EFiled: Jun 08 2021 04:37PM EDT
Filing ID 66666994
Case Number 71,2021

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

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Dated: June 8, 2021

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PRELIMINARY STATEMENT

The Court of Chancery's decision upsets merger parties' settled expectations in two ways: It reads the standard Ordinary Course Covenant as a backdoor MAE clause that punishes "reasonable" and "warranted" value preservation, and it blesses closing-avoidance tactics that were previously off-limits. This Court should correct those legal errors.

When the pandemic forced Strategic to dramatically curtail its business operations, the MAE provision assigned that risk to Mirae, not Anbang. The trial court recognized the MAE risk allocation but then used the Ordinary Course Covenant to nullify it, holding that the calamity's effect on the business was a breach of the covenant and thus an escape hatch from the deal. Now, in Delaware, a seller who prudently manages its business in crisis has breached its contract. Better to defy commercial reason and act as if there were no crisis. The buyer will then get a *less* valuable business, but will be required to close.

That is the bizarre rule of law announced below. Relying on an unpublished academic manuscript, Mirae seeks to side-step the implications of the court's decision by arguing that the covenant's consent provision tempers inflexibility by promoting "dialogue." But the prospect of consent cannot render an unreasonable construction reasonable. Nor does Mirae's "dialogue" theory work. Under it, a seller scrambling to address a public crisis has two choices: operate as if there

were no crisis, or engage in mid-crisis negotiation with a buyer who now has every reason to seek escape from the deal and stonewall—as Mirae did here when Anbang requested consent. In either event, value preservation is subordinated to the buyer's interest in maintaining its "say."

This interpretation of the covenant is not commercially reasonable. It conflicts directly with the reasoned judgment of a major Canadian business court addressing the identical ordinary course question. And to accommodate for the ruling below in other cases, the Court of Chancery has already been forced to invent a test that permits some adaptations to crisis conditions but not others, without regard to their reasonableness, depending on an after-the-fact evaluation of "extreme"-ness. *Snow Phipps Grp., LLC* v. *KCAKE Acquisition, Inc.*, 2021 WL 1714202, at *40 (Del. Ch. Apr. 30, 2021). The decision leaves Delaware law newly unpredictable, exposing sellers at their point of maximum vulnerability, and inviting buyer opportunism in response to external market shocks.

The decision below also violates a second guiding principle of M&A law: A party cannot tank its own deal. There's no mystery to why Mirae sought to avoid closing. Before the pandemic, it agreed to pay $5.8 billion for luxury hotels in a transaction without a financing condition. Then COVID-19 happened; hotel demand plummeted; and debt markets cratered. In response, Mirae asked Anbang for a months-long extension of the closing and a $2 billion discount; brainstormed

ways to "defer[] or cancel[]" the deal; and lobbied its insurers to provide a "failsafe" against closing.

Delaware has never favored merger partners who seek to avoid their commitments. Yet the trial court made one dubious ruling after another to facilitate Mirae's escape. The court found that the DRAA Exception excepted the Fraudulent Deeds even though the insurers "intentionally deleted" the provision that *actually* excepted them—and notwithstanding unchallenged interpretive principles requiring courts to favor coverage. Then it excused Robert Ivanhoe's admitted efforts to turn the insurers against coverage—when he was bound by contract to try to avoid the possibility that the Fraudulent Deeds would get excepted.

Mirae now offers the remarkable claim that the Reasonable-Efforts Covenant *allowed* it to work against the deal because that deal had become "commercially unreasonable." Insisting that Andy Bang's ludicrous fraud might have jeopardized Strategic's title to the hotels, Mirae represents Anbang as a villain that deserved to lose, contract notwithstanding. That narrative is misleading and unfair, and relies on improper adverse inferences from proper privilege invocations. Anbang did not think it necessary to apprise Mirae of every bizarre new turn in Bang's patently frivolous scheme. But the matter was not hidden; it played out in open court—with Anbang, its counsel, and the Court of Chancery

alike struggling to make sense of Bang's motives and ramblings. The loose talk of "fraud" rests on an imaginary series of pointless lies, supposedly orchestrated in part by a distinguished U.S. law firm, to hide (in plain sight, no less) a handful of fraudulent deeds that might as well have been drafted in crayon, plus ridiculous lawsuits to "enforce" a blatantly fake contract and fake arbitral awards.

The undisputed facts establish that Mirae's counsel Ivanhoe breached the Reasonable-Efforts Covenant. The court's refusal to so hold undermines the contractarian architecture of Delaware law not just by nullifying this important covenant, but by signaling a new regime in which a court's equitable sensibilities determine whether a merger contract will be enforced according to its terms.

The judgment should be reversed.

ARGUMENT

I. THE ORDINARY COURSE COVENANT WAS SATISFIED

A. There was no breach of the covenant

Anbang's covenant that Strategic would operate in the "ordinary course of business consistent with past practice" did not bar Strategic from responding to COVID-19 in the "reasonable" and "warranted" (Op. 171) ways necessary to preserve its value. The court's contrary holding undercuts the covenant's core purpose, nullifies the MAE definition's risk allocation, and creates ill-advised incentives for merger parties operating in crisis.

