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IN THE SUPREME COURT OF THE STATE OF DELAWARE

FINGER LAKES CAPITAL PARTNERS, LLC, Plaintiff and counterclaim defendant below, Appellant, v. HONEOYE LAKE ACQUISITION LLC, and LYRICAL OPPORTUNITY PARTNERS, L.P., Defendants and counterclaim plaintiffs below, Appellees.	§	No. 42, 2016 On appeal from the Court of Chancery of the State of Delaware, C.A. No. 9742

APPELLANT'S REPLY BRIEF ON APPEAL

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PRELIMINARY STATEMENT

Lyrical asserts that Finger Lakes seeks to "take advantage of the one contract out of the three (the [HLA] Agreement)" at issue in this litigation while "repudiating its obligations under the other two contracts." AB at 1. Of course, that "one contract out of the three" is, under its unambiguous terms, the *only* relevant contract governing the issue at this action's heart: HLA's distribution of the proceeds derived from the Revolabs sale.

Lyrical barely mentions the HLA Agreement in its nearly ten-page recitation of parol evidence concerning the Prior Agreements. Lyrical's attempt at misdirection fails, however, because it concedes the one point that renders all such extrinsic evidence irrelevant: the fully integrated HLA Agreement is unambiguous on its face. Under longstanding Delaware law, the parol evidence rule precludes reliance on extrinsic evidence to interpret an unambiguous agreement.

Faced with this black letter law, Lyrical argues the parol evidence rule does not apply because the trial court held the Prior Agreements and the HLA Agreement do not address the same subject matter. Contrary to Lyrical's assertion, the trial court concluded all three agreements *do* address the same subject matter, as it held that all three, "read together," "govern the distribution and allocation of the proceeds from the Revolabs sale." Op. at 46. The trial court nonetheless determined the Prior Agreements were not superseded because they applied across

multiple entities outside the "scope" of the HLA Agreement. There is no support in the law for this novel supposed exception to the parol evidence rule. Moreover, Delaware courts have held that a later integrated agreement supersedes a prior agreement insofar as they address the same subject matter, regardless of "scope."

The Prior Agreements, if enforced, would also *modify the distribution scheme set forth in Section 7 of the HLA Agreement*. To the extent they do so, they are superseded as a matter of law. Lyrical argues that the HLA Agreement governs "the initial calculation" of the carried interest allocated to Finger Lakes while the Prior Agreements govern the final calculation of the carried interest to be distributed to Finger Lakes. But the HLA Agreement sets forth the final (and only) calculation of the carried interest be distributed to Finger Lakes. There is no "initial calculation" and there is no allocation without a matching distribution.

While the Court need not reach this question unless it finds the Prior Agreements are enforceable, Lyrical asserts for the first time on appeal that the interpretation of the Clawback Agreement that it has advocated throughout this case is no longer valid. Lyrical now attempts to adopt the trial court's erroneous interpretation, even though the trial court was, and Lyrical is, unable to cite any factual support for it. Lyrical's new position not only violates Supreme Court Rule 8, but also the doctrines of judicial and quasi-estoppel. Lyrical also seeks a recalculation of the trial court's determination of the Clawback Amount if the

Court rejects the trial court's erroneous interpretation. Lyrical cannot seek such affirmative relief without a cross-appeal, which it failed to timely file.

Lyrical ignores the fact that Sections 4.2 and 4.6 of the HLA Agreement supersede the Term Sheet provision regarding Lyrical's claim to 25% of Finger Lakes' management fees because those sections authorize Finger Lakes to provide management services to Revolabs and all the other portfolio companies "without any accountability, liability or obligation whatsoever" to Lyrical. Lyrical then conflates the parties and claims in this action to try to assert that it is entitled to recoupment (which it is not), and disregards controlling Delaware statutory law to assert that its claim for setoff is not time-barred.

Finally, both Finger Lakes' affirmative claims and its defenses against the Counterclaims implicate its status as an HLA member. Accordingly, Finger Lakes is entitled to indemnity for its attorney fees under HLA Agreement Section 4.1. Furthermore, Finger Lakes' commencement of this action to protect its rights as an HLA member cannot be deemed "willful misconduct," particularly given that Finger Lakes obtained judgment on the pleadings in this case.

The Court should (1) enforce the HLA Agreement in accordance with its terms and award Finger Lakes the amount of the distribution of the Revolabs proceeds to which it is entitled by virtue of those terms, including its attorneys' fees; and (2) dismiss the Counterclaims.

