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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Appellant Equity Trust Company ("Equity Trust") filed its Complaint on May 17, 2017 in the Superior Court of the State of Delaware alleging a single count of breach of contract by Appellee Interactive Brokers LLC ("Interactive Brokers"). Equity Trust claims that Interactive Brokers is obligated to pay approximately $2.75 million in fees (the "Closing Fees"[1]) for its alleged "termination" of an Agreement between the parties; however, under the plain language of the Agreement, Interactive Brokers was entitled to (and did) exercise its right not to renew the Agreement; the Agreement therefore expired on December 31, 2016. As a result, Interactive Brokers is not liable to Equity Trust for the Closing Fees that only would have been triggered if the Agreement had been cut short rather than allowed to run its course and expire at the end of its one-year term.

On July 26, 2017, Interactive Brokers moved to dismiss, with prejudice, pursuant to Superior Court Civil Rule 12(b)(6), for failure to state a claim because the plain language of the Agreement demonstrates that Interactive Brokers' interpretation is the only reasonable one. Equity Trust's interpretation would produce an absurd result – namely, that any non-renewal of the Agreement by

[1] In its briefing below, Interactive Brokers used the term "Termination Fees." The Trial Court in its Opinion used the term "Closing Fees." Interactive Brokers adopts the Trial Court's defined term to avoid confusion.

either party, for any reason (including for Equity Trust's non-performance or breach) would trigger an obligation for Interactive Brokers to pay the Closing Fees to Equity Trust.

Equity Trust filed its Opposition to Interactive Brokers' Motion to Dismiss on August 28, 2017, arguing that the Agreement provided Interactive Brokers with only two options – to allow the Agreement to automatically renew *ad infinitum*, or to "terminate" and incur the Closing Fees that, at a combined $60 per Account, totaled $2.75 million for the 46,317 Accounts. According to Equity Trust, the "'termination' occu[red] on the date the party provides its notice of non-renewal---which must occur 'sixty (60)' days . . . prior to the renewal date."[2] And, according to Equity Trust, even though the Agreement contains no such language and Equity Trust did not plead any such allegation in its Complaint, the Closing Fees were intended "to further compensate Equity Trust for the additional services to be provided if and when the Accounts were eventually closed."[3]

Interactive Brokers filed its Reply on September 12, 2017, noting that Equity Trust sought to rewrite the Agreement by converting an account closing fee into a

[2] A075-76 (Ans. Br. at 12-13).

[3] A074 (*Id.* at 11).

fee for not renewing the contract, pointing out that Equity Trust's interpretation was unreasonable, and would result in a significant windfall to Equity Trust.[4]

The Trial Court held oral argument on October 25, 2017, and on March 6, 2018 issued a Memorandum Opinion (the "Opinion") granting Interactive Brokers' Motion to Dismiss, finding that "the Agreement provided the parties a non-renewal option, which Defendant properly exercised," and that "Defendant's non-renewal did not 'terminate' the Agreement during a calendar quarter in the 2016 Agreement year [such] that [it] would have triggered the Closing Fees asserted by the Plaintiff."[5] The Trial Court construed the unambiguous terms of the contract as a whole, giving effect to each of its terms, and "focused on the specific language in Section 2(k), Section 9, and the Amended Fee Schedule."[6] The Court agreed with the reasoning advanced by Interactive Brokers, "adopt[[ing]] the construction that is reasonable and that harmonizes the affected contract provisions."[7] The Court rejected Equity Trust's arguments as "simply unpersuasive" and presenting only a

[4] A090 (Reply Br. at 8).

[5] Opinion at 10-11.

[6] Opinion at 11.

[7] Opinion at 11.

"strained interpretation of the Agreement where the Defendant must pay Closing Fees regardless of how the relationship ended."[8]

Equity Trust appealed the Opinion. This is Appellee/Defendant-Below Interactive Brokers' answering brief in opposition to Equity Trust's appeal.

[8] Opinion at 12, 14.

SUMMARY OF ARGUMENT

1. **Denied.**

This action is a straight-forward case of contract interpretation. The Agreement provided for Closing Fees – Non-Bulk and Bulk – to be owed by Interactive Brokers if all or some of the Accounts were "closed," "transferred," or "terminated" either "during a calendar quarter" or "in any Agreement year (January 1 to December 31)." The Trial Court properly held as a matter of law that the language of the Agreement is unambiguous. Interactive Brokers properly exercised its contractual right to not renew its relationship with Equity Trust after 2016, and the Agreement expired by its terms at such time. As no Accounts were "closed," "transferred," or "terminated" during an Agreement year, no Closing Fees were owed to Equity Trust.