1. The decision flouts the core purpose of the Ordinary Course Covenant

The Ordinary Course Covenant is designed to protect the buyer by "constrain[ing] the moral hazard problem that can lead to misconduct" by the seller. *Akorn, Inc.* v. *Fresenius Kabi AG*, 2018 WL 4719347, at *88 (Del. Ch. Oct. 1, 2018). The covenant prohibits the seller from operating the business "in such a way as to extract value" between signing and closing. Claire A. Hill et al., *Mergers & Acquisitions* 403 (2d ed. 2019). It does not bar, but rather requires, value-preserving adjustments to crises and competitive challenges. OB 31-36. To be sure, "ordinary course of business" means operating in the "normal and ordinary routine of conducting business." AB 21-22. But that includes responding to systemic risks in commercially reasonable ways, consistent with competitors'

responses and one's own past responses to comparable challenges. The point is not that a seller must be allowed to protect its *own* interests through an implied "reasonable efforts" qualifier (AB 28-29), but rather that it must have flexibility to preserve the value of the *business* being sold.

The decision below disregards the moral-hazard-avoidance purpose of the covenant and discounts value preservation entirely—without precedent. Before this case, no Delaware court had ever held that a seller breached an ordinary course covenant by engaging in value-preserving conduct. OB 31-32. Every case where a breach was found involved fraud or bad faith. Ordinary course policed seller opportunism; MAE allocated external risk. The law was settled on these points.

Until now. The decision below overthrows long-settled principles and conflicts with all relevant precedent. *FleetBoston Financial Corp.* v. *Advanta Corp.* blessed a seller's pursuit of an "unprecedented" marketing strategy in response to new competitive pressures. 2003 WL 240885, at *26 (Del. Ch. Jan. 22, 2003); OB 32. Mirae says that *FleetBoston* "did not suggest that even unprecedented changes are part of the ordinary course of business if they are responsive to market conditions and consistent with industry standards." AB 30. But that is *exactly* what *FleetBoston* said: To preserve value, a seller may take "unprecedented" actions to respond to changing market conditions, consistent with its undertaking to operate in the ordinary course. *FleetBoston*, 2003 WL 240885,

at *26. Contrary to Mirae's mischaracterization, all that gave the court "pause" (AB 30-31) were allegations suggesting that the seller was opportunistically "load[ing] up the acquired consumer card receivables portfolio with money-losing accounts" to boost the merger consideration—the very kind of self-interested conduct that the covenant traditionally targets. 2003 WL 240885, at *25-27.

The decision below also conflicts with *Fairstone Financial Holdings Inc.* v. *Duo Bank of Canada*. There, in precisely the context of a buyer invoking the pandemic to assert a termination right, a Canadian business court held that the ordinary course covenant should not be interpreted to punish reasonable and warranted seller responses to the crisis. 2020 ONSC 7397, ¶¶ 197-206 (Can. Ont. Super. Ct. of Justice) (A6533-35). *Fairstone* thus leaves Canadian law far more reliable and protective of vulnerable sellers than Delaware law, and leaves Delaware far more welcoming of deal-avoidance opportunism. Mirae does not even try to harmonize *Fairstone* with the ruling below.

Nor did *Cooper Tire & Rubber Co.* v. *Apollo (Mauritius) Holdings Pvt. Ltd.* "reject[] … a 'reasonability' standard" for assessing pre-closing operational changes. AB 30. That issue was not presented in *Cooper*; the question was whether the seller was contractually responsible for its subsidiary's undisputedly non-ordinary-course conduct aimed at torpedoing the deal. 2014 WL 5654305, at *15-17 (Del. Ch. Oct. 31, 2014). The court addressed whether the seller's actions

in responding to the internal disruption were "reasonable" only in deciding that they were not designed to "preserve" and "maintain existing relations" with suppliers, and thus that the "reasonable efforts" qualifier did not apply. *Id.*; *see* OB 34-35.

The decision below thus comes out of the blue. And it leaves practitioners and courts adrift, as the recent *Snow Phipps* case demonstrates. The court there held that "severe cost-cutting" in response to the pandemic was *consistent* with the ordinary course covenant because adjusting to declining demand was part of the seller's ordinary course of business. 2021 WL 1714202, at *40. Struggling to reconcile that sound holding with the decision below, *Snow Phipps* said Strategic's responses were "more extreme" than the *Snow Phipps* seller's. *Id.* But just as in *Snow Phipps*, Strategic's responses were "reasonable" and "warranted" (Op. 171) even if—as dictated by industry-wide conditions and commensurate with the calamity itself—"extreme." In both cases, the question was: Does "acting in the ordinary course of business mean[] doing what was ordinary during the pandemic?" *Id.* The court below said no; *Snow Phipps* and *Fairstone* and the great weight of precedent say yes; and right now, no one can really tell.

The resulting incentives are perverse. When the next crisis hits, cautious sellers will not scramble to preserve value and comply with law; will not be advised that their first obligation is to do what is "warranted" and "reasonable" in

response to the crisis; and will not do what is "ordinary" under conditions of crisis. To be clear: The decision below unequivocally holds value-preserving actions of that kind to be a breach of contract.

