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Case Number 465,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF ON APPEAL

John L. Reed (I.D. No. 3023)
R. Craig Martin (I.D. No. 5032)
Daniel P. Klusman (I.D. No. 6839)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com

Attorneys for Appellees/Plaintiffs-Below REM OA Holdings, LLC and SIFT Fixed US002, LLC

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NATURE OF PROCEEDING

As this Court recently confirmed: "The courts of this State hold freedom of contract in high—some might say, reverential—regard." *Cantor Fitzgerald, L.P. v. Ainslie*, 2024 WL 315193, at *1 (Del. Jan. 29, 2024). Here, the trial court's post-trial Opinion adhered to a long-recognized rule of contact enforcement: "Delaware is a 'contractarian' state. Our law recognizes that 'parties have a right to enter into good and bad contracts' and 'enforces both.'" (Op. at 47 (citations omitted).)[1]

This appeal by Appellant/Defendant-Below Northern Gold Holdings, LLC ("Northern Gold") seeks to avoid Delaware's straightforward rules on the enforcement of binding agreements. Simply put, Northern Gold regrets executing consents authorizing a financing. It is undisputed that it did not sign under duress; rather, and equally undisputed, Northern Gold reviewed the documents with counsel for more than two weeks and negotiated them numerous times before finally signing. The trial court also found that the authorized financing was "explicitly disclosed" (Op. at 20), but because Northern Gold did not make sufficient inquiry into the details of the document it signed and the financing it authorized, it asked the trial court—and is now asking this Court—to excuse it from the consequences of its actions. Nothing in law or equity supports Northern Gold's desired outcome.

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[1] The Opinion has a Westlaw citation—*REM OA Holdings, LLC v. Northern Gold Holdings, LLC*, 2023 WL 6143042 (Del. Ch. Sept. 20, 2023)—but this Answering Brief cites to the pages of the Opinion in the form as issued by the Court of Chancery.

The important facts are not complicated. In 2020, Northern Gold (through its principal Richmond Italia) and Appellee/Plaintiff-Below REM OA Holdings, LLC ("REM OA") (through its principal Scott Soura) purchased the assets of America's oldest gun maker—the Remington Outdoor Company—out of bankruptcy and transferred those assets to Appellee/Nominal Defendant-Below REM EQ Holdings, LLC ("REM EQ" or the "Company"). By agreement between the parties, Italia handled day-to-day operations and Soura handled legal and financial matters.

Because the Company required significant additional capital to restore operations, Soura, in 2021, pursued a loan from SIFT Capital Limited Partners ("SIFT Capital"). Soura and SIFT Capital negotiated a financing commitment contemplating a $10 million loan in exchange for a promissory note and a warrant to purchase 2.5% of the Company's membership interests.

On May 14, 2021, Soura sent Italia a two-and-a-half-page Written Consent of the Members of REM EQ (the "Written Consent") (A0076-79), as well as six similar consents for REM EQ's subsidiaries. Relevant here, the "WHEREAS" clauses of the Written Consent expressly stated (and so informed Italia) that (i) "the Company has received a commitment letter with term sheet from SIFT Capital Partners Limited (the "Commitment Letter") to provide financing to the Company in the approximate amount of $10,000,000.00, subject to certain conditions and due diligence" and (ii) "the Members have reviewed the Operating Agreements, the

Sales Transactions and the Commitment Letter, and have determined it is in the best interests of the Company … to enter into the … Commitment Letter and to perform all its obligations contemplated thereby." The Written Consent authorized the Company to execute the Commitment Letter and further authorized "any Member or Officer, acting alone," to perform the Company's obligations under the Commitment Letter, including negotiating and executing additional documents as necessary. The term "Commitment Letter" is capitalized and underlined and appears eight times on the Written Consent and five times on each of the consents for the subsidiaries. (Op. at 23.) The Commitment Letter was not sent with the Written Consent, but at no time did Italia ever ask Soura for a copy of the Commitment Letter.

Under the Company's LLC Agreement, both Members' signatures were required to make the Written Consent effective (and likewise for each of the subsidiaries). Italia, on behalf of Northern Gold, could have refused to sign, could have requested additional information, or could have demanded changes to the Written Consent. The record shows that what Italia did instead was send the Written Consent to his most trusted attorney and engaged in negotiations with Soura on other aspects of the Written Consent, for *more than two weeks*. Italia then freely and voluntarily signed the Written Consent (and each of the subsidiary consents) on June 2, 2021.

As authorized by the Written Consent executed by Italia and Soura, Soura executed the Commitment Letter on behalf of the Company and negotiated ancillary documents to effectuate the loan transaction with SIFT Capital's assignee—Appellee/Plaintiff-Below SIFT Fixed US002 LLC ("SIFT Fixed")—including a warrant agreement. The loan transaction closed on February 22, 2022, with the transactional documents being executed by the Company's CFO, and the Company received the badly needed influx of capital from SIFT Fixed in exchange for the agreed-upon promissory note and warrants. Subsequently, the Members reviewed and signed yet *another* written consent circulated on February 25, 2022 that, among other things, specifically confirmed and ratified the prior Written Consent and all actions and agreements taken or executed pursuant to the Written Consent.

SIFT Fixed exercised its warrant in March 2022. It was at this time that Northern Gold, purportedly surprised to discover that it no longer held 50% of the Company, raised issues about the Company's authority to issue warrants to SIFT Fixed. On June 30, 2022, REM OA and SIFT Fixed filed this litigation seeking a declaration under 6 *Del. C.* § 18-110 that (i) the warrants were authorized, (ii) SIFT Fixed was a 2.5% member of the Company, and (iii) Northern Gold and REM OA each held 48.75% of the member interests rather than the original 50%.

In its post-trial Opinion, the trial court correctly found that "SIFT Capital's commitment to invest $10 million in the Company was explicitly disclosed to Italia" (Op. at 20) and that "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 term sheet during weeks of review and negotiation. He opted not to." (*Id*. at 3.) As is evident from the Opinion, the story was complicated by irrelevant facts and collateral attacks. Nevertheless, the outcome of this appeal is dictated by a simple rule: "Delaware law holds sophisticated parties to their contracts." (*Id.*)

On appeal, Northern Gold gives short shrift to Delaware law on contracts and argues that some unspecified considerations of equity require that Italia be excused of his voluntary action in signing the Written Consent, the subsidiary consents, and subsequent ratification on behalf of Northern Gold. This argument fails because the trial court considered, and properly rejected, Northern Gold's equitable argument that the warrants should be invalidated due to an alleged breach of fiduciary duty. Under the LLC Agreement and Delaware law, REM OA owed no fiduciary duty to Northern Gold and thus could not have committed such a breach. Moreover, REM OA properly and repeatedly disclosed the existence of the Commitment Letter, and Northern Gold chose not to ask for it, notwithstanding that it is expressly represented in the Written Consent that Italia reviewed it.

Northern Gold relies on inapposite case law in which courts overturned corporate transactions where the defendants *ambushed* the plaintiffs and effectuated schemes in such a way as to deprive the plaintiffs of their ability to protect their interests. But those cases do not apply here, because it is uncontroverted that Soura repeatedly and explicitly disclosed the existence of the Commitment Letter and the financing to Italia in every consent requesting his approval, that after receiving the Written Consent, Italia reviewed it with counsel and negotiated it with Soura for over *two weeks* before signing it voluntarily. Italia could have taken a multitude of actions—including simply requesting a copy of the Commitment Letter, demanding changes to any terms, and withholding his consent unless Soura capitulated to his demands—but he did none of those things, nor was he prevented from doing any of those things. As such, equity does not require reversal of the trial court's decision.

