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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AB STABLE VIII LLC, Plaintiff Below, Appellant, v. MAPS HOTELS AND RESORTS ONE LLC, MIRAE ASSET CAPITAL CO., LTD., MIRAE ASSET SECURITIES CO., LTD., MIRAE ASSET GLOBAL INVESTMENTS, CO., LTD., and MIRAE ASSET LIFE INSURANCE CO., LTD., Defendants Below, Appellees.	)	No. 71, 2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0310-JTL

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

In September 2019, MAPS Hotels and Resorts One LLC, a subsidiary of Mirae Asset Financial Group, agreed to acquire Strategic Hotels & Resorts LLC ("Strategic"), an indirect subsidiary of Anbang Insurance Group, Ltd. that owns U.S. luxury hotels.[1] There was no financing condition. The Material Adverse Effect ("MAE") provision of the Sale and Purchase Agreement ("SPA") allocated systemic risks to Mirae. Closing was conditioned on Mirae's ability to obtain title insurance for fraudulent deeds recorded on six Strategic hotels by a trademark troll and serial nuisance called "Andy Bang." Those deeds were judicially declared void by January 2020, long before closing, and expunged.

As the April 2020 closing approached, COVID-19 upended the world. With the deal suddenly less attractive, Mirae started manufacturing excuses to avoid closing. It lobbied its title insurers to deny coverage for the fraudulent deeds so the title-insurance condition would fail, even though the voided deeds posed no risk. When that effort failed, Mirae cried breach, claiming that reasonable measures taken to preserve the value of Strategic's business in the face of the pandemic breached the SPA's customary ordinary course covenant.

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[1] "Mirae" refers to Mirae Asset Financial Group and its subsidiaries; "Anbang" refers to Anbang Insurance Group, its successor Dajia Insurance Group, Ltd., and their subsidiaries, including the seller, appellant AB Stable VIII LLC.

After trial, the Court of Chancery let Mirae out of the deal. It found that Mirae bore the risk of the pandemic under the MAE provision, and that Strategic's responses to the pandemic were "warranted" and "reasonable." Nonetheless, the court ruled that these "reasonable" commercial adjustments breached the ordinary course covenant. The court also ruled that the title-insurance condition had failed—even though the insurers, against Mirae's urging, had deleted the specific exception in their commitments that excluded the voided deeds from coverage. In factual findings not necessary to those rulings, the court accused Anbang and its counsel, Gibson Dunn, of "committ[ing] fraud about fraud" by failing to tell Mirae everything they knew about nuisance litigant Bang.

There are two issues on appeal.

First: Does a seller breach an ordinary course covenant by taking reasonable, industry-standard steps to preserve its business in the face of a systemic risk allocated to the buyer by the same contract?

Second: Can Mirae rely on a purported failure of the SPA's title-insurance condition where (1) the insurers specifically declared their intent to cover the fraudulent deeds; (2) the insurance commitments, accordingly, by their terms, covered the fraudulent deeds, satisfying the condition; and (3) Mirae sought to frustrate the closing by preventing the condition from being satisfied?

The answer to both questions is no. The court's contrary rulings violate foundational principles of contract interpretation, upset settled expectations of deal practitioners, and radically expand the justifications available to remorseful buyers to undermine their own deals.

SUMMARY OF ARGUMENT

(1) Anbang did not breach its covenant that Strategic's business would be "conducted only in the ordinary course of business, consistent with past practice in all material respects." The pandemic-induced changes at Strategic's hotels were made by hotels nationwide and consistent with Strategic's responses to previous downturns, and the trial court found they were "warranted" and "reasonable responses to the pandemic." Memorandum Opinion, Exhibit A hereto ("Op.") 171. The conclusion that the changes nonetheless breached the covenant contravenes settled law and reads irrationality into the SPA.

(a)(i) A seller does not breach an ordinary course covenant by taking reasonable steps to respond to a systemic risk. Ordinary course covenants operate to prevent sellers from acting opportunistically between signing and closing—not to incapacitate them from implementing "reasonable" value-preserving measures in the face of changing commercial conditions.

(ii) The court's contrary holding pits the MAE and ordinary course provisions against one another. The court recognized that the MAE provision allocated the systemic risk of the pandemic to Mirae. The court nullified that allocation by holding that the ordinary course covenant excused Mirae from closing due to Strategic's reasonable and commercially necessary response to the pandemic.

(iii) The "consistent with past practice" language in the SPA's ordinary course covenant does not support the court's holding. That customary language does not require exclusive focus on specific past business decisions. Any such reading would read the phrase "ordinary course of business" out of the covenant and turn the "past" into a straitjacket of the future. Moreover, Strategic's actions were "consistent with" its responses to previous downturns, negating any finding of breach.

(b) Any alleged breach of the ordinary course covenant was immaterial. Fixated on Anbang's brief delay in seeking Mirae's consent (which the court's findings establish could not reasonably have been withheld), the court failed to consider whether that delay was material. Thus, contrary to precedent, the court allowed what was, at worst, a minor technical breach to derail a $5.8 billion transaction.

(2)(a) The title-insurance condition did not fail. This condition required only that the insurers commit to cover the fraudulent deeds. That requirement was satisfied. Strategic obtained judgments declaring the deeds "void *ab initio*"; the appeal periods expired; the deeds were expunged; and so the insurers "intentionally deleted" from their commitments a coverage exception for the deeds. The court's holding that a *different* exception in the commitments "encompassed" the deeds contradicts that exception's words and negates overwhelming evidence that the insurers did not intend to except the deeds from coverage.

(b) Assuming (contrary to the text of the commitments) that the title-insurance condition failed, Mirae cannot rely on that alleged failure because its own breach materially contributed to the failure. Mirae's counsel did not seek coverage for the fraudulent deeds, and instead lobbied the insurers to *deny* such coverage—admittedly to increase Mirae's leverage in seeking an extension of the closing. Had Mirae's counsel complied with his reasonable-efforts obligation, there would have been no issue about coverage for the deeds—which had been judicially voided and expunged and thus presented no risk to anybody, as Mirae and the insurers knew.

STATEMENT OF FACTS

A. The sale of Strategic

Anbang, a Chinese insurance company, acquired Strategic from Blackstone in 2016. Strategic owns fifteen U.S. luxury hotels, which are operated by third-party managers—brands such as Ritz-Carlton, Four Seasons, and JW Marriott. Op. 10-12, 25-26; A2278.

In 2018, Anbang decided to sell Strategic to reduce its international footprint. Op. 25-26, 33. Mirae, a Korean asset manager, made the high bid, $5.8 billion. A1364/22:13-24:17 (Glover). Mirae planned to seek debt financing to help finance the purchase, but its offer was not contingent on financing. A1364-66/22:13-23:4, 24:5-17, 28:6-31:6 (Glover); A2442.

Anbang and Mirae signed an exclusivity agreement on August 20, 2019. Op. 42; A2532-35.

B. The fraudulent deeds, Andy Bang, and the DRAA petition

The fraudulent deeds. Before signing the exclusivity agreement, Anbang discovered that fraudulent deeds had been recorded against six Strategic hotels in California after it was reported that Anbang was selling Strategic. A2337-39. These deeds were all signed by Daniil Belitskiy, a 26-year-old ex-con Uber driver with no connection to Anbang or Strategic. Op. 21-23; A2718-19. Anbang disclosed the deeds to Mirae on August 16—four days before entering the exclusivity agreement, and long before the SPA was signed. A2522-24.[2]

Andy Bang. The fraudulent deeds purported to convey the six hotels to entities named to sound like Strategic affiliates. Op. 21-23. In reality, the entities were fronts for an individual known as Hai Bin Zhou, a/k/a Andy Bang. Bang is a trademark troll who uses shell companies to register trademarks associated with actual companies—including Apple, WhatsApp, and Alibaba—and then sues for

[2] The trial court made many erroneous findings concerning Anbang's knowledge of this fraud, often by improperly drawing adverse inferences from privileged communications. *E.g.*, Op. 26-27, 34-35. *Contra* D.R.E. 512(a) ("No inference may be drawn" from "[t]he claim of a privilege"). These factual errors pervade the opinion. An illustrative example: The court found that Strategic's General Counsel, Tricia Needham, falsely declared to the California courts that she learned of the fraudulent deeds in August 2019. Op. 50. As reflected in the declarations the court cited for this grave accusation of a practicing attorney, Needham in fact truthfully reported when she learned of each deed—May 2019 in some cases, August 2019 in others. A6333-34, A6380, A6392-93, A6422; *see also* Op. 34, 39-40 (recognizing that Needham learned of two deeds in May and others in August). Addressing each of the many similar unsupported findings adverse to Anbang is unnecessary to resolve this appeal, and is practically impossible given space constraints and the court's 242-page opinion. These findings, while not all addressed here, are nevertheless not conceded.

infringement. Op. 12-15.[3] Bang uses this strip-mall mail-drop in Tiburon, California as the "headquarters" for several of his "companies":

A4126; *see* A3306, A3309-11; A4052-54.

