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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH L. WASHINGTON, JAMES F. SOLIC, JAMES WASHINGTON, JR., LAURA M. ODELL, and ARLENE BETH CLARKE,	)	
Plaintiffs Below, Appellants,	)	No. 436, 2016
v.	)	Appeal from Court of Chancery
	)	C.A. No. 10810-VCL
PREFERRED COMMUNICATION SYSTEMS, INC.,	)	
Defendant Below, Appellee.	)	

OPENING BRIEF OF PLAINTIFFS BELOW/APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

OTHER **PAGE(S)**

NATURE OF PROCEEDINGS

Appellants lent money to appellee Preferred Communication Systems, Inc. ("PCSI") in return for promissory notes (the "Notes") promising principal, interest, and warrants for stock in PCSI. The Notes included a fee-shifting provision. Later, the Notes were amended by letter (the "Offer Letter") to promise more warrants ("Extension Warrants") in return for Appellants forbearing to sue until PCSI had the cash to pay the Notes.

Once PCSI obtained the cash to pay the Notes, Appellants had to sue PCSI – originally in Texas – to force it to comply with its promises. The parties resolved the issue of PCSI's obligation to pay principal and interest in Texas (PCSI paid pursuant to a settlement agreement) but agreed to litigate Appellants' entitlement to the Extension Warrants in Delaware. The case below resulted.

The lower court ruled on summary judgment that Appellants were entitled to the Extension Warrants. Appellants then sought fees under the Notes' fee-shifting provision.

At first the court granted Appellants' motion in a brief, two-paragraph ruling, relying on the second sentence of the provision, upon which Appellants had not based their motion. On PCSI's motion for reargument, the court reversed itself in an even briefer ruling (four sentences) and denied Appellants' motion.

A plain English reading of the provision entitles Appellants to fees for having to force PCSI to provide the Extension Warrants it promised. The provision is triggered by a lawsuit after a "default". An "Event of Default" is specifically defined in the Notes to include failure to "observe, perform or comply with any covenant, agreement or provision of this Note," which clearly includes PCSI not granting warrants.

Even if the provision is ambiguous, it should be interpreted in Appellants' favor pursuant to the doctrine of *contra proferentem*. The Notes and the Offer Letter were identical form documents sent out to investors. PCSI's President and/or his attorney drafted the Offer Letter. As the lower court has copiously recorded in this and related litigation, PCSI was then run by individuals with criminal records in their industry whose dealings with investors and government regulators were often dishonest – and which have required Delaware and other courts to resolve a great deal of litigation to sort out the mess they created.[1] PCSI only has itself to blame if a reasonable reading of the contract allows Appellants their legal fees and expenses for having to force PCSI to provide what it promised.

Appellants respectfully request that this Court reverse the court below and remand with an order to grant Appellants their reasonable attorneys' fees.

[1] A258-66; *Judy v. PCSI*, 2016 WL 4992687, at *2-14 (Del. Ch. Sept. 19, 2016).

SUMMARY OF ARGUMENT

1. PCSI is required to pay attorneys' fees under prong one of the first sentence of the fee-shifting provision (Section 6.2[1]) if "any indebtedness evidenced by this Note" is "collected" in any "court proceedings". As Appellants' citations show, related terms such as "debt" have been interpreted to include nonmonetary things owed (such as the Extension Warrants at issue here). Even as originally drafted, before being amended by the Offer Letter, the Notes promised warrants. Thus, the fee-shifting provision would logically have applied to court proceedings to obtain them. Because the Offer Letter amended the Notes to promise the Extension Warrants, thus expanding the "indebtedness" evidenced by the Notes to include them, PCSI is required to pay Appellants' reasonable fees and expenses here.

2. PCSI is also required to pay fees under prong two of Section 6.2[1] "should this Note be placed in the hands of attorneys for collection after default". The Notes define "Event of Default" broadly to include failure to "observe, perform or comply with any covenant, agreement or provision of this Note". That language clearly includes failure to provide the Extension Warrants.

3. The lower court's interpretation of the fee-shifting provision, brief and bare of citations, ignores the above-referenced points, creates unnecessary conflict

between various terms of Section 6.2[1], and is contrary to Delaware black-letter law of contract interpretation.

4. The second sentence of the fee-shifting provision (Section 6.2[2]) does not support the lower court's interpretation. It was drafted the way it was to provide fee-shifting for PCSI, and as such it had nothing whatsoever to do with warrants and does not speak to whether or not having to sue to obtain them is covered by Section 6.2[1].

