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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| EQUITY TRUST COMPANY, | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellant | ) | |
| | ) | |
| v. | ) | No. 172, 2018 |
| | ) | |
| INTERACTIVE BROKERS LLC, | ) | Case Below: |
| | ) | |
| Defendant Below, | ) | Superior Court of the State of Delaware |
| Appellee. | ) | C.A. No. N17C-05-252 WCC[CCLD] |

# APPELLANT'S OPENING BRIEF ON APPEAL

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## NATURE OF THE PROCEEDINGS

Appellant Equity Trust Company ("Equity Trust") commenced this action on May 17, 2017 by filing its Complaint (the "Complaint") in the Superior Court of the State of Delaware alleging that Appellee Interactive Brokers LLC ("Interactive Brokers") breached the parties' Service Agreement dated December 31, 2000 (the "Agreement") by failing to make required payments of fees triggered by the closing and transfer of accounts following Interactive Brokers' decision to terminate the Agreement effective December 31, 2016.

On July 26, 2017, Interactive Brokers moved to dismiss the Complaint (the "Motion to Dismiss"). Interactive Brokers argued that, as a matter of law, it was not obligated under the Agreement to pay any closing fees to Equity Trust because Interactive Brokers had not "terminated" the Agreement. Although the plain language of Section 9 speaks only to a termination of the Agreement, not a "right to not renew," Interactive Brokers argued that such a right was implicit in Section 9. Interactive Brokers claimed that the "non-renewal" option that it read into the contract allowed it to avoid paying the closing fees specified under the Agreement.

Equity Trust opposed the Motion to Dismiss because the Agreement unambiguously provides the parties with only two options: automatic renewal or termination. And, regardless of the terminology, Interactive Brokers' decision to

terminate the Agreement triggered Interactive Brokers' obligation to pay closing fees to Equity Trust to cover the closing and transfer of accounts.

The trial court's Memorandum Opinion dated March 6, 2018 (the "Opinion") granted the Motion to Dismiss, despite the fact that the Agreement sets forth a clear notice procedure for a party to "terminate" the Agreement. In its Opinion, the trial court wrote that there should be a method for a party to elect not to renew the Agreement and avoid the incurrence of any closing fees, even though the contract contained no such provision. Despite the absence of any such provision in the contract, the trial court found that the only reasonable construction of the Agreement was to create "an inherent option for non-renewal," and found that Interactive Brokers had somehow exercised that "inherent option," and could avoid all closing fees, which the Court characterized as a "non-renewal penalty," even though that also was not provided by the contract. Despite the fact that one-third of the closing fees are based purely on whether the accounts have been closed and/or transferred, and have no bearing on whether the Agreement is "not renewed," "terminated," or continued in force, the trial court undertook no separate analysis to determine whether the contractual standard for such fees had been met.

Equity Trust filed a timely appeal of the Opinion. This is Equity Trust's Opening Brief in support thereof.

## SUMMARY OF ARGUMENT

I. The trial court erred as a matter of law in determining that Interactive Brokers' interpretation was the "only reasonable construction of the Agreement." In reaching that conclusion, the trial court misapplied the well-established standard on a motion to dismiss that required the trial court to accept all well-pleaded factual allegations in the Complaint as true, and draw all reasonable inferences in favor of plaintiff, the non-moving party. The trial court should not have dismissed the Complaint because there is a "reasonably conceivable set of circumstances," under which Equity Trust would be entitled to recover one or both of the closing fees.

The trial court made three critical errors. First, rather than rely on the plain language of the Agreement, the trial court wrote a non-renewal option into the contract, which it then construed as providing Interactive Brokers with a means to exit the Agreement without paying any of the contractually-required closing fees. This judicial rewriting of the Agreement violated basic rules of contract construction and constitutes reversible error.

Second, the trial court failed to assess Equity Trust's interpretation of the Agreement under the appropriate standard and failed to explain why (or even if) Equity Trust's interpretation was not a reasonable construction of the Agreement under any reasonably conceivable set of circumstances alleged in the

Complaint. Instead, the trial court ignored the plain language of the Agreement, and drew factual inferences against Equity Trust to prop up Interactive Brokers' interpretation, which is not supported by the plain language of the Agreement. The trial court's misapplication of the legal standard on a motion to dismiss is reversible error.

Third, the trial court conflated the requirements for the non-bulk closing fees and the bulk closing fees, assessing both as being incurred upon the termination of accounts in an "Agreement year." The non-bulk closing fees, however, were not triggered by the termination of accounts in an "Agreement year," but rather were incurred upon the "clos[ing]" and transfer of any account. The trial court's failure to assess whether Interactive Brokers was obligated to pay the Non-Bulk Closing Fees misapplied the standard for such fees under the Agreement. The trial court's misapplication of the contractual standard on a motion to dismiss requires reversal for further proceedings on Equity Trust's claim.