Among the Bang entities implicated in this case is "World Award Foundation," which purports to count Pope John Paul II and Michael Jackson

[3] Bang also holds patents on nonexistent inventions like amphibious flying cars, which he lists for sale online. A3443; *see, e.g.*, U.S. Patent No. 9,776,715 (Oct. 3, 2017), *available at* https://bit.ly/3cICDrz.

among its “Fellows & Members.” A4053-54, A4108-09. Bang himself is shown here brandishing one of the company’s awards:

A4108; *see* A4052-53.

Anbang trademark attorneys (not involved in the Strategic deal) had been repelling Bang’s nuisance suits for years all over the world. A5242-44; A5364-65. In 2018, Anbang stopped defending its U.S. trademarks because it was reducing its U.S. operations, and those marks were canceled. Op. 17-18.

The DRAA petition. On August 5, 2019, four Bang entities including World Award Foundation (the “Bang Group”) filed a two-page petition in the Court of Chancery asking the court to order arbitration of an unspecified dispute against

Anbang under an unidentified contract that allegedly provided for arbitration under the Delaware Rapid Arbitration Act ("DRAA"). A2348-49. This was another fraud; there was no such contract or dispute.

Anbang's counsel at Gibson Dunn discovered the petition (which was never served) on August 20. A2536-55; A5249-50; A1371/49:23-50:4 (Glover). The petition did not mention the seller (AB Stable VIII LLC), Strategic, or the hotels, so Gibson and Anbang concluded it was irrelevant to the pending transaction. A1377/75:6-76:1, A1379-80/91:14-93:2 (Glover).

C. The plan to clear the fraudulent deeds

Given the deeds' obviously fraudulent character, Mirae's counsel, Greenberg Traurig, immediately recognized that the risk that Strategic "d[id] not have good title to these six properties because of the existence of the Fraudulent Deeds [was] extremely remote, at best." A3554; *see* A1403-05/643:1-651:21 (Ivanhoe).

The parties' negotiations reflected this shared (and accurate) assessment that the fraudulent deeds were a nuisance rather than a commercial risk. Mirae's title insurers had raised a specific exception for the deeds in their commitments for the six California hotels, which they would not remove until the deeds were canceled through litigation. A2556-59; A2695-703. Mirae and its lenders did not want to close until that litigation was over and the insurers provided coverage for the deeds. Op. 46-47; A2704-05; A2706-09; A2744-46. Mirae was otherwise satisfied to rely on existing protections in the then-draft SPA, primarily Anbang's representation that Strategic or its subsidiaries had "good and marketable fee title" to the hotels. A2783; *see* A2744-46; A1291/67:9-68:25 (Towbin Dep.); A1249/155:17-156:23, A1256-57/185:7-186:7 (Lonergan Dep.).

The parties thus agreed that between signing and closing, Strategic would litigate in California state court to cancel the deeds and quiet title to the six hotels. Mirae would not be required to close unless Strategic prevailed and the insurers agreed to cover the deeds. A2721-29; Op. 47-48.

D. The SPA

On September 10, 2019, the parties signed the SPA. Mirae deposited 10% of the $5.8 billion purchase price through a subsidiary created to acquire Strategic, and four other Mirae entities executed equity commitments for $2.2 billion. Op. 49; A3008-28. Mirae planned to seek debt commitments for the balance in early 2020. A3466-68; A4532; A1464/1191:3-1193:7 (Kim).

Title-Insurance Condition. The parties' agreement regarding the fraudulent deeds is reflected in Section 7.3(c) of the SPA, the "Title-Insurance Condition." It provides, as a condition to Mirae's obligation to close, that Strategic "shall have obtained" judgments that "shall result in the expungement, removal or clearing of the Fraudulent Deed[s] from the public record … and submitted same to the Title

Company for recording in a manner sufficient for the Title Company to issue" policies "either (A) without taking exception therefrom for the Fraudulent Deeds or (B) issuing affirmative insurance … providing coverage over the Fraudulent Deeds." SPA § 7.3(c); Op. 190-91.[4] "Fraudulent Deeds" is defined as the specific deeds recorded on the six California hotels pre-signing. SPA § 5.10(a); A3249-50. The SPA does not condition Mirae's obligation to close on securing title insurance for anything *other* than the contractually defined "Fraudulent Deeds."

Ordinary Course and Organizational Preservation Covenants. The "Ordinary Course Covenant" in Section 5.1 provides that, "[e]xcept as otherwise contemplated by this Agreement," or "unless the Buyer shall otherwise provide its prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed), the business of [Strategic] and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects." SPA § 5.1. Section 5.1 further provides, in the "Organizational Preservation Covenant," that Strategic and its subsidiaries shall "use their respective commercially reasonable efforts to preserve intact in all material respects their business organization and … preserve in all material

[4] Citations in the form "SPA § __" refer to the Sale and Purchase Agreement (A2898-3028).

respects the present commercial relationships with key Persons with whom they do business." *Id.*

MAE definition. Mirae's obligation to close is also conditioned on the absence of an MAE. SPA §§ 3.8(b), 7.3(a); *see* Op. 120-21. The MAE definition excludes the effects of systemic risks, including "natural disasters or calamities," "general economic, business, regulatory, political or market conditions," and "general changes or developments in any of the industries in which [Strategic] or its Subsidiaries operate." SPA § 1.1 (at A2906-07).

Reasonable efforts. Section 5.5(a), the "Reasonable-Efforts Covenant," requires both sides to use "all commercially reasonable efforts" to close "as promptly as practicable." SPA § 5.5(a). Section 7.4 bars the parties from relying on any failure of a closing condition caused by their own failure to use such efforts. SPA § 7.4.

Termination. The SPA permits Mirae to terminate the agreement if a breach by Anbang results in failure of a closing condition that is not waived by Mirae or cured within 15 days of notice. SPA § 8.1(b)(ii). It also permits Mirae to terminate if the Title-Insurance Condition was not satisfied by September 10, 2020. SPA § 8.1(c).

E. The fraudulent DRAA Litigation

After the SPA was signed, while Strategic was pursuing the quiet-title actions in California, Bang pursued the fraudulent DRAA petition in Delaware. Bang's new scheme (the "DRAA Litigation") involved trying to enforce fake arbitral awards supposedly related to the trademark disputes he had ginned up with Anbang. Op. 52-62.

First, in the Chancery action commenced in August, the Bang Group asked the court to docket a fake "default judgment" from a fake arbitration, which claimed that awards had been rendered against Anbang. The court did so, albeit with a cover sheet stating that the document did "not have any implications under the [DRAA]." Op. 53-58; A3445; A3446-58; A3950-51, A3986-87.

The Bang Group then stripped the cover sheet from the fake judgment and filed an action in Delaware Superior Court to "enforce" the judgment, claiming it had been "deemed confirmed" by the Court of Chancery. Op. 59; A3469, A3476. The Bang Group filed five more similar judgment-enforcement actions in Superior Court over the ensuing weeks. In each of these six actions, the Bang Group attached a different fake arbitral award against Anbang from a fake underlying arbitration. Op. 59-61.

These awards were ludicrous. Combined, they purported to award the Bang Group nearly a trillion dollars plus various properties and business interests, including the Strategic hotels and numerous Chinese companies totally unconnected to Anbang. Op. 61; A3696-701, A3703-07, A3709-22, A3739-53, A3755-74, A3788-807; A1396/479:6-481:17 (Li). Each award invoked a fictional "DRAA Agreement" as the basis for the Bang Group's claims. The nonsensical awards suggested that Anbang owed these vast sums solely because Bang had prevailed in the parties' U.S. trademark litigation. For example:

> **RELIEF REQUESTED**
>
> In the DRAA Statement of Claim, Claimant requested Second Award. Respondent 1 then: 1) offered ownership of twenty properties valued as USD$9,000,000,000.00 as deposit; and collateral worth USD$90,000,000,000.00 in return for cancellation of Claimant's ownership of Mark and gets 408 billion …
>
> If, however, Claimant counterclaim cancels Respondent 1's two USA ANBANG registered trademarks, then Respondent 1 is required to pay double the above proposed payment of $90,000,000,000.00; this penalty equal to a total of USD$180,000,000,000.00 (USD$180 billion) for all current and pending ANBANG marks.

A3704.

The awards were signed by eleven "arbitrators." As Anbang discovered, most had criminal histories. Three lived in the same R.V. park in California, and a fourth was the mother of one of those three. Another was a waiter at a restaurant in the strip mall where Bang's World Award Foundation had its mail-drop headquarters. A4039-40, A4044-54.

As the final step in the scheme, the Bang Group filed copies of the fake judgment and award from one of the Delaware Superior Court cases in Alameda County, California, and applied for recognition of the "sister-state judgment." A clerk granted the application on December 6, 2019. Op. 61-62; A3499; A3548.

Anbang learned of these filings only on December 11. A3580; A3605-06; A5250-52. Reacting swiftly, Anbang secured TROs in Delaware and Alameda County, prompting the Bang Group's counsel in both states to withdraw to avoid further assisting the fraud. A3659; A3820; A3823; A3827; A3844; A3847; A3848. On January 15, 2020, the Court of Chancery entered a default judgment that included an injunction against the Bang Group's "representing to any court or person that [they] hold title to any of the properties" listed in the fake awards. A3853-57. The Superior Court judgments were vacated shortly thereafter, followed by the Alameda judgment. A3862-67; A4289-92.