5. Even if the lower court was correct that litigation against PCSI to recover principal or interest under the Notes was required to trigger Section 6.2[1], the fact remains that that did occur. PCSI failed to pay at all, requiring Appellants to bring litigation to force PCSI to pay. Appellants naturally also asked for payment of the Extension Warrants, eventually litigated in the court below – to do otherwise would have risked claim preclusion for claim splitting. As such Appellants are entitled to their "reasonable attorneys' fees" in the litigation, including for their successful claim for Extension Warrants.

6. Even if the lower court's interpretation of the provision is a reasonable one, a reasonable investor also would have been justified in reading the fee-shifting provision as granting fees if he or she had to sue PCSI to force it to provide warrants. The Notes and the Offer Letters were sent out as identical contracts of adhesion to Appellants. PCSI could have – but did not – edit the

provision or include additional language making clear the fee-shifting provision would not apply if it had to be forced to provide warrants. Instead, PCSI included language such as "indebtedness" (which includes non-monetary debts) and "default" (defined in the contract to include contract breaches such as not providing warrants), giving rise to a reasonable interpretation that the fee-shifting provision would apply. As such, the doctrine of *contra proferentem* applies, and the provision should be interpreted in Appellants' favor.

STATEMENT OF FACTS

A. The "Four Fraudsters" Form PCSI To Bilk Investors.

PCSI originated in a scheme by Pendleton Waugh, Charles Austin, Jay Bishop, and Charles Guskey (the "four fraudsters," to use the lower court's words) to buy cellular spectrum FCC licenses in Puerto Rico and the U.S. Virgin Islands, then flip them to Telecellular, Inc. Trans. ID 58118766, at 33; A259 ¶ C. Waugh (now deceased) was Telecellular's director and President. A259 ¶ C.

Waugh had a lengthy industry criminal record. *Id.* ¶ D. Waugh pled guilty to conspiracy to structure financial transactions to evade securities and banking reporting requirements, a felony. *Id.* He was thereby sentenced to 21 months in prison, three years of probation, and a $20,000 fine. *Id.* Later he received over four more years of prison for violating his parole and was convicted of felony securities fraud. A261 ¶ J.

Bishop was also a convicted industry felon. A260-61 ¶ F. He was a principal of a cellular license company seized in an SEC enforcement action for defrauding investors. *Id.* He was convicted of felony conspiracy to defraud the IRS and attempted tax evasion and received a 30-month prison sentence. *Id.*

Because felon Waugh could not acquire FCC licenses, Austin was brought in as a front-man. A260 ¶ E. PCSI's four founders tried to conceal Waugh and Bishop's involvement at PCSI. A261 ¶ H. Waugh, however, was secretly in

control (at least until an SEC enforcement action later drove a wedge between him and Austin). *Id.*

Austin was President and CEO of PCSI until its 2013 court-ordered annual meeting. *Id.* ¶ I. In October of 2009, the lower court in another action involving PCSI issued an order prohibiting Austin from holding himself out as constituting the PCSI board of directors. *Judy v. PCSI*, 2009 WL 8482304, at *3 (Del. Ch. Oct. 13, 2009).

PCSI raised money "through a variety of different, poorly documented securities." A262 ¶ M. The lower court found that its "primary business activity appears to have been inducing individuals to buys its securities." *Judy v. PCSI*, 2016 WL 4992687, at *4 (Del. Ch. Sept. 19, 2016).

Given that background, the conduct of the "four fraudsters" in running PCSI was contradictory and dishonest:

> PCSI's founders did not follow corporate formalities. They regularly backdated documents and took dramatically different positions regarding PCSI's capital structure depending on whether they were dealing with regulatory authorities like the FCC, potential investors, or the court. The positions that PCSI took in its regulatory filings with the FCC contained internally (and remarkably) contradictory averments about fundamental points.

A262 ¶ K.

B. Appellants Purchase Nine Month Promissory Notes Promising Fee-Shifting If PCSI Had To Be Sued To Comply.

In April 2006, PCSI made a private offering of promissory notes (the "Notes"). A262 ¶ N. The Notes were due in nine months and promised payments of principal and interest and warrants for PCSI common stock. *Id.* Appellants each purchased Notes, which were essentially identical to each other. A77-84, 91-94, 107-10, 115-18, 145-48.