## STATEMENT OF FACTS

### A. Interactive Brokers Agreed To Pay Fees For Closing And Transferring Accounts Managed By Equity Trust Pursuant To The Agreement.

On December 31, 2000, Interactive Brokers entered into the Agreement with Equity Trust's predecessor-in-interest, Delaware Charter Guarantee & Trust Company ("Delaware Charter"), pursuant to which Delaware Charter agreed to provide certain trust and related services to Interactive Brokers' customers.[1] With the consent of Interactive Brokers, Delaware Charter assigned its rights in the Agreement to Equity Trust at the end of 2014.[2] By the fourth quarter of 2016, Equity Trust was managing 46,317 accounts for Interactive Brokers pursuant to the Agreement (the "Accounts").[3]

In return for Equity Trust's services, Interactive Brokers agreed, among other things, to pay a small quarterly fee for each open account managed by Delaware Charter and to pay certain one-time fees incurred when any accounts were closed or transferred. Section 2 of the Agreement defines Interactive Brokers' "Obligations" under the Agreement and, with respect to applicable management and closing fees, provides, in relevant part:

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[1] A021-22 (Agreement § 1). Whether Equity Trust satisfied its obligations under the Agreement is not at issue below or on appeal.

[2] A012 (Compl. ¶ 19).

[3] A007 (Compl. ¶ 1).

> 2. Interactive Brokers LLC Obligations. To enable Delaware Charter to provide the services described in Section 1, Interactive Brokers LLC agrees to: … (k) Pay all Delaware Charter fees for Accounts closed during a calendar quarter and all quarterly trustee fees for all open Accounts (as set forth in Exhibit B to this Agreement) no later than 30 business days after receiving the quarterly invoice prepared by Delaware Charter[.][4]

The fee schedule attached to the Agreement as Exhibit B (the "Fee Schedule"), as amended in 2012, obligated Interactive Brokers to pay two types of closing fees.[5] First, Interactive Brokers agreed to pay a closing fee of $20 per account in exchange for Equity Trust closing an account and transferring the assets to a successor (the "Non-Bulk Closing Fee"). Second, Interactive Brokers agreed to pay a closing fee of $40 per account "[i]f more than 20% of the Account base terminates in any Agreement year" (the "Bulk Closing Fee") and, if such a situation arises, "the Non-Bulk Closing Fee and the Bulk Closing Fee are applicable and will be billed."[6] The Non-Bulk Closing Fee and the Bulk Closing Fee are collectively referred to as the "Closing Fees."

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[4] A022-23 (Agreement § 2).

[5] A036-37 (Fee Schedule). As originally drafted, the Fee Schedule provided for both non-bulk and bulk closing fees, but at a lower amount than Interactive Brokers agreed to in the 2012 amendment. A029.

[6] A037 (Fee Schedule).

Pursuant to Section 9, the Agreement would renew each year unless either party "terminate[d]" the Agreement for any reason upon sixty days' written notice. Section 9 provides, in full:

> 9. Terms and conditions of the Agreement. This Agreement shall have a non-cancelable term until December 31, 2001. ***This Agreement shall automatically renew for additional one-year periods effective January 1st unless either party, upon at least sixty (60) days' written notice prior to the renewal date, terminates the Agreement.*** The terms of this Agreement may be changed by written mutual consent of both parties.[7]

Section 10 of the Agreement also provides a mechanism by which either party may terminate the Agreement for cause upon thirty days' written notice of a material breach; although the breaching party could avoid termination by curing any such breach during the thirty day notice period. Section 10 provides:

> 10. Termination. In the event of any material breach of this Agreement by one party, the other party may (reserving cumulatively all other remedies and rights under this Agreement and at law and in equity) terminate this Agreement by giving at least thirty (30) days written notice to the breaching party, provided, however, that any such termination shall not be effective if the party in breach has cured such breach prior to expiration of said thirty (30) day notice period.[8]

[7] A026 (Agreement § 9) (emphasis added).

[8] A026 (Agreement § 10).

