, 2023, Dkt.8.)

[4] The Order also provided that "[t]he Court shall have further proceedings necessary to resolve Plaintiffs' entitlement to attorneys' fees and costs and expenses." (Dkt.206.)

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO CONSIDER OR APPLY EQUITABLE PRINCIPLES IN DETERMINING WHETHER THE WRITTEN CONSENT CONSTITUTED APPROVAL AS REQUIRED UNDER THE OPERATIVE LLC AGREEMENT.

A. Question Presented

Whether the Court of Chancery erred as a matter of law by failing to consider or apply equitable principles in its holding that the Written Consent constituted valid approval of the Commitment Letter as required by the Operative LLC Agreement. This issue was preserved below at Defendant/Counterclaim Plaintiff Northern Gold Holdings, LLC's Post-Trial Answering Brief (Dkt.183) at 40-44 (A1576-79)

B. Scope of Review

"Whether … an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed de novo." *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 95, 106 n.191 (Del. 2021) (equity will invalidate board actions tainted by deception) (citing *Adlerstein v. Wertheimer*, 2002 WL 205684, at *8 (Del. Ch. Jan. 25, 2002) (invalidating a board action where other directors coordinated to keep the CEO-director "deliberately uniformed about their plan to present" a proposal that would dilute the CEO's ownership stake at a board meeting)) (citation and quotation marks omitted).

C. Merits of the Argument

The issue before the trial court was whether the Company's two members, via the Written Consent, validly approved the Company entering into the Commitment Letter. The trial court held it did. Opinion at *1 ("Italia authorized the SIFT transaction when he willingly signed the written consent." (emphasis added)) ("The [Commitment letter incorporating the term sheet and] term sheet was not, however, sent to Italia."); *id.* at *18 ("Although Northern Gold lacked actual knowledge of the transaction's terms, it could have learned them through basic diligence. None of Northern Gold's challenges invalidate its consent, the SIFT transaction, or the admittance of SIFT Fixed as a member of the Company." (emphasis added)).

The trial court erred in evaluating the validity of the Written Consent approving the Commitment Letter as if it was a commercial contract between opposing arms-length parties, instead of applying equitable principles to determine the validity of a written consent approving a "financing" transaction where one 50% member does not disclose that the terms of a "financing" transaction gives him "sole discretion" to dilute the other member below 50%. *See Bäcker*, 246 A.3d at 96-97 (noting that every action needs to be "twice-tested; first for legal authorization and second [for] equity" because legal authority "must be exercised consistently with equitable principles" (citations and quotation marks omitted) (alteration in original)).

The trial court cited no authority holding (and Defendant is aware of none) that the Court of Chancery evaluates such a written consent under contract law to the exclusion of considering equitable principles.

But that is what the trial court did, and that is reversible error.

> Northern Gold's frustration is understandable. Soura is not blameless and should have been upfront with his business partner. But ultimately, Italia authorized the SIFT transaction when he willingly signed the written consent. Italia—an experienced businessperson represented by counsel—had every chance to ask about the [undisclosed] term sheet during weeks of review and negotiation. He opted not to.
>
> Northern Gold does not get a do over for its failed diligence. Delaware law holds sophisticated parties to their contracts. SIFT Fixed was a 2.5% member of the company when this action was filed. Judgment is entered for the plaintiffs.

Opinion at *1-2 (emphasis added); *id.* at *19 ("Delaware is a 'contractarian' state. Our law recognizes that 'parties have a right to enter into good and bad contracts' and 'enforces both.'" (citations omitted)); *id.* at *20 ("A contracting party must 'stand by the words of his contract.' Avoidance is not justified by 'a party's failure to read a contract' or insistence that she 'had not been informed of [its] stated terms.'" (citations omitted) (alteration in original)).