The DRAA Litigation fraud, which was all public, was thus reduced to a non-issue within a few weeks. A1381-82/160:13-163:17 (Glover). Anbang did not raise it with Mirae.

F. The move toward closing

Strategic also swiftly won the quiet-title actions in California. By mid-January, it had secured default judgments declaring all of the fraudulent deeds "void *ab initio* and … rescinded." A3494; A3577-78; A3597-98; A3851-52. The appeal period for the last judgment was set to expire in mid-March, so the parties began moving toward an April closing. A3894-95.

In February, counsel for Mirae's lead lender, Goldman Sachs, learned of the DRAA Litigation through a public-records search. A3868. Anbang, Mirae, and Goldman (through their counsel) had a call to discuss it. Based on that call and Greenberg Traurig's review, Mirae knew by February 21 that Andy Bang was behind both the DRAA Litigation and the fraudulent deeds; that he had a history of trademark disputes with Anbang; and that the fake arbitral awards invoked a written DRAA Agreement and purported to award the Strategic hotels to the Bang Group. A3908-4000; A4001; A4004-05; A1410-15/671:3-694:18 (Ivanhoe); A1152-61/400:6-437:22 (Ivanhoe Dep.).

Mirae understandably saw the Bang fraud as a non-issue. Mirae's lead deal lawyer, Robert Ivanhoe, told Goldman's counsel on February 23 that "there is little to no risk on our transaction from these cases." A4009. Goldman agreed. A1316-17/73:8-76:14 (Wheeler Dep.).

On February 25, the Bang Group's former counsel in the Chancery action docketed a letter from a new lawyer at DLA Piper. The letter said that DLA had been retained to evaluate the Bang Group's rights under the purported DRAA Agreement cited in the fake arbitral awards, and claimed that the DRAA Litigation might not be an "outright fraud." A6315-21. Anbang responded with a letter offering to meet with DLA "to further explain Petitioners' fraud" and revealing what it had learned about the "arbitrators." A4038-40.

DLA backtracked. On March 12, the DLA lawyer told a Greenberg litigator that DLA "had no intention of revisiting any litigation related to any properties," and that "nothing we were doing should be pointed to as a basis to delay any transaction." A4561-62. He later told Gibson Dunn the same thing: "*Nothing about [DLA's] work should be pointed to as a basis to delay any transaction. We have no role in the quiet-title proceedings or the properties at issue.*" A4563. DLA never appeared for the Bang Group.[5]

G. COVID-19 and the contraction of the credit markets

In late February, COVID-19 disrupted the financial markets. On February 27, Goldman proposed terms for a "bridge" loan to Mirae that were less favorable than the terms it had previously offered. A4033-36. Mirae's financial advisors "implore[d]" Mirae to pursue this option, calling it "the best path and maybe only path in what is the worst debt market since the Financial Crisis." A4032. The only

[5] According to the Bang Group, "at least 210 possible" attorneys declined to handle their appeals in the DRAA Litigation, due to Vice Chancellor Laster's "scary demonic tactic[s]" and "psychological warfare," amounting to "kill[ing] a chicken in front of monkeys." A1929. The Bang Group persists in collateral federal-court litigation against several players in this case, including Vice Chancellor Laster. *See* A6574-820.

possible alternative was to "wait for the market to develop," which would require "ask[ing] Anbang for more time to close." A4027.

Mirae opted for the wait-and-ask approach. On March 1, it requested a months-long extension, hoping the market would "come back." A4147. Mirae falsely claimed it had *no* financing options—that "there's nothing [Mirae] can do to get money." A4251; *see also* A4256; A4262; A4267; A4271; A4294-96. Anbang knew this was not true, and asked Mirae to proceed promptly to closing as the SPA required. A4287; *see also* A4293-95.

H. COVID-19 and the hotel industry

In early March, the World Health Organization declared COVID-19 a pandemic. A1337; A6478-79. Public officials suspended foreign entry, limited air travel, imposed quarantines, and required social distancing. A4544; A4577; A6461. The lodging industry suffered as travel diminished dramatically. A5436-37.

The third-party brands responsible for operating Strategic's hotels "implemented cost reduction initiatives" in response to declining demand, and "made adjustments to operations" intended "to safeguard the business for the future," to protect the health and safety of guests and employees, and to comply with government-imposed operational restrictions. A6329; *see also* A6325; A6451; A6454; A6322. These included "adjusting hours of operations in food and beverage," closing spas and fitness centers, "furlough[ing] staff," and carrying out the "temporary closure of hotels as required." A6329; *see also* A5428, A5435.

As it had done in response to prior market disruptions, Strategic cooperated with the brands to implement these measures. A1445/815:9-816:11, A1451/872:20-873:3 (Hogin). Two of Strategic's fifteen hotels were closed temporarily. A1446-47/821:22-824:2 (Hogin); A4569. The others remained open, but temporarily reduced staffing, expenditures, and some services, such as indoor dining. A4817-18.

Luxury hotels throughout the United States took similar steps. A5428-29, A5435; A6015-21. Mirae's own hotels furloughed and terminated hundreds of employees, closed fitness centers and spas, suspended food and beverage services, and, in one case, closed down entirely. A5303-28; A1184-90/550:11-573:24 (Ivanhoe Dep.).

Due to Strategic's prudent management through these challenges, its hotels performed in line with or better than their competitors. A5435-36, A5443, A5579; A1219/30:4-32:23 (Lesser Dep.); A1474-76/1365:9-1372:22 (Fischel); A6312-13. Strategic's hotels were also well-positioned to rebound to their historic performance levels once restrictions lifted and travel resumed. A5443.

I. Mirae schemes to avoid closing

As the pandemic worsened, Mirae looked to escape the deal. In a March 19 internal memo brainstorming ways to "defer[] or cancel[]" the transaction, Mirae suggested that recent changes at Strategic's hotels—which Mirae had "verified by making phone calls directly" to the hotels—"may be interpreted as [a] violation" of the Ordinary Course Covenant. A4494, A4500-01. The DRAA Litigation, which Mirae knew posed "little to no risk," was also floated as a possible out. A4500.

Mirae also began telling Anbang that these issues meant it was not required to close if Anbang did not grant an extension—communications Mirae's financial advisor characterized as "posturing w[ith] the seller." A4460; *see also* A4458; A4462. Mirae harped on the frivolous DRAA Litigation and stressed that the Title-Insurance Condition remained unsatisfied. A4293; A4546-56. But Mirae scarcely concealed that its threats were all about leverage: It suggested it would drop its legal objections if Anbang extended the closing until the "US market recover[ed] from the Corona virus situation" or reduced the deal price by an "excess of $2 billion." A4800-01.

Meanwhile, Mirae's counsel lobbied the insurers *not* to issue commitments that would satisfy the Title-Insurance Condition, playing up the supposed risks from the frivolous DRAA Litigation. On March 10, three weeks after learning of the litigation, Greenberg Traurig's Ivanhoe forwarded various filings to the insurers' agent, Marty Kravet. A4303-04; A4305-07. Over the ensuing weeks, Ivanhoe and his colleagues sent the insurers curated subsets of the same documents, highlighting allegations that asserted "specific claims to the assets of [the seller]" and supposedly "t[ied] [the] DRAA Agreement to the hotel[s]." A4312; A4772; A4790. Greenberg Traurig also sent the insurers highlighted versions of DLA's February 25 letter—without providing Gibson Dunn's response, and without disclosing DLA's subsequent assurances that it would not "revisit[] any litigation related to any properties." A4561-62.

As closing drew nearer, Ivanhoe grew more brazen. He communicated constantly with Kravet, exchanging some 93 text messages with him in March and April, many of which asked to speak by phone. A6434-49. On March 20, after the insurers sent a letter at Ivanhoe's request saying they were still reviewing the materials he had sent them, Ivanhoe complained to Kravet that their "benign" letter was not "more definitive in saying that you are not prepared to [issue new commitments] now." A4506; *see* A4513. On April 9, he texted Kravet that it was "[g]reat" that "the most skeptical" underwriter was involved in the insurers' decisionmaking. A4819-24.

Then, on April 10, Ivanhoe went further: He advocated directly for an exception to coverage that would prevent closing. During a phone call, the insurers asked Ivanhoe whether, in light of the DRAA Litigation, "it was more appropriate for them to leave the Fraudulent Deeds as an exception or to omit that and raise a new exception" for the DRAA Litigation. If the insurers retained an exception for the fraudulent deeds, the Title-Insurance Condition would fail. Ivanhoe urged them to do just that. He said there was a "very clear link" between the DRAA Litigation and the deeds, so the insurers should not only "raise an exception to title for the [DRAA Litigation]," but also continue to except the deeds from coverage, even though they had been "removed of record"—permanently voided and expunged. A4848-49.

At trial, Ivanhoe admitted that by advocating for *less* insurance for his client, he was trying to procure the failure of a closing condition: He wanted a "failsafe" for Mirae to avoid closing, and hoped that preventing the satisfaction of the Title-Insurance Condition "would get Anbang's attention" so "they would have a constructive discussion about an extension." A1433/764:1-725:2 (Ivanhoe); *see also* A1423/724:11-725:11, A1432/759:1-18 (Ivanhoe).