The Trial Court did not, as Equity Trust argues, "wr[i]te a non-renewal option into the contract."[9] Rather, the Trial Court correctly construed the language of the unambiguous Agreement "according to the 'common and ordinary meaning'" of its terms, finding that "there is a common sense implication that if you have the option to renew [the Agreement], you also have the option not to renew" rather than only the option to terminate and pay a penalty.[10]

[9] Op. Br. at 3.

[10] Opinion at 6, 11, 12.

Furthermore, the Trial Court correctly applied the correct legal standard that dismissal was appropriate because, even "assum[ing] the truthfulness of the Complaint's well-pleaded allegations," and "afford[ing] Plaintiffs 'the benefit of all reasonable inferences that can be drawn from their pleading,'" the Trial Court was "able to determine with 'reasonable certainty' that Plaintiffs would not be entitled to relief 'under any set of facts that could be proven to support the claims asserted' in the Complaint."[11] Specifically, the Trial Court agreed with Interactive Brokers that it simply cannot be correct (and therefore it is unreasonable) that the Closing Fees would be owed to Equity Trust regardless of the reason that the Agreement ended.[12]

For all of these reasons, Equity Trust's arguments on appeal should be rejected, and this Court should uphold the Trial Court's ruling dismissing the Complaint.

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[11] Opinion at 5-6.

[12] Opinion at 14.

COUNTERSTATEMENT OF FACTS

On December 31, 2000, Interactive Brokers and Delaware Charter Guarantee & Trust Company ("Delaware Charter") entered into the "Service Agreement Between Interactive Brokers LLC and Delaware Charter Guarantee & Trust Company" (the "Agreement").[13] In the Agreement, Delaware Charter agreed to "provide trust and related services to [Interactive Brokers' customers] in connection with such [c]ustomers' retirement plans . . ."[14] in exchange for Interactive Brokers paying a quarterly servicing fee for each "open Account[]."[15] In the event that Accounts were "closed during a calendar quarter," a different fee was levied. Paragraph 2(k) of the Agreement reads:

> 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; [ ] (emphasis added)

[13] A010. The Agreement contains a Delaware choice of law and a Delaware venue provision. A010 (Compl. ¶ 9, Ex. 1 at 14).
[14] A010, A021 (Compl. ¶ 13, Ex. 1 at 1).
[15] A023 (Compl., Ex. 1 at 2(k)).

Paragraph 9 of the Agreement set out its term:

> 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 . . . . [16]

The parties executed several amendments to the Agreement, including, on December 20, 2012, the Fourth Amendment, which modified the Fee Schedule (Exhibit B) to the Agreement.[17] The Fourth Amendment added a "Closing Fee (per account)" of $20 (the "Non-Bulk Closing Fee") and a "Bulk Closing Fee" of $40 per account "[i]f more than 20% of the Account base terminates in any Agreement year."[18]

With the consent of Interactive Brokers, at the end of 2014, Delaware Charter assigned its rights and obligations under the Agreement to Equity Trust.[19]

During their two-year-long relationship under the Agreement, Interactive Brokers paid Equity Trust the quarterly servicing fees owed for Equity Trust's performance (despite Equity Trust's struggle to timely and substantively perform),

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[16] A026 (Compl., Ex. 1 at ¶9).

[17] A011 (Compl. ¶15).

[18] A011(Compl. ¶16).

[19] A012 (Compl. ¶19).

and, when Accounts were closed or transferred from Equity Trust, Interactive Brokers paid the Non-Bulk Closing Fee in accordance with the language of the Fourth Amendment.[20]

Interactive Brokers decided not to renew the Agreement for 2017, and on October 28, 2016, Interactive Brokers notified Equity Trust that Interactive Brokers would not renew:

> **RE: Notice of Non-Renewal**
>
> **Dear Sir or Madam:**
>
> **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.**[21]

Interactive Brokers' October 28, 2016 Notice of Non-Renewal did not "terminate" any Account "in any Agreement year," nor were any of the Accounts "closed" "during a calendar quarter."[22]

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[20] A012 (Compl. ¶19).