The Written Consent drafted by Soura was action by the majority of the members for which Soura needed 50% member Northern Gold to sign. It stated that the Commitment Letter was "to provide financing to the Company in the

approximate amount of $10,000,000.00, subject to certain conditions and due diligence." Opinion at *9 (emphasis added). It was not a "contract" between REM OA and Northern Gold giving Soura "sole discretion" to dilute Northern Gold to minority status. *See Daniel v. Hawkins*, 289 A.3d 631, 645 (Del. 2023) (holding that contracts that purport to eliminate voting rights, such as an irrevocable proxy, must be "clear and unambiguous"; ambiguity will be construed against a party seeking to enforce a contract purporting to irrevocably waive voting rights).

Northern Gold repeatedly cited the following applicable cases (in its Counterclaim, pre-trial briefing, and post-trial briefing; citations *supra*) showing that Plaintiffs were not entitled to relief under Section 18-110 because Northern Gold's signing of the Written Consent did not validly approve the Commitment Letter.

- *Adlerstein v. Wertheimer*, 2002 WL 205684, at *10-12 (Del. Ch. Jan. 25, 2002) (holding board's approval of the investment proposal "must be undone" because failure to give advance notice of the investment proposal amounted to "trickery");
- *VGS, Inc. v. Castiel*, 2000 WL 1277372, at *5 (Del. Ch. Aug. 31, 2000) (finding merger invalid where board failed to give advance notice to controlling member; two LLC managers owed a fiduciary duty of loyalty to the LLC, LLC members, and fellow LLC manager to disclose their plan

to authorize the dilutive merger in order to allow fellow LLC manager and member to exercise his voting control to protect his controlling position);

- *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1264-65 (Del. 1989) (holding that a lockup agreement must be enjoined because of, among other things, a breach of fiduciary duty by inside director to mislead other directors);
- *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 863 (Del. 2015) (holding that the advisor committed fraud on the board when advisor did not disclose its self-interest to board approving transaction); and
- *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 115 (Del. Ch. 2006) ("Eureka should not be bound to manage and operate an LLC with a co-member with which it never intended or agreed to go into business.").

The trial court did not address any of these cases, which would have resulted in judgment in favor of Northern Gold.

If left to stand, the trial court's holding would effectively overrule the *VGS* and *Alderstein* line of cases, because the injured party in those cases could have always asked further questions about the undisclosed agenda for the meeting.

The equitable holdings of the above-cited case are good law approved by this Court. *See Bäcker* 246 A.3d at 97 (citing *Alderstein* and affirming the Court of

Chancery's decision to invalidate board resolutions because the defendant made misrepresentations to other directors and deceived another director into attending the board meeting in order to achieve a quorum for a board action) ("Consistent with these principles, Delaware courts have used their equitable powers on numerous occasions to invalidate otherwise lawful board actions tainted by inequitable deception."); *OptimisCorp v. Waite*, 137 A.3d 970, 2016 WL 2585871, at *3 (Del. Apr. 25, 2016) (TABLE) (rejecting Court of Chancery's criticism regarding the *VGS* and *Adlerstein* line of cases and noting that the line of cases involve finding of inequity) ("[I]t has long been the policy of our law to value the collaboration that comes when the entire board deliberates on corporate action and when all directors are fairly accorded material information.") ("Nothing in our affirmance should be read as endorsing that view, or as expressing any view on a line of fact-specific rulings where inequity was found in deceiving a director about the action intended to be taken at a board meeting.").

And there are strong policy reasons for a reversal. In cases involving inequitable behavior in diluting a 50% member and repeated perjured testimony to the trial court, the Court of Chancery should live up to its raison d'être and act as a court of equity. As stated on the Court of Chancery web page:

> The role of procedural and doctrinal inflexibility in the decline of England's Chancery Court contrasts with the determination of Delaware's Chancellors over two centuries to eschew broad rules in favor of [equitable]

> specific holdings and carefully crafted remedies that address the particular circumstances of the case at hand…. Delaware has preserved the essence.

William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, Delaware Courts (1993) (emphasis added).[5]

Commentators have noticed with alarm:

> [A]n increasing embrace of Delaware corporate law as a corpus governed by contract principles, antithetical to equity, with the object of conferring greater certainty and holding parties to things-deemed-agreements…. TCD regards Delaware's unique application of equity as what distinguishes the jurisdiction and fosters the franchise.