J. The removal of the fraudulent-deeds exception

But the insurers decided "not to go with the approach" Ivanhoe had suggested, and instead made the "determination … that we were omitting the fraudulent deeds as an exception." A1212-13/149:14-150:10, A1214/157:12-19 (Kravet Dep.). Because the deeds had been "expunged of record and the appeal period ha[d] ran," the deeds posed no further concern. A1216/162:23-163:15

(Kravet Dep.). On April 13, when Gibson Dunn asked the insurers to confirm this position, Kravet said they would "be issuing this afternoon amended title commitments *omitting the wild deeds as an exception to title.*" A5035; *see also* A4850; 4951.

The updated insurance commitments delivered later that day made clear that the fraudulent deeds were no longer excepted from coverage. In the commitments for the six hotels formerly affected by fraudulent deeds, the previous exception for the deeds was replaced with the phrase, "This item has been intentionally deleted." *Compare* A3342 *with* A4881; *see* A1423-24/726:1-729:20 (Ivanhoe). Added to the commitments for all fifteen hotels was a new exception for the DRAA Litigation and the fictional DRAA Agreement, which none of the parties, including Anbang, had yet seen. The new exception covered "[a]ny defect, lien, encumbrance, adverse claim, or other matter resulting from, arising out of, or disclosed by" either (1) the DRAA Agreement "and the rights, facts, and circumstances disclosed therein," or (2) the DRAA Litigation and "the rights, facts, and circumstances alleged therein." A4881; Op. 96-97. This new "DRAA Exception" was "a separate exception" that "stands on its own." A1217/216:2-23 (Kravet Dep.).

Further underscoring this point, Kravet told Ivanhoe that the new commitments "*omit[ted] the fraudulent deeds* on the six California properties and add[ed] the exception for the Delaware and Alameda litigation." A4962 (emphasis added). He later added, "[W]e wrote a 'cover email' which said: We are enclosing the updated title commitments which *omit[] the wild deeds* recorded against the six California properties and add[] an exception relating to the Delaware and Alameda litigation." A4964 (emphasis added).

On April 15, the Bang Group's former counsel finally produced the DRAA Agreement, which Gibson Dunn had been trying to obtain since December. A3829-43; A4038; A5227-30.[6] Like the arbitral "awards" that cited it, this "agreement" was a ludicrous fraud. A1384-93/194:12-230:10 (Li). Its basic premise was that Anbang would pay enormous, ever-escalating penalties to the Bang Group—hundreds of billions of dollars, plus assets including the Strategic hotels—if it did not prevail in the parties' U.S. trademark litigation by a certain date. A6272-76. The fake agreement required arbitration under the DRAA; if Anbang appealed an award, it would owe "200% to 300% of the award amount"; if it appealed again, it would owe "400% to 500% of the award amount." A6273. Among many other unhinged provisions, the document makes allegations of torture and kidnapping; asks "Where is the law and justice? Where is the law of

[6] The Court of Chancery reviewed a copy of this document *in camera* during a January 8 hearing in the DRAA Litigation, but refused to let Gibson Dunn see it at the time. Op. 71; A3996-97.

heaven?"; and contains a non-disclosure provision stating that it "may only be perused by US arbitrators and judges" to protect "relevant personnel" from "criminal liability or death penalty." A6262, A6265, A6273.

One of Mirae's central contentions in this case—through trial—was that this document might be real. *See, e.g.*, A615-16, A648-49, A666, A670-72; A1072-74.

K. Mirae's claim of breach and the ensuing action

After the insurers removed the exception for the fraudulent deeds from their commitments, Mirae realized it could not claim a failure of the Title-Insurance Condition to avoid closing. On April 14, it sent Anbang a breach notice claiming that the new DRAA Exception breached Anbang's marketable-title representation. A4979-82. It also sent an email claiming a grab-bag of breaches of representations, warranties, and covenants, including the Ordinary Course Covenant. A4983-86. On April 2, in an excess of caution, Anbang had sought Mirae's consent to the pandemic-driven changes at Strategic's hotels—which Mirae had known about since March 19 at the latest. A4757-58; p. 22, *supra*. Mirae denied consent that same day with a reservation of rights. A4756-57. Now, Mirae developed that reservation into a full-blown claim of breach.

On April 17, the scheduled closing date, Anbang sent Mirae a closing certificate, and Mirae sent Anbang a default notice. A5004-07; A5008-30. Anbang filed this action on April 27, seeking specific performance. A1; A195. On

May 3, Mirae sent a termination notice. A5045-52. At a hearing on May 8, the Court of Chancery granted Anbang's motion for expedition. A328-36.

At no point during any of this did Mirae claim a failure of the Title-Insurance Condition. That claim was invented later, as a litigating position. A408.

L. The Court of Chancery's decision

Following trial, the Court of Chancery held that Mirae had validly terminated the SPA and was entitled to the return of its deposit on two grounds: because the changes to Strategic's hotels breached the Ordinary Course Covenant, and because the DRAA Exception caused the Title-Insurance Condition to fail. Op. 149-223, 224-28.

The court agreed with Anbang that the pandemic was not an MAE because the MAE provision allocated the risk of COVID-related business changes to Mirae. Op. 119-48. But it held that Anbang nonetheless breached the Ordinary Course Covenant by implementing "warranted" and "reasonable" responses to the pandemic. Op. 161, 171-75.

Separately, the court credited Mirae's claim that the Title-Insurance Condition had failed. Although the insurers had unequivocally deleted their exception for the fraudulent deeds, the court held that the separate DRAA Exception "encompasse[d]" not just the DRAA Litigation and DRAA Agreement, but the already-expunged deeds as well. Op. 192-99. The court allowed Mirae to rely on the failure of condition even though Mirae made no effort to obtain coverage for the deeds, and even lobbied its insurers *not* to cover them. Op. 117-18, 205.

ARGUMENT

I. THE ORDINARY COURSE COVENANT WAS SATISFIED

A. Question Presented

Did the Court of Chancery err in ruling that Anbang breached the Ordinary Course Covenant? This question was raised below (A1706-11; A1892-96; A2160-70) and considered by the Court of Chancery (Op. 149-88).

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's legal conclusions in interpreting the SPA, *Alta Berkeley VI C.V.* v. *Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012), and in formulating and applying the materiality standard, *Arnold* v. *Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994).

C. Merits of Argument

The trial court framed the ordinary course question this way: "[I]f you have flooding," does an ordinary course covenant require you to act in a manner that is ordinary course "when you are in a flood, or is it ordinary course on a clear day"? A320-21/39:22-40:2. The court decided that clear-day operation was required, even in a 100-year flood. Accordingly, held the court, Strategic's operational responses to the pandemic, which the court found were "warranted" and "reasonable" and "ordinary during the pandemic," nonetheless breached the covenant. Op. 171. The court then refused to consider Anbang's demonstration that the alleged breach, even if credited, was immaterial. This interpretation of the

Ordinary Course Covenant is inconsistent with the provision's text, structure, and commercial purpose.

1. Strategic operated "in the ordinary course of business consistent with past practice"

a. The covenant did not preclude Strategic from taking reasonable, industry-standard steps in response to the pandemic

Under the Ordinary Course Covenant, Anbang agreed that Strategic would operate its business "only in the ordinary course of business consistent with past practice in all material respects." SPA § 5.1. Found in essentially every merger contract, ordinary course covenants "provide the buyer adequate assurance as to the target's maintenance of its business" between signing and closing. *Akorn, Inc.* v. *Fresenius Kabi AG*, 2018 WL 4719347, at *83 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018). They "constrain the moral hazard problem that can lead to misconduct" by the seller, *id.* at *88—"opportunistic behavior" that might be prompted by the impending sale, Robert F. Bruner, *Applied Mergers and Acquisitions* 769 (2004); *accord Anschutz Corp.* v. *Brown Robin Cap., LLC*, 2020 WL 3096744, at *11-12 (Del. Ch. June 11, 2020); Claire A. Hill et al., *Mergers & Acquisitions* 403-04 (2d ed. 2019).

Reflecting this design, ordinary course covenants have been invoked when a party to a transaction has engaged in value-destroying conduct such as financial manipulation, *e.g.*, *ChyronHego Corp.* v. *Wight*, 2018 WL 3642132, at *8 (Del.

Ch. July 31, 2018), or looting, *e.g.*, *Ivize of Milwaukee, LLC* v. *Compex Litig. Support, LLC*, 2009 WL 1111179, at *9 (Del. Ch. Apr. 27, 2009). Until the decision below, an ordinary course covenant had never been held to be breached by a transacting party's adapting its practices, consistent with industry standards, to preserve value in response to unforeseen business challenges arising between signing and closing.