[21] A039 (Ex. 2 to Compl.).

[22] Opinion at 13.

Nevertheless, Equity Trust's final invoice to Interactive Brokers, received on November 29, 2016 – which Interactive Brokers expected to reflect any quarterly fees owed for Equity Trust's performance for the final quarter of 2016 – also included approximately $2.75 million in charges reflecting the $20 Non-Bulk Closing Fee and the $40 Bulk Closing Fee (as defined above, together, the "Closing Fees") for each of the 46,317 Accounts that Equity Trust would not be servicing after the Agreement expired on December 31, 2016.[23]

Equity Trust continued to perform under the Agreement through December 31, 2016.[24]

Interactive Brokers disputes that it owes the Closing Fees. Equity Trust filed suit, alleging that Interactive Brokers breached the Agreement under Paragraph 2(k) by failing to pay the Closing Fees to Equity Trust within 30 business days of receiving Equity Trust's quarterly invoice on November 29, 2016.[25] Interactive Brokers moved to dismiss, Equity Trust opposed, and the Trial Court granted the Motion to Dismiss over Equity Trust's objection.

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[23] A014 (Compl. ¶26).

[24] Opinion at 13; A012 (Compl. ¶ 21). Interactive Brokers does not dispute that it owed Equity Trust its regular quarterly fees for services provided during the fourth quarter of 2016.

[25] A011, A014, A016-17 (Compl ¶¶ 17, 26, 35).

The Trial Court correctly held that, as a matter of law, the unambiguous language of the Agreement gave Interactive Brokers the contractual right not to renew the Agreement, that Interactive Brokers properly exercised that right, and that the Agreement expired on December 31, 2016.[26] Therefore, because no Accounts were closed "during a calendar quarter," or "terminated" "in any Agreement year," the Non-Bulk and Bulk Closing Fees were not triggered, Interactive Brokers did not owe them to Equity Trust, and Equity Trust failed to state a claim.[27]

[26] Opinion at 10.

[27] Opinion at 10-11.

ARGUMENT

I. The Trial Court Correctly Held that Equity Trust Failed to State a Claim for Breach of Contract Against Interactive Brokers

A. Question Presented

Whether the Trial Court correctly held that the Agreement did not require Interactive Brokers to pay Equity Trust the Closing Fees totaling approximately $2.75 million. This issue was preserved below.[28]

B. Scope of Review

This Court reviews questions of contract interpretation *de novo*. *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266-67 (Del. 2017) ("The proper construction of any contract is purely a question of law, so we review questions of contract interpretation *de novo*.") (Purchase Agreement did not require defendant to pay $14 million earn-out payment).[29]

C. Merits of Argument

1. The Trial Court Properly Construed the Language of the Agreement

The proper construction of any contract is well-settled:

> Our objective is to determine the intent of the parties from the language of the contract. This inquiry should focus on the parties' shared expectations at the time they

[28] A054, A056-57, A086, A090-91.

[29] Equity Trust agrees the scope of review *is de novo*. Op. Br. at 12. However, the cases cited by Equity Trust on the scope of review do not apply in this case, where the issue is contract interpretation, and not the reasonable conceivability of well-pleaded factual allegations in the complaint.

> contracted, but because Delaware adheres to an objective theory of contracts, the "contract's construction should be that which would be understood by an objective, reasonable third party." If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity."[30]

"When the language of a contract is plain and unambiguous, binding effect should be given to its evident meaning."[31] Clear and unambiguous contract terms are given their ordinary and usual meaning.[32] "[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[33]

And particularly applicable to this appeal, the law favors reasonable, rather than unreasonable, interpretations of contracts.[34]

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[30] *Exelon Generation Acquisitions, LLC v. Deere & Co*., 176 A.3d 1262, 1266-67 (Del. 2017) (citations omitted).

[31] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2009) *citing Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

[32] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

[33] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citations omitted).