Northern Gold also argues that the warrants should be invalidated because the Commitment Letter mentioned preemptive rights and the parties did not enter into a preemptive rights agreement. As the trial court correctly found, however, Northern Gold expressly authorized Soura to enter into subsequent and ancillary agreements and granted him sole discretion to make any changes he deemed advantageous to the Company without further approval. Italia cannot complain that Soura did exactly that. In any event, the Warrant Agreement superseded the Commitment Letter because it covered the same subject matter and contained an integration clause, and

therefore the contemplation of preemptive rights was eliminated. Moreover, subsequent to the February 22, 2022 closing of the SIFT transaction, in another written consent dated February 25, 2022 (signed March 2, 2022), Northern Gold explicitly "approved, confirmed and ratified ... any and all actions taken by [the Company] in connection with, related to, or in furtherance of any written consent and/or written resolution," including the May 2021 Consent and "executing any agreements or otherwise entering into any transactions." (Op. at 35.) This subsequent consent acknowledged the original Written Consent, and like with the earlier Written Consent, Northern Gold was represented by counsel and actively negotiated the wording of this consent.

Simply put, none of Northern Gold's arguments alters the indisputable fact that Northern Gold authorized everything it now challenges by signing the Written Consent in 2021. It did not do so under duress, and it was not surprised or ambushed or prevented from protecting itself. The investment and the Commitment Letter were disclosed to Northern Gold no less than thirty-eight times in the May 14, 2021 Written Consent and subsidiary consents, all of which were signed by Italia, and direct reference was made to those consents in the subsequent February 25, 2022 consent. Northern Gold chose not to inquire into the details of what it was being asked to consent to and gave its consent without qualification. Delaware law enforces contracts and other binding documents, even when those binding

documents work to the detriment of those who sign them—which is questionable here given that Northern Gold and REM OA were *treated equally* in connection with a transaction that provided desperately needed capital for the Company—and Northern Gold has offered no justification to divert from that cardinal rule.

Northern Gold affirmatively states that it "does not appeal any of the *factual findings* of the trial court contained in the Opinion" (OB at 20 (emphasis in original)) and, as shown herein, the trial court committed no legal error.

Respectfully, the judgment of the trial court should be affirmed.

SUMMARY OF ARGUMENT ON APPEAL

1. DENIED. Contrary to Northern Gold's assertion, the trial court *did* consider and apply equitable principles in making its determinations. The trial court addressed and rejected Northern Gold's arguments that the Written Consent should be invalidated because of equitable concerns of deception or breach of fiduciary duty. It is undisputed that "SIFT Capital's commitment to invest $10 million in the Company was explicitly disclosed to Italia." (Op. at 20.) Nothing in law or equity suggests that a sophisticated contracting party, who has had ample opportunity to review the applicable document, consult with his attorney, and protect his interests, may be excused from the effect of the document he freely signed.

2. DENIED. The Commitment Letter does not provide that a pre-emptive rights agreement was a condition *precedent* to effectuating the loan transaction and issuing warrants to SIFT Fixed. Moreover, the Written Consent authorized Soura to negotiate and execute additional documents to effectuate the transaction, making any changes he deemed advantageous to the Company without having to obtain further approval, and both parties were treated the same. Accordingly, the Warrant Agreement supersedes the Commitment Letter.

STATEMENT OF FACTS

Like Northern Gold, REM OA and SIFT Fixed adopt the factual findings of the trial court as stated in the Opinion. (OB at 20.) For purposes of this appeal, however, a brief recitation of the facts is useful.

A. Soura and Italia Acquire Remington Out of Bankruptcy

On July 27, 2020, Remington Outdoor filed for bankruptcy. (Op. at 4.) Remington Outdoor's CEO approached Italia about submitting a bid for its assets. (*Id.*) Italia was a successful businessman who founded and sold two paintball companies. (*Id.* at 4-5.) Italia lacked the necessary funds, so he reached out to Soura, another successful businessman, about submitting a joint bid. (*Id.* at 5.)

In October 2020, an entity owned by Soura submitted the winning bid of $13 million for Remington Outdoor's firearm division assets, and the parties created REM EQ to hold the assets. (*Id.* at *3.) Italia and Soura each contributed half of the bid in exchange for equal 50-50 ownership of REM EQ. (*Id.*) Italia and Soura also agreed that "[a]ny future investment of capital or equity may dilute [Italia's] 50% ownership … proportionately." (*Id*. at 5-6; B0001.)

On March 25, 2021, the parties executed the REM EQ Limited Liability Company Agreement (the "LLC Agreement"). (Op. at 6.) Soura and Italia decided amongst themselves that Italia would be responsible for day-to-day operations and Soura would be responsible for legal and financial matters. (*Id.* at 7.)

B. The Company Requires Substantial Capital to Restart Operations

When REM EQ was formed, the Remington Outdoor firearm assets were not operational, and the Company had negative cashflow. (*Id.* at 8.) Soura and Italia estimated that the Company would require $25-40 million of additional capital to restart operations. (*Id*. at 8-9.) As per the agreement between Soura and Italia, Soura led the Company's efforts to obtain financing. (*Id*. at 9.) On January 21, 2021, Soura told Italia that he was "working on raising $25-30 m[illion]" structured "as a combination of preferred and common equity with a non-controlling stake," and Italia responded with a thumbs-up emoji. (*Id.*; B0002-3.) Soura and Italia both recognized that the Company was unlikely to have success with traditional bank loans, so a non-traditional arrangement would be necessary. (Op. at 11 & n.49.)

In March 2021, Soura approached SIFT Capital. (*Id.* at 11.) Through March and April 2021, Soura and SIFT Capital negotiated a potential transaction whereby SIFT Capital would provide a $10 million interest-only loan with a three-year maturity in exchange for a warrant to purchase 2.5% of the Company's units at a nominal exercise price. (*Id.* at 13.)

C. SIFT Capital Sends the Commitment Letter to Soura

On May 9, 2021, SIFT Capital sent Soura the Commitment Letter, which consists of a two-page cover letter, a signature page for the Company and several subsidiaries, and a five-page term sheet negotiated by Soura and SIFT Capital. (Op.

at 14-15; A0068-75.) Among other things, the Commitment Letter contemplated definitive documentation to consummate the transaction:

> Upon receipt by the undersigned [SIFT Capital] of an executed counterpart of this commitment letter, our obligation to purchase from the Company, and the Company's obligation to issue, sell and deliver to us the Notes and Warrants shall become a binding agreement between us subject to the conditions set forth herein.

(Op. at 15-16; A0069.)

Soura testified that he showed Italia the Commitment Letter and reviewed it with him during a May 10, 2021 meeting in Ilion, New York. (Op. at 17-20.) Italia testified that Soura did not show him the Commitment Letter. (*Id.* at 18-19.) Although the trial court found that "Italia's account seems (slightly) more plausible," it also found that the conflicting testimony "plays a minor role in the overall story." (*Id*. at 20.) "That is because four days later, SIFT Capital's commitment to invest $10 million in the Company was explicitly disclosed to Italia." (*Id.*)

D. <u>Italia Reviews, Deliberates, and Ultimately Signs the Written Consent</u>

On May 14, 2021, Soura sent Italia a set of documents that included the Written Consent. (*Id.*; A0076-79.) The Written Consent provided that the Members—Northern Gold and REM OA—"do hereby consent and adopt the following resolutions, which action shall have the same force and effect as if taken by affirmative vote at a duly called meeting of the Members." (A0076.) The Written Consent also noted that "Section 4.1 of the LLC Agreement permits the Members to

take actions by written consent in lieu of a meeting." (*Id.*) The Written Consent explicitly disclosed that:

> [T]he Company has received a commitment letter with term sheet from SIFT Capital Partners Limited (the "Commitment Letter") to provide financing to the Company in the approximate amount of $10,000,000.00, subject to certain conditions and due diligence.

(*Id.*) The Written Consent further provided that:

> [T]he Members [Northern Gold and REM OA] have each reviewed … the Commitment Letter, and have 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 its obligations contemplated thereby.