The Long Form – Nov. 30 & Dec. 1, 2023, The Chancery Daily (Dec. 1, 2023) (emphasis added).

> TCD assumes that Delaware's "competitive advantage" as a judicial jurisdiction is in its century-in-the-making, unique body of equitable case law, and the expertise of the Court of Chancery in application of equitable rules to disputes involving the internal affairs of business entities -- which is influential because it proceeds in accordance with a mature framework.
>
> … Indeed, "contract" is a legal construct, often perceived as antithetical to equity, and to which the Court of Chancery's traditional area of expertise arguably has no application.

The Long Form – December 4, 2023, The Chancery Daily (Dec. 4, 2023).

---

5 https://courts.delaware.gov/chancery/history.aspx#:~:text=Rather%2C%20equity%20in%20Delaware%20was,statute%2C%20not%20the%20royal%20prerogative

> [C]orporate law is not contract law, but an independent legal category, with its own principles, structure, and economic and social implications….
>
> [A] close reading of Delaware case law does not lend support to a "contractarian" view of the corporation. The exact opposite is true: at every turn, corporate law actors rely on *ex post* adjudication to remedy violations, deter misconduct, and reduce power and information asymmetries.
>
> While contract law is about promises made before-the-fact, and enforceable according to their pre-defined terms, corporate law disciplines its actors through ex post devices: the law of corporate purpose, equitable remedies, and fiduciary duties.

Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223, 277, 280, 284 (2021) (emphasis added).

A court of equity (nor any court) should not blow-off repeated perjury (a criminal offence) by Soura as "a minor role in the overall story." Opinion at *8-9; *see Matter of Sutton*, 1996 WL 659002, at *1 (Del. Super. Aug. 30, 1996) (granting motion to compel against attorneys and paralegal representing defendant Parretti) ("criminal case [investigation which resulted in a conviction] that Parretti committed perjury during a Court of Chancery trial [*Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 1996 WL 757274], when he testified [] about defense exhibit 38A (DX38A)"); *see also Romeo v. State*, 21 A.3d 597, 2011 WL 1877845, at *3 (Del. May 13, 2011) (TABLE) ("[A] person is guilty of perjury when he 'swears falsely.'").

This is especially true given that Soura's repeated perjury was anything but a "minor" matter; it was, by Plaintiffs' own admission, the main issue in case:

> Your Honor, we submit, of course, that the only reason Mr. Italia was able to understand the commitment letter and what it entailed is because he had received it and reviewed it [in Ilion, NY on May 10, 2021] and understood its terms.

(Transcript of Post-Trial Oral Argument at 21:1-5 (May 10, 2023) (A1723) (emphasis added); *see also* Company's Reply To The Cross-Motions For Entry Of A Status Quo Order (Dkt.25) at ¶¶6, 9 (August 4, 2022) (A0468-70) ("Plaintiffs allege that Northern Gold's principal, Richmond Italia, received a copy of a proposed commitment letter [from Soura] … in Ilion, New York, on May 10, 2021 [*which the Opinion held was a lie by Soura] and that Northern Gold subsequently executed several consents that on their face approve of the commitment letter…. Northern Gold's principal theory appears to be that Plaintiffs tricked Northern Gold into consenting to the dilutive issuance…. Whether a factual and equitable basis exists for such relief appears to be the key question that the Court must resolve in this matter, and on that question, the Company stands neutral.") (emphasis added)).)

If the Opinion is upheld, especially where Soura lied to the Court by claiming he gave Italia the Commitment Letter, it will condone perjury as a "minor" matter and will do damage to the trial court's reputation as a court of equity. *See In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *12-13 (Del. Ch. Aug. 18, 2005) ("neither

party is entitled to the remedies that they seek [the appointment of a custodian under DGCL 291]" because the company "is simply a penny stock fraud" run by the parties); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 917-18 (Del. Ch. 2002) (denying the plaintiffs' request for court-ordered annual meeting because the court-ordered annual meeting was part of plaintiff's plan to "circumvent important registration and disclosure elements of the federal securities laws"; "this court is unwilling to use its powers to assist Stirling to profit by the sale of regulatory avoidance."), *aff'd*, 846 A.2d 237 (Del. 2003); *Shawe v. Elting*, 157 A.3d 142, 151 (Del. 2017) (Court of Chancery properly "imposed a civil sanction against [plaintiff] for his repeated lies under oath in interrogatory responses, at deposition, at trial, and in a post-trial affidavit to cover up what he had done."); Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391, 424-426 (2018) ("[T]he equitable powers of the Delaware courts also fundamentally shape the relationship of the participants in a LLC…. in ways that depart from ordinary contract law precepts.").