ARGUMENT

I. THE HLA AGREEMENT, A FULLY INTEGRATED, UNAMBIGUOUS AGREEMENT, SUPERSEDES THE PRIOR AGREEMENTS

A. Lyrical Concedes that the HLA Agreement is Unambiguous On Its Face -- Rendering Its Recitation of Parol Evidence Irrelevant

As set forth in Finger Lakes' opening brief, the parol evidence rule bars the admission of evidence extrinsic to an unambiguous, integrated written contract. OB at 3, 11. In its answering brief, Lyrical concedes, as it must, that the HLA Agreement is "unambiguous," such that it cannot be "overrid[den]." AB at 17; OB at 11-12. Lyrical nonetheless asserts the trial court appropriately relied on parol evidence to conclude that the Prior Agreements *can* override the HLA Agreement.

This reasoning is backwards. OB at 14-17. A court is permitted to look to parol evidence to interpret a contract *only when there is an ambiguity in the contract. See Eagle Indus., Inc. v. DeVilbiss Health Care*, Inc., 702 A.2d 1228, 1233 (Del. 1997). The parties' behavior before or after the HLA Agreement was entered into (what Lyrical calls their "course of conduct") is therefore irrelevant. AB at 2. The Prior Agreements, which themselves constitute parol evidence, are likewise irrelevant, as are Lyrical's nearly ten pages of extrinsic facts describing them. *See* AB at 4-13. The emails Finger Lakes sent to Lyrical after the HLA Agreement was executed are also irrelevant. AB at 6.

While some may view exclusion of this extrinsic evidence as "unpalatable" (AB at 16), it is the law, and for good reason. "Delaware courts seek to ensure freedom of parties in commerce to strike bargains and honors and enforces those bargains as plainly written." *Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *6 (Del. Ch. July 23, 2010); *see also Galatino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012) ("The policy underlying [the parol evidence] rule is cautionary: to avoid upsetting the sanctity of fully integrated written agreements.").

Furthermore, Lyrical, a sophisticated party, had every opportunity to avoid this result. It chose not to – not by mistake or inadvertence, but because it consciously decided not to bargain for survival of the Prior Agreements in the text of the HLA Agreement. *See ev3, Inc. v. Lesh*, 114 A.3d 527, 532 n.14 (Del. 2015) ("To the extent any prior agreement or any portion thereof, is intended to survive, language should be incorporated into the integration clause to effectuate that intent."). For the Performance LLC agreement upon which the rest of the LLC Agreements (including the HLA Agreement) were modeled, Lyrical was represented by sophisticated counsel. The parties exchanged several drafts before executing the Performance LLC agreement. *See, e.g.*, A20-158. If Lyrical intended any part of the Term Sheet – which, according to Lyrical, it had entered

into "only a few days" before – to survive the Performance LLC agreement, it easily could have (and presumably would have) said so. It did not.

Lyrical is therefore correct that the fact that the Term Sheet was executed shortly before the Performance LLC agreement is telling, but not for the reason it asserts. Rather than create any "absurdity," *see* AB at 9, it shows Lyrical's deliberate choice to not provide for the survival of the Term Sheet in the Performance LLC agreement's terms. What would be "absurd" is the opposite inference – that Lyrical signed the Performance LLC Agreement (and, later, the HLA Agreement), which stated in no uncertain terms that it contained "*all* of the understandings" between the parties and "supersede[d] *all* prior agreements," while also intending the Term Sheet to survive. *See, e.g.*, *Black Horse Cap. LP v. Xstelos Holdings, Inc.*, 2014 WL 5025926, at *13 (Del. Ch. Sept. 30, 2014) ("The only reasonable inference from the [integrated] Commitment Letter is that there was no other 'understanding of the parties' with respect to the [] Bridge Loan…. [It] is not reasonably conceivable that Chappell and Couchman could have signed the Commitment Letter while also intending to manifest assent to another, undisclosed, side agreement concerning the Bridge Loan.").

So too with the HLA Agreement. The parties did not incorporate any of the Term Sheet's terms, nor exclude any of them from the consequences of its integration clause. This also is true for the Clawback Agreement, which the parties

entered in July 2005. By the time the HLA Agreement was executed – October 2005 – the Performance investment had already failed (resulting in a loss to Lyrical of over $6 million). Yet the parties again did not choose to incorporate the Clawback Agreement into the HLA Agreement, nor exclude it from its integration clause's effect. Lyrical must now abide by the consequences of these choices.