(A0076-77.) To that end, the Written Consent authorized:

> any Member or Officer acting alone … to execute and deliver, and to cause the Company, and to cause any subsidiary or related party, to perform its obligations under, the Commitment Letter and all documents relating thereto or contemplated thereby, with such changes as the Member or Officer, as applicable, deems in his sole discretion advantageous to the Company, all without further act, vote or approval of any Member, Officer or other person or entity.

(A0077.) The Written Consent contained signature lines for Soura on behalf of REM OA and Italia on behalf of Northern Gold. (A0078.)

Soura did not send the Commitment Letter to Italia with the Written Consent. However, as the trial court found, "[t]he May 2021 Consent referenced the Commitment Letter eight times across each of its three pages. The term

'Commitment Letter' is underlined, capitalized, and set apart in parentheses." (Op. at 23.)[2] Moreover, Italia testified that he noticed the references to the Commitment Letter in the Written Consent, formed an impression about its purpose, but "didn't pay much attention to it," and therefore never asked Soura about it. (*Id.*) Along with the Written Consent, Soura sent Italia six additional two-page written consents for each subsidiary of REM EQ, each of which referenced the Commitment Letter five times and similarly underlined, capitalized and set apart in parentheses the term "Commitment Letter."

Italia sent the Written Consent to his accountant for review, and on May 17, 2021, sent the Written Consent to Justin Vineberg of Davies Ward Phillips & Vineberg LLP, Italia's "oldest and trusted lawyer/friend." (*Id*. at 24.) Vineberg and Italia reviewed the Written Consent for *two weeks*. (*Id.*) During that time, Vineberg and Italia had multiple discussions about the documents with Soura and Company counsel, and engaged in negotiations regarding other aspects of the Written Consent unrelated to the SIFT financing transaction. (*Id.* at 24-25.) Specifically, Italia sought certain changes to an amendment to the LLC Agreement authorized by the Written Consent, and Soura agreed. (*Id.* at 25.) However, "*[t]hroughout the parties'*

[2] The trial court refers to the Written Consent as the "May 2021 Consent" to differentiate it from later consents in which Italia reaffirmed his execution of the Written Consent. (Op. at 20, 34.) Because Northern Gold uses the term "Written Consent," REM OA and SIFT Fixed have done the same for the Court's convenience.

discussions and negotiations, neither Italia nor his counsel inquired about the Commitment Letter, asked for a copy of the Commitment Letter, or proposed any changes to the May 2021 Consent." (*Id*. at 26 (emphasis added).)

Italia executed the Written Consent on June 2, 2021. (*Id.*)[3]

E. The SIFT Transaction Closes and SIFT Fixed Exercises its Warrants

Between late 2021 and early 2022, Soura and SIFT Capital negotiated definitive loan materials to effectuate the transaction, including a "Warrant Agreement," as authorized by Northern Gold in the Written Consent. (*Id.* at 29-30.) REM EQ was represented by the Kutak Rock and SIFT Capital was represented by Tarabicos, Grosso & Hoffman. On January 25, 2022, as contemplated by the Commitment Letter, SIFT Capital assigned its rights and obligations to SIFT Fixed. (*Id.* at 31.) The Company and SIFT Fixed executed the loan documents on January 31, 2022, and the transaction closed on February 22, 2022. (*Id.* at 32-34.)

Subsequent to the closing, on March 2, 2022, Italia and Soura executed another written consent dated February 25, 2022 (the "February 2022 Consent") to remedy an error in the amended LLC Agreement. (*Id.* at 34.) Among other things,

[3] In addition to the Written Consent itself, Soura sent, and Italia reviewed, *fourteen* similar consents for the Company's subsidiaries. (Op. at 21 & n.106.) Six of the subsidiary consents "similarly defined, described, and provided for the authorization of the Commitment Letter." (*Id.* at 23.) Italia did not propose any changes to the subsidiary consents and signed them with the Written Consent on June 2, 2021. (*Id.* at 26 & n.138.)

the February 2022 Consent affirmed that "any written consent and/or written resolution adopted by [Northern Gold and REM OA] (*including, without limitation, the written consent of the Members dated as of May 14, 2021*) was validly entered into." (*Id.* at 35; B0004-6 (emphasis added).) It also "approved, confirmed and ratified … any and all actions taken by [the Company] in connection with, related to, or in furtherance of any written consent and/or written resolution," including the May 2021 Written Consent and "executing any agreements or otherwise entering into any transactions." (*Id.*) Italia had Vineberg and a Delaware attorney review the February 2022 Consent, discussed revisions with Soura, and ultimately signed the revised February 2022 Consent on March 2, 2022. (*Id*. at 35-36.)[4]

On March 21, 2022, SIFT Fixed executed a Notice of Exercise with regard to its warrants. (*Id.* at 39.) On March 22, 2022, Soura updated the LLC Agreement to reflect SIFT Fixed's status as a 2.5% member of the Company. (*Id.*) On March 31, 2022, Soura explained to Italia that SIFT Fixed had exercised its warrant. (*Id.* at 39-40.) On April 4, 2022, Italia claimed "surprise" that the Company had "taken a loan from an offshore entity in Hong Kong." (*Id.* at 40; B0007.)

[4] Although Italia claims that he and his attorneys did not review the Written Consent when considering the February 2022 Consent, Northern Gold's privilege log reflected that on March 2, 2022, Italia and his attorneys had a privileged discussion about the "May 14 Subsidiary Consents." (Op. at 36 n.201.)

On April 5, 2022, Northern Gold filed a books and records action, and on June 30, 2022, REM OA and SIFT Fixed commenced this litigation, seeking a declaration under 6 *Del. C.* § 18-110 that SIFT Fixed was a 2.5% member of the Company and Northern Gold and REM OA were 48.75% members. (Op. at 40-42.) Northern Gold filed a counterclaim seeking declarations that the warrants issued to SIFT Fixed were invalid. (*Id*. at 42.) During the proceedings below, Northern Gold "raised numerous collateral attacks on the transaction ranging from invalidity to voidness," which included questioning "whether SIFT Capital is real, the relevant agreements are forged, and SIFT Fixed's representative at trial was a paid actor." (*Id.* at 2.)

The trial court issued its Opinion on September 20, 2023, holding, among other things:

> Northern Gold authorized the Commitment Letter and SIFT transaction when it signed the May 2021 Consent after weeks of review and advice from counsel. It provided further authorization through the February 2022 Consent. 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.

(*Id*. at 44.)

This appeal followed.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONSIDERED EQUITABLE PRINCIPLES WHEN HOLDING THAT NORTHERN GOLD AUTHORIZED THE SIFT TRANSACTION BY EXECUTING THE WRITTEN CONSENT

A. Question Presented

Did the trial court err in its application of equitable considerations to its holding that Northern Gold authorized the SIFT transaction by executing the Written Consent after reviewing and negotiating it with counsel for more than two weeks and never asking to see the Commitment Letter referenced multiple times in the Written Consent (and multiple more times in the subsidiary consents)? (Arguments regarding mutual mistake, fraudulent inducement, and fiduciary duty were preserved at A1658-1662; arguments regarding amorphous "equitable considerations" arguments were not preserved by Northern Gold.)

B. Scope of Review

Northern Gold correctly states that "[w]hether … an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*," (OB at 21), but fails to complete the quoted sentence, which continues, "but … 'application of those facts to the correct legal standards … are reviewed for an abuse of discretion.'" *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 95 (2021) (quotation omitted). Moreover, when an equitable determination is based on factual findings, those factual findings are reviewed for clear error. *Id.* at 96 (rejecting

argument that trial court's determination of affirmative deception was mixed question of fact and law to be reviewed *de novo*).

Accordingly, while the trial court's factual findings would be subject to review only for clear error, here, Northern Gold affirmatively states that it "does not appeal any of the *factual findings* of the trial court contained in the Opinion." (OB at 20 (emphasis in original).) Thus, the trial court's application of the unchallenged facts to the law should be reviewed for abuse of discretion.