The above case law cited to the trial court focuses on cases involving inequity in deceiving a director or controller about the action to be taken by the governing body, and is directly applicable to the invalidity of the Written Consent, regardless of whether REM OA owed fiduciary dues generally on operational business decisions of the Company. *See* Opinion at *32 ("Section 4.1(A) of the LLC

Agreement permits the Company's members to act 'without a meeting,' 'vote to authorize any action in writing' ...."); (Written Consent at 1 (A0076) (member action by the written consent "shall have the same force and effect as if taken by the affirmative vote at a duly called meeting of the Members").)

Similar to *VGS* and *Alderstein*, the Written Consent approving the Commitment letter is invalid because REM OA breached its duty of loyalty and disclosure to its fellow LLC member and manager. The trial court correctly recognized that the LLC Agreement provided that "each Member shall have the default fiduciary duties provided by applicable law." Opinion at *22 (citing LLC Agreement Section 4.4(B)); *see In Re Mindbody, Inc., Stockholder Litigation*, 2023 WL 2518149, at *32 (Del. Ch. Mar. 15, 2023) (holding that "[a] single disclosure deficiency" negates claim that transaction was approved by fully informed equity holders); *Sunder Energy, LLC v. Jackson*, 2023 WL 8166517, at *18-19 (Del. Ch. Nov. 22, 2023) (finding that the terms of the 2019 and 2021 LLC Agreements were not validly approved because the managing members breached their duty of disclosure when seeking approval for the agreements).

But the trial court reversibly erred when it held that 50% member and manager REM OA owed no fiduciary duty of disclosure of the dilutive terms to its other 50% member and manager because REM OA was a "minority" member of an LLC and

not a "managing members or controllers." Opinion at *22. But as a matter of math, a 50% member is not a "minority."

And the LLC agreement requires any action on behalf of the Company be approved by a majority vote of the members, so each 50% member controls whether to approve any action, and thus REM OA is a "controller" for purposes of owing fiduciary duties. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994) (affirming the Court of Chancery's holding that a minority stockholder, who owned 43.3% of the company's stock interests, owed fiduciary duty of a controlling stockholder because it "did exercise actual control over the company by dominating its corporate affairs"); *Voigt v. Metcalf*, 2020 WL 614999, at *22 (Del. Ch. Feb. 10, 2020) (finding that it is "reasonable conceivable" that the defendant, who was a minority stockholder who owned 34.8% of the corporation's voting power, was a controller of the company and owed fiduciary duty).

The trial court went on to hold that "[e]ven if REM OA owed a fiduciary duty to Northern Gold, Northern Gold had the means to evaluate the decision presented to it." Opinion at *22 n.291 (citing *Dohmen v. Goodman*, 234 A.3d 1161, 1171 (Del. 2020)). But *Dohmen* is inapplicable to this case, where the fiduciary duty of disclosure of 50% member REM OA seeking the approval of the other 50% member for the Company to enter into a Commitment Letter "to provide financing to the Company" is to also disclose that Commitment Letter's Company "financing" gives

REM OA the "sole discretion" to dilute Northern Gold below 50%. *Dohmen*, 234 A.3d at 1171 (no affirmative fiduciary duty of disclosure when a corporation asks a stockholder as an individual to enter into a purchase or sale of stockholder's interest, or a general partner's request to an individual limited partner for a one-time capital contribution).

Finally, it should be noted that Plaintiff obviously thought it had a duty of disclosure because the Court found Soura lied repeatedly to the Court by falsely testifying that he had made such disclosure.