B. The Prior Agreements Concern the Exact Same Subject Matter as the HLA Agreement and are Therefore Superseded

Lyrical attempts to avoid the consequences of the parol evidence rule by asserting that the Prior Agreements are not superseded because the trial court made a "key factual finding[]" that "the 'subject matters' of the [Prior Agreements] were different than the 'subject matter' of the [HLA] Agreement." AB at 18. Lyrical is wrong. To the contrary, the trial court acknowledged that all three agreements directly address the Revolabs investment, including the distribution of Revolabs proceeds:

> The plain language of the integration clause in the Revolabs Agreement stated that it superseded all prior agreements 'with respect to the subject matter hereof.' The 'subject matter hereof' was the investment in Revolabs.

Op. at 38. The trial court then concluded, relying on parol evidence, that the Prior Agreements and the HLA Agreement – "[r]ead together" – "govern the distribution and allocation of the proceeds from the Revolabs sale." *Id.* at 46.

The trial court therefore held that the pertinent terms of the Prior Agreements address the *same* subject matter as the HLA Agreement. They are thus superseded. The trial court bypassed this otherwise obvious result, however, by concluding that the Prior Agreements differed in "scope" from the HLA Agreement because (according to the court) they are "overarching" agreements which apply across multiple entities, while the "special purpose" HLA Agreement only applied to the Revolabs investment. *Id*. at 38.

There is no support in the law for the trial court's novel exception to the parol evidence rule. OB at 17-19. Perhaps recognizing this, Lyrical repackages the trial court's "scope" reasoning as being about "subject matter," arguing that because the Prior Agreements are "overarching" they somehow concern a different subject matter altogether. This argument fails.

Delaware cases have uniformly held that a later integrated agreement supersedes a prior agreement insofar as they address the same subject matter – regardless of "scope." *See* OB at 18; *Ostroff v. Quality Servs. Lab., Inc.*, 2007 WL 121404 (Del. Ch. Jan. 5, 2007); *Minn. Invco of RSA #7, Inc. v. Midwest Wireless Hldgs., LLC*, 903 A.2d 786, 795 (Del. Ch. 2006); *see also In re Liquidation of Freestone Ins. Co.*, 2014 WL 7399502, at *9 (Del. Ch. Dec. 24, 2014) (holding the parties' overarching Custody Agreement, providing a security in payment

obligations arising under "any other agreement," was superseded by subsequent integrated agreement for specific deal).

Lyrical's attempt to distinguish these cases (AB at 20 n.9) is ineffective.[1] Its further assertion that determining the HLA Agreement's subject matter is a "fact-intensive question that depends on context" is also without merit. AB at 17. Nor do the cases Lyrical cites so hold. In *Brady v. i2 Technologies, Inc.*, 2005 WL 5756601 (Del. Ch. Dec. 14, 2005), decided under Texas law, the court determined a prior advancement right was not superseded by a later integrated severance agreement including an indemnification right (but no advancement right) because under Delaware law, advancement and indemnification are two "separate and distinct" legal rights (and thus the two agreements, on their face, concerned two distinct subject matters). *Id.* at *3. In addition, the court stated the prior agreement

[1] Lyrical argues *Ostroff* is distinguishable because the later integrated agreement carved out prior agreements from being superseded, of which the prior "Split Dollar Agreement" was not one. First, the court's holding in *Ostroff* did not rely on this fact, but on the later agreement's integration clause, which superseded any agreements related to its subject matter. *Ostroff*, 2007 WL 121404, at **9-10. Second, even without express "carve-outs," under the law, the effect of the HLA Agreement's integration clause is the same – it supersedes all prior agreements. If Lyrical wanted to "carve out" the Prior Agreements, it could have done so (it did not). Similarly, Lyrical argues *Invco* is distinguishable because the integrated agreement there included an express provision stating it would govern in the event of any conflict with the prior agreement. Again, the court's holding did not turn on this fact, but on the fact that the integrated agreement superseded all agreements within its subject matter. *Invco*, 903 A.2d at 795. Moreover, even without such an express provision, under the parol evidence rule, the HLA Agreement's integration clause supersedes all prior agreements that vary or contradict its terms.

was not superseded because it did not "contradict [the integrated agreement's] express or implied terms." *Id.* at *4.[2]

Here, there is no ambiguity about the HLA Agreement's subject matter: it, on its face, includes every provision of that agreement, including the provision governing distributions. The HLA Agreement's Section 7, entitled "Distribution of Profits and Losses," sets forth a clear distribution scheme for the Revolabs proceeds.