C. Merits of Argument

1. Northern Gold Did Not Preserve This Argument and Therefore Waived It

Northern Gold's post-trial briefing did not argue that the trial court failed or refused to consider equitable considerations. (A1526-1642.) Northern Gold claims that the issue was preserved on Pages 40-44 of its post-trial brief (OB at 21), but those pages make no mention of "equitable considerations." (A1576-1579.) Rather, those pages articulate Northern Gold's arguments that the Written Consent was voidable because of mistake, fraud, or breach of fiduciary duty, each of which was expressly considered and rejected by the trial court. (Op. at 51-53.) To the extent Northern Gold is suggesting that other unspecified "equitable" principles were not considered by the trial court, that argument was not fairly presented to the trial court and has been waived. Sup. Ct. R. 8; *Gala v. Bullock*, 250 A.3d 52, 64 (Del. 2021).

2. The Trial Court Correctly Found that Northern Gold Authorized the SIFT Transaction by Signing the Written Consent, Notwithstanding Any Equitable Considerations

a. Italia Signed the Written Consent Freely and Voluntarily, After Weeks of Review and Deliberation With Counsel

As the trial court held, where a party freely and voluntarily enters into a contract, Delaware will enforce that contract against that party, good or bad. (Op. at 47 (citing *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *12 (Del. Ch. July 11, 2011) (Delaware "is more contractarian than … many other states"); *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("[P]arties have a right to enter into good and bad contracts" and Delaware "enforces both.")).) "'The presumption that the parties are bound by the language of the agreement' they signed 'applies with even greater force when the parties are sophisticated' and 'engaged in arms-length negotiations.'" (Op. at 47-48 (quoting *W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007).) The presumption is especially applicable when such parties are represented by counsel. (*Id.* at 48 (citing *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *4 (Del. Ch. Apr. 27, 2004).)

To the extent Northern Gold argues that the Written Consent is not a contract (OB at 22), such a semantic distinction fails because the Written Consent is clearly a *document* that the Members signed to memorialize their willingness to be bound

by it. *See Off. Comm. of Unsecured Creds. of Motors Liquid Co. v. JPMorgan Chase Bank, N.A.*, 103 A.3d 1010, 1015 (Del. 2014) ("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.") (emphasis added).[5] Whether the Written Consent is a typical "contract" is irrelevant because it is a binding document, which is why the trial court held that Italia authorized the SIFT transaction by signing the Written Consent. Moreover, as the trial court also noted, the LLC Agreement provides that "any written consent executed by the Members will be deemed an amendment to this Agreement to the extent necessary to effectuate the subject matter of such written consent." (Op. at 74 n.386 (quoting A0097 § 11.4).)[6]

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[5] In *JPMorgan Chase*, the document in question was a UCC-3 termination statement, and this Court certified to the Second Circuit that JPMorgan was bound by a termination statement it authorized to be filed, despite later finding an error that was inconsistent with its subjective intention in authorizing the document. 103 A.3d at 1011-12, 1015-16 ("Before a secured party authorized the filing of a termination statement, it ought to review the statement carefully and understand which security interests it is releasing and why.").

[6] LLC agreements are contracts. *See* 6 *Del. C.* § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements"); *Godden v. Franco*, 2018 WL 3998431, at *8 (Del. Ch. Aug. 21, 2018) ("When analyzing an LLC agreement, a court applies the same principles that are used when construing and interpreting other contracts"); *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 880 (Del. Ch. 2009) (same).

It is beyond cavil that the Opinion correctly states Delaware law and that Italia is a sophisticated businessman. When he received the Written Consent, he sent it to both his accountant and his attorney for review. Italia did not sign under duress, but rather spent *two weeks* discussing and negotiating the Written Consent with counsel and Soura. As the trial court found, Italia is presumptively held to his agreements. (Op. at 48.)

Italia's ignorance of the terms of the Commitment Letter does not rebut this presumption. Italia was admittedly aware that the Written Consent authorized a Commitment Letter for SIFT Fixed to provide a $10 million financing to the Company, if for no other reason than it was obvious from the face of the Written Consent, which emphasized it repeatedly. (*Id.* at 49.) As the trial court held, avoidance of a party's obligations "is not justified by 'a party's failure to read a contract' or insistence that she 'had not been informed of [its] stated terms.'" (*Id.* & n.270 (quoting *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 477 (Del. 1991) and other cases).) The fact that the Written Consent did not expressly reference the specific warrant provision is also irrelevant, because "[t]he 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." (*Id.* at

50 (quoting *McAnulla Elect. Const. Inc. v. Radius Techs., LLC*, 2010 WL 3792129, at *4 (Del. Super. Sept. 24, 2010) (emphasis added).)[7]

The trial court correctly found that Italia's failure to inquire about the Commitment Letter also defeated Northern Gold's arguments that the Written Contract should be rescinded due to mistake or fraud. (Op. at 51-53.) *See also W. Willow-Bay*, 2009 WL 3247992, at *4 n.19 ("[F]ailure to read a contract provides no defense against enforcement of its provisions where the mistake sought to be avoided is unilateral and could have been deterred by the simple, prudent act of reading the contract."); *Carrow v. Arnold*, 2006 WL 3289582, at *11 (Del. Ch. Oct. 31, 2006) (fraudulent inducement is "not available as a defense when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation"). In any event, Soura informed Italia in January 2021 that he was looking to raise funds for the Company in exchange for "a non-controlling stake," and Italia was aware that "[a]ny future investment of capital or equity may dilute [Italia's] 50% ownership percentage." (Op. at 5-6, 9.) Therefore, Italia was well

[7] The *McAnulla* case is particularly instructive here. *McAnulla* was decided on similar facts. There, a subcontract between the parties expressly stated that the plaintiff was bound by the prime contract between the defendant and the general contractor. The plaintiff argued that the terms of the prime contract were not validly incorporated into the subcontract because he was never provided a copy of the prime contract. The court rejected this argument, holding that plaintiff's failure to ask for the contract incorporated by reference did not excuse his obligations under the prime contract. 2010 WL 3792129 at *4 & nn.14-15.

aware that Soura was pursuing financing that could result in the dilution of Italia's ownership percentage.

Finally, the trial court correctly noted that "Northern Gold and REM OA *further authorized* the Commitment Letter and Loan Materials when they executed the February 2022 Consent." (Op. at 47 (emphasis added).) By signing the February 2022 Consent, Italia confirmed that the Written Consent "was validly entered into," and also "approved, confirmed, and ratified" all actions taken by the Company pursuant to the Written Consent, including "executing any agreements or otherwise entering into any transaction." (*Id.* at 35; B0004-6.) Italia's execution of the February 2022 Consent—again freely and voluntarily following review and consultation with counsel—authorizes and ratifies the Company's execution of the Commitment Letter and consummation of the SIFT transaction *even if those actions had been void or voidable*. *See* 6 *Del. C.* § 18-106(e) ("Any act or transaction that may be taken by or in respect of a limited liability company under this chapter or a limited liability company agreement, but that is void or voidable when taken, may be ratified (or the failure to comply with any requirements of the limited liability company agreement making such act or transaction void or voidable may be waived) by the members, managers or other persons whose approval would be required under the limited liability company agreement … [f]or such act or transaction to be validly taken."). In short, nothing in the record calls into question the trial court's

determination that Italia authorized the SIFT transaction by signing the Written Consent and must abide by that document.

b. The Trial Court Considered and Rejected Northern Gold's Equitable Fiduciary Duty Arguments

Contrary to Northern Gold's assertion, the trial court did apply equitable considerations and gave due consideration to Northern Gold's only equitable argument: that the Written Consent was negated by "REM OA's violation of its fiduciary duty of disclosure" concerning the Commitment Letter. (Op. at 53.) The court held that REM OA did not owe fiduciary duties to Northern Gold, and even if it did, it did not breach those duties because Northern Gold had the ability to ask for the Commitment Letter and did not do so. (*Id.* at 54 & n.291.)