### B. Interactive Brokers Terminated The Agreement And Refused To Pay Closing Fees.

By letter dated October 28, 2016, Interactive Brokers provided notice to Equity Trust that it was terminating the Agreement "*[p]ursuant to Section 9*" (the "Notice"). The Notice stated:

> ***Pursuant to Section 9*** of the Service Agreement between Interactive Brokers LLC and Delaware Charter Guarantee & Trust Company (the "Agreement"), of which Equity Trust Company is a successor to Delaware Charter, ***Interactive Brokers LLC elects not to renew the Agreement on January 1, 2017.*** December 31, 2016 will be the last day the Agreement is effective.[9]

Pursuant to the Notice, all 46,317 of the Accounts managed by Equity Trust at that time were to be closed and transferred to Interactive Brokers. Throughout November and December 2016, Equity Trust repeatedly reminded Interactive Brokers of its obligations to pay the Closing Fees pursuant to Section 2(k) of the Agreement and the Fee Schedule attached thereto.[10] Interactive Brokers did not divulge its current position—that would not honor its obligations to pay Closing Fees—until January 2017, after it had already taken possession of the Accounts without Equity Trust's knowledge.[11]

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[9] A039 (Compl. Ex. 2 Notice) (emphasis added).

[10] A013-16 (Compl. at ¶¶ 24-31).

[11] A016 (Compl. ¶¶ 31-33).

Equity Trust prepared a quarterly invoice for the fourth quarter of 2016 that reflected the Closing Fees, which Interactive Brokers received on November 29, 2016.[12] Pursuant to Section 2(k), the Closing Fees reflected on the invoice became due "no later than 30 business days after receiving the quarterly invoice[.]"[13] To date, Interactive Brokers has not paid either the Non-Bulk Closing Fees or the Bulk Closing Fees, or any portion thereof.[14]

### C. Equity Trust Commenced This Action To Enforce Interactive Brokers' Contractual Obligation.

After attempting to persuade Interactive Brokers to honor its obligation to pay the Closing Fees, on May 17, 2017, Equity Trust filed its Complaint alleging that Interactive Brokers was liable for breach of contract for failing to pay the Closing Fees as required under Section 2(k) of the Agreement.[15] In the Complaint, Equity Trust sought a declaration that Interactive Brokers had breached the Agreement, and damages equal to the Non-Bulk Closing Fee and the Bulk Closing Fee, which together amounted to $60 per account, for each of the 46,317 Accounts terminated by Interactive Brokers.[16]

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[12] A014 (Compl. ¶ 26).

[13] A022-23 (Agreement § 2(k)).

[14] A016-17 (Compl. ¶¶ 34-35).

[15] A017-18 (Compl. ¶¶ 36-42).

[16] A008-09, A017-18 (Compl. ¶¶ 2-4, ¶¶ 41-42, and Prayer for Relief).

Interactive Brokers moved to dismiss the Complaint on July 26, 2017.[17] Interactive Brokers claimed that, as a matter of law, it had not "terminated" the Agreement, but instead had merely "exercise[d] its right not to renew" it, ignoring the fact that the language of the Agreement made no such distinction.[18] Furthermore, despite the language in the Agreement obligating Interactive Brokers to pay the Closing Fees upon the closing of accounts, and despite admitting that it had consistently paid Non-Bulk Closing Fees for accounts closed in the past, Interactive Brokers argued that the Closing Fees amounted to a penalty, which it claimed was an absurd result.[19]

### D. The Trial Court Modified The Agreement And Incorrectly Applied The Standard Of Review.

On March 6, 2018, the trial court issued its Opinion granting Interactive Brokers' Motion to Dismiss.

Although the trial court noted that both parties relied on Section 9 and the Fee Schedule to support their differing positions, the trial court found that the Agreement was "unambiguous" and that it was able "to interpret and reach two reasonable conclusions regarding the Agreement."[20] First, despite the fact that the

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[17] A040-43 (Mot. to Dismiss).

[18] *Compare* A056 (Def. Op. Br. at 10), *with* A026 (Agreement § 9).

[19] A055-57 (Def. Op. Br. at 9-11).

[20] Op. at 10.

Agreement provided that, absent a termination for cause, the only options available to the parties with respect to the continuation of the Agreement was either to do nothing and allow the Agreement to automatically renew, or to "terminate" the Agreement on sixty days' written notice, the trial court determined that there was actually "***an inherent option for non-renewal***" in Section 9 of the Agreement, and Interactive Brokers had properly exercised that unwritten option.[21] Second, the trial court found that Interactive Brokers' "non-renewal did not 'terminate' the Agreement during a calendar quarter in the 2016 Agreement year" and that, as a result, Interactive Brokers had not "triggered the Closing Fees asserted by the Plaintiff."[22] Based on those findings, the trial court determined that, as a matter of law, Interactive Brokers owed no Closing Fees to Equity Trust, and granted the Motion to Dismiss.

[21] Op. at 10, 12 (emphasis added).

[22] Op. at 10-11.

## ARGUMENT

### I. THE TRIAL COURT ERRED BY HOLDING THAT, AS A MATTER OF LAW, INTERACTIVE BROKERS' INTERPRETATION OF THE AGREEMENT WAS THE ONLY REASONABLE CONSTRUCTION.