II. ALTERNATIVELY, EVEN IF THE WRITTEN CONSENT VALIDLY APPROVED THE TRANSACTION CONTEMPLATED BY THE COMMITMENT LETTER (AND IT DID NOT), THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE UNAMBIGUOUS TERMS OF THE COMMITMENT LETTER CONDITIONS THE ISSUANCE OF ANY WARRANTS UPON NORTHERN GOLD ENTERING AN AGREEMENT CONTAINING PRE-EMPTIVE RIGHTS, WHICH UNDISPUTEDLY NEVER HAPPENED.

A. Question Presented

Whether the trial court erred as a matter of contract law by holding that the issuance of dilutive Warrants to SIFT Fixed was valid under the terms of the Commitment Letter even though the unambiguous terms of the Commitment Letter conditioned any such issuance upon Northern Gold entering into a pre-emptive rights agreement, and such condition undisputedly never occurred?

This issue was preserved below in Northern Gold's Post-Trial Answering Brief (Dkt.183) at 59-60 (A1595-96); Transcript of Post-Trial Oral Argument at 71:2-21 (A1774) ("[Even if] Mr. Italia is deemed to have agreed to this commitment letter, it doesn't mean that he agreed in any way that SIFT would become a member or that SIFT would be issued units or warrants" if Northern Gold did not enter into a pre-emptive rights agreement.); Letter to The Honorable Lori W. Will from Martin S. Lessner in response to Plaintiffs' May 18 and May 23 letters (Dkt.195) at 4-5 (A1861-62) ("[A]ny claimed approval of the Commitment Letter used to justify making [SIFT Fixed] a member with Units must fail because any alleged approval was conditioned on Northern Gold ... 'shall enter into an agreement containing [a]

Co-Sale, Drag-along, and Preemptive rights customary and consistent with transactions of this type' but no such agreement was ever made."); Opinion at *8 n.66 (citing Dkt.195); Northern Gold's Motion for Reargument (Dkt.199) (A1863-71); Letter Decision at *1-3.

B. Scope of Review

This Court "review[s] questions of contract interpretation *de novo* ...." *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022).

C. Merits of the Argument

1. The Plain Language of the Commitment Letter Conditions Issuance of Warrants on Entry Into an Agreement Containing Pre-Emptive Rights.

The trial court erroneously ruled, as explained in Argument Section I, *supra*, that Northern Gold's signing of the Written Consent validly authorized "the transaction contemplated by the Commitment Letter." Opinion at *11 (emphasis added).[6]

---

[6] Opinion at *11 ("By operation of the May 2021 Consent, the Company was authorized to execute, and its members and officers to close on, the transaction contemplated by the Commitment Letter 'without further act, vote or approval' of its members.") (emphasis added); *id*. at *8 ("Italia was given documents to authorize the Commitment Letter.") (emphasis added); *id*. at *10 ("The May 2021 Consent referenced the Commitment Letter eight times ... and provided for the authorization of the Commitment Letter.") (emphasis added); *id*. at *22 ("Northern Gold executed multiple written consents authorizing the Commitment Letter.") (emphasis added); *id*. at *21 n.276 ("By signing the materials, [Northern Gold's] 'mutual assent to the exchange and consideration' [under the written terms of in the Commitment Letter] was manifested.") (citation omitted)).

The Commitment Letter is a contract signed by Soura on behalf of the Company. The Court found that: "[T]he Commitment Letter is eight pages long. The first two pages consist of SIFT Capital's cover letter, signed by Zhang; the third page is a signature page for the Company and several subsidiaries; and the last five pages are the term sheet that Soura and SIFT Capital negotiated." Opinion at *7 (citing the Commitment Letter as JX-210).