As the trial court held, the LLC Agreement imposes "default fiduciary duties provided by applicable law," but otherwise disclaims fiduciary duties between the Members. (*Id.* at 53-54 & n.288 (quoting A0088 § 4.4(B) ("To the fullest extent permitted by law, the *Members*, *when acting pursuant to the authority given to them in this Agreement*, *shall not have any fiduciary duties to another Member* or any other Person bound by this Agreement") (emphasis added).) Under Delaware law, "only managing members or controllers owe fiduciary duties by default in LLCs." (*Id.* at 54 (quoting *Beach to Bay Est. Ctr. LLC v. Beach to Bay Realtors Inc.*, 2017 WL 2928033, at *5 (Del. Ch. July 10, 2017).) REM OA, as a 50% owner at the time, was not a controller. *See also Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d

1110, 1113 (Del. 1994) ("[A] shareholder owes a fiduciary duty only if it owns a majority interest in or *exercises control* over the business affairs of the corporation.") (emphasis in original).

Northern Gold claims that, "as a matter of math, a 50% member is not a 'minority,'" and argues for the first time on appeal that "REM OA is a 'controller' for purposes of owing fiduciary duties." (OB at 32.) It is true that, in a 50/50 split, either member may veto an action, but deadlock is not the same as control. That is, while REM OA may have had the ability to ***prevent*** the Company from acting in certain circumstances, it could not affirmatively cause the Company to act without Northern Gold's vote. *See In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006) ("Under our law, a controlling stockholder exists when a stockholder ... owns more than 50% of the voting power of a corporation"; and holding that deeming a non-majority holder to be a controller is only appropriate where "the controller's power is so potent that independent directors and minority stockholders cannot freely exercise their judgment, fearing retribution from the controller"); *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) ("A shareholder is a 'controlling' one if she owns more than 50% of the voting power in a corporation[.]" (citation omitted)); *Voigt v. Metcalf*, 2020 WL 614999, at *11 n.7 (Del. Ch. Feb. 10, 2020) (citing Am. L. Inst., Principles of Corporate Governance: Analysis and Recommendations §

1.10(a) (1994) (defining controlling stockholder as a person who has the power to vote more than 50% of the voting equity…)).[8]

Nothing in the record here suggests such dominance on the part of REM OA. To the contrary, Soura sought Italia's signature on written consents in May 2021 and February 2022, and discussed and agreed to changes in those documents at Italia's request.[9] Accordingly, because REM OA was neither a majority holder nor a controller, it owed no fiduciary duties of disclosure to Northern Gold.

More importantly, even if REM OA did owe fiduciary duties to Northern Gold, those duties were satisfied. The Written Consent contained multiple clear references to the Commitment Letter and the $10 million financing contemplated in the SIFT transaction, placing Northern Gold (at a minimum) on inquiry notice that,

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[8] "[A] minority blockholder is not considered to be a controlling stockholder unless it exercises 'such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control.'" *In re Morton's Restaurant Grp., Inc. S'holders Litig.*, 74 A.3d 656, 664 (Del. Ch. 2013). "[T]he Delaware Supreme Court described two scenarios in which a stockholder could be found a controller under Delaware law: where the stockholder (1) owns <u>more than</u> 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but 'exercises control over the business affairs of the corporation.'" *In re KKR Fin. Holdings LLC S'holder Litig*., 101 A.3d 980, 991 (Del. Ch. 2014) (emphasis added), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015) (quoting *Kahn v. Lynch Communication Systems, Inc*., 638 A.2d 1110, 1113 (Del. 1994)).

[9] Moreover, per their agreement, Italia was responsible for the Company's day-to-day operations and Soura was responsible for its legal and financial matters. (Op. at 7.) Such an arrangement does not suggest dominance by one member or the other.

if it wanted more information, it could have asked for the Commitment Letter. Italia saw those references to the Commitment Letter in the Written Consent, formed a mental impression about their purpose, and declined to inquire further. (Op. at 23, n.120.) Indeed, Italia could have refused to sign the Written Consent until receiving such information, but he chose not to do so. (Op. at 54 n.291 (citing *Dohmen v. Goodman*, 234 A.3d 1161, 1171 (Del. 2020) (stockholder "may refuse to [enter into transaction] until he is satisfied the [company] has given him sufficient information to evaluate the decision presented to him")).)

Northern Gold unsuccessfully attempts to distinguish *Dohmen* (OB at 32-33), but the Court in *Dohmen* cogently explained why no affirmative fiduciary duty of disclosure exists in a situation like the one presented here:

> The rule requiring calls for stockholder action to be accompanied by full and fair disclosure of all material information regarding the decision presented to the stockholders is premised on the collective action problem that stockholders, in the aggregate, are faced with when asked to vote or tender their shares. *In such a situation, it would be impractical, if not impossible, for each stockholder to ask and have answered by the corporation its own set of questions regarding the decision presented for consideration*. In the absence of a fiduciary duty by the corporation and its directors to engage in full and fair disclosure, stockholders would thus be forced to make a decision in an information vacuum. These same factors do not, however, come into play when the corporation asks a stockholder as an individual to enter into a purchase or sale. *There, the stockholder may refuse to do so until he is satisfied the corporation has given him sufficient information to evaluate the decision presented to him*.

234 A.3d at 1171 (emphasis added) (quoting *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, at *6 (Del. Ch. July 24, 2009)). The same is true here: Northern Gold (through Italia) was the only other member being asked to sign the Written Consent. Italia could have asked for the Commitment Letter or further information and could have refused to sign the Written Consent until he was satisfied. He did not.[10]

3. Equitable Principles Do Not Change The Outcome

a. Northern Gold Relies on Irrelevant and Inapplicable Case Law to Suggest Inequity

Assuming *arguendo* that the trial court somehow failed to perform as thorough a review of equitable considerations as it should have, such error would be harmless because holding Northern Gold to the contract it signed does not offend equity. Northern Gold attempts to nurture an appealable issue by relying heavily on *Adlerstein v. Wertheimer*, 2002 WL 205684 (Del. Ch. Jan. 25, 2002), *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81 (Del. 2021), and *VGS, Inc. v. Castiel*, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000) (*see, e.g.*, OB at 21, 24-26), but those cases were advanced with such little force below that the trial court did not even

[10] In any event, the relationship between Northern Gold and REM OA is governed by the LLC Agreement, and courts regularly dismiss allegations of breach of fiduciary duties where contractual relationships are present. *See, e.g.*, *Nemec v. Shrader*, 2009 WL 1204346, at *4 (Del. Ch. Apr. 30, 2009) (dismissing breach of fiduciary duty claim because relationship between shareholders and directors was "governed by contract principles"). The Delaware Limited Liability Company Act is intended "to give the maximum effect to the principle of freedom of contract." 6 *Del. C.* § 18-1101(b).

discuss them. That aside, those cases are factually dissimilar from this case in several important respects. Specifically, each of those three cases and their progeny involve situations in which defendants acted in secret to deprive plaintiffs of their ability to use their power to prevent the challenged actions from occurring. Because Italia could simply have refused to sign the Written Consent without further information, the equitable underpinnings of those cases renders them inapposite.

In *Adlerstein*, defendants conspired in secret to wrest control away from the founder and CEO by issuing new shares of super-voting preferred stock to a third party and using the newfound voting majority to remove the plaintiff as director and CEO. 2002 WL 205684 at *1. Defendants executed this scheme by concealing the proposed transaction until ambushing the plaintiff with it at a board meeting and approving the transaction over the plaintiff's objections. *Id.* at *6-7. In holding that the transaction should be reversed, the court focused on the timing because the concealment stripped the plaintiff of his ability to prevent the transaction:

> Here, the decision to keep Adlerstein in the dark about the plan to introduce the Reich proposal was significant because *Adlerstein possessed the contractual power to prevent the issuance of the Series C Preferred Stock by executing a written consent removing one or both of Wertheimer and Mencher from the board*. He may or may not have exercised this power had he been told about the plan in advance. But he was fully entitled to the opportunity to do so and the machinations of those individuals who deprived him of this opportunity were unfair and cannot be countenanced by this court.