#### A. Question Presented

Whether the trial court erred in determining that, as a matter of law, Interactive Brokers' interpretation is the only reasonable construction of the Agreement. This issue was presented and preserved below.[23]

#### B. Scope of Review

This Court reviews a trial court's ruling on a motion to dismiss *de novo* to "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts."[24] When reviewing a ruling on a motion to dismiss, this Court accepts all well pleaded factual allegations as true, accepts even vague allegations as "well pleaded" if they give the opposing party notice of the claim, and draws all reasonable inferences in favor of the non-moving party. This Court will "not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."[25]

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[23] A067-76 (Pl. Ans. Br. at 4-13); A113-114 (Hr'g Tr. at 20:11-21:3); Op. at 6-14.

[24] *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009); *accord Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011).

[25] *Cent. Mortg.*, 27 A.3d at 535; *accord Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002).

C. Merits of Argument

In the Complaint, Equity Trust set forth its interpretation of the plain language of the Agreement. Under Section 2(k), Interactive Brokers agreed to pay "fees for Accounts closed during a calendar quarter … as set forth in [the Fee Schedule]."[26] The Fee Schedule provided that Interactive Brokers owed Equity Trust a Non-Bulk Closing Fee of $20 per account in exchange for closing the account and/or transferring the assets to a successor, and owed Equity Trust an ***additional*** Bulk Closing Fee of $40 per account "[i]f more than 20% of the Account base terminates in any Agreement year."[27]

Under Section 9, the Agreement "automatically renew[ed]" each year "unless either party … terminate[d] the Agreement."[28] Interactive Brokers elected to terminate the Agreement in October 2016 and directed Equity Trust to transfer all 46,317 Accounts.[29] Interactive Brokers thereby triggered the Closing Fees provision of the Agreement, and was obligated to pay $60 for each account closed.

The trial court never explained in the Opinion why Equity Trust's interpretation was not reasonable under the "reasonably conceivable" standard, and made other critical errors that require reversal.

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[26] A022-23 (Agreement § 2(k)); A011 (Compl. ¶ 14).

[27] A037 (Fee Schedule); A011 (Compl. ¶¶ 15-16).

[28] A026 (Agreement § 9) (emphasis added); A012 (Compl. ¶ 18).

[29] A012-13 (Compl. ¶¶ 20-22).

### 1. The Trial Court Erred As A Matter Of Law By Rewriting The Termination Provision of the Agreement.

The trial court erred as a matter of law by ignoring the plain language of the Agreement and substituting its own subjective view of the parties' intent to reach its erroneous conclusion that Interactive Brokers' position was the only reasonable construction of the Agreement. "Under Delaware law, courts interpret contracts to mean what they objectively say. This approach is longstanding and is motivated by grave concerns of fairness and efficiency."[30] Thus, Delaware courts "will interpret clear and unambiguous terms according to their ordinary meaning." Such "terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[31] Failure to apply that well-established standard constitutes reversible error.[32]

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[30] *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007); *accord Osborne ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("Delaware adheres to the 'objective' theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party.").

[31] *GMG Capital Invs., v. Athenian Venture P'rs I*, 36 A.3d 776, 780 (Del. 2012).

[32] *Nationwide Emerging Mgrs, LLC v. Northpointe Hldgs, LLC*, 112 A.3d 878, 897 (Del. 2015) (reversing trial court for implying contractual obligations inconsistent with the contract's express terms); *GMG Capital*, 36 A.3d at 781-84 (reversing trial court for failing to recognize reasonability of interpretation based on plain terms of contract).

Here, rather than rely on the plain language of Section 9 of the Agreement, the trial court relied on its own "***common sense implication***" that a neutral non-renewal option ***should*** exist as an invitation to create one out of whole cloth. The trial court rewrote the terms of the contract to provide Interactive Brokers with a means to exit the Agreement without paying any of the contractually-required Closing Fees.[33] That judicial "blue-penciling" of the Agreement violated basic rules of contract construction. It is black letter law that "[a] court may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous, … nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case."[34] By reading an implied non-renewal option into the Agreement, the trial court violated those basic principles and committed reversible error.[35]

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[33] Op. at 11-14.

[34] *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000); *accord Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Syst. Co.*, 708 A.2d 989, 992 (Del. 1998) ("Delaware observes the well-established general principal that … it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement."); *Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1217 (Del. 1983) ("Delaware follows the well-established principle that in construing a contract a court cannot in effect rewrite it or supply omitted provisions."); *In re Int'l Re-Ins. Corp.*, 86 A.2d 647, 652 (Del. 1952) ("[T]he plain answer is that the courts cannot supply provisions to remedy deficiencies in the agreement.").