To the exact contrary, as the Court of Chancery's decision in *FleetBoston Financial Corp.* v. *Advanta Corp.*, 2003 WL 240885 (Del. Ch. Jan. 22, 2003), demonstrates. The seller there, a credit-card company facing "increasingly fierce" competition for customers, engaged in an "unprecedented" strategy: offering below-cost interest rates to existing customers. *Id.* at *26. The court found no breach of the covenant because adapting in response to market conditions was part of the ordinary course of business. Thus, when the industry changed, the seller "had only one alternative: match its competitors' strategy." *Id*. As the court observed in rejecting the ordinary course claim, the contract could not reasonably be interpreted to "preclude[]" the seller from taking action necessary to "be competitive in the marketplace." *Id.*

The same analysis applies here. Responding to changes in demand, public health concerns, and newly imposed legal restrictions is part of the ordinary course of business for hotels; indeed, the trial court agreed that the measures Strategic's hotels undertook were "warranted" and "reasonable responses" to the pandemic. Op. 171; *see also* A4761 (Strategic's hotels acted "to comply with applicable laws [and] to protect the lives and safety of customers and employees and preserve the value of the assets"). Luxury hotels around the country, including ones owned by Mirae, took similar steps. A5303-28; A5429-31, A5435-38; A6015-21; A1184-90/550:11-573:2 (Ivanhoe Dep.). Strategic had taken the same kinds of steps in response to prior downturns. A1445/815:19-816:11, A1451/872:20-873:3 (Hogin); A1115/197:9-19, A1118/292:15-293:4 (Hogin Dep.). Failing to take these steps would have "affirmatively harm[ed]" Strategic's "customers, employees, and the business as a whole," leaving it less valuable upon acquisition. A6174.

Nothing in the Ordinary Course Covenant compelled Strategic to engage in such value-destroying conduct. Here again, the law is to the exact contrary: A seller's obligation is to "preserve its business under the ordinary course covenant," including by "cushion[ing] systematic risks." Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 Wm. & Mary L. Rev. 2007, 2074 (2009). The Organizational Preservation Covenant, contained in the same § 5.1 of the SPA as the Ordinary Course Covenant, reinforces this imperative. The Organizational Preservation Covenant required Anbang to "cause [Strategic] and its [s]ubsidiaries to use their respective commercially reasonable efforts to preserve intact in all material respects their business organization and to preserve in all material respects" their commercial relationships with key third-parties—like the prestigious hotel brands whose guidance Strategic followed in adjusting operations in response to the pandemic. SPA § 5.1. Yet rather than construe the Ordinary Course Covenant in harmony with the Organizational Preservation Covenant, the trial court adopted a rigid construction of the former and dismissed the latter. Op. 179-82.[7]

No precedent has ever held that a merger party forfeits its contractual rights by operating its business to preserve value in the face of external commercial challenges. The court below relied on *Cooper Tire & Rubber Co.* v. *Apollo (Mauritius) Holdings Pvt. Ltd.*, 2014 WL 5654305 (Del. Ch. Oct. 31, 2014). Op. 156-57. But *Cooper* does not require the result reached below. The seller there had an "unqualified" obligation to ensure the ordinary course operation of its subsidiaries, but was only required to use "commercially reasonable efforts" to "keep available the services of its … employees" and "maintain existing relations" with its "partners [and] suppliers." 2014 WL 5654305, at *15-16. Before closing,

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[7] Here, as elsewhere, the court deemed "waived" arguments to which, in the court's view, Anbang devoted insufficient attention. Op. 179. But Anbang cannot fairly be faulted for responding succinctly to each of the myriad excuses Mirae raised for failing to close. Mirae devoted roughly *three pages* of its 101-page pretrial brief, and only a few more in its post-trial briefs, to arguing that operational changes at Strategic's hotels breached the Ordinary Course Covenant. A1081-82, A1094-95; A1572-73, A1577-78; A1789-90, A1791-94.

employees at a Cooper subsidiary seized a plant and halted production under instructions from the seller's joint-venture partner, who wanted to interfere with the sale. The seller did not dispute that this conduct was non-ordinary-course; the only question was whether it should be analyzed under the former, unqualified covenant or the latter, efforts-qualified one. *Id.* at *16.

The court rejected the seller's argument that the efforts-qualified covenant applied, holding that the seizure could not "be fairly characterized as bearing solely on [the seller's] ability to maintain existing relations with its joint venture partner and [the subsidiary's] ability to keep available the services of employees and labor unions." *Id.* The court further observed that the seller's own actions—including cutting off payments to the subsidiary's suppliers—"while perhaps a reasonable reaction" to the seizure, showed "a conscious effort to *disrupt* [the subsidiary's] operations," not maintain them. *Id.* at *17.

The court below seized on this language to suggest that a seller breaches an ordinary course covenant by acting "reasonabl[y]" in response to "extraordinary" events. Op. 157. That issue was not presented in *Cooper*, because the seller never argued that either the seizure at its subsidiary or its own response constituted ordinary course conduct. Nor can Strategic's efforts to preserve its business in response to the pandemic be equated with the *Cooper* seller's efforts to "disrupt" its subsidiary's business in response to the seizure. The *Cooper* decision hinged critically on the fact that the seller was responsible for, and actively disrupted, its own subsidiary's operations. But when an external, industry-wide risk is involved, the principle of *FleetBoston* controls. A seller does not violate an ordinary course covenant by responding reasonably to preserve its business, consistent with its competitors and past responses to similar challenges.

b. The court's holding negates the parties' allocation of systemic risk to Mirae through the contract's MAE definition

The trial court's ruling also created needless conflict between the provisions of the SPA, and with it substantial uncertainty for M&A practitioners. As is typical, the SPA's MAE provision "allocates general market or industry risk to the buyer, and company-specific risks to the seller." *Akorn*, 2018 WL 4719347, at *49. The definition of MAE thus includes broad carve-outs for "changes in … general economic, business, regulatory, political or market conditions," "general changes or developments" in Strategic's industry, or "natural disasters or calamities." SPA § 1.1. Because these systemic risks—including the pandemic—do not qualify as MAEs, they do not excuse Mirae from closing.

The court nevertheless held that Strategic's "reasonable responses" to the pandemic *did* excuse Mirae from closing because they breached the Ordinary Course Covenant. Op. 171. The court thus interpreted the covenant as allocating to Anbang the risk that the pandemic would result in changes to Strategic's operations—negating the MAE provision's allocation of that same risk to Mirae. As a Canadian court observed in addressing substantially the same issue of merger contract law in the midst of the pandemic, any holding "us[ing] the more general ordinary course provision to, in effect, override the more specific MAE provision … would not read the contract as a whole but would read it as a series of unrelated, standalone provisions." *Fairstone Fin. Holdings Inc.* v. *Duo Bank of Can.*, 2020 ONSC 7397, ¶ 190 (Can. Ont. Super. Ct. of Justice) (A6532-33). To give effect to both the MAE provision and the covenant, the court must (as *Fairstone* did) recognize that the covenant permits reasonable, industry-standard responses to systemic risks allocated to the buyer by the MAE provision.

Cooper further underscores this point. There, the court recognized that it would be nonsensical for an event carved out of the MAE definition to be viewed as triggering breach of the ordinary course covenant—at least where, as here and in *Cooper*, the covenant's text permits the seller to take action "otherwise expressly contemplated by" the agreement. 2014 WL 5654305, at *17-19 (citing *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 57 (Del. Ch. 2001)); SPA § 5.1. In *Cooper*, that irrational result was avoided because the event at issue was not, in fact, carved out of the MAE definition. 2014 WL 5654305, at *19. Here, by contrast, the clash is unavoidable: The Ordinary Course Covenant permits Anbang to take actions "otherwise expressly contemplated by" the agreement, and the event at issue *is* carved out of the MAE definition.

c. The covenant's language is standard and does not support the court's holding

In explaining its deviation from *FleetBoston* and like authority, the court emphasized that the Ordinary Course Covenant does not include an "efforts qualifier" and refers to "past practice." Op. 160-61. But both those things are standard. Materially identical language appears in the ABA's model merger agreement and—as Mirae's expert conceded—the large majority of comparable deals. *See* Model Merger Agreement for the Acquisition of a Public Company § 4.1(a)(i) (2011); A5827 (Coates report: 70% of agreements in a representative sample contained no efforts qualifier before the "ordinary course" language and 64% referred to "past practice"); A6180 (Solomon report: 73% included either "past practices" or equivalent language).

The court found that this standard contract term must be construed as "creat[ing] a standard that looks exclusively to how the business has operated in the past." Op. 161. In announcing this rigid rule, the court appeared to contrast this case with others in which, the court recognized, it was appropriate to consider *not* just past practice, but *also* "the customary and normal routine of managing a business in the expected manner"—which can require departing from the seller's "normal practice." Op. 154-55 & n.242. But the court ignored that nearly all the caselaw it cited for the latter, more commercially flexible interpretation involved provisions with "past practice" language. *See Anschutz*, 2020 WL 3096744, at *4; *ChyronHego*, 2018 WL 3642132, at *7; *Osram Sylvania Inc.* v. *Townsend Ventures, LLC*, 2013 WL 6199554, at *3 (Del. Ch. Nov. 19, 2013).[8] As these cases reflect, a blinkered focus on consistency with "past practice" reads the phrase "ordinary course of business" out of the covenant, impermissibly rendering it "surplusage." *Osborn ex rel. Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010). This is because, under the inquiry as framed below, the meaning of the covenant would be exactly the same if it did not include the phrase "ordinary course of business" at all. Tellingly, the only decision the court cited in support of its construction interpreted a contract that did *not* have an "ordinary course" provision, but rather a clause that had *just* the "past practice" language. *See* Op. 161 (citing *Mrs. Fields Brand, Inc.* v. *Interbake Foods, LLC*, 2017 WL 2729860 (Del. Ch. June 26, 2017)).