Id. at *9 (emphasis added); *see also id.* at *10 ("The question is whether he had an *adequate opportunity* to protect his interests.") (emphasis added).

In *Bäcker*, the board removed the founder ("Alex") from his role as CEO, and Alex repeatedly and affirmatively misrepresented to the board that he supported the employee chosen to be his successor ("Grauman") and intended to vote at a board meeting to appoint Grauman. 246 A.3d at 85. Then, "[o]n the eve of the board meeting, … Alex leapt into action, devising a secret counter agenda to fire Grauman and lock-in Alex's control of the Company. Alex *caught his fellow directors by surprise at the meeting*, passing his counter agenda over objections and seizing control of the Company." *Id.* (emphasis added). This Court upheld the Court of Chancery's determination that, while Alex's actions were technically legal, his "affirmative deception" of the other directors rendered his actions invalid as a matter of equity. *Id.*

In *VGS*, two of the three directors acted in secret by written consent to merge the company into a Delaware corporation and deprive the third director and founder ("Castiel") of control, without informing Castiel of their intent to do so. 2000 WL 1277372 at *2. Moreover, one of the two other directors ("Quinn") was Castiel's designee on the board, and Castiel had authority to remove Quinn unilaterally. *Id.* The court held that the two directors had breached their duty of loyalty to Castiel, noting that "[n]otice to Castiel would have immediately resulted in Quinn's removal

from the board and a newly constituted majority which would thwart the effort to strip Castiel of control." *Id.* at *2. The Court was deeply troubled by what it referred to as "clandestine machinations." *Id*.

This line of cases is nothing even close to what happened here. In all three cases, the defendants purposely withheld notice of their schemes (and, in the case of *Bäcker*, affirmatively misrepresented his intentions) in order to deprive the plaintiffs of the ability to protect themselves from a corporate takeover. Here, by contrast, Italia had ample opportunity to protect his interests because the SIFT transaction was explicitly disclosed to him in advance and *he could have refused to sign the Written Consent at any time*. Soura could not proceed with the SIFT transaction without Italia's consent, and Italia considered the document for two weeks and vetted and negotiated it with counsel before ultimately signing it. Nor can Italia claim that Soura failed to provide notice or kept the terms of the SIFT transaction a secret. The Written Consent—a two-and-a-half-page document—contained eight references to the Commitment Letter, and the Commitment Letter plainly set forth SIFT Capital's right to a warrant, but Italia never asked Soura for a copy of the Commitment Letter.

Northern Gold fails to explain what REM OA's supposed scheme is even meant to be in this instance. Where is the deception in making multiple references to the Commitment Letter throughout the short Written Consent (eight times in the Written Consent and an additional thirty times in the six contemporaneous

subsidiary consents), allowing Italia to review the Written Consent and consult with counsel for weeks, and having numerous discussions regarding potential edits, when Italia could at any time have demanded to see the Commitment Letter or refused to sign the Written Consent? Again, those facts are nothing like the ambushes faced in *Adlerstein*, *Bäcker*, or *VGS*, and do not support Northern Gold's claim that equity should excuse Italia from the consequences of his actions and inactions.[11]

b. Neither Dilution Nor Purported "Perjury" Provides A Basis To Set Aside Italia's Voluntary Execution of the Written Consent Or Its Subsequent Ratification

Northern Gold asserts two specific reasons why (in its view) equity requires reversal—diluting a 50% member and purportedly committing "perjury" (OB at 26-31)—but neither assertion justifies Northern Gold's desired result.

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[11] Northern Gold's other cases (OB at 24-26) are even farther afield both factually and legally and provide no support for Northern Gold's claims. *See Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1264-65 (Del. 1989) (entire fairness review under a *Revlon* analysis); *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 863 (Del. 2015) (seller's third-party financial advisor aided and abetted breaches of fiduciary duty by failing to disclose interest in providing winning bidder with buy-side financing); *Eureka VIII LCC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 115 (Del. Ch. 2006) (co-owner committed multiple breaches of LLC Agreement; analysis under contract principles, not equity). Similarly, and contrary to Northern Gold's assertion that *OptimisCorp v. Waite* "reject[ed] Court of Chancery's criticism regarding the *VGS* and *Adlerstein* line of cases" (OB at 26), the Court there held that "[n]othing in our affirmance should be read as … expressing <u>*any view*</u> 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." 137 A.3d 970, 2016 WL 2585871, at *3 (Del. Apr. 25, 2016) (TABLE) (emphasis added).

Nothing prevents a 50% member from signing a contract that will dilute his ownership. Italia put Soura in charge of raising badly needed funds for the Company. No later than January 21, 2021, Italia knew that Soura was pursuing a financing transaction "as a combination of preferred and common equity with a non-controlling stake," and Italia gave a "thumbs-up." (B0002-3.) And Italia was well aware that "[a]ny future investment of capital or equity may dilute [Italia's] 50% ownership proportionately." (B0001.) He knew from the face of the Written Consent that SIFT Capital intended to make a $10,000,000 financing to the Company, and he could have seen the warrant requirement (which is not uncommon in non-bank financings) in the Commitment Letter.[12] The simple fact that the transaction diluted Northern Gold's ownership does not render the transaction inequitable. Importantly, Soura and Italia were diluted equally, for the proper purpose of obtaining badly needed capital for a company that did not qualify for traditional financing.

[12] Northern Gold cites *Daniel v. Hawkins* for the proposition that a contract to eliminate voting rights must be "clear and unambiguous" (OB at 24), but *Daniel* specifically relates to an irrevocably proxy that was deemed ambiguous and construed against the party seeking to enforce it. 289 A.3d 631, 645 (Del. 2023). The Written Consent is not ambiguous, and neither the Written Consent nor the SIFT transaction eliminated or deprived Northern Gold of any voting rights (Northern Gold was a 50% owner, not a majority controller), and Northern Gold does not allege that the Written Consent was ambiguous.

In support of its dilution argument, Northern Gold quotes from its post-trial briefing to allege that "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" (OB at 12), but neither its Opening Brief nor its post-trial briefing articulates what evidence purportedly supports this conclusory allegation. (A1577.) In any event, the trial court did not determine that Soura intentionally misled or deceived Italia, and Northern Gold expressly does not challenge the trial court's factual findings. (OB at 20.) The trial court also held that Soura explicitly disclosed SIFT Capital's commitment to invest $10 million in the Company to Italia in the Written Consent. *See Bäcker*, 246 A.3d at 96 ("At bottom, the determination of whether the conduct was deceptive was a factual one.").

Northern Gold mischaracterizes the trial court's Opinion to suggest that Soura committed "perjury" by stating that he had shown Italia the Commitment Letter at a meeting in Ilion, New York, which (in its view) somehow justifies excusing Italia's voluntary signing of the Written Consent. (OB at 28-30.) The trial court's discussions of credibility determinations, however, do not justify equitable reversal. As a threshold matter, the trial court's statement that "one of them [Soura or Italia] is lying" and that it found Italia's testimony to be "(slightly) more plausible" is a far cry from a determination of perjury (Op. at 20), let alone a conviction which requires

proof beyond a reasonable doubt, not one story being "slightly" more plausible than the other.[13]

Even assuming a false statement from Soura (made in litigation long after the transaction closed) that Italia had been provided with the Commitment Letter at a particular time and place, that would not change the fact that Italia received the Written Consent (with eight references to the Commitment Letter) and six subsidiary consents (each with five references to the Commitment Letter), reviewed and negotiated everything for over two weeks with his attorney, and signed everything freely and voluntarily without once asking for the Commitment Letter. (Op. at 20-24.) The trial court expressly held that the question of whether or not Soura provided the Commitment Letter to Italia at the time he said he provided it was irrelevant to its determination that Italia authorized the SIFT transaction by signing the Written Consent. (*Id.* at 20.)