Lyrical fails to explain how the pertinent terms of the Prior Agreements concern a *distinct* subject matter. Nor could it. For all of Lyrical's efforts to argue semantics – that the Term Sheet "operate[s] on a separate level from the calculation of the carried interest in the [HLA] Agreement," and that the Clawback Agreement "applied across investments," AB at 18, 20 – Lyrical fails to respond to a critical point Finger Lakes raised in its opening brief: the Prior Agreements, if enforced, *modify Section 7 of the HLA Agreement*. *See* OB at 13-14. While

[2] *U.S. v. Stein*, 452 F. Supp. 2d 230, 264 (S.D.N.Y. 2006), AB at 18 n.7, is inapposite. The court there held a prior implied agreement for the firm to indemnify its members was enforceable where the integrated partnership agreement was between the members only, not its members and the firm itself. Here, all three agreements are between the same parties and concern the same subject matter. *Green Isle Partners Ltd. v. Ritz-Carlton Hotel Co. L.L.C.*, 2000 WL 1788655, at *3 (Del. Ch. Nov. 29, 2000) also does not help Lyrical, as that case dealt with whether an integrated agreement addressing inspection of books and records superseded the forum selection clause of a *later* agreement that dealt with an entirely different subject matter. The court determined that the integrated agreement controlled because it was the "entire agreement" regarding its subject matter and Green Isle was not substantively bound by the later agreement in any event. Here, the Term Sheet and the Clawback Agreement are *prior* agreements between the *same* parties dealing with the *same* subject matter (distribution of the Revolabs proceeds) as the fully integrated HLA Agreement, which pursuant to its express terms is the sole agreement governing that subject matter. They are therefore superseded.

Lyrical argues that the HLA Agreement only "controls the initial calculation of FLCP's carried interest," this is not so. AB at 19. The HLA Agreement governs *distributions of the Revolabs proceeds*, not a mere "initial calculation." Moreover, in so arguing, Lyrical only confirms the fact that enforcing the Prior Agreements would *modify* distributions otherwise required to be made under the HLA Agreement.

Finally, even if the HLA Agreement was found to be "partially integrated" (which the trial court never held and Lyrical never argued), such that, contrary to its express terms, it does not address "all of the understandings" between the parties regarding the Revolabs investment, it would *still* supersede the portions of the Term Sheet and Clawback Agreement that vary its terms. *See*, *e.g.*, *Carlson v. Hallinan*, 925 A.2d 506, 523 (Del. Ch. 2006). In that circumstance, any terms of the Prior Agreements that, if enforced, would operate to "redistribute" the amounts otherwise required by Section 7 of the HLA Agreement to be distributed to Lyrical and Finger Lakes respectively – such as the Term Sheet's "GM Stake" provision allocating 25% of the carried interest to Lyrical, or the Clawback Agreement allocating another 25% of the carried interest to Lyrical (or all of it, under the trial court's erroneous interpretation) – would be superseded by the HLA Agreement and unenforceable.

II. LYRICAL'S NEW INTERPRETATION OF THE CLAWBACK AGREEMENT, RAISED FOR THE FIRST TIME ON APPEAL, IS BOTH INCORRECT AND PROCEDURALLY BARRED

If this Court determines the Clawback Agreement remains enforceable notwithstanding the later HLA Agreement, then that agreement should be interpreted in accordance with the only interpretation advocated by both Lyrical and Finger Lakes throughout this litigation and otherwise supported by the record. Lyrical's attempt to adopt, for the first time on appeal, the trial court's erroneous interpretation should not be credited by this Court.

First, Lyrical asserts "the record supports the result reached" by the trial court, yet fails to cite any facts supporting that assertion. AB at 22. There are no such facts, and the only evidence presented by Lyrical supports the formula Finger Lakes – and Lyrical – have advocated throughout this litigation (which Lyrical acknowledges, albeit only in a footnote, *see* AB at 23 n.11). Lyrical not only advocated this interpretation at trial, it pleaded it in its Counterclaims (*see* A369 ¶ 42(iv), ("[t]he full amount of any . . . Clawback shall be deducted from any otherwise distributable proceeds from HLA and paid by HLA to Lyrical, *before* any such proceeds or otherwise allocated for distribution as between FLCP and Lyrical")), it testified to it at trial (A1094 ("capital that had been lost by Lyrical would be taken out of available proceeds before carried interest or the common

allocations were determined")), and described it in its pre-and post-trial exhibits (*see* A1193-95; A1266-67).