Section 6.2 of the Notes is a fee-shifting provision:

> Should any indebtedness evidenced by this Note be collected by action at law, or in bankruptcy, receivership, or other court proceedings, or should this Note be placed in the hands of attorneys for collection after default, Maker agrees to pay, upon demand by Holder, in addition to principal and interest and other sums, if any, due and payable hereon, court costs and reasonable attorneys' fees and other reasonable collection charges. Should Maker be required to bring any action to enforce its rights under this Note, it shall be entitled to an award of its court costs and reasonable attorneys' fees in such action.

A78.

The first sentence of Section 6.2 references "default". *Id.* Section 5(b) of the Notes defines an "Event" of "Default" to include "Maker fail[ing] to duly observe, perform, or comply with any covenant, agreement or provision of this Note" unremedied for 10 days after written notice. *Id.*

C. The Offer Letter Promises Extension Warrants In Return For Appellants Forbearing From Suing PCSI When It Could Not Repay.

PCSI did not pay when the Notes came due, thereby defaulting. A268 ¶ 3.c.

In November of 2007, PCSI sent to each of Appellants a letter (the "Offer Letter"). A263 ¶ Q; A86-87. Austin and/or his attorney drafted the Offer Letter. A287. The Offer Letter was a proposed agreement under which Appellants would forebear from suing. In return, PCSI agreed to pay the Notes when it had enough cash and, at the time of payment, provide additional warrants to purchase PCSI common stock (the "Extension Warrants") exercisable at $5 per share. A263, 266-67 ¶¶ Q, 3.a.

The number of Extension Warrants provided would depend on how long it took PCSI to pay off the Notes. A266-67 ¶ 3.a. Each of Appellants executed and returned their respective Offer Letter. A283.

D. PCSI Receives Approximately $60M, Triggering Its Obligations Under The Offer Letter.

In a December 2013 transaction, PCSI essentially gave up certain of its assets to Sprint Corporation in return for a payment of approximately $60 million. A265 ¶ FF. This transaction triggered PCSI's obligation to pay principal, interest, and Extension Warrants under the Notes as modified by the Offer Letter. *Id.*

E. Appellants Sue In Texas To Enforce The Notes And Seek Extension Warrants There.

Noteholders including Appellants filed suit in Texas to enforce the Notes. A266 ¶ GG. Noteholders also made a claim in Texas for Extension Warrants. A156-58.

PCSI and the Texas plaintiffs settled the noteholders' claims to outstanding principal and interest under the Notes. A266 ¶ GG. The parties agreed to litigate claims for Extension Warrants in the Delaware Court of Chancery. *Id.*

F. The Court Below Enters Summary Judgment Granting Appellants Extension Warrants.

Appellants filed their complaint in the court below, thereafter amended, seeking Extension Warrants. A61-257. The lower court issued an order granting in part Appellants' motion for summary judgment (the "Summary Judgment Order"). A34-60; A258-76.

The Summary Judgment Order held that the Offer Letter was a valid contract which was accepted by certain Noteholders. It found that "PCSI promised warrant coverage as a component of the plaintiffs' return and is now obligated to provide it." A275 ¶ 15. Thus, the court held, "The contract at issue consists of the Notes as modified by the Offer Letter".[2] A266 ¶ 3.

G. The Court Below Grants – Then Denies – Appellants' Motion For Fees In Brief Orders.

Appellants filed a motion seeking fees and expenses; Appellants exclusively relied on the first sentence of Section 6.2 (Section 6.2[1]).[3] A322-43. The trial

[2] The court did not grant summary judgment to certain plaintiffs. Ultimately, remaining plaintiffs elected to dismiss their claims.

[3] Appellants sought only fees associated with themselves (the successful plaintiffs). A325 ¶ 9.

court issued an order granting Appellants' request for attorneys' fees and expenses (the "First Fee Order") in the amount of $166,313.26, but relied on Section 6.2[2]:

> Section 6.2, entitled "Collection," contains two sentences. The first deals with the indebtedness evidenced by the Note and the collection of that indebtedness. The second is broader. It states, "Should Maker be required to bring any action to enforce its rights under this Note, it shall be entitled to an award of its court costs and reasonable attorneys' fees in such action." The right to the Extension Warrants was a right that the Maker received under the Note. This action was brought to enforce that right. PCSI has a fair point that this enforcement action did not fall within the first sentence. Instead, it fell within the second sentence.
>
> The court has reviewed the fees and expenses sought. They are reasonable given the nature and scope of the action. In the context presented, they are adequately supported.