[35] *Nationwide*, 112 A.3d at 881 ("Instead of giving effect to the parties contractual bargain, the Superior Court erred by implying contractual obligations on the part of the seller that were inconsistent with the contract's express terms.").

2. The Trial Court Erred As A Matter Of Law By Misapplying The Standard Of Review.

On a motion to dismiss, the court is bound by the allegations of the Complaint and must draw all reasonable inferences therefrom in favor of the non-moving party. It is reversible error for a court to dismiss an action "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." [36] The trial court erred by failing to apply that well-established standard to Equity Trust's interpretation of the Agreement.

Equity Trust's position that Interactive Brokers terminated the Agreement and was liable for fees from the resulting closing and/or transfer of the Accounts is supported by the plain language of Sections 2(k) and 9, the Fee Schedule, and reasonable inferences drawn therefrom. Notwithstanding, and despite finding that the language of the Agreement was "unambiguous" as to both the termination right and the fee provisions, the trial court improperly substituted its own "common sense" judgment that, contrary to the terms of the Agreement, the parties must have intended for Section 9 to contain an additional term that would permit Interactive Brokers to terminate the Agreement without incurring Closing Fees. That was patently improper.[37]

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[36] *Cent. Mortg.*, 27 A.3d at 535.

[37] *GMG Capital*, 36 A.3d at 779 (explaining that a court's view of a party's unexpressed "intent" is irrelevant; what matters instead are "the parties intentions as reflected in the four corners of the agreement").

Moreover, in reaching that conclusion, the trial court stood the motion to dismiss inquiry on its head—drawing inferences against Equity Trust and substituting its own "common sense" in place of the express terms of the Agreement. The trial court also failed to assess whether it was conceivable that Equity Trust's interpretation of the Agreement was reasonable in light of the allegations in the Complaint.[38] The trial court's misapplication of the motion to dismiss standard is reversible error.

Had the trial court viewed the Complaint under the appropriate standard of review, it should have concluded that Equity Trust's interpretation—the only interpretation supported by the plain language of the Agreement—was reasonable. Section 9 is crystal clear that the Agreement "***shall automatically renew … unless either party*** … ***terminates the Agreement***."[39] Thus, each year Interactive Brokers had two—and only two—options: (1) do nothing, which would result in the Agreement's "***automatic[] renew[al]***" for an additional year, or (2) "***terminate[] the Agreement***," which would result in the closure and transfer of all 46,317 of the accounts managed by Equity Trust. In sending the Notice,

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[38] *Cent. Mortg.*, 27 A.3d at 537 (distinguishing Delaware's conceivability standard from the federal plausibility standard, which "invites judges to determin[e] whether a complaint states a plausible claim for relief and draw on … judicial experience and common sense."); *accord Cambium Ltd. v. Trilantic Capital P'rs III L.P.*, 36 A.3d 348 (Del. 2012).

[39] A026 (Agreement § 9) (emphasis added).

Interactive Brokers elected the latter option, terminating the Agreement. Under the unambiguous terms of the Fee Schedule, that triggered Interactive Brokers' obligation to pay the Closing Fees for each account closed and/or transferred.

The trial court found that interpretation "unpersuasive," but did not explain why (or even whether) it found that Equity Trust's interpretation could not prevail under "any reasonably conceivable set of circumstances."[40] Instead, the Opinion improperly focused on creating an implied non-renewal option that would allow Interactive Brokers to avoid liability for the Closing Fees.[41]

The trial court never explained how Equity Trust's construction of the *actual* language of Sections 2(k) and 9 was unreasonable in view of the allegations in the Complaint. This is significant because it was reversible error for the trial court to grant the Motion to Dismiss absent a conclusion that *Equity Trust's* interpretation was not reasonable under "any reasonably conceivable set of circumstances."[42] The trial court failed to consider the well-pled allegations,

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[40] The trial court never explicitly stated that Equity Trust's interpretation of the Agreement is "unreasonable," only that it is "unpersuasive" and that Interactive Brokers' interpretation is the "only reasonable construction." Op. at 12, 15.

[41] As discussed above, doing so was reversible error and violates the conceivability standard on a motion to dismiss. *See supra* notes 34-35, 37-38.

[42] *VLIW Tech, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 614-15 (Del. 2003). *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1262-63 (Del. 2007) ("The trial court's interpretation of the facts of record is reasonable. The difficulty, however, is that its analysis ignores other record facts that support an equally reasonable but opposite interpretation.").

particularly those relevant to the payment of fees under Section 2(k), before reaching its conclusion that Interactive Brokers did not have to pay fees based on an implied right not spelled out in the terms of the Agreement.