The only authority Mirae could find for this bizarre outcome is an academic manuscript advancing the policy argument that the trial court's conception of the covenant promotes "dialogue" by requiring the seller to seek the buyer's consent even for "reasonable responses to changed circumstances." AB 26-27. Leave to the side that unpublished papers on the internet are not authority. Consider the incentives the trial court has created. Crisis strikes; the buyer wants out; the seller needs to act urgently to preserve value. Just as happened here, the buyer will use consent-related discussions to drag its feet and posture while it builds a case for termination. The seller will be handcuffed from operating its business and forced to decide whether to preserve value or comply with the inflexible conception of "ordinary course" announced below. The consequences will be value destruction and proliferating litigation. Neither precedent nor policy requires this outcome. Sellers who act reasonably to preserve value do not violate their obligation to operate in the ordinary course.

2. The court's holding nullifies the parties' allocation of risk as reflected in the MAE provision and creates tension with other important provisions

The court's construction of the Ordinary Course Covenant nullifies the MAE definition's allocation to Mirae of the risk that the pandemic would affect Strategic's business. OB 36-37.

Mirae justifies this outcome by observing that the parties did not include an "MAE limitation" on the covenant. AB 31-32. That is true but misses the point: Because the MAE provision allocates external risk, it makes no sense to conclude that the Ordinary Course Covenant also allocates that same risk in the *opposite* way. Instead, the covenant should be interpreted to address the problem of seller opportunism—and permit (even require) operational adjustments to systemic risks that the MAE provision allocates to the buyer. This approach of reading the agreement sensibly as a whole was the one adopted in *Fairstone*. 2020 ONSC 7397, ¶¶ 187-190 (A6532-33). And it is supported by the express permission in the covenant itself allowing actions "otherwise contemplated by this Agreement," SPA § 5.1; OB 37-38—a nod not just to the MAE provision but to other provisions requiring Anbang to preserve its strategic relationships and organizational value and to comply with law. *See* SPA §§ 3.9, 5.1. These made it essential for Anbang to work collaboratively with its hotel partners to avoid losses and protect the health

of employees and customers in the face of public health guidance and looming shut-down orders. OB 33-34.

Mirae then suggests that the MAE definition and the Ordinary Course Covenant serve different purposes—focused on value and operations, respectively. AB 32-33. Here again, true but beside the point. The provisions should be interpreted to work together, along with other obligations Mirae would claim had been breached if Strategic had operated as if there were no pandemic. Had Strategic acted as Mirae's proposed interpretation suggests—maintaining its operations while all other hotels were shuttering (and in that way creating friction with its best-in-breed hotel partners); maintaining expenses that generated no revenue; inviting guests to amenity-free facilities (and in that way risking liability by infecting guests and violating lockdown rules)—Mirae would no doubt have complained that Strategic was irrationally destroying value, contrary to commercial reason, the Ordinary Course Covenant, and the Organizational Preservation Covenant. Indeed, as Mirae's own expert explained, the buyer cares about the target company's operations *because of* the impact on "expected value." A5816 (Coates report). In Mirae's telling, that concern allows a buyer to claim an ordinary course walk right no matter what the seller does in response to a crisis.

That cannot be Delaware law. The MAE definition provided that Mirae, not Anbang, would bear the risk of a pre-close calamity. The Ordinary Course

Covenant should be interpreted to allow (even require) the seller to mitigate the damage from that calamity, not exacerbate it. No other interpretation makes sense. *See* 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).

3. The standard "consistent with past practice" language does not create a straitjacket

Finally, it cannot be that the "past practice" language requires a court to "look[] exclusively to how the business has operated in the past." Op. 161. That reads "ordinary course of business" out of the provision—all that matters is whether the company has done something in the past, without regard to whether it is "ordinary course." Both "past practice" *and* "ordinary course of business" must be given meaning—a point the court missed in relying on *Mrs. Fields Brand, Inc.* v. *Interbake Foods, LLC*, 2017 WL 2729860 (Del. Ch. June 26, 2017), where the contract did not even include an "ordinary course" provision. OB 39.

Rather than defend the court's interpretation, Mirae pretends the court adopted a two-part test wherein "each phrase has meaning and imposes a distinct obligation." AB 23-24. That is an inaccurate description of the ruling below. Op. 160-61. The bigger problem is that Mirae's argument rests on altered contract language. Supposedly quoting "the full phrase" at issue, Mirae misquotes it, inserting an "and" between "ordinary course of business" and "consistent with past

practice." AB 25. That sleight-of-hand conceals that "consistent with past practice" does not create a second test but instead *modifies* "ordinary course of business," thus emphasizing the company's prior experience without radically altering the inquiry.

In any event, Strategic's actions *were* consistent with past practice. As cases like *Snow Phipps* make clear, "consistent" does not mean "identical." OB 39-40. No one disputes Strategic historically cut costs to match demand, including by closing facilities. A1445/815:19-816:11, A1451/872:20-873:3 (Hogin); A1115/197:9-19, A1118/292:15-293:4 (Hogin Dep.). Just as in *Snow Phipps*, Strategic's mid-pandemic "severe cost-cutting measures" were consistent with a past practice of "reduc[ing] costs in tandem with the sales decline." 2021 WL 1714202, at *40.