Ex. A.

PCSI moved to reargue. A344-48. Appellants responded, again arguing for fees under Section 6.2[1]. A349-58. The lower court granted PCSI's motion to reargue (the "Second Fee Order") in a brief ruling:

> The two sentences in Section 6.2 are worded differently. The second is broader, but it grants rights only to the Maker. The movant is correct that the Maker is the defendant, not the plaintiff. The plaintiff's fee-shifting rights extend only to collection efforts.

Ex. B.

ARGUMENT

I. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION FOR ATTORNEYS' FEES AND EXPENSES.

A. Question Presented

Whether the Court of Chancery legally erred in interpreting the Notes' fee-shifting provision when it denied Appellants their fees and expenses in successfully litigating to obtain warrants promised by the Notes as amended. A322-43.

B. Scope Of Review

This Court reviews "the Vice Chancellor's interpretation of a contractual fee-shifting provision *de novo*." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 675 (Del. 2013).

C. Merits Of Argument

"Under standard rules of contract interpretation, a court must determine the intent of the parties from the language of the contract." *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003) (citations omitted). "Where no ambiguity exists, the contract will be interpreted according to the 'ordinary and usual meaning' of its term." *Id.* (quotation omitted); *see also Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 182568, at *4 (Del. Ch. Mar. 24, 1999), *aff'd,* 741 A.2d 16 (Del. 1999) (interpreting contract under "plain English reading"). Contract language is ambiguous where it is "reasonably susceptible of

two or more interpretations or may have two or more different meanings." *Twin City Fire*, 840 A.2d at 628 (quotation omitted).

Under the doctrine of *contra proferentem*, "ambiguities in a contract will be construed against the drafter". *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551 (Del. 2013) (applying the doctrine to a contract only one party drafted creating rights in public securities investors to give effect to those investors' reasonable expectations).

The first sentence of the fee-shifting provision (Section 6.2[1]), which applies to Appellants, is triggered under two conditions: (1) "[s]hould any indebtedness evidenced by this Note be collected" in "court proceedings"; or (2) "should this Note be placed in the hands of attorneys for collection after default". The conditions are phrased in the alternative, "or," so that if either applies the provision is satisfied. If triggered, PCSI offered and agreed to pay all "court costs and reasonable attorneys' fees and other reasonable collection charges."

1. Appellants Are Owed Fees Because The Lower Court Ruled PCSI "Indebted" To Plaintiffs To Provide Warrants.

Appellants are owed fees under the first prong of Section 6.2[1] because the lower court ruled in the Summary Judgment Order that PCSI was indebted to provide plaintiffs with the Extension Warrants promised in the Offer Letter.

The Summary Judgment Order holds that "plaintiffs' contracts were breached, and they suffered damage." The contract that was breached "consists of

the Notes as modified by the Offer Letter." A266 ¶ 3. Thus, the "indebtedness" evidenced by the Notes includes the obligations later added to each Note by the Offer Letter.

The first prong of Section 6.2[1] allows fees for having to litigate "any indebtedness evidenced by this Note" and is not limited to a failure to pay principal or interest. The term "indebtedness" is properly interpreted to include nonmonetary, as well as monetary, debts. *See* Black's Law Dictionary 488 (10th ed. 2014) (defining "debt" as "***A nonmonetary thing*** that one person owes another, such as goods or services <her debt was to supply him with 20 international first-class tickets on the airline of his choice>") (emphasis added); *Westchester Fire Ins. Co. v. Hasbargen*, 632 N.W.2d 754, 757 (Minn. Ct. App. 2001) ("'debt' has broad meaning, reaching not only money, but whatever one is bound to render to another, such as goods or services") (citing Black's Law Dictionary); *In re Robinson's Estate*, 23 N.Y.W.2d 905, 06 (N.Y. Sur. Ct. 1940) (meaning of "indebted" includes obligation to deliver securities).

Even as originally drafted, the Notes promised warrants. A77 § 2. That is all the more reason why a reasonable investor would have read the Notes to promise to shift fees for a successful lawsuit – not only to seek payment of principal or interest, but also to force PCSI to issue warrants. Had the drafters of the Notes – Austin and/or the other "four fraudsters" – wanted to narrow Section

6.2[1] to exclude suits for warrants, they could very easily have done so. For example, they could have replaced "indebtedness" with "principal or interest" (they would also have had to revise or eliminate Section 6.2[1]'s second prong, discussed below). Instead, they used the broad and general term "indebtedness" that refers to nonmonetary as well as monetary debts.