Second, Lyrical has waived this argument by presenting it for the first time on appeal in any event. *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review"); *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 989 (Del. 2013) ("Under Supreme Court Rule 8, a party may not raise new arguments on appeal.").

Third, Lyrical's position is precluded by the doctrines of judicial estoppel and quasi-estoppel. "[U]nder the doctrine of judicial estoppel, a party may be precluded from asserting in a legal proceeding a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding." *Capaldi v. Richards*, 2006 WL 3742603, at *2 (Del. Ch. Dec. 8, 2006). It exists "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id*. Quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken," and "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Personnel Decisions, Inc. v. Bus. Planning Sys. Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008).

Here, Lyrical has made a "self-interested 180 degree turn," *id.* at *7, on appeal by repudiating the position it previously held throughout this litigation. *See* AB at 24. It has gained an advantage by doing so to Finger Lakes' detriment, as Finger Lakes defended against the Counterclaims through trial with the understanding that Lyrical's interpretation of the Clawback Agreement was what the facts support and what it advocated in this litigation up through trial.

Lyrical then goes a step further, asserting that should this Court agree that the parties' interpretation of the Clawback Agreement governs, this Court should recalculate the Clawback Amount in favor of Lyrical because the trial court erred in excluding certain debt investments. AB at 26. This, too, is impermissible.

To seek such affirmative relief, Lyrical is required to have filed a cross-appeal, which it did not do. While Lyrical may "*defend* the judgment with any argument that is supported by the record," it cannot seek to "*enlarge[e]* [its] own rights or *lessen[] the rights of an adversary*" without a cross-appeal. *Hailey v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996) (AB at 25 n.13) (emphasis added). It is thus of no matter that the end-result would be "less than the judgment" the trial court awarded Lyrical (AB at 25 n.13) because Lyrical is seeking *affirmative relief. See Hailey*, 672 A.2d at 58 ("[a] cross-appeal is necessary if the appellee seeks affirmative relief from a portion of the judgment").

III. LYRICAL IGNORES FINGER LAKES' ARGUMENT THAT THE HLA AGREEMENT SUPERSEDES THE TERM SHEET MANAGEMENT FEE SPLIT PROVISION

Lyrical ignores Finger Lakes' argument that Sections 4.2 and 4.6 of the HLA Agreement supersede the provision of the Term Sheet concerning a split of management fees. OB at 25-26. The HLA Agreement authorized Finger Lakes, under Section 4.2(p), to provide management services to portfolio companies and collect management fees. A219. Section 4.6 authorized Finger Lakes to "engage in… any business or activity whatsoever, *without any accountability, liability, or obligation whatsoever*" to Lyrical. A220 (emphasis added). These provisions nowhere reference or incorporate the Term Sheet management fee split provision.

Lyrical argues this provision is not superseded because "[i]t would make no sense that the integration clause of the [HLA] Agreement controlled the 'subject matter' of FLCP's revenue stream consisting of management fees from Portadam or Rethink." AB at 20. First, Lyrical forgets that those investments – as is true for all of the parties' investments – each have their own LLC agreements with identical provisions regarding Finger Lakes' power to collect management fees and identical integration clauses. *See* Op. at 10, 11, 15; *see also, e.g.*, A137-38. The Term Sheet "split" provision therefore constitutes the same subject matter as the HLA Agreement (and the same subject matter as each of the other LLC agreements) and is accordingly superseded.

More importantly, the fact that a term may make "no sense" to Lyrical does not constitute an exception to the parol evidence rule. *See Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303, at *1 (Del. Ch. Mar. 1, 2007) (even an "unpalatable" result is not a basis for the court to vary the "words chosen by sophisticated parties who drafted a complex and comprehensive agreement").