To the extent that the trial court addressed Equity Trust's interpretation at all in the Opinion, the trial court's analysis does not preclude a conclusion that Equity Trust's interpretation is a reasonable construction of the Agreement and, in fact, supports such a conclusion.

***First***, the trial court initially found that the Agreement did not make a distinction between non-renewal and termination, and that "the use of 'terminate' instead of 'non-renewal' should be considered meaningless."[43] That finding is entirely consistent with Equity Trust's allegations and interpretation of the Agreement, which states that Section 9 of the Agreement provides for one—and only one—method for the parties to avoid the automatic renewal of the Agreement: to "terminate[] the Agreement" by providing "at least sixty (60) days' written notice prior to the renewal date…."[44]

Having found support for Equity Trust's interpretation in the language of the Agreement, the trial court should have concluded that the Complaint could not be dismissed at the pleadings stage. Yet, in the very next sentence, under the

[43] Op. at 11-12.

[44] A026 (Agreement § 9).

guise of interpreting the Agreement, the trial court created its own option for termination that made precisely the kind of distinction between "terminate" and "non-renewal" that it had previously found was not supported by the plain language of the Agreement. Believing that the parties would not have agreed to require Closing Fees to be paid when the Agreement was not renewed, the trial court created "an inherent option for non-renewal" that, in the trial court's view, differed from a "termination" by allowing a party to exit the Agreement without paying the Closing Fees specified in the Agreement.[45] In defending its analysis, the trial court concedes that its implied third option was not supported by any specific language in Section 9, but rather its own "*common sense implication*."[46]

The trial court loosely tied its theory to the Agreement by claiming that "there is no language to suggest that non-renewal is not an option."[47] But that statement ignores the fact that Section 9 *already* ***expressly*** provided an option for

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[45] Op. at 12.

[46] Op. at 12. The trial court's solution is problematic for several reasons not relevant to the issue of whether Equity Trust's interpretation was a reasonable construction of the Agreement. For example, the trial court did not explain the procedure for exercising its implied option, leaving unanswered questions such as whether it required written notice and, if so, how far in advance (30 days like § 10, 60 days like § 9, or some longer time to reflect that Equity Trust was not receiving Closing Fees). Had the parties intended fee-free non-renewal to be an option, those questions could have been addressed via negotiation. Instead, one-sided terms favoring Interactive Brokers were imposed by judicial fiat.

[47] Op. at 12.

non-renewal: sixty days' written notice of termination. It also ignores the fact that, while Section 2(k) and the Fee Schedule do not expressly prohibit alternative means of ending the Agreement, by obligating Interactive Brokers to pay Closing Fees upon the *closing* of the Accounts, they do militate against a *fee-free* non-renewal. It is, at the very least, a reasonable inference from Sections 2(k) and the Fee Schedule that the trial court's implied fee-free non-renewal option is contrary to the language of the Agreement. Thus, dismissal as a matter of law was error.[48]

Moreover, even assuming that the trial court was correct that there is no language that *precluded* a second method of non-renewal, it is equally true that there is no language that *required* a second method of non-renewal under Section 9, or *required* that such an option allow Interactive Brokers to avoid the Closing Fees mandated under the Agreement.

By relying on an inference from the plain language of the Agreement to support its view that Interactive Brokers' interpretation was the only reasonable construction, and ignoring a contrary reasonable inference that supported Equity Trust's interpretation, the trial court impermissibly drew factual inferences that would benefit Interactive Brokers at Equity Trust's expense.[49]

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[48] *Gantler*, 965 A.2d at 709 ("On a motion to dismiss, the [court] was not free to disregard that reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn.").

[49] *Id.*

The trial court claimed that its implied option was necessary because *"[i]f not renewing the Agreement was intended to be a termination, common sense would suggest the sophisticated parties represented by counsel would have clearly set forth that understanding and referenced the applicable fees.*"[50] But, contrary to the trial court's belief, the parties *did* clearly set forth that non-renewal of the Agreement was intended to be a "termination." While the parties *could* have included language in Section 9 or elsewhere that specifically confirmed that "termination" of the Agreement pursuant to Section 9 triggered the Closing Fees, it was neither *necessary* for the parties to do so nor *unreasonable* that the parties chose not to do so.[51] Indeed, the Agreement and accompanying Fee Schedule actually provided a broader standard than merely imposing Closing Fees upon the *termination* of the Agreement. Instead, those fees were tied to the "clos[ing]" and "transfer[]" of some or all of the accounts, regardless of whether the Agreement continued in force.[52] Those obligations were clearly set forth in Section 2(k) of the Agreement, which expressly referenced the Fee Schedule and support Equity Trust's interpretation of the Agreement.

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[50] Op. at 12.