2. Plaintiffs Are Owed Fees Because PCSI Was In "Default" On The Note By Not Providing Extension Warrants.

Prong two also allows fees "should this Note be placed in the hands of attorneys for collection after default". A78 § 6.2.

The Notes define "Event of Default" broadly, to include not only nonpayment of "principal or interest due hereunder" but also failure to "observe, perform or comply with any covenant, agreement or provision of this Note". A78 § 5.

The lower court in the Summary Judgment Order held that the Appellants' contract with PCSI consisted of the Note as modified by the Offer Letter. A266 ¶ 3. Given the Offer Letter's promise of the Extension Warrants when PCSI had enough cash to pay the Notes and PCSI's failure to pay on the Notes or provide the Extension Warrants when obligated (which failure led to the Texas/Delaware litigation), PCSI quite clearly committed a "default" by not providing Extension Warrants.

As such, the second prong of Section 6.2[1] also applies to shift fees in this litigation, placed in the hands of Appellants' attorneys for collection of the Extension Warrants.

3. The Court Misread The Fee-Shifting Provision.

As set forth above, the court's entire ruling and rationale in the Second Fee Order consisted substantively of a single sentence: "The plaintiff's fee-shifting rights extend only to collection efforts." Ex. B

Section 6.2[1] does not use the phrase "collection efforts." For that matter, the first prong of that provision does not even use the term "collection." Rather, it entitles Appellants to all "reasonable attorneys' fees" if any "indebtedness" evidenced by the Note is "collected" in any "court proceedings." As set forth above, PCSI owed a "debt" to Appellants to provide them with warrants, which were "collected" by use of the "court proceeding" below. *Supra* Argument § I.C.1.

In Delaware, contracts are interpreted using the "plain English" meaning of their words. *Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 182568, at *4 (Del. Ch. Mar. 24, 1999), *aff'd,* 741 A.2d 16 (Del. 1999). That is the meaning given to them by ordinary people, not specialized commercial lawyers. *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P.*, 2011 WL 549163, at *4 n.24 (Del. Ch. Feb. 16, 2011) ("All mercantile contracts should be construed according to their plain meaning, to persons of sense and understanding, and not

according to forced and refined interpretations which are intelligible only to lawyers.") (quoting 17A AM. JUR. 2D *Contracts* § 396).

One can in plain English certainly "collect" warrants via a court proceeding. Webster's New World College Dictionary (4th ed. 2000) (defining "collect" as "to gather together; assemble"). Indeed, it is arguably more grammatical, interpreting this specific use of the word "collected," to say one "collected" physical certificates representing warrants than it is to say one "collected" (more abstract) cash. *See* A278 ¶ 3 (ordering PCSI to provide to certain plaintiffs "warrant certificates to purchase the aforementioned shares of stock").

The use of the term "collection" in the entitlement section of Section 6.2[1] is non-exclusive. That is, if Section 6.2[1] is triggered, Appellants are entitled to "reasonable attorneys' fees ***and other*** reasonable ***collection charges***." (emphasis added). The term "collection" modifies "charges," not "attorneys' fees."

To the extent the lower court used a specialized meaning of "collection efforts" in derogation of the plain English meaning of the specific words of the fee-shifting provision, it erred as a matter of black-letter Delaware law of contract interpretation.

This conclusion is reinforced by, as set forth above, prong one of Section 6.2[1]'s use of the broad term "indebtedness" and prong two's use of the broad term "default." Any other reasoning would result in a paradoxical reading of

Section 6.2[1] that PCSI's failure to provide the Extension Warrants created "indebtedness evidenced by this Note" and a "default" that nevertheless somehow could not be "collected" by court proceedings or "placed in the hands of attorneys for collection".

Moreover, the lower court's interpretation creates a mixed regime of "some fees are shifted, others are not" that Delaware courts have historically disfavored. *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009).

This would be an unduly cramped interpretation even if the fee-shifting provision were narrower, such as a contract solely allowing "costs of collection". In *Steiner Elec. Co. v. Maniscalco*, 51 N.E.3d 45 (Ill. App. 2016), the court ruled that such a narrower provision granted fees for plaintiff's successful veil-piercing action to enforce a money judgment. *Id.* at 67.