B. Any breach of the covenant was immaterial

Even if Strategic's "reasonable" and "warranted" operational adjustments were outside the ordinary course, Anbang's two-week delay in seeking consent until April 2, where consent could not reasonably be withheld, was not so "significant in the context of the parties' contract" as to be material. *Channel Medsys., Inc.* v. *Bos. Sci. Corp.*, 2019 WL 6896462, at *17 (Del. Ch. Dec. 18, 2019). Mirae does not explain how it was prejudiced by the delay or by Strategic's pre-April 2 operational changes—changes Mirae knew about no later than March 19 and to which it raised no contemporaneous objection. Yet the trial court refused

to consider the materiality of the delay. Op. 187-88; OB 42. It also slighted the reality that many of Strategic's responses—closing hotel restaurants, gyms, and spas, for example—anticipated or reflected shut-down orders that required those actions anyway. Op. 185-86.

Mirae first tries to avoid the issue by arguing that there is "no evidence in the record" establishing that it was unreasonable for Mirae to withhold consent when Anbang sought it. AB 35. Not so. The record establishes that Strategic's responsive actions were "reasonable" and "warranted," Op. 171; that Mirae's own hotels implemented similar changes, A5303-28; A1184-90/550:11-573:24 (Ivanhoe Dep.); and that Mirae never said Strategic should do anything differently, not during the cure period or at any time thereafter, OB 40-42. Against all that, Mirae adduced no evidence that it had the requisite "legitimate business purpose" for withholding consent. *Union Oil Co.* v. *Mobil Pipeline Co.*, 2006 WL 3770834, at *11 (Del. Ch. Dec. 15, 2006). Even now, all it offers are hypothetical reasons, untethered to the record, for why a "buyer *might* 'reasonably' withhold consent." AB 35 (emphasis added).

Unable to defend its consent denial, and unable to show actual harm from the delay, Mirae now argues that losing a "bargained-for opportunity to participate in decisions" during the delay is enough to establish materiality. AB 35. But where a consent requirement is qualified by a reasonableness standard, failure to

seek consent does not alone establish material breach—the court must find prejudice. *See Rhodes* v. *SilkRoad Equity, LLC*, 2009 WL 1124476, at *8 (Del. Ch. Apr. 15, 2009); *Fitzgerald* v. *Cantor*, 1999 WL 182571, at *2 (Del. Ch. Mar. 23, 1999). This rule balances the right to a "meaningful opportunity to participate" in decision-making against the "harsh result of forfeiture." *Solera Holdings, Inc.* v. *XL Specialty Ins. Co.*, 213 A.3d 1249, 1259 (Del. Super. Ct. 2019), *rev'd on other grounds*, 240 A.3d 1121 (Del. 2020). Accordingly, delay in seeking—or even failure to seek—consent is not "inherently material." AB 35. Instead, the party with the consent right must show how it would have done things differently had its counterparty timely sought consent. *See Arch Ins. Co.* v. *Murdock*, 2018 WL 1129110, at *13 (Del. Super. Ct. Mar. 1, 2018).

Mirae cannot make this showing. Even now, Mirae offers nothing that it would have asked Strategic to do differently. Instead, tipping its hand, Mirae claims it was denied "leverage" in renegotiating its deal with Anbang. And it relies on a case involving an *unqualified* consent provision, AB 35-36 (citing *Telcom-SNI Invs., L.L.C.* v. *Sorrento Networks, Inc.*, 2001 WL 1117505, at *9 (Del. Ch. Sept. 7, 2001)), failing to recognize that where a consent provision is qualified by a reasonableness standard, consent may *not* be withheld "to gain negotiating leverage." *Cypress Assocs., LLC* v. *Sunnyside Cogeneration Assocs. Project*, 2007 WL 148754, at *2, *17 (Del. Ch. Jan. 17, 2007).

In any case, Mirae *did* have an opportunity to engage in "dialogue." It does not contest it "knew about the main pre-April 2 changes as early as March 19 but raised no contemporaneous objection." OB 41 (citing A4494-95, A4501). If Mirae had legitimate objections to Strategic's pandemic responses, it could have raised them before the changes were implemented and while Anbang could have acted within the cure period—in that way giving Anbang an opportunity to address any legitimate concerns Mirae may have had.[1] *See Snow Phipps*, 2021 WL 1714202, at *39. But Mirae never had any legitimate objections to Strategic's responses; it just wanted to use them as an excuse not to close. So rather than engage in "dialogue," it sat on its knowledge until it was ready to declare a breach, working all the while to gin up *other* "leverage." By March 19, Mirae was already "posturing" to delay closing, and Ivanhoe was already scheming to try to trigger failure of the Title-Insurance Condition. OB 22-23.

Mirae had ample opportunity to have its "say." AB 8, 34. What it said was "goodbye."

[1] Mirae does not dispute that the court erred when it relied on changes implemented after Anbang sought consent on April 2 in finding material breach. OB 42 n.9. It argues that the pre-April 2 changes were nonetheless "substantial" (AB 36), but the court made no findings as to what changes were implemented by this time, let alone whether such changes were material.