[51] *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 229 (Del. 2005) (finding that mandatory "shall" language, such as that present in the Agreement, precludes including other implicit options because "the expression of one thing is the exclusion of another").

[52] A022-23 (Agreement § 2(k)); A037 (Fee Schedule).

***Second***, the trial court found that no Closing Fees could be due because Interactive Brokers acknowledged in the Notice that it had continuing obligations in the Agreement through December 31, 2016.[53] In reaching that conclusion, the trial court misread the Agreement and impermissibly drew inferences from the facts that favored Interactive Brokers over Equity Trust.

As an initial matter, there is no allegation in the Complaint as to when any of the Accounts were transferred from Equity Trust to Interactive Brokers. To the contrary, the Complaint alleges that, despite Equity Trust's attempts to negotiate an orderly conversion of the accounts, Interactive Brokers unilaterally removed Equity Trust's names from the Accounts and transferred them without Equity Trust's consent or knowledge at some point prior to January 4, 2017.[54] Thus, there is no basis in the allegations in the Complaint for the trial court to have found that the Accounts were not closed and transferred in an "Agreement year." Instead, it is reasonable to draw the inference that Interactive Brokers actually closed and transferred the Accounts at some point prior to the close of 2016. The trial court erred by drawing the opposite conclusion that favored Interactive Brokers over Equity Trust.

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[53] Op. at 13.

[54] A015-16 (Compl. ¶¶ 30-33).

But even if the Accounts were actually closed at some point *after* the Agreement was terminated, Equity Trust's interpretation that it was entitled to the Closing Fees is still a reasonable construction of the Agreement.

As discussed in Section I.C.3, *infra*, the Non-Bulk Closing Fees were not tied to termination in "any Agreement year," and were based solely on the "clos[ing] and "transfer" of an account and were expressly triggered whenever an account "closed during a calendar quarter…."[55] Section 2(k) imposes no requirement that the "calendar quarter" in which the accounts are closed occur during an "Agreement year." Parties routinely agree to the payment of obligations that come due at the time of termination.[56] Had the parties intended to cut off such fees post-termination, they should have expressly so stated.[57] Regardless, in the absence of such express language, it is conceivable that the parties intended for such fees to be paid whenever an account was closed or transferred to a successor. Here, Equity Trust alleged that the accounts were transferred to Interactive Brokers. Thus, Section 2(k) directs that the Non-Bulk Closing Fees are due.

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[55] A022-23 (Agreement § 2(k)); A037 (Fee Schedule).

[56] *E.g.*, *Bonanza Rest. Co. v. Wink*, 2012 WL 1415512, *4 (Del. Super. Apr. 17, 2012); Ct. Ch. R. 132(e) (providing for "fiduciary commissions" for trustees who care for and manage property upon distribution or transfer of trust assets).

[57] Furthermore, the "calendar quarter" language in Section 2(k) could reasonably be read as directing how the regularity with which Equity Trust would invoice the Closing Fees and when Interactive Brokers was obligated to pay such fees (i.e., within thirty business days of the invoice).

While the Bulk Closing Fees are tied to the termination of more than 20% of the accounts during an "Agreement year," Equity Trust's position that the Notice accomplished exactly that is a reasonable interpretation of the Agreement. The Notice stated that "December 31, 2016 will be the last day the Agreement is effective." A reasonable inference from that language, read in conjunction with Section 9, is that the Agreement, along with the accounts governed thereby, is terminated in whichever year in which the Notice of Termination is sent. Even accepting the trial court's conclusion that the Agreement extended up to the final moments of December 31, 2016, the trial court expressly found that the Agreement did not continue past the end of 2016 and into 2017.[58]

A reasonable inference—indeed, the only inference—from that conclusion is that the Agreement "terminated" in 2016. As discussed above, it is of no moment whether the accounts were actually closed and transferred after the Agreement was terminated, as Section 2(k) imposes no requirement that the "calendar quarter" in which the accounts are closed occur during an "Agreement year." Thus, Equity Trust's interpretation that Interactive Brokers owed Closing Fees as a result of terminating the Agreement and closing the accounts was reasonable, regardless of the trial court's conclusion that Interactive Brokers' obligations continued through December 31, 2016.

[58] Op. at 13-14.

***Third***, the trial court erred in finding that the only reasonable interpretation of the Agreement was that the Closing Fees were a "a non-renewal penalty" or a "fee for simply parting ways."[59] That conclusion was based on the trial court's incorrect reading of the Agreement as requiring payment of the Closing Fees only upon a mid-year closure or transfer of Accounts and erroneous finding that there was "no evidence that such a payment was bargained for by [Equity Trust] and if they wanted guaranteed Closing Fees, [Equity Trust] could have easily contracted for them."[60]

Those findings are clearly contradicted by the Agreement. Section 2(k) of the Agreement and the Fee Schedule are clear evidence that Equity Trust bargained for—and Interactive Brokers agreed to pay—the Closing Fees.