Pursuant to the Commitment Letter, what conditions must be met for the Company to issue dilutive Warrants to SIFT Fixed? The answer is that the Commitment Letter unambiguously provides the material terms and conditions that must be met for the Company to issue the Warrants in a section titled **"Warrants."** (bold and underline original):

> **Warrants**
>
> Amount: Warrants representing two and a half percent (2.5%) of the fully diluted ownership of the Company at closing, inclusive of any and all membership units issuable pursuant to any Management Membership Unit Option Plan as described below. Such warrants shall be exercisable for 5 years from issuance at a nominal exercise price of one cent ($0.01) and shall be allocated to the Noteholders in proportion to the amount of Notes purchased by each purchaser.
>
> **Co-Sale, Drag-along and Pre-emptive rights: The Company, the Warrant holders and the other members of the Company *shall* enter into an agreement containing Co-Sale, Drag-along and Pre-emptive rights customary and consistent with transactions of this type.**

> Dilution: The Warrants will be diluted only by the sale of membership units at or above Fair Market Value.
>
> Original Issue Discount: $100,000 of purchase price for the Notes and Warrants shall be allocated to the Warrants and $9,900,000 shall be allocated to the Notes.

(Commitment Letter at 5-6 (A0072-73) (underline original, bold added, italics added)); Opinion at *28 n.353.

What are "Pre-emptive rights?" Pre-emptive rights are rights that protect a holder (such as a 50% holder like Northern Gold) from a dilution of their interest in the company. *See* 6 *Del. C.* § 18-301(e) (a member of an LLC shall have the "preemptive right to subscribe to any additional issue of limited liability company interests or another interest in a limited liability company" as "provided in a [LLC Agreement] or another agreement") (emphasis added); 8 *Del. C.* § 102(b)(3) (certificate of incorporation may grant stockholders "the preemptive right to subscribe to any or all additional issues of stock of the corporation … or to any securities of the corporation convertible into such stock"); 11 *Fletcher Cyclopedia of the Law of Corporations* § 5135 (2023) ("Preemptive rights are triggered by an issuance of shares that might disrupt the balance of ownership interests in the corporation. Preemptive rights require the corporation to first give all existing shareholders a fair and reasonable opportunity to purchase a sufficient portion of the newly issued shares to preserve the shareholder's proportionate ownership interest. A majority of the shareholders or the directors or officers cannot lawfully deprive

any shareholder of this right.") ("Preemptive right exists whether the stock issued represents an increase in the authorized capitalization of the corporation or represents previously authorized but unissued stock.") (emphasis added).

2. The Issuance of Dilutive Warrants to SIFT Fixed Without Northern Gold's Entry Into a Pre-emptive Rights Agreement Renders the Issuance of the Warrants Invalid.

The Commitment Letter is an "agreement" pursuant to 6 *Del. C.* § 18-301(e) providing that member Northern Gold "shall" enter into a preemptive rights agreement as condition of an issuance of Warrants to SIFT Fixed. It is undisputed that Northern Gold never entered into a pre-emptive rights agreement, and there never was a pre-emptive rights agreement. (Trial Tr. at 177:5-178:18 (A0968-69) (Soura cross).)

Because this material preemptive rights condition was not met, the issuance of dilutive Warrants to SIFT Fixed was invalid. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 504 (Del. 2019) ("[T]he parties contemplated that new Members could be admitted, and they placed certain restrictions on the Board's discretionary authority in the admission process. For example, the Preemptive Rights Provision protects existing Members from dilution…. These provisions suggest that the parties considered the impact of new Members but decided to delegate other issues affecting unitholder rights to the Board." (emphasis added)).

The pre-emptive rights term/condition in the Commitment Letter was a material term for issuing Warrants and it cannot be ignored or not considered or deemed mere surplusage. The trial court erred because it did not follow Delaware contract law and give effect to the preemptive rights provision. *See* Opinion at *29 n.369 ("[T]he court must construe the contract 'as a whole and ... will give each provision and term effect, so as not to render any part of the contract mere surplusage[.]'"); *id.* at *20 ("A contracting party must 'stand by the words of his contract.'"); *id.* at *22 ("A party is not excused from its obligations because it 'was mistaken as to the legal effect of his contract.'"); *id.* at *29 n.364 ("Delaware law adheres to the objective theory of contracts, meaning that a contract's construction should be that which would be understood by an objective, reasonable third party." (citation and quotation marks omitted)); *id.* at *19 ("As a matter of ordinary course, parties who sign contracts and other binding documents, or authorize someone else to execute those documents on their behalf, are bound by the obligations that those documents contain." (citations and quotation marks omitted).)