[34] *See, e.g.*, *Osborn ex. rel. Osborn v. Kemp*, 991 A.2d 1153, 1160-61 (Del. 2010) (Delaware Supreme Court affirmed Court of Chancery's ruling as the "only reasonable interpretation" of a contract and rejected both parties' proposed interpretations which would produce "an absurd, unfounded result.") *citing Gore v. Beren*, 867 P.2d 330, 337 (Kan. 1994) ("In placing a construction on a written instrument, reasonable rather than unreasonable interpretations are favored by law. Results which vitiate the purpose or reduce terms of the contract to an absurdity

The Trial Court correctly held that Interactive Brokers was entitled to, and did, exercise its contractual right not to renew the Agreement. The Trial Court also was correct in holding that Interactive Broker's exercise of its right of non-renewal did not "terminate" the Agreement during a calendar quarter in the 2016 Agreement year, meaning that Equity Trust's purported contractual entitlement to the Closing Fees was not triggered.[35]

The Trial Court correctly rejected Plaintiff's argument that "there is no non-renewal option" and correctly rejected Plaintiff's argument that "not renewing the

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should be avoided."); *ITG Brands, LLC v. Reynolds Am., Inc.*, 2017 WL 5903355, at *12 (Del. Ch. Nov. 30, 2017) ("ITG Brands' interpretation would lead to an absurd result in my view. Delaware courts avoid adopting "[a]n unreasonable interpretation [that] produces an absurd result or one that no reasonable person would have accepted when entering the contract." But here, adopting ITG Brands' reading of Section 2.2 would have the nonsensical result of . . . ."), citing *Osborn*, 991 A.2d at 1160; *Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, *17 (Del. Ch. May 28, 2015) (Delaware Court of Chancery rejected interpretation of contract that would "lead to absurd results that, in [the Court's] view, 'no reasonable person would have accepted.'") *quoting Osborn ex. rel. Osborn*, 991 A.2d at 1160-61; *Born v. Hammond*, 146 A.2d 44, 47 (Md. 1958) ("[I]f a contract was susceptible of two constructions, one of which would produce an absurd result and the other of which would carry out the purpose of the agreement, the latter construction should be adopted."); *Huntington on the Green Condo. v. Lemon Tree I-Condo.*, 874 So.2d 1, 5 (Fla. Dist. Ct. App. 2004) ("[I]f one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would accord with reason and probability.") (citations omitted).

[35] Opinion at 10-11.

Agreement was intended to be a termination."[36] The Trial Court correctly rejected Plaintiff's unsupported argument that not renewing the agreement as of January 1, 2017 under Agreement Section 9 was somehow the same as "terminating" the Agreement on the date the non-renewal notice was sent (October 28, 2016).[37]

[36] Opinion at 12; *see* A087 (Reply Br. at 5) ("Furthermore, case law supports the proposition that the non-renewal of a contract for a future year term is not the termination of the contract during the current term. *See Kitsap Cty. Consol. Hous. Auth. v. Henry-Levingston*, 385 P.3d 188, 195 (Wash. Ct. App. 2016) (citing Webster's Third New International Dictionary at 2359, 1922 (2002)) ("Terminate" and "renew" have different meanings; "'Terminate' means 'to bring to an ending or cessation in time, sequence, or continuity' or 'to end formally and definitely.' The dictionary defines 'renew' as 'to make new again.' A lease that has 'ended definitely' no longer exists and cannot logically be 'made new again.'. . . . [W]e interpret statutory language in a way that avoids an absurd result. [] It simply makes no sense to hold that a lease that has been lawfully terminated can automatically renew.") (internal citations omitted); *King v. Hous. Auth. of Pittsburgh*, 496 A.2d 1280, 1281 (Pa. Commw. Ct. 1985) ("We have emphasized the words 'terminate' and 'refusal to renew' because they are different terms and they are treated differently in the language we have quoted from the leases; nevertheless, the Housing Authority, as we have seen, used the terms interchangeably in the notices sent to Appellants. A lease ordinarily may be terminated at any time within the term thereof for proper cause and with proper notice, but the authority not to renew implies that that option may be exercised only at the expiration of the term of the lease.").

[37] Opinion at 13-14 ("Plaintiff's argument that termination occurred on the date the notice was sent is illogical and unsupported as the Defendant specifically stated the end date would be December 31, 2016."); Opinion at 3-4 ("After two years, Defendant decided not to renew the Agreement for 2017, and on October 28, 2016, Defendant notified Plaintiff of its decision not to renew the Agreement via the following correspondence ("Notice"): 'Pursuant to Section 9 of the [Agreement] 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.'").