Finally, even under the trial court's reading, there was no breach here; "consistent" does not mean "identical." *See* Consistent, *Oxford Eng. Dictionary*

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[8] Without briefing on this point, the court *sua sponte* concluded that the word "only" also justified a narrow focus on "past practice." Op. 161. This is implausible grammatically, as "only" immediately precedes "in the ordinary course of business," not "consistent with past practice." SPA § 5.1. The word "only" makes clear that the covenant imposes a mandatory obligation even though phrased in the passive voice. A1276/145:2-22 (Solomon Dep.).

(2d ed. 1989) ("congruous, compatible"). Uncontested evidence showed that Strategic's conduct was consistent with its response to prior downturns like the 2008 financial crisis, adjusting for the severity of the pandemic. A1445/815:19-816:11, A1451/872:20-873:3 (Hogin); A1115/197:9-19, A1118/292:15-293:4 (Hogin Dep.). It would have been inconsistent with past practice and commercial common sense had Strategic failed to reduce the services its hotels offered commensurate with reduced demand caused by external economic shock.

2. Any breach of the covenant was immaterial

The Ordinary Course Covenant and Section 7.3(a) of the SPA both make plain that only "material" compliance is required—that the covenant is concerned with "issues that are significant in the context of the parties' contract." *Channel Medsys., Inc.* v. *Bos. Sci. Corp.*, 2019 WL 6896462, at *17 (Del. Ch. Dec. 18, 2019).

Even if Strategic acted outside the ordinary course, the materiality principle bars the holding below. The Ordinary Course Covenant allows Strategic to take non-ordinary course actions with Mirae's "prior written consent," which "shall not be unreasonably withheld, conditioned or delayed." SPA § 5.1. This clause "provide[s] the seller flexibility to take reasonable actions that are not in the 'ordinary course.'" A6182. In mid-March, along with every other hotel operator on Earth (including Mirae), Strategic recalibrated its operations in reaction to a cresting pandemic. Because these operational adjustments were commercially necessary and industry standard, they were "ordinary course." Nevertheless, on April 2, just a few weeks into the pandemic and in an excess of caution, Anbang asked Mirae to consent to Strategic's operational responses to the pandemic. Op. 188. Mirae refused consent that same day and continued refusing consent thereafter.

It was "unreasonable" for Mirae "to withhold consent" where Strategic's actions were "common to those that businesses around the world had taken" and "similar to the steps [Mirae] had taken." *Fairstone*, 2020 ONSC 7397, ¶¶ 296-303 (A6550-51). Indeed, given the court's finding that Strategic's operational adjustments were "reasonable" and "warranted," Op. 171, Mirae cannot now argue that withholding its consent was anything but "unreasonable." Thus, the only ordinary course breach Mirae can complain of is that Anbang did not seek consent for operational adjustments in response to the pandemic in the last two weeks of March 2020.

The harm to Mirae from this alleged breach was less than immaterial; it was non-existent. Mirae knew about the main pre-April 2 changes as early as March 19 but raised no contemporaneous objection. A4494-95, A4501; *see Fitzgerald* v. *Cantor*, 1999 WL 182571, at *2 (Del. Ch. Mar. 23, 1999). And Anbang's request for consent on April 2, in circumstances where consent could not reasonably be withheld, cured whatever breach may have occurred in the 15 days preceding the request, foreclosing termination. *See* SPA § 8.1(b)(ii)(B).

Anbang argued the materiality point below, but the court never addressed it. *See* A1896 & n.34; A2168-70. The court chose instead to decide whether Mirae's consent "should be deemed given," Op. 187, an argument Anbang never made. The court thus allowed Mirae to skip out on a $5.8 billion deal because of, at most, a foot fault—Anbang's two-week delay at the onset of a global crisis requesting consent it didn't think was necessary, for operational changes that had to be made, in circumstances where consent couldn't reasonably be refused, all of which caused Mirae zero harm. This is just the kind of "nitpicky" complaint that the Court of Chancery has elsewhere assured M&A practitioners will not give rise to a walk right. *Akorn*, 2018 WL 4719347, at *85.[9]

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[9] Highlighting the analytical inconsistency of its ruling, the court relied in substantial part on adjustments Strategic made after April 2—after consent had been sought and unreasonably refused, and in many instances after Mirae had repudiated the agreement. *See* Op. 171-72 ("lengthening normal seasonal closure" by postponing planned reopening from May to June); Op. 172 (employees "laid-off or furloughed" as of April 30) (citing A5742); Op. 173 (April and May marketing expenses; "major material changes" made "by April 23"). Further consent requests under these circumstances plainly would have been futile. Thus, even accepting its inaccurate assertion that Anbang relied on a "Buyer-would-have-been-obligated-to-consent theory," Op. 187, the court should have excluded these post-consent-request adjustments when it evaluated whether Anbang materially breached the covenant.

II. THE TITLE-INSURANCE CONDITION WAS SATISFIED

A. Questions Presented

Did the Court of Chancery err in ruling (1) that the Title-Insurance Condition failed and (2) that Mirae was entitled to rely on that failure to avoid closing and terminate the SPA? These questions were raised below (A1712-19; A1873-80; A2202-13) and considered by the Court of Chancery (Op. 189-223).

B. Scope of Review

This Court reviews questions of law and contract interpretation *de novo* and factual findings for clear error. *CompoSecure, LLC* v. *CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018).

C. Merits of Argument

The Title-Insurance Condition was added to protect Mirae against title risk from the fraudulent deeds. After the parties signed the SPA, that risk vanished: Strategic obtained judgments declaring the deeds "void *ab initio*," the appeal periods expired, and the deeds were expunged. The insurers, accordingly, removed the "exception … for the Fraudulent Deeds" from their commitments, satisfying the condition. SPA § 7.3(c).

Yet the court held that the condition failed because the DRAA Exception—which did not mention the deeds but rather covered the fraudulent DRAA Agreement and the frivolous DRAA Litigation—also "encompass[ed]" the deeds.

Op. 193. That holding is inconsistent with the words of the exception; construes the exception exceedingly broadly when the law requires a narrow construction; and disregards incontrovertible evidence that the insurers did not intend for the exception to extend to the deeds. Moreover, even if the Title-Insurance Condition had failed, Mirae was barred from invoking that failure to escape the SPA because its own breach materially contributed to it.

1. There was no "exception … for the Fraudulent Deeds" in the title commitments

As relevant here, the Title-Insurance Condition turns on a simple question: Did the title insurers' commitments take "exception … for the Fraudulent Deeds"? SPA § 7.3(c).

That question is governed by California law,[10] which requires courts to "give effect to the parties' mutual intentions." *Montrose Chem. Corp.* v. *Superior Court*, 460 P.3d 1201, 1210 (Cal. 2020); *accord Salamone* v. *Gorman*, 106 A.3d 354, 368 (Del. 2014). "If the terms are ambiguous"—*i.e.*, "susceptible of more than one reasonable interpretation"—courts enforce the "objectively reasonable expectations of the insured." *Montrose*, 460 P.3d at 1210. Exceptions in title

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[10] The commitment merges into the policy upon the latter's issuance, *see* J. Bushnell Nielsen, *Title & Escrow Claims Guide* § 6.2 (2020 ed.), and the policy chooses the law of the state where the property is located, *see* A2285—here, California. Delaware law is in accord.

insurance policies, like other "exclusions from coverage, are interpreted narrowly against the insurer." *Minkler* v. *Safeco Ins. Co. of Am.*, 232 P.3d 612, 616 (Cal. 2010); *accord Pioneer Nat'l Title Ins. Co.* v. *Child, Inc.*, 401 A.2d 68, 70 (Del. 1979) (title insurance policies are "liberally construed in favor of the insured and strictly construed against the insurer"); *see* 11A Steven Plitt et al., *Couch on Insurance* § 159:4 (2020 ed.).

Faithful application of the applicable rules of construction compels the conclusion that the insurers' updated commitments did not take "exception … for the Fraudulent Deeds." SPA § 7.3(c).

a. The plain language of the DRAA Exception does not "encompass" the fraudulent deeds

The insurers' updated commitments purposely and on their face omitted any exception for the fraudulent deeds. They included instead the DRAA Exception, which was limited to "[a]ny defect, lien, encumbrance, adverse claim, or other matter resulting from, arising out of, or disclosed by" either (1) the DRAA Agreement "and the rights, facts, and circumstances disclosed therein," or (2) the DRAA Litigation and "the rights, facts, and circumstances alleged therein." A4866; Op. 96-97.

The question is whether the DRAA Exception excepts the fraudulent deeds from coverage as a matter of insurance policy interpretation. The answer is no, on multiple grounds:

(1) The deeds are not a "defect, lien, encumbrance, adverse claim, or other matter." The deeds were declared "void *ab initio*" pursuant to non-appealable judgments and expunged before the commitments issued. Op. 7, 192; A1216/162:3-163:6 (Kravet Dep.). They were "absolute nullit[ies]" incapable of affecting title. Void, *Black's Law Dictionary* (11th ed. 2019). As a result, the deeds were not a "defect, lien, encumbrance, [or] adverse claim."