3. The Warrant Agreement, Which Does Not Contain Pre-Emptive Rights and Was Not Entered Into by All Members, Cannot Supersede the Commitment Letter.

So how did the trial court reach the erroneous holding the Commitment Letter authorized the issuance of the dilutive Warrants to SIFT Fixed without giving Northern Gold preemptive rights? The trial court erroneously held that the Warrant

Agreement authorized by the Commitment Letter "supersedes" the Commitment Letter because it "covers the same subject matter." Opinion at *28 (only "where a new, later contract between the parties covers the same subject matter as an earlier contract, [does] the new contract supersedes and controls that issue" (emphasis added) (citation and quotation marks omitted)); Letter Decision at *2 ("The Commitment Letter and the Warrant Agreement cover the same subject matter .... The Warrant Agreement's silence on a 'term/condition of the pre-emptive rights agreement' as contemplated by the Commitment Letter does not require a finding otherwise.").

This holding is erroneous because the Warrant Agreement (governing the technical terms of the dilutive Warrants actually issued to SIFT Fixed) does not cover the same subject matter as the Commitment Letter (setting the conditions for issuing Warrants in the first place) because the Warrant Agreement (or any other agreement) does not include the material term/condition of the pre-emptive rights for Northern Gold contained in the Commitment Letter.

The parties never "expressly agreed" that the Warrant Agreement would supersede the terms of the Committment Letter, and the trial court cites no such "express agreement" by Northern Gold to supersede its preemption rights in the Committment Letter. Opinion at *28, n.351 (citing *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *5 (Del. Ch. Jan. 31, 2007) ("The new contract, as a

general matter, will control over the old contract with respect to the same subject matter to the extent that the new contract is inconsistent with the old contract or if the parties expressly agreed that the new contract would supersede the old one." (emphasis added))). It is illogical and unsupported that Northern Gold would "expressly agree" to have have the preemptive rigthts condition of the Committment Letter removed so that Northern Gold's interest could be diluted below 50%.

The trial court cited the Warrant Agreement's "integration clause" and Committment Letter's "Other Terms and Conditions" of "[d]efinitive documentation" and "ancillary documents ... to be executed prior to disbursement of proceeds" as "evidence[]" of "[t]he parties' intent that a later contract supersede an earlier one." Opinion at *28. But this "ancillary documents" condition is in no way an agreement (much less an express agreement) that the preemptive rights condition of the Committment Letter can be igonored. It makes no sense than "definitive documentation" or "ancillary documents" supersede the material terms of the Committment Letter itself, and the trial court provides no support for such an illogical proposition.

It also makes no sense that an integration clause in an ancellary document be deemed to eliminate the material condition in the main contract upon which the ancillary document was created in the first place. Under the trial court's reasoning, a written consent authorizing a Company to enter into a Posion Pill Rights Plan with

a certain trigger, subjected to definitive and ancillary documentation, would be deemed as a matter of law to have appoved definitive and ancillary documentation reflecting an entirely diffferent trigger because the later-signed documents purportedly are on the same subject matter. This reasoning is not supported by Delaware contract law.

The trial court also held that 50% member Northern Gold's signing of the Written Consent gave the the other 50% member a blank check ("sole discretion") to dilute Northern Gold's interest below 50%, or eliminate it entirely:

> The May 2021 Consent also authorized the Company to enter agreements contemplated by the Commitment Letter "with such changes as the Member or Officer, as applicable, deem[ed] in his sole discretion advantageous to the Company." It follows that the Company was permitted to enter into a superseding agreement that lacked pre-emptive rights, since the member or officer representing the Company was empowered to unilaterally make any advantageous changes to future agreements.

Letter Decision at *2 (emphasis added) (footnote omitted). Tellingly, the trial court cited no legal citation authority for this sweeping holding, nor is Northern Gold aware of any.

First, the "sole discretion" in the Written Consent refers to "agreements contemplated by the Commitment Letter." This language does not give Soura "sole discretion" to eliminate the the preemptive rights provision in the Committement Letter itself.