II. THE TITLE-INSURANCE CONDITION WAS SATISFIED

Mirae wanted to avoid closing and so wanted the Title-Insurance Condition to fail. The evidence is one-way on this point. Also beyond dispute is that Ivanhoe tried to manufacture a "failsafe" for Mirae by urging the insurers to except the Fraudulent Deeds from their commitments. In this, Ivanhoe failed. The insurers excepted the DRAA Agreement and Litigation—but "intentionally deleted" the insurance exception for the deeds themselves. As the SPA made clear, so long as the contractually-defined "Fraudulent Deeds" were covered—and they were—Mirae had to close. SPA § 7.3(c).

Yet the court below bent over backwards to conclude that Ivanhoe had *succeeded* in getting the Fraudulent Deeds excepted, and that Mirae could rely on that fact to abandon the merger even though Ivanhoe helped precipitate it. Those rulings reward an opportunistic buyer who fails to make contractually required efforts to solve problems along the road to closing. That should not be Delaware's policy.

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

The sole legal question presented by the lower court's interpretation of the title-insurance commitments is: Did the commitments take exception for the Fraudulent Deeds? They did not; they took exception for the DRAA matters, which were a different issue. The court's contrary ruling ignores the evidence, is

inconsistent with the words of the DRAA Exception, and contravenes every relevant canon of contractual construction. No wonder, then, that Mirae defends its position with implausible claims of waiver and mischaracterizations of the record and Anbang's position.

1. Mirae's interpretation is contrary to all the evidence

First, the evidence. There is no doubt that the insurers did not intend to take exception for the Fraudulent Deeds and did not believe they had taken an exception for the Fraudulent Deeds.

Earlier versions of the insurance commitments contained an explicit exception for the deeds. After the deeds were voided and expunged, the insurers replaced that exception with the phrase "***This item has been intentionally deleted***" and added the DRAA Exception—***which does not mention the deeds***. Title agent Marty Kravet—the only witness privy to the insurers' decision-making—confirmed ***the insurers made a "final determination … that we were omitting the fraudulent deeds as an exception" because they "were expunged of record and the appeal period has ran***." A1213/150:3-10, A1216/163:2-4 (Kravet Dep.) (emphasis added). Mirae cannot avoid the import of this testimony, particularly since Kravet was the focus of Ivanhoe's back-channel text-messaging campaign to torpedo coverage for the deeds. OB 23-24; A6434-49. Substantial documentary

evidence corroborates Kravet's blunt admission that the Fraudulent Deeds were *not* excepted from coverage. OB 49-50.

To repeat: The evidence could not be clearer. The insurers did not take exception for the Fraudulent Deeds. Mirae barely contests this evidence. It instead cites the SPA's integration clause and asks the Court to avert its eyes from the facts. AB 46-47. But integration clauses only preclude reading in provisions from prior versions of the contract. They do not bar reference to drafting history that illuminates the meaning of—and is reflected in—the final version. *Eagle Indus., Inc.* v. *DeVilbiss Health Care, Inc*., 702 A.2d 1228, 1233 & n.10 (Del. 1997); *see* 5 *Corbin on Contracts* § 24.12 (2020 ed.); OB 50.

2. The words of the DRAA Exception do not "encompass" the Fraudulent Deeds

Mirae is thus left to argue that—despite the insurers' unmistakable contrary intent—the text of the DRAA Exception must be read to "encompass" the Fraudulent Deeds, and thus yield a result opposite of what was intended. To prevail, Mirae's textual interpretation must be free from all doubt. Even under Delaware law, that is the only way the court could properly ignore the evidence of the insurers' intent and the rule that ambiguity must be resolved in favor of coverage rather than exclusion. *See Salamone* v. *Gorman*, 106 A.3d 354, 374 (Del.

2014); *Twin City Fire Ins. Co.* v. *Del. Racing Ass'n*, 840 A.2d 624, 630-31 (Del. 2003).[2]

But Mirae cannot even demonstrate that its reading of the DRAA Exception is reasonable, let alone inevitable:

(1) In its opening brief, Anbang established that the Fraudulent Deeds were not included in the exception as "other matter[s]." OB 46-47. "Other matter" cannot properly be interpreted to mean "anything" at all (Op. 193), but must instead be read to encompass things like all the enumerated items in the exception—that is, presently existing interests affecting title. *See Aspen Advisors LLC* v. *United Artists Theatre Co.*, 861 A.2d 1251, 1265 (Del. 2004). Common sense, and the fundamental interpretive principle of *ejusdem generis*, compel this conclusion. That is why other courts considering this exact question—the meaning of "other matter" in a title-insurance exception—have rejected the expansive interpretation of "other matter" adopted below. *See Lombardo* v. *Pierson*, 852 P.2d 308, 312 (Wash. 1993) (applying *ejusdem generis*, "other matters" means "matters which affect title"); *Fifth Third Mortg. Co.* v. *Chi. Title Ins. Co.*, 692 F.3d

[2] While it does not matter to the analysis, California law controls. OB 44 & n.10, 50. The SPA's Delaware choice-of-law clause (AB 39) does not apply because the question is how the commitments would be interpreted in a dispute between Mirae and the insurers. And Anbang did not waive this point, which is an "additional reason" supporting an argument advanced below, *Mundy* v. *Holden*, 204 A.2d 83, 85 (Del. 1964), and was presented in Anbang's opening brief, OB 44 & n.10.