The trial court held, however, that the fraudulent deeds were an "other matter" within the meaning of the commitments. According to the court, "other matter" means "anything." Op. 193. This was error. Under the principle of *ejusdem generis*, "where general words follow a specific enumeration, [they] should not be construed in their broadest sense but should be read as applying to the same general class of things as the specifically enumerated things." *Martin Marietta Corp.* v. *Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113, 1126-27 (1995); *see* 5 *Corbin on Contracts* § 24.28 (2020 ed.). Accordingly, "other matter" should be interpreted, like the terms preceding it, to refer to presently existing property interests that pose a risk to title, and thus as not extending to the deeds. A5391-92. The court's interpretation impermissibly deprives the words "defect, lien, encumbrance, [and] adverse claim" of any meaning—if "other matter" means "anything at all," then the enumerated matters preceding it could be deleted from the contract with no interpretive effect. *See Harris* v. *Cap. Growth Inv'rs XIV*, 805 P.2d 873, 882 (Cal. 1991).

(2) Even if the deeds were an "other matter," they did not "result[] from" or "aris[e] out of," nor were they "disclosed by," the DRAA Agreement or the "rights, facts, and circumstances disclosed therein." The terms "arising out of" and "resulting from" "requir[e] some causal relation or connection." 7 Steven Plitt et al., *Couch on Insurance* § 101:52; *see, e.g.*, *Mosley* v. *Pac. Specialty Ins. Co.*, 49 Cal. App. 5th 417, 424 (2020) ("resulting from" means "originat[ing], grow[ing] or flow[ing] from"); *Pac. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256 & n.42 (Del. 2008). Because the DRAA Agreement and the deeds were fictional, such a causal connection was necessarily lacking. Indeed, the agreement appears to have been created *after* the deeds—it was drafted to fit "events that had already occurred," Op. 19-21 & nn.36-37, and the Bang Group's attorneys could not agree on its date, *see* A5060, A5086, A5089. Nor does the agreement mention the deeds, so it could not have "disclosed" them.

Similarly, the deeds did not "result[] from" or "aris[e] out of," nor were they "disclosed by," the DRAA Litigation or the "rights, facts, and circumstances alleged therein." The deeds could not result from or arise out of the DRAA Litigation, which was filed after the fraudulent deeds were recorded. And again, because both the deeds and the "rights, facts, and circumstances alleged in" the

DRAA Litigation were fictional, the deeds could not have resulted from or arisen out of those rights, facts, and circumstances.

Nor were the fraudulent deeds "disclosed by" the DRAA Litigation, as the court held. Op. 194-96. The deeds were publicly recorded in 2018, and the insurers knew about them before they were mentioned in the actions. *See* p. 11, *supra*. The litigation did not "make [the deeds] known or public," "show [them] after a period … of being unknown," or "reveal" them. Disclose, *Black's Law Dictionary* (11th ed. 2019).

Rather than give the phrase "disclosed by" its dictionary definition, the court equated it with "referenced in"—a phrase that does not appear in the exception—and held that anything anyone *mentioned* throughout the DRAA Litigation fell within the DRAA Exception. Op. 194-96. As it did with "other matter," the court thus gave the phrase "disclosed by" its broadest possible meaning. This was legal error. Exceptions to insurance must be interpreted narrowly, in favor of coverage. *Minkler*, 232 P.3d at 617; *White* v. *W. Title Ins. Co.*, 710 P.2d 309, 313 (Cal. 1985); *see also* Nielsen, *Title & Escrow Claims Guide* § 12.7.3 ("[C]ourts ordinarily limit poorly worded exceptions to their most narrow reasonable construction."). The court ignored this principle, and instead rested its interpretation on the testimony of incompetent witnesses: Ivanhoe, who had no special insight into the meaning of "disclosed," and the parties' experts, who were unqualified to opine on policy interpretation. Op. 194-95, 197; *see United Rentals, Inc.* v. *RAM Holdings, Inc.*, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007).

b. The court gave the DRAA Exception an interpretation that the insurers did not intend

Confirming the error, the court's maximalist interpretation fails to "give effect to the parties' mutual intentions." *Montrose*, 460 P.3d at 1210; *see Salamone*, 106 A.3d at 368. In fact, the result below is directly contrary to the insurers' unmistakable and clearly expressed intentions. Early versions of the commitments for the California hotels included an explicit exception for the fraudulent deeds. After the deeds were declared "void *ab initio*" and expunged, the insurers replaced that exception with this phrase—"***This item has been intentionally deleted***"—and added a different exception that does not mention the deeds. P. 25, *supra* (emphasis added). This is unmistakable evidence that the insurers did not intend to except the fraudulent deeds from coverage.

Any remaining doubt on that score is dispelled by the testimony of Kravet, the insurance representative and only relevant eyewitness. He testified that the insurers made a "***final determination … that we were omitting the fraudulent deeds as an exception to the title reports on the six California properties***." A1213/150:30-10 (Kravet Dep.) (emphasis added). "[T]hese deeds were expunged of record and the appeal period has ran. Therefore we can omit them." A1216/163:2-4 (Kravet Dep.). Confirming this testimony, Kravet told Ivanhoe that the updated commitments "omit[ted] the fraudulent deeds on the six California properties," A4962; told Gibson Dunn that the commitments "omitt[ed] the wild deeds as an exception to title," A5035; and included the same language in the covering note attaching the updated commitments, A4964; *see also* A4951; A4955.

The court refused to consider all this evidence because of language in the commitments that it said "functions like a powerful integration clause." Op. 198-99. But integration clauses do not bar courts from considering extrinsic evidence of intent, including drafting history, when determining what a contract's words mean. *See, e.g.*, 5 *Corbin on Contracts* § 24.12 ("The Distinction Between Integrated and Unintegrated Contracts Is Relevant Not to Interpretation But to Application of The Parol Evidence Rule"); *Pac. Gas & Elec. Co.* v. *G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (Cal. 1968) ("Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined"). And governing California law instructs courts to consider evidence of the parties' intent to determine which interpretations are reasonable in the first place. *Dore* v. *Arnold Worldwide, Inc.*, 139 P.3d 56, 60 (Cal. 2006); *Pac. Gas*, 442 P.2d at 644.

Applying these principles, the court should have asked whether—taking into account the evidence that the insurers did not intend to except the deeds from coverage—the DRAA Exception could reasonably be interpreted as *not* "encompassing" the fraudulent deeds. As demonstrated above, the answer is yes. Accordingly, the court should have adopted that interpretation, which effectuates the insurers' manifest intentions; accords with the principle that exceptions from coverage should be construed narrowly, not broadly; and gives effect to the text of the commitments. Its failure to do so was legal error.

2. Mirae cannot rely on a claimed failure of the condition that resulted from its own breach

In breach of its obligation to use "all commercially reasonable efforts" to achieve the closing "as promptly as practicable," SPA § 5.5(a), Mirae failed to take reasonable steps to obtain insurance for the fraudulent deeds, and caused its lawyer Ivanhoe to lobby the insurers to include exceptions in their commitments. This breach gave rise to the exception that Mirae invoked to escape the merger. "Where a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." *WaveDivision Holdings, LLC* v. *Millennium Digital Media Sys., LLC*, 2010 WL 3706624, at *14 (Del. Ch. Sept. 17, 2010). Accordingly, Mirae should not have been permitted to invoke the non-satisfaction of the Title-Insurance Condition to avoid its obligations under the SPA.

a. Ivanhoe's communications with the title insurers breached Mirae's Reasonable-Efforts Covenant

Section 5.5(a) required Mirae "to take all reasonable steps to solve problems and consummate the transaction," including by securing commitments that provided coverage for the fraudulent deeds so the Title-Insurance Condition would be satisfied. *Williams Cos.* v. *Energy Transfer Equity, L.P.*, 159 A.3d 264, 272 (Del. 2017). Ivanhoe did the opposite. As it became clear that Anbang would not agree to extend the closing on Mirae's terms, Ivanhoe urged the insurers *not* to issue updated commitments that would satisfy the Title-Insurance Condition. As the insurers considered which exceptions to include, Ivanhoe lobbied them furiously, advancing "negative assessment[s]" of the insurance risks and claiming a "clear link" between the DRAA Litigation and the fraudulent deeds. Op. 214, 217; A4848. This campaign culminated in a call on which Ivanhoe expressly urged the insurers not only to "raise an exception … for the [DRAA Litigation]" but also to except the deeds from coverage—even though they had been "removed of record"—knowing the latter would cause the Title-Insurance Condition to fail. A4848-49.

There is no need to guess about Ivanhoe's intentions. He admitted that his objective was not to consummate the transaction "as promptly as practicable," SPA § 5.5(a), but rather to create leverage that would force Anbang to "have a constructive discussion about an extension." A1433/764:1-725:2 (Ivanhoe); *see* *also* A1432/759:1-18 (Ivanhoe). Ivanhoe's words thus confirm what his actions demonstrate: He was working not to "solve problems" with respect to the Title-Insurance Condition, but to create them, *Williams*, 159 A.3d at 272; he was working to make satisfaction of the condition "less likely," not more likely as the law requires, *WaveDivision*, 2010 WL 3706624, at *18.

b. The court's defense of Ivanhoe's conduct does not withstand scrutiny

The court nonetheless held that Ivanhoe did not breach the covenant. Op. 210-20. The court interpreted Ivanhoe's admissions to mean that he "did not want [Anbang] to be able to force [Mirae] to close" unless Mirae had insurance for the DRAA Litigation. Op. 214-16. The court then explained that, in emphasizing risks and advocating for *exceptions* from coverage, Ivanhoe was actually, somehow, trying to *obtain* coverage for that litigation. Op. 217-20. According to the court, Ivanhoe was engaged in a reasonable pursuit of insurance to protect his client: either he would get coverage for the DRAA Litigation and the deal would close, or he would not, and the deal would fail. Op. 214.