Second, there is no authority for the proposition that a contract can give one party to that contract the "sole discretion" to eliminate the material terms of the contract itself. Under this reasoning, any such contract is illusory because the material terms (such as price, quanity, services to be performed, etc.) could be unilateraly added/changed/eliminated at the "sole discretion" of one of the parties.

Third, there was no factual showing (and the Court cites none) that member REM OA (via Soura) or any Officer of the Company ever decided that the elimination of Northern Gold's preemption rights was "advantages to the Company" as opposed to advantagous to Soura in eliminating his fellow 50/50 member. *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity*, 624 A.2d 1199, 1206 (Del.1993) (holding that where a "Partnership Agreement provides the General Partner discretionary authority to exclude a limited partner from participation in an investment when participation would have a materially adverse effect, the General Partner is obliged to exercise that discretion in a reasonable manner. Reasonableness is a question of fact to be determined by the finder of fact" (emphasis added)). Precisely to the contrary, the trial court found that the Written Consent "confirm[ed] that" REM OA "determined that it is in the best interests of the Company and its stakeholders for the Company to enter into ... the Commitment Letter and to perform all its obligations contemplated thereby." Opinion at *9 (emphasis added). Of

course, the obligations contemplated thereby include the Company's obligation to enter a pre-emptive rights agreement with all members, including Northern Gold.

Fourth, "sole discretion" does not give Soura the right to unilaterally dilute Northern Gold below 50% by unilateraly eliminating Northern Gold's preemption rights from the very Committement Letter that the Court deemed Northern Gold to have approved. *Oxbow Carbon & Minerals*, 202 A.3d at 503-04 & n.92&93 (the vesting of a Board with discretion does not "relieve the Board of its obligation to use that discretion consistently with the implied covenant of good faith and fair dealing"; "[T]he implied covenant of good faith and fair dealing often comes into play ... when a party to the contract is given discretion to act as to a certain subject and it is argued that the discretion has been used in a way that is impliedly proscribed by the contract's express terms."); *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (the implied covenant of good faith and fair dealing inheres in every contract governed by Delaware law and "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." (citation and quotation marks omitted)); *Whitestone REIT Operating Partnership, L.P. v. Pillarstone Capital REIT*, 2024 WL 274228, at *1 (Del. Ch. Jan. 25, 2024) (adoption by general manager of a "poison pill" to frustrate a unit holder's redemption right breached the implied covenant of good faith and fair dealing).

Because Northern Gold agreeing to a pre-emptive rights agreement was a material and key business term of the Commitment Letter, and cannot be ignored, the Court erred as a matter of law when it held that Northern Gold authorized a transaction issuing warrants to SIFT Fixed in the absence of Northern Gold entering into a preemptive rights agreement.

CONCLUSION

For the foregoing reasons, Northern Gold respectfully requests that this Court reverse the judgment of the Court of Chancery and instruct the Court of Chancery to enter judgment holding that Northern Gold retains its 50% membership interest in the Company.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ Martin S. Lessner
Martin S. Lessner (No. 3109)
Elisabeth S. Bradley (No. 5459)
M. Paige Valeski (No. 6336)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for Appellant/Defendant and Counterclaim Plaintiff-Below Northern Gold Holdings, LLC

Dated: February 8, 2024

CERTIFICATE OF SERVICE

I, M. Paige Valeski, Esquire, hereby certify that on February 8, 2024, a copy of the foregoing document was served on the following counsel in the manner indicated below:

BY FILE & SERVEXPRESS

John D. Hendershot, Esq.
Matthew W. Murphy, Esq.
Edmond S. Kim, Esq.
RICHARDS LAYTON
& FINGER PA
One Rodney Square
920 North King Street, Suite 200
Wilmington, DE 19801

John L. Reed, Esq.
Daniel P. Klusman, Esq.
DLA PIPER LLP
1201 North Market Street, Suite 2100
Wilmington, DE 19801

/s/ M. Paige Valeski
M. Paige Valeski (No. 6336)