The Trial Court carefully reviewed Section 9 of the Agreement and gave binding effect to its language that permitted Interactive Brokers not to renew the Agreement. And, because Interactive Brokers did so at least 60 days prior to the end of the contract term on December 31, 2016, the Trial Court found that Interactive Brokers did not owe any of the Closing Fees. The Trial Court did not, as Equity Trust argues, "re-write" the Agreement; rather, the Trial Court interpreted the provisions of Section 9, Section 2(k), and the Amended Fee Schedule (Exhibit B) "according to their 'common or ordinary meaning' and [ ] adopt[ed] the construction that is reasonable and that harmonizes the affected contract provisions.'"[38]

[38] Opinion at 11.

2. The Trial Court Correctly Identified and Applied the Law of Contract Interpretation to Find that Interactive Brokers' Interpretation of the Agreement Is Reasonable and Equity Trust's Is Not

The Trial Court correctly applied the dismissal standard when interpreting a contract, stating that "[a]t this preliminary stage, dismissal will be granted only when the Court is able to determine with 'reasonable certainty' that Plaintiffs would not be entitled to relief 'under any set of facts that could be proven to support the claims asserted' in the Complaint."[39] The Trial Court accurately described the parties' arguments below, noting that "the parties do not dispute the sufficiency of Plaintiff's allegations with respect to the elements of an existing contract and, if proven, the damages that would flow from the breach" but "[i]nstead, the parties disagree as to whether Plaintiff has adequately alleged that Defendant breached the Agreement when it gave notice that it was ending their relationship in 2016 and by failing to pay Closing Fees at the end of their

[39] Opinion at 6, citing *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3-4 (Del. Super. Apr. 16, 2014) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

Agreement."[40] Therefore, the Trial Court undertook to interpret the terms of the Agreement, a question of law that is properly resolved on a motion to dismiss.[41]

The Trial Court found the Agreement to be unambiguous.[42] In interpreting an unambiguous contract, the Trial Court was entitled to – and did – consider not only the allegations in the Complaint, but also the "documents that are 'integral to a plaintiff's claims' [and are therefore properly] incorporated by reference without converting the motion to a summary judgment."[43] The Trial Court emphasized that "[d]ismissal is proper only if the defendant's interpretation is the *only* reasonable construction as a matter of law."[44] The Trial Court acknowledged its obligation to draw all reasonable references in Equity Trust's favor.[45]

Correctly applying those standards, the Trial Court held that Interactive Brokers' interpretation of the Agreement is the "only reasonable construction."[46] Therefore, Interactive Brokers had the contractual right to not renew the

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[40] Opinion at 6.

[41] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2009) (granting motion to dismiss as to breach of contract claim).

[42] Opinion at 10.

[43] Opinion at 6.

[44] Opinion at 8 (emphasis in original).

[45] Opinion at 5-6.

[46] Opinion at 15.

Agreement, properly exercised that right with the result that the Agreement expired after December 31, 2016, and is not obligated to pay the Closing Costs because no Accounts were "closed," "transferred," or "terminated" before December 31, 2016 when the Agreement expired.

Equity Trust now complains on appeal that the Trial Court's ruling constitutes legal error, but each of its arguments fails.

First, it is not, as Equity Trust argues, reversible error under either *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531 (Del. 2011) or *VLIW Tech, LLC v. Hewlett-Packard Co.*, 840 A.2d 606 (Del. 2003) for the Trial Court to have granted the Motion to Dismiss in this case. Both cases are distinguishable, as they did not involve interpretations of unambiguous contract provisions, and these cases are therefore inapposite.

In *Central Mortgage*, this Court reversed "the Vice Chancellor's dismissal of [Plaintiff's] breach of contract claims because Plaintiff's pleadings regarding notice satisfy the minimal standards required at this early stage of the litigation."[47] As stated above, the sufficiency of the allegations in Plaintiff's Complaint is not at issue in this case; *Central Mortgage* does not move the needle for Equity Trust. Rather, in this case, the Trial Court interpreted the meaning of the Agreement as a matter of law. And, while one of the bases for dismissal in *VLIW Tech* involved

[47] 27 A.3d 531, 538-39 (Del. 2011).

contract interpretation, this Court's reversal depended on a finding that the contract was ambiguous, because "the provisions in controversy [were] reasonably or fairly susceptible of different interpretations."[48] This Court's ruling in *VLIW Tech* means that for Equity Trust to be entitled to consideration of its interpretation of the Agreement as an alternatively reasonable one, this Court must overrule the Trial Court and find that the Agreement is ambiguous. It is not.