507, 512 (6th Cir. 2012) (applying *ejusdem generis*, "other matter" means something "similar to a title defect or encumbrance"); Barlow Burke, *Law of Title Insurance* § 4.04 (3d ed. 2021).

In response, Mirae claims waiver. AB 41. That is nonsense. The interpretation of the DRAA Exception was fundamental to the parties' dispute below. With the issues now narrowed—and in light of the trial court's 242-page opinion that introduced many issues briefed by neither party—Anbang may advance "additional reason[s] in support of" its argument, particularly basic interpretive principles. *Mundy* v. *Holden*, 204 A.2d 83, 87-88 (Del. 1964); *accord N. River Ins. Co.* v. *Mine Safety Appliances Co.*, 105 A.3d 369, 383 (Del. 2014).

Also nonsense is Mirae's suggestion that *ejusdem generis* depends on a finding of ambiguity. AB 41. The canon exists to ascertain the meaning of contractual language, not alter it, and applies whenever an open-ended catch-all phrase follows a list of enumerated items, because reading the catch-all "in [its] widest extent" would deprive the enumerated items of any meaning. *Aspen Advisors*, 861 A.2d at 1265; *see In re IAC/InterActive Corp.*, 948 A.2d 471, 496 & n.99 (Del. Ch. 2008) (*ejusdem generis* "does not depend on a finding of ambiguity").

As a backup, Mirae now claims that the deeds *did* affect title. AB 42-43. This is counterfactual. Before the insurers, at Ivanhoe's urging, added the DRAA

Exception, the California courts had declared the deeds "void *ab initio*," the appeal periods expired, and the deeds were expunged. The deeds were "absolute nullit[ies]." Void, *Black's Law Dictionary* (11th ed. 2019). Mirae says Anbang "conceded uncertainty" about this (AB 42), but that is both implausible—given the manifestly frivolous character of Andy Bang's lawsuits—and unsupported. Nor can Mirae properly rely on "industry-specific" expert testimony to supply contract interpretation (AB 41-42)—particularly where none of the witnesses was involved in the negotiations. Well-settled law establishes that a witness may not "opine on" contract interpretation under the guise of discussing "customs and practices." *United Rentals, Inc.* v. *RAM Holdings, Inc.*, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007); *see also Monzo* v. *Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 125 (Del. 2021) (expert testimony unnecessary "to answer the purely legal question of whether the policy covered the claim."). Nor, finally, can Mirae escape the fact that the insurers agreed that the Fraudulent Deeds did not affect title: They "intentionally deleted" the Fraudulent Deeds exception when the California appeal periods ran.

(2) Because the deeds are not an "other matter," they were not excepted, and the Court need not address whether they "aris[e] out of" or "result[] from" the DRAA Agreement, or whether they were "disclosed by" the DRAA Litigation. But on those questions, too, Mirae's interpretation falls short.

Mirae does not dispute that "arising out of" and "resulting from" require a but-for relationship. *Goggin* v. *Nat'l Union Fire Ins. Co.*, 2018 WL 6266195, at *4-5 (Del. Super. Ct. Nov. 30, 2018). Because the DRAA Agreement and the deeds were fictional—figments of Andy Bang's imagination—the Agreement was not a but-for cause of the deeds. OB 47. Indeed, if the deeds likely predated the agreement (Op. 20 & nn.36-37), as Mirae does not dispute, then the Agreement could not possibly have been a but-for cause of the deeds. Mirae has no answer to this point.

Nor were the deeds "disclosed by" the DRAA Litigation. They were publicly filed in 2018; the insurers knew about them before the SPA was signed; and they were the subject of public quiet-title actions before they were mentioned in the DRAA Litigation. The DRAA 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); OB 48. Here again, Mirae improperly relies (AB 44-45) on experts who were not involved in securing or drafting the DRAA Exception and whose testimony—acceding to a definition of "disclosed by" ("referenced in") that Mirae's counsel fed them in depositions—cannot substitute for the text's ordinary meaning. *See Penn Mut. Life Ins. Co.* v. *Oglesby*, 695 A.2d 1146, 1149 & nn.6-7 (Del. 1997).

The Fraudulent Deeds and the DRAA Agreement and Litigation presented distinct insurance questions. The insurers knowingly excepted the DRAA matters from coverage—but knowingly included the Fraudulent Deeds within coverage. The evidence, the contractual language, and the principle that insurance agreements should be construed in favor of coverage all compel reversal of the court's ruling on this point.

B. Mirae cannot rely on a claimed failure of the Title-Insurance Condition that resulted from its own breach

Even if the DRAA Exception did "encompass" the Fraudulent Deeds, causing the Title-Insurance Condition to fail, Mirae still should not be excused from the contract. Mirae was bound to use "commercially reasonable efforts" to consummate the transaction "as promptly as practicable." SPA § 5.5(a). This included taking "all reasonable steps" to obtain commitments that covered the deeds so the Title-Insurance Condition would be satisfied. *Williams Cos.* v. *Energy Transfer Equity, L.P.*, 159 A.3d 264, 272-73 (Del. 2017). Mirae did the opposite. Ivanhoe urged the insurers to retain an exception for the already-voided deeds, and, when they removed that exception and added the DRAA Exception, declined to ask them to narrow or clarify the new exception to confirm it did not encompass the deeds.