[13] Indeed, the trial court's likening of the differences in testimony to the "Spider-Man Pointing Meme" strongly suggests that the court did not view the conflict to be material in a criminal sense. (Op. at 19 n.98; *see also id.* at 20 (noting that the conflicting stories regarding the Ilion meeting "play[] a minor role in the overall story").) Moreover, the trial court also recounted Italia's testimonial "inconsistencies," noting that his testimony repeatedly "contradicted [his] own filings" and that his testimony was anything but truthful when confronted with those inconsistencies (Op. at 40, n.224), and that recordings of Italia suggest he was orchestrating a kickback scheme involving the Company and that his denials were untruthful. (*Id*. at 37-38.)

Moreover, in signing the Written Consent, Italia affirmed in writing that "the Members [including Northern Gold] have each reviewed … the Commitment Letter." (A0076.) If Italia did not review the Commitment Letter, it was a lie to affirm that he had. Indeed, contrary to Northern Gold's insinuations, the trial court was critical of the credibility of <u>both</u> Soura <u>and</u> Italia. (*See* Op. at 4 n.4 ("Ascertaining the truth is complicated by Soura and Italia's mudslinging. … Suffice it to say that the credibility of these witnesses leaves much to be desired.").)[14]

Northern Gold's assertion that affirmance will "condone perjury as a 'minor' matter and will do damage to the trial court's reputation as a court of equity" (OB at 29) is, if not hyperbole, certainly unwarranted. Judges are frequently asked to make subjective credibility determinations between two conflicting accounts, and doing so does not render the less-believable account perjury or require an equitable reversal of otherwise determinative contract law. The case law cited by Northern Gold for this assertion relates to circumstances far more egregious than any of the facts here.

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[14] The trial court noted other aspects of Italia's testimony that appeared untruthful. (*See*, *e.g.*, Op. at 40 n.224 (noting that Italia's testimony was inconsistent with Northern Gold's court filings).) Moreover, the court noted that Northern Gold suspiciously and conveniently lost potentially valuable data because it failed to image Italia's phone until months into the litigation, and "Italia apparently dropped his phone from a helicopter in April 2022, and pre-April 2022 data was irretrievably lost." (*Id.* at *24 n.309.) Thus, Northern Gold's citation to *Matter of Sutton*, 1996 WL 659002 (Del. Super. Aug. 30, 1996) (OB at 28), is inapposite because *Sutton* granted the State's motion to compel documents from attorneys regarding a pending <u>*criminal case*</u> in which the attorneys' client was indicted for perjury. *Id.* at *1. No such facts are present here.

See In re Silver Leaf, LLC, 2005 WL 2045641, at *12-13 (Del. Ch. Aug. 18, 2005) (applying the doctrine of unclean hands to deny equitable relief where both parties were complicit in "penny stock fraud"); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 917-18 (Del. Ch. 2002) (declining to order annual meeting of shareholders where plaintiff intended to use meeting to circumvent federal law and impose reverse merger); *Shawe v. Elting*, 157 A.3d 142, 151 (Del. 2017) (imposing civil sanctions against plaintiff for deleting documents, failing to safeguard cell phone, improperly gaining access to defendants' emails, and lying multiple times under oath).

Northern Gold's arguments attempt to make this case into something it is not. Soura did not commit perjury, secretly act to dilute Italia's ownership, treat Northern Gold differently than REM OA, or lay in wait to ambush Italia with a scheme Italia otherwise would have had the ability to prevent. Rather, Soura sent Italia a Written Consent (and six subsidiary consents) disclosing the intention to enter into a transaction with SIFT Capital and expressly referencing a Commitment Letter that contained further details. Italia reviewed the Written Consent with counsel for two weeks, never requested the Commitment Letter, and ultimately signed the Written Consent (as well as each of the subsidiary consents) stating that he had received and reviewed the Commitment Letter. The trial court considered Northern Gold's legal and equitable arguments and correctly rejected them. Respectfully, this Court should do the same.

c. Undoing the Warrants Would Inequitably Harm SIFT Fixed, an Innocent and Bona Fide Purchaser

Contrary to Northern Gold's tortured view of the equities of this dispute, its desired outcome would inequitably deprive SIFT Fixed of equity that it purchased in good faith and for fair consideration. SIFT Fixed is a "bona fide purchaser," that is, "one who acquires legal title to property in good faith, for valuable consideration, and without notice of any other claim of interest in the [property]" and is thus entitled to retain that property notwithstanding Northern Gold's objections. *Fletcher v. City of Wilmington UDAG*, 905 A.2d 746 (Table), 2006 WL 2335237, at *2 (Del. 2006). "The bona fide purchaser rule exists to protect innocent purchasers of property from competing equitable interests in the property because as '[s]trong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it.'" *Id.* (quoting *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 284 F.3d 1323, 1329 (Fed. Cir. 2002).)

There is no question that SIFT Fixed relied on the authority and lawfulness of the Company's actions in executing the Warrant Agreement, including the Written Consent and subsidiary consents containing Northern Gold's representation that it reviewed and approved the Commitment Letter for the SIFT financing. (Op. at 29 n.162.) Soura's authority to bind the Company was either actual—in that Italia signed the Written Consent granting Soura such authority—or apparent. *Albert v.*

Alex. Brown Mgmt. Svcs., Inc., 2005 WL 2130607, at *10 (Del. Ch. Aug. 26, 2005) ("Apparent authority is that authority which, though not actually granted, the principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing."). Even if justification existed to void Northern Gold's execution of the Written Consent, SIFT Fixed reasonably believed that Soura and the Company's CFO had authority to act on behalf of the Company in effectuating the SIFT transaction and executing the Warrant Agreement.

There is also no question that SIFT Fixed paid valuable consideration for the warrants, in the form of the $10 million loan that was unavailable from other sources. The Company (and by extension Northern Gold) badly needed those funds and benefited from them. It would be inequitable to allow Northern Gold to benefit from SIFT Fixed's consideration but prohibit SIFT Fixed from retaining the equity for which it bargained and kept its end of the bargain. In short, equitable considerations militate in favor of enforcing Northern Gold's execution of the Written Consent and all that followed.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT DIFFERENCES BETWEEN THE COMMITMENT LETTER AND THE WARRANT AGREEMENT DO NOT RENDER THE ISSUANCE OF WARRANTS INVALID

A. Question Presented

Did the trial court err in holding that the warrants were valid notwithstanding that the Commitment Letter referenced pre-emptive rights? (Preserved at A1596.)

B. Scope of Review

Questions of contract law are subject to *de novo* review. *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022).

C. Merits of Argument

1. The Warrant Agreement Superseded the Commitment Letter

As the trial court properly found, the fact that the parties did not enter into an agreement with pre-emptive rights as mentioned in the Commitment Letter does not invalidate the subsequent issuance of warrants because the Company and SIFT Fixed entered into the subsequent Warrant Agreement, which contained an integration clause and superseded the Commitment Letter. (Op. at 66.)