Moreover, the Closing Fees were triggered not by the termination of the Agreement, but by the resulting transfer of the accounts to Interactive Brokers. The Fee Schedule plainly stated that the purpose of the Closing Fees was to compensate Equity Trust for services provided in connection with closing the accounts and transferring them to another trustee.[61] Section 2(k) similarly required

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[59] Op. at 14.

[60] Op. at 14.

[61] A037 (Fee Schedule).

the payment of fees for accounts "closed" during a calendar quarter.[62] Indeed, as alleged in the Complaint and conceded by Interactive Brokers, Interactive Brokers had routinely paid the Non-Bulk Closing Fee whenever an Account was closed during the two years in which Equity Trust was a party to the Agreement.[63] Similarly, even adopting the trial court's faulty construction of the Agreement, there is no question that, had more than 20% of the Accounts been closed or transferred to a successor, but the Agreement renewed for another year, Interactive Brokers would be obligated to pay both the Non-Bulk Closing Fee and the Bulk Closing Fee for all such accounts.[64] Thus, the trial court erred in finding that the Closing Fees could only reasonably be viewed as a non-renewal penalty upon a termination under Section 9 of the Agreement.

The trial court's conclusion that the Closing Fees amounted to a "non-renewal penalty" was also wrongly premised on a series of improper inferences that favored Interactive Brokers. Specifically, the trial court inferred that "if the parties end[ed] their relationship amicably the Defendant would [not] have agreed to pay a fee for simply parting ways" and, thus, the Closing Fees amounted to "a

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[62] A022-23 (Agreement § 2(k)).

[63] A012 (Compl. ¶ 19); A050 (Def. Op. Br. at 4).

[64] *See* A109-10 (Hr'g Tr. at 16:19-17:5).

non-renewal penalty."[65] By relying on an inference that benefitted Interactive Brokers at Equity Trust's expense, the trial court impermissibly drew inferences in favor of the moving party at the motion to dismiss stage.[66] Furthermore, it is not the trial court's province to determine the subjective intentions of the parties at the time of contracting, but only to analyze the objective language of the contract.

3. The Trial Court Erred By Conflating The Requirements To Trigger The Non-Bulk Closing Fee And The Bulk Closing Fee.

The trial court erred as a matter of law by conflating the issue of whether the Agreement was terminated "during a calendar quarter in the 2016 Agreement year" with whether Interactive Brokers was contractually obligated to pay to Equity Trust the Non-Bulk Closing Fee.[67] For purposes of the Non-Bulk Closing Fee, there is no requirement that the accounts be "terminated" before the fees come due. Instead, a fee of $20 is due whenever an account is "[c]lose[d]" and "[t]ransfer[red]" to [a] Successor."[68] Thus, for purposes of the Non-Bulk Closing Fee, it is irrelevant whether the Agreement remained in force, was "terminated," or—contrary to the language of the Agreement—was simply not

[65] Op. at 14.

[66] *Gantler*, 965 A.2d at 709.

[67] Op. at 10-11; A037 (Fee Schedule).

[68] A037 (Fee Schedule).

renewed. Instead, all that matters is whether the accounts were closed and/or transferred to a successor.[69]

Section 2(k) has no language that any of the Accounts need be closed or terminated in an Agreement year. The Fee Schedule similarly provides that there is a Non-Bulk Closing Fee of $20 per account anytime Interactive Brokers "[c]lose[s] [an] account" or "[t]ransfer[s] assets to [a] Successor." As Equity Trust alleged, all 46,317 Accounts were transferred to Interactive Brokers. Thus, even if the Court finds that the Bulk Closing Fee is not applicable, it is reasonably conceivable that the parties intended to compensate Equity Trust for the additional services attendant in preparing each Account to be closed and/or transferred to a successor trustee, which is all that the Agreement requires to trigger the Non-Bulk Closing Fee. The trial court committed reversible error by conflating the requirements of the Bulk Closing Fee with those of the Non-Bulk Closing Fee. Based on the plain language of the Agreement, the trial court erred in dismissing the Complaint as to the Non-Bulk Closing Fee.

[69] A022-23 (Agreement § 2(k)); A037 (Fee Schedule). And, as discussed above, extending such obligations beyond termination of the parties' contract is not uncommon. *Supra* note 56.

## CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Supreme Court should reverse the trial court's decision to grant Interactive Brokers' Motion to Dismiss.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of May, 2018, copies of the foregoing document were served, by File & ServeXpress on the following attorneys of record:

*/s/ Matthew R. Clark*
Matthew R. Clark (#5147)