No inferences are necessary here. Uncontested evidence shows that Ivanhoe tried to manufacture a way for Mirae to avoid closing, lobbying the carriers to keep

the Fraudulent Deeds exception and add more exceptions. OB 23-24. Ivanhoe then admitted at trial that he wanted the insurers to raise exceptions to prevent the transaction from closing as scheduled. *See* A1423/724:11-725:11, A1432/759:1-18 A1433/764:1-765:2 (Ivanhoe). These facts prove breach. OB 52-55. Mirae disputes none of them. It should not be allowed to escape their import.

1. The Reasonable-Efforts Covenant applied with full force here

Mirae first argues that Ivanhoe was not actually obliged to work toward closing: "[P]ushing to close without good and marketable title or clean title insurance would have been commercially *un*reasonable," Mirae says, so "Ivanhoe was not obligated to go down that path." AB 52-53. Mirae thus imagines that its obligation to use commercially reasonable efforts to clear every condition to closing gave it discretion to make no efforts to clear conditions if aspects of the transaction had become commercially unreasonable from its perspective. No law supports this conclusion and the contract does not permit it. The Reasonable-Efforts Covenant required Mirae to try to clear obstacles to closing as they arose. *See Williams*, 159 A.3d at 272-73; *Hexion Specialty Chems., Inc.* v. *Huntsman Corp.*, 965 A.2d 715, 754-56 (Del. Ch. 2008).

It changes nothing that the insurers supposedly did not provide "clean title insurance." AB 52. The deal Mirae struck did not include an all-purpose title-insurance out. It included only the negotiated Title-Insurance Condition—which

pertained only to the Fraudulent Deeds. SPA § 7.3(c); A2746. Mirae advisedly assumed the risk that it would have to close even if the insurers excepted other matters from coverage. Mirae also assumed the risk that financing could be more expensive when it signed a contract without a financing condition.

Mirae adds the claim that closing was "impossible" because Anbang breached its marketable-title representation. AB 52-53. For starters, Anbang did not breach that representation; Mirae raised the claim below and the court was skeptical. A1579-82; Op. 108 n.185. Regardless, the alleged but unadjudicated failure of one condition cannot justify procuring the failure of a second condition and then relying on the second failure to avoid closing. Creating incremental failures of conditions does not "enhance the likelihood of consummation," as the Reasonable-Efforts Covenant requires, *Williams*, 159 A.3d at 272, but is rather a clear breach of that covenant.

Mirae invokes *Exelon Generation Acquisitions, LLC* v. *Deere & Co.*, 176 A.3d 1262 (Del. 2017) (AB 53), but that case proves Anbang's point. *Exelon* recognizes that a party may cease efforts after regulatory developments make closing impossible. *Id.* at 1265, 1272 n.34. But satisfying the Title-Insurance Condition was not even costly, let alone impossible. Unlike in *Exelon*, Mirae could have cleared the condition—it just didn't want to.

2. Mirae's arguments do not justify Ivanhoe's failure to seek coverage for the Fraudulent Deeds

As Anbang demonstrated in its opening brief, the court's elaborate defense of Ivanhoe's conduct never actually addressed the key question. OB 54-56. Rather than ask whether Ivanhoe took reasonable steps to ensure the commitments covered the Fraudulent Deeds (which would have satisfied the Title-Insurance Condition), the court asked whether Ivanhoe's actions were justified as an effort to get coverage for the DRAA Agreement and Litigation (which were irrelevant to the Title-Insurance Condition). Op. 217-20.[3]

Mirae scarcely defends the trial court's approach. Where the court relied on the knowledge-of-the-insured doctrine, Mirae pivots, knowing that doctrine cannot apply when the insurers already knew about the Fraudulent Deeds. J. Bushnell Nielsen, *Title & Escrow Claims Guide* § 11.3 (2020 ed.). Mirae instead reaches back 140 years to discover an alleged broader duty of an insured to "disclos[e] all material facts" at risk of voiding coverage. *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U.S. 485, 510 (1883). It then suggests Ivanhoe's actions were aimed at

[3] Because that question is irrelevant, Anbang generally has not challenged the court's factual findings on this score. It has challenged the finding that Ivanhoe advised the insurers to write an endorsement covering the deeds (Op. 218-19), which was clearly erroneous. OB 56. Mirae cites nothing showing otherwise, but, inexplicably, cites an admission by Ivanhoe that he was trying to procure exceptions to delay closing. AB 49 (citing B106/632:2-21 (Ivanhoe)).

alerting the insurers not just to risks associated with the DRAA matters (as the trial court found), but also to risks associated with the already-voided Fraudulent Deeds. AB 48-49. The argument founders on the law and the record.