By signing the Written Consent, Northern Gold authorized the Company to execute the Commitment Letter and perform its obligations under it, and authorized "any Member or Officer, acting alone," to "execute and deliver … the Commitment Letter *and all documents relating thereto* or contemplated thereby, *with such*

changes as the Member or Officer, as applicable, deems in his sole discretion advantageous to the Company, all without further act, vote or approval of any Member, Officer or other person or entity." (A0077 (emphasis added).) The Commitment Letter was expressly subject to future "[d]efinitive documentation" and "ancillary documents … to be executed prior to disbursement of proceeds." (A0073.) In other words, by freely and voluntarily signing the Written Consent, Italia authorized Soura to negotiate additional agreements to effectuate the SIFT transaction (including the Warrant Agreement) with whatever changes he deemed advantageous in his sole discretion. That is what Soura did.[15]

As the trial court held, "where a new, later contract between the parties covers the same subject matter as an earlier contract, the new contract supersedes and controls that issue, if the two agreements conflict." (Op. at 66 (quoting *Cabela's LLC v. Wellman*, 2018 WL 5309954, at *4 (Del. Ch. Oct. 26, 2018).) The Warrant Agreement contains an integration clause stating that "[t]he entire agreement of the parties hereto is herein written and the parties are not bound by any agreements, understandings, or conditions otherwise than are as expressly set forth and stipulated

[15] Again, if Italia did not want to grant Soura that broad authority or discretion, Italia had the choice not to sign the Written Consent. Soura most certainly did not exploit that authorization by treating Northern Gold differently from REM OA, and the fact that the Company needed capital and that other traditional sources of capital such as banks were unavailable to the Company has never been in dispute.

herein." (A0123.) The integration clause is evidence of the parties' intent that the Warrant Agreement supersede the Commitment Letter. (Op. at 66.)[16]

2. Northern Gold's Arguments to the Contrary Fail

The absence of a preemptive rights agreement does not render the warrants invalid.[17] Northern Gold's reliance on *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC* (OB at 38) is misplaced because the case only explains the purpose of a preemptive rights clause and does not suggest that a reference to preemptive rights in an earlier agreement invalidates a later one without such rights. 202 A.3d 482, 504 (Del. 2019). In fact, the Court in *Oxbow* analyzed a preemptive rights clause that *already existed* in the company's LLC agreement, rather than one merely referenced in a superseded term sheet. *Id.* at 492.

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[16] Nothing in the term sheet appended to the Commitment Letter suggests that the execution of "an agreement containing Co-Sale, Drag-along and Pre-emptive rights" was a *condition precedent* to issuing warrants, or that modification of any specific term would render subsequent transactions invalid. (A0071-75.) Moreover, such a reading would be inconsistent with the express language of the Written Consent authorizing "such changes as the Member or Officer, as applicable, deems in his sole discretion advantageous to the Company, all without further act, vote or approval of any Member, Officer or other person or entity."

[17] Northern Gold's argument contains a flaw. On the one hand, Northern Gold argues that the Written Consent is invalid because Italia contends that the Commitment Letter was inequitably concealed from him (it was not). On the other hand, Northern Gold argues that the Warrant Agreement is invalid because (presumably) Italia relied upon the belief that it would contain a pre-emptive rights provision when he authorized it. But Italia claims to have never seen the Commitment Letter, which contains the pre-emptive rights requirement, and thus could not have relied upon it. Northern Gold cannot have it both ways, or, indeed, either way.

Next, Northern Gold argues without support that the Warrant Agreement does not supersede the Commitment Letter. It argues that the Warrant Agreement does *not* cover the same subject matter as the earlier document because it does not contain the preemptive rights mentioned in the Commitment Letter. (OB at 40.) But Northern Gold confuses the *subject matter* of an agreement (*i.e.*, providing a $10 million loan in exchange for warrants) with the *details* of that agreement (such as a preemptive rights provision). The trial court addressed and disposed of this argument in its October 19, 2023 letter opinion denying reconsideration:

> The Motion [for Reconsideration] must also be denied because my decision was not predicated on a misapprehension of facts. The Commitment Letter and the Warrant Agreement cover the same subject matter: the $10 million transaction with SIFT to purchase a promissory note with a warrant allowing SIFT to purchase 2.5% of the Company's units at an exercise price of $0.01 per unit. 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.

REM OA Holdings, LLC v. Northern Gold Holdings, LLC, 2023 WL 6884845, at *2 (Del. Ch. Oct. 19, 2023) (the "Letter Opinion").[18]

[18] The court continued that, because the Written Consent authorized the Company to enter into further agreements with any changes deemed advantageous by Soura in his sole discretion, "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." 2023 WL 6884845, at *2.

Northern Gold calls this a "sweeping holding" (OB at 42), but it is merely what Italia agreed to by signing the Written Consent. In fact, it is Northern Gold's desired interpretation that is "sweeping." Under Northern Gold's interpretation of the term "subject matter," no agreement could ever supersede another unless it contained every single provision or detail contemplated in the earlier agreement. Such an interpretation is neither practical nor reasonable.

Northern Gold argues that it did not "expressly agree" to give up the preemptive rights provision (OB at 40), but it *did* expressly agree to authorize Soura to make any changes he deemed advantageous in his sole discretion, "without further act, vote or approval of any Member, Officer or other person or entity." (A0077.) Northern Gold was not given an opportunity to agree or disagree with a transaction without preemptive rights because it consented to remove itself from further discussions or approval with regard to the SIFT transaction documents.

Again, Northern Gold's arguments against Soura's "sole discretion" to make advantageous changes (which it describes as a "blank check" (OB at 42-44)) are of no moment because Italia agreed to give Soura that "sole discretion" by voluntarily signing the Written Consent. Specifically, its implication that Soura was required to make a "factual showing" that executing an agreement without preemptive rights was advantageous to the Company is contrary to the law. The Court in *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity*, relied upon by Northern Gold

(OB at 43), reversed a trial court's judgment on the pleadings in favor of defendants, holding that plaintiffs had made a *prima facie* showing that defendants had exercised their discretion in bad faith, and remanded to give plaintiffs the opportunity to prove their allegations. 624 A.2d 1199, 1206 (Del. 1993). The Court did not require the party exercising its discretion to make an affirmative factual showing of the reasonableness of that exercise. Northern Gold did not allege that Soura exercised his discretion in bad faith or otherwise present facts that would shift the burden to REM OA to prove reasonableness or advantageousness. To the contrary, SIFT Fixed's exercise of its warrants had the effect of diluting Northern Gold *and* REM OA equally (and treated both equally in all respects), so there can be no allegation that REM OA somehow benefited from Northern Gold's alleged misfortune.[19]

[19] To the extent Northern Gold now argues that Soura's exercise of the discretion granted to him by the Written Consent violated the implied covenant of good faith and fair dealing (OB at 44), that argument was not fairly presented in the proceeding below and is therefore waived. Even if not waived, Soura could not have acted in bad faith when exercising the discretion that Italia granted to him because Italia signed the Written Consent after two weeks of review and deliberation, Northern Gold and REM OA were treated equally, and the Company received the capital it badly needed, which was recognized by the trial court. (*See* Op. at 51, n.276); *see also Glaxo Group Limited v. DRIT LP*, 248 A.3d 911, 920 (Del. 2021) ("The implied covenant, however, is a 'cautious enterprise.' As we have reinforced on many occasions, it is 'a limited and extraordinary legal remedy' and 'not an equitable remedy for rebalancing economic interests that could have been anticipated.'") (citations omitted).

In summary, the Court should not credit any of the Northern Gold's attempts to avoid the consequences of its actions. Given the opportunity to review and negotiate a Written Consent giving Soura sole discretion to effectuate a transaction with SIFT Capital, Italia chose not to inquire further. Moreover, Northern Gold subsequently ratified the SIFT transaction in the February 25, 2022 Consent (signed on March 2, 2022). Italia may now be unhappy with the way that Soura used the authority that Italia granted him, but such dissatisfaction is not grounds for overturning the trial court's well-reasoned decision.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's judgment.

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DLA PIPER LLP (US)

/s/ John L. Reed

John L. Reed (I.D. No. 3023)
R. Craig Martin (I.D. No. 5032)
Daniel P. Klusman (I.D. No. 6839)
1201 North Market Street, Suite 2100
Wilmington, DE 19801-1147
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com

Attorneys for Appellees/Plaintiffs-Below REM OA Holdings, LLC and SIFT Fixed US002, LLC