IV. LYRICAL IS WRONG THAT TIME-BARRED MANAGEMENT FEES MAY BE USED FOR RECOUPMENT OR SETOFF

First, with regard to recoupment, it is Lyrical who puts forth a "misleading" argument by deliberately conflating which claims were asserted against which parties in this action. AB at 29. While Finger Lakes indeed sued both HLA and Lyrical, it sued Lyrical for breach of the HLA Agreement in its capacity as the managing member of HLA. Finger Lakes thus seeks its rightful distribution of the Revolabs proceeds from *HLA*, not Lyrical. In contrast, as stated in Finger Lakes' opening brief, *Lyrical* (*not* in its capacity as managing member of HLA) seeks recoupment of management fees from Finger Lakes under the *Term Sheet*, not the HLA Agreement. The claim and counterclaim thus involve both different parties and different transactions. Lyrical argues in a footnote that the transactions are not the same because "the management fees and the carried interest [from HLA] claimed by FLCP against which they are being recouped are simply different facets of the same 'GM Stake' that Lyrical has the same 25% interest in pursuant to the Term Sheet." AB at 29 n.16. Not only does this argument undercut Lyrical's claim that the Term Sheet constitutes a different "subject matter" than the HLA Agreement, it is also incorrect – the two claims arise under different agreements and involve different parties.

Second, with regard to setoff, as Finger Lakes stated in its opening brief, 10 *Del. C.* § 8120 is dispositive here, and *Delaware Chemicals, Inc. v. Reichhold*

Chemicals Inc., 121 A.2d 913 (Del. Ch. 1956), does not hold otherwise. Under the statute, when a defendant asserts a debt owed by the plaintiff as a setoff against a debt owed by the defendant, the setoff claim is subject to the same statute of limitations as if the defendant had commenced a separate action. OB at 28. This is precisely what Lyrical has asserted here – that its claim to management fees is a *setoff* to Finger Lakes' distribution under the HLA Agreement. In *Reichhold*, the defendant asserted a counterclaim of fraudulent inducement – not setoff – which the court held the defendant could assert "defensively" despite the statute of limitations bar. *Reichhold* explicitly stated, however, that this exception to the statute of limitations "applies only in the case of strict defense[]" and "*does not apply to cases of set-off or counterclaim"* in the absence of statute. *See* 121 A.2d at 918 (emphasis added). Here, the relevant statute is clear – Lyrical's claim to setoff is time-barred.

V. FINGER LAKES IS ENTITLED TO ATTORNEYS' FEES

As a preliminary matter, Lyrical's argument that Finger Lakes is judicially estopped from arguing it is entitled to indemnification for defending the counterclaims is baseless. AB at 32. Finger Lakes' failure to "quarrel" with the trial court's determination in January 2015 that a "reasonable reserve is approximately zero" did not amount to it taking an "inconsistent position." *See Motorola Inc. v. Amkor Tech Inc.*, 958 A.2d 852, 859 (Del. 2008). Finger Lakes never argued no reserve should be kept because it was not entitled to indemnification for defending the Counterclaims. Rather, the trial court reached that result because it found that keeping a reserve "would have to be made based on the interests of HLA as an entity," and since Lyrical was not asserting the Counterclaims in its capacity as manager of HLA, no reserve for fees incurred by Lyrical in asserting its Counterclaims was warranted. A427.

Lyrical is otherwise wrong that Finger Lakes' defense against the Counterclaims does not arise from its status as a member of HLA. Lyrical seeks to recover the Clawback Amount and amounts under the Term Sheet directly from Finger Lakes' rightful distribution as a member of HLA. OB at 33. Moreover, Lyrical engaged in "self-help" *as manager of HLA* by causing HLA to allocate amounts Lyrical believed were due to it from the Term Sheet and the Clawback Agreement from HLA to itself before making any distribution to Finger Lakes.

Finally, the trial court's holding that Finger Lakes was not entitled to indemnity because Shalov and Mehta engaged in "willful misconduct" under Section 4.4(a) of the HLA Agreement was error. Finger Lakes' decision to bring suit to recover its rightful distribution from HLA– for which Finger Lakes obtained judgment on the pleadings – cannot be characterized as "willful misconduct" depriving it of indemnification under the HLA Agreement. OB at 34 n.5.

CONCLUSION

For the reasons set forth above and in Finger Lakes' opening brief, the court should (1) reverse the Court of Chancery's Judgment and the underlying Opinion and Reargument Order, and (2) award Finger Lakes $5,940,860.64, representing its distributive share under the HLA Agreement, together with attorney's fees and prejudgment interest.

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Dated: August 5, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, a copy of the foregoing Appellant's Reply Brief on Appeal was caused to be served on the following counsel of record by File & Serve*Xpress*:

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