First, no authority anywhere required Ivanhoe to share his subjective risk assessment with the insurers (even assuming he believed it). Mirae's authorities hold only that an insured must disclose material facts when asked by the insurer or to make affirmative representations not misleading. *See Grayson, Givner, Brooke, Silver & Wolfe* v. *Old Republic Ins. Co.*, 1998 WL 385409 (Table), at *4 (9th Cir. June 23, 1998); *Commonwealth Land Title Ins. Co.* v. *IDC Props., Inc.*, 547 F.3d 15, 22-23 (1st Cir. 2008); Steven Plitt et al., *Couch on Insurance* § 84.2 (3d ed. 2020).[4] Anbang does not argue that Ivanhoe should have withheld material facts. But Ivanhoe should have asked the insurers to provide coverage for the deeds and provided full information, not materially incomplete and inaccurate information curated to emphasize risk. There is no rule of law or "best practice[]" (AB 48) that stands counter to that—still less one that permits a buyer to actively procure a condition failure.

[4] Mirae claims Cal. Ins. Code § 339 (OB 55) is inapplicable "because Ivanhoe was asked a direct question" about whether to except the deeds. AB 50. Wrong. That provision says: "Neither party to a contract of insurance is bound to communicate, *even upon inquiry*, information of his own judgment upon the matters in question." (Emphasis added.)

Second, the premise of Mirae's new argument—that Ivanhoe thought the Fraudulent Deeds posed a real risk—is nonsensical. The deeds had been voided and expunged. The court may have found that DLA Piper's potential involvement in the DRAA Litigation was a "game changer" for Ivanhoe's views about that *litigation* (AB 15), but it never found that Ivanhoe was concerned about the *Fraudulent Deeds*—nor could it have. DLA was adamant—in communications Ivanhoe *did not disclose to the insurers*—that it would not disturb the final, non-appealable judgments that voided the deeds. *See* A4561-63 ("[W]e ha[ve] no intention of revisiting any litigation related to any properties … *We have no role in the quiet-title proceedings or the properties at issue*."). This plain-as-day statement defeats Mirae's theory that the DRAA matter and the deeds shared the same risk because they were "interdependent." AB 51. Ivanhoe separated them. *See* A4848-49 (Ivanhoe lobbied insurers to "leave the Fraudulent Deeds as an exception" in addition to "rais[ing] an exception to title for the [DRAA Litigation]"). And the insurers knew the difference, which is why they made a "final determination" to "omit[] the fraudulent deeds as an exception" while raising an exception for the litigation.

Finally, the testimony from Anbang's title expert upon which Mirae places exaggerated emphasis does not refute that Ivanhoe failed in his "affirmative obligation … to take all reasonable steps" to ensure the Title-Insurance Condition

was satisfied. *Williams*, 159 A.3d at 272-73. At the end of a line of questioning principally about *Anbang*'s counsel, in which Ivanhoe was not even mentioned by name, Norman Chernin said the parties "seem[ed] to be working in a normal fashion … toward accomplishing a closing." AB 47-48 (citing A1465/1249:24-1250:8 (Chernin)); *see* AR2-3/30:20-35:11 (Chernin Dep.). Asked to opine on Ivanhoe's conduct, Chernin made clear it was not normal but "highly unusual." A5987 (Chernin rebuttal report).

3. The condition would have been satisfied had Ivanhoe sought coverage for the Fraudulent Deeds

The evidence is uncontroverted that the insurers did not intend to except the deeds from coverage, and thus did not intend for the DRAA Exception to encompass the deeds. *See supra* pp. 18-19. That evidence generates an irresistible inference that, had Ivanhoe only asked, the insurers would have narrowed or clarified the DRAA Exception to more clearly reflect its intended scope. OB 58.

Mirae argues that Ivanhoe "Did Not Cause The *Addition Of The DRAA Exception*." AB 53 (emphasis added). That addresses the wrong question. The insurers could have written a different DRAA Exception that could *not* be misconstrued to encompass the deeds. Mirae observes that the insurers refused to "*remove[]* the DRAA Exception" when Anbang's counsel asked. Op. 222 (emphasis added); *see* AB 54. But that says nothing about their willingness to *narrow* the exception or to *clarify* it to prevent its misconstruction.

All it would have taken to achieve that result is a word from Mirae—surely far less than what commercially reasonable efforts requires. And any uncertainty about what would have happened had Ivanhoe said the word must be resolved against Mirae. The breaching party bears the burden to show that "the condition would not have occurred regardless of [its] lack of cooperation." *WaveDivision Holdings, LLC* v. *Millennium Dig. Media Sys., LLC*, 2010 WL 3706624, at *15 n.113 (Del. Ch. Sept. 17, 2010); *accord Williams*, 159 A.3d at 273-74. Rather than defend the court's *sua sponte* refusal to apply this rule, Mirae cites the general statement—more than 200 pages earlier in the opinion—that the burden of proof did not affect the court's findings. AB 54-55. That statement is irrelevant; the court did not make *any* finding about whether the insurers would have carved the deeds out of the DRAA Exception. OB 59-60. The answer to that question is yes regardless of the burden of proof—and certainly if it is placed on Mirae, as it should have been.

CONCLUSION

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

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Dated: June 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2021, true and correct copies of Appellant's Reply Brief were caused to be served by File&Serve*Xpress* on the following counsel of record:

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