This analysis ignores that Ivanhoe had both motive—the confessed intention to create obstacles to closing to use as leverage against Anbang—and opportunity—an endless stream of backchannel communications—to influence the insurers to trip the condition. It also ignores incontrovertible evidence that Ivanhoe directly lobbied the insurers to except the fraudulent deeds from coverage and force-fed them evidence designed to influence them not to provide condition-satisfying coverage. The court's refusal to find a reasonable-efforts breach in these circumstances is inexplicable.

But leave all that to the side. Even accepting the court's findings, its analysis was premised on a fundamental legal error. Ivanhoe was *not* entitled to prioritize Mirae's interest in obtaining insurance coverage for the DRAA Litigation—which was not a closing condition—over the consummation of the transaction. *See Hexion Specialty Chems., Inc.* v. *Huntsman Corp.*, 965 A.2d 715, 755 (Del. Ch. 2008). His obligation instead was to work to satisfy the Title-Insurance Condition by securing commitments that covered the fraudulent deeds, regardless of whether they covered the DRAA Litigation. By ruling that Mirae could hold the deal hostage to seek protection it did not bargain for, the court rewrote the SPA.

This legal error infected the court's entire analysis. The court went to great lengths to explain why Ivanhoe's behavior was designed to obtain coverage for the DRAA Litigation. Op. 217-20. But even crediting that dubious finding, it makes no difference. The relevant question under the Reasonable-Efforts Covenant is whether Ivanhoe made all reasonable efforts to obtain coverage for the *fraudulent deeds* so the Title-Insurance Condition would be satisfied and the deal could close. *See Williams*, 159 A.3d at 273. The answer is no. Regardless of what Ivanhoe may have felt he needed to tell the insurers about the DRAA Litigation, he was contractually obligated to tell them that the risk from the *deeds* had been eliminated (which was indisputably true), and that they should not except the deeds from coverage. Ivanhoe was also obligated to seek to narrow or clarify the DRAA Exception after the insurers raised it to ensure it could not be misread to "encompass[]" the deeds—to ensure that it did not present an obstacle to closing—because that is what reasonable efforts means. *See id.* His failure to take those "virtually costless" steps was breach. *Hexion*, 965 A.2d at 755.

To justify Ivanhoe's campaign to limit coverage, the court invoked the knowledge-of-the-insured doctrine, which allows insurers to deny coverage for matters "not recorded in the public records" and known to the insured but "not known to the insurer." Nielsen, *Title & Escrow Claims Guide* § 11.3; *see* A2283 (exclusion 3(b)). The court said this doctrine required Ivanhoe to offer his purported "negative assessment of the risk" from the DRAA Litigation if he wanted to obtain coverage for it. Op. 217-19.

This conclusion is flat wrong legally—California law expressly provides that an insured need not disclose its "own judgment upon the matters in question," Cal. Ins. Code § 339—but, more important, it is irrelevant. That is because, no matter how interpreted, the doctrine posed no obstacle to Ivanhoe's obligation to advocate for coverage for the *fraudulent deeds*. The doctrine did not even apply to the deeds, which were "known to the insurer[s]." Nor could Ivanhoe conceivably have hazarded a "negative assessment of the risk" from the deeds, which by that point had been permanently voided and expunged. By conflating Mirae's obligation to seek coverage for the fraudulent deeds with its (purported) desire for protection against the DRAA Litigation, the court permitted Mirae to advocate against a condition that it was contractually obligated to take all reasonable steps to satisfy.

The court also said that Ivanhoe was not actually trying to limit Mirae's insurance coverage by advocating for exceptions—which would be "illogical" unless he was "trying to tank the deal." Op. 218-19. Instead, the court said, Ivanhoe wanted the insurers to raise exceptions and then provide coverage for the excepted risks "through an endorsement." *Id.* The court did not cite any evidence supporting its finding that Ivanhoe advocated for an endorsement; there is none. Ivanhoe did *not* advise the insurers to issue an endorsement; he advised them to retain an exception for the fraudulent deeds that would cause the Title-Insurance Condition to fail, and stopped there. A4848-49. Nor is there anything "illogical" in all this: By his own admission Ivanhoe *was* "trying to tank the deal."

Even with these errors stacking the deck in Mirae's favor, the court still found it a close question whether Ivanhoe breached the Reasonable-Efforts Covenant. Op. 216. To break the tie, the court made one last error: It mischaracterized supposedly "dispositive" testimony from Anbang's title expert, Norman Chernin. Op. 216-17. Contrary to the court's assertions, Chernin never testified that the knowledge-of-the-insured doctrine justified Ivanhoe's conduct. He said that Ivanhoe "fulfilled [Mirae]'s obligations" under the doctrine. Op. 218. But that was never in dispute; the question was whether he went *beyond* those obligations in a way that breached the SPA. Chernin never testified that Ivanhoe was "obligated to provide … negative assessments," as the court claimed, Op. 219—that testimony did not happen. Nor did Chernin ever testify that Ivanhoe was required to tell the insurers to except the fraudulent deeds from coverage. To the contrary, both Chernin and Anbang's other title expert made clear that doing so was improper. *See* A5987 (Chernin rebuttal report: "[I]t is highly unusual for counsel of a motivated buyer to advise a title insurer to include an exception."); A6063 (Mertens rebuttal report: "*[E]ncouraging* the Title Insurers to include exceptions … is inconsistent with a transaction involving a buyer that is willing to close."); A1274/274:23-276:16 (Mertens Dep.) (same). The court ignored this evidence. Its statement that there was a "consensus among the experts" cannot be credited. Op. 219.

c. Mirae's breach contributed materially to the claimed failure of the condition

"[O]nce a breach of a covenant is established, the burden is on the breaching party to show that the breach did not materially contribute to the failure of the transaction." *Williams*, 159 A.3d at 273. This requires showing that "the condition would not have occurred regardless of the lack of cooperation." Restatement (Second) of Contracts § 245 cmt. b; *see WaveDivision*, 2010 WL 3706624, at *15 n.113. Mirae therefore bore the burden to establish that the insurers would have excepted the fraudulent deeds even if Ivanhoe made reasonable efforts to get the deeds covered.

Mirae presented no evidence that could satisfy that burden, nor could it have. Given the overwhelming evidence that the insurers did not intend to except the deeds from coverage, all Ivanhoe had to do to ensure the satisfaction of the condition was ask the insurers to clarify that the DRAA Exception did not encompass the deeds, and they would have done so.

Yet the court never even inquired whether Mirae proved that the insurers would have refused to carve the fraudulent deeds out of the DRAA Exception had Ivanhoe asked. Instead, the court invented a new causation rule and applied it to the wrong question.

First, the court held that "the parties agreed contractually to modify the 'contributed materially' rule by substituting a requirement of causation." Op. 119. It located this purported modification in SPA § 7.4, which bars the parties from relying on a condition failure "caused by" their own breach of the Reasonable-Efforts Covenant. According to the court, the words "caused by" not only altered the default contributed-materially standard, but also shifted the burden to Anbang.

See Op. 118-19 ("[Anbang] bore the burden of proving that [Mirae]'s breach caused the Title Insurance Condition to fail.").

The court came up with this argument on its own; Mirae did not make it. It was unfair for the court to raise the argument *sua sponte* after all briefing, and, respectfully, it lacks merit. The word "caused" has many meanings. The contributed-materially rule is another name for substantial-factor causation, which asks whether the defendant's conduct "was a material element and a substantial factor in" bringing about a result. *Culver* v. *Bennett*, 588 A.2d 1094, 1097 (Del. 1991); *see, e.g.*, *Pac. Shores Props., LLC* v. *City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013); *Birnie* v. *Elec. Boat Corp.*, 953 A.2d 28, 41 (Conn. 2008). The words "caused by" do not modify the contributed-materially rule, much less shift the burden of proof.

That alone is grounds to reverse on this point. But the court then applied its new causation test to the wrong question: It assumed the DRAA Exception's language was unchangeable, asked whether Ivanhoe's breach caused the insurers to raise that exception, and answered no because they were concerned about the DRAA Agreement and DRAA Litigation even without Ivanhoe's lobbying. Op. 220-23. But that is wrong. As discussed, the insurers could have written a different exception for those risks that did not also encompass the fraudulent deeds. The proper question, then, is whether they would have done so had Ivanhoe taken steps toward that end—and thus whether his failure to do so materially contributed to the failure of condition. Given the uncontroverted (albeit ignored) evidence that the insurers did not intend to except the deeds from coverage, the answer can only be yes.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 22, 2021, true and correct copies of the Appellant's Opening Brief were caused to be served by File & Serve*Xpress* on the following counsel of record:

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