The trial court's reasoning seems to assume that litigation for principal or interest would trigger the fee-shifting provision. Yet the trial court had previously found and held the Extension Warrants ***to be interest***. The Summary Judgment Order specifically ruled, "The plaintiffs invested in a speculative and financially troubled entity. If anything, the rate of interest they earned was moderate given the nature of their investment. PCSI promised ***warrant coverage as a component of***

the plaintiffs' return and is now obligated to provide it." A275 ¶ 15 (emphasis added).

To the extent the lower court's ruling in the Second Fee Order was predicated on its reference in the First Fee Order to the heading of Section 6.2, it also legally erred. Contract headings are not "controlling evidence of the meaning of a contract's substantive provisions". *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 581 n.35 (Del. Ch. 1998). While they "may be considered as additional evidence tending to support the substantive provisions," *id.*, here the lower court's interpretation flies in the face of Section 6.2[1]'s use of the broad terms "indebtedness" and "default".

4. Section 6.2[2] Was Drafted To Shift Fees For PCSI, Not To Exclude Proceedings To Obtain Warrants From 6.2[1].

The lower court seemed to rely on the differences between 6.2[1] and [2] in its ruling. While in some cases different wordings of different provisions can clarify both relevantly, in this case it does not.

The difference in wording is driven by the difference in who can enforce it (Appellants as "Holder" for Section 6.2[1] and PCSI as "Maker" for Section 6.2[2]). PCSI obviously could not add itself to Section 6.2[1] because "indebtedness evidenced by this Note" was something only sought by Holder (the one to whom Maker was indebted), not Maker. The wording of Section 6.2[2] was

solely a consequence of the difference in identity between Holder and Maker; it had nothing to do with whether or not Holder could seek fees as to warrants.

For that reason, the difference in wording does nothing to make the lower court's reading reasonable or fair to a prospective investor reading the provision. Such an investor would, as set forth above, have read the plain language of Section 6.2[1] and concluded that it would apply if he or she had to sue PCSI to collect warrants from it. Such investor would then naturally read Section 6.2[2], not as somehow stating that non-cash defaults like a failure to provide warrants were not included in Section 6.2[1], but solely a consequence of the fact that PCSI wanted fee-shifting rights too but would naturally not be suing to collect "indebtedness".

5. Appellants Are Also Owed Fees Because They Had To Sue To Force PCSI To Pay Principal And Interest.

The lower court's interpretation of Section 6.2[1] is contrary to its plain language. Even if it were correct, however, Appellants would still be entitled to their fees. The fact remains that Appellants were forced to sue because PCSI refused to pay principal or interest on the Notes, which even the lower court's interpretation of Section 6.2[1] covers. As such, Appellants were entitled to all "reasonable attorneys' fees" from the resulting "court proceedings".

In the Texas litigation, Appellants asked not only for payment of principal and interest but also for payment of the Extension Warrants. Indeed, to do otherwise would have risked claim preclusion. *Maldonado v. Flynn*, 417 A.2d

378, 382-85 (Del. Ch. 1980) (claim precluded by rule against claim splitting because plaintiff failed to present it in previous action arising out of same transaction).

Appellants are thus entitled to their "reasonable attorneys' fees" for the court proceedings which resulted from PCSI's failure to comply with the Notes as amended, including resolution of their rights to Extension Warrants in the court below.

6. Even If Ambiguous, Section 6.2[1] Is Properly Interpreted Under *Contra Proferentem* In Appellants' Favor.

As set forth above, the only reasonable interpretation of Section 6.2[1] giving full effect to all its terms in harmony with each other is that it shifts fees if PCSI refuses to provide warrants. At worst, however, an additional reasonable interpretation of that provision makes it ambiguous. *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003).

Where a contract is ambiguous, under the *contra proferentem* principle "ambiguities in a contract will be construed against the drafter". *Bank of New York Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551 (Del. 2013) (applying the doctrine to a contract only one party drafted creating rights in public securities investors to give effect to those investors' reasonable expectations).

Both the Notes and the Offer Letter were contracts of adhesion, sent out in substantially the same form to each investor. PCSI President Austin and/or his

attorney drafted the Offer Letter. A287. PCSI could have, but did not, edit the provision or include additional language making clear the fee-shifting provision would not work if PCSI had to be forced to provide the warrants. Doubtlessly PCSI did not for fear it would have scared away investors from investing money. Accordingly, the contract should be interpreted in Appellants' favor to provide them attorneys' fees in this suit.

CONCLUSION

Appellants respectfully request that this Court reverse the lower court with instructions to grant Appellants' motion for attorneys' fees.

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