Even Equity Trust does not take the position that the Agreement is unambiguous. In fact, Equity Trust does not come right out and state that the Agreement is either unambiguous or ambiguous, opting instead to walk the tightrope between urging this Court that the language is "crystal clear" such that the Agreement's "plain language" can be construed in Equity Trust's favor[49] and complaining that the Trial Court did not address whether "Equity Trust's interpretation could not prevail under 'any reasonably conceivable set of circumstances,'" relying on the (inapplicable) *VLIW Tech* case in which that standard became applicable due to the Court's determination of ambiguity.[50] Confusingly, Equity Trust refers to the "unambiguous terms of the Fee

[48] *VLIW Tech*, 840 A.2d at 615.

[49] Op. Br. at 17.

[50] Op. Br. at 18.

Schedule,"[51] and argues in several instances that only a single interpretation (Equity Trust's) of the Agreement is reasonable.[52] Taken together, all of this suggests that Equity Trust either does not understand the standards of review, or wants to hedge its bets.[53] Whichever it is, Equity Trust's argument fails.

Equity Trust is also wrong that the Trial Court "never explained how Equity Trust's construction of the actual language of Sections 2(k) and 9 was unreasonable."[54] The Trial Court considered but rejected Equity Trust's arguments, finding them to be "unpersuasive," "illogical and unsupported," "strained," and "simply unsupported."[55] The Trial Court instead adopted Interactive Brokers' interpretation of the Agreement as "the only reasonable

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[51] Op. Br. at 18.

[52] Op. Br. at 18, 26.

[53] *See Town of Cheswold v. Cent. Delaware Bus. Park*, -- A.3d ---, 2018 WL 2748372, at *7 (Del. June 8, 2018) ("Contractual language is not rendered ambiguous simply because the parties in litigation differ concerning its meaning.") (citations omitted); *Hercules, Inc. v. AIU Ins. Co*., 784 A.2d 481, 506 (Del. 2001) ("We are not persuaded by Hercules' attempt to create ambiguity in the provisions at issue. An ambiguity exists when the contractual provisions are 'reasonably or fairly susceptible' of different interpretations or two different meanings. Both interpretations must be reasonable. The provision at issue is not a model of drafting. Nevertheless, the only reasonable interpretation of the language is that it excludes coverage for defense costs.").

[54] Op. Br. at 18.

[55] Opinion at 12-14.

construction."[56] That Equity Trust does not like the outcome of the Trial Court's interpretation does not make it unreasonable. The Trial Court "gave binding effect to the Agreement's evident meaning."[57]

If the Court were to adopt Equity Trust's interpretation, Equity Trust would have been entitled to collect the Closing Fees – both Non-Bulk and Bulk – regardless of the fact that Interactive Brokers had done exactly what the Agreement said it was entitled (and required) to do if it no longer wished to do business with Equity Trust, even if Interactive Brokers and Equity Trust parted ways amicably.[58] Interactive Brokers would have been subject to a significant penalty – $2.75 million – simply for opting to exercise its right under the Agreement not to renew. There is nothing in the Agreement that subjects Interactive Brokers to a penalty, much less a $2.75 million penalty, if it exercises its right under paragraph 9 to not renew the Agreement. The Trial Court found that "[t]here is no evidence that such a payment was bargained for by the Plaintiff and if they wanted guaranteed Closing Fees, it could have easily contracted for

[56] Opinion at 15.

[57] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2009) *citing Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

[58] Opinion at 13-14.

them."[59] The Court was faced with two interpretations – one reasonable and the other unreasonable – and the Court rejected the latter and adopted the former.[60]

3. The Trial Court Correctly Held that the Non-Bulk Closing Fee Did Not Apply Because the Accounts Were Not Closed During a Calendar Quarter and that the Bulk Closing Fee Did Not Apply Because the Accounts Were Not Closed During an Agreement Year

As Interactive Brokers argued to the Trial Court, the timing of the events purportedly giving rise to Plaintiff's claim is important.[61] Equity Trust takes the Trial Court to task for "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."[62] Equity Trust argued below, and continues to argue on appeal to this Court, that its entitlement to the Non-Bulk Closing Fee is not dependent on timing:

> 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

[59] Opinion at 14.

[60] *See, e.g., Osborn ex. rel. Osborn*, 991 A.2d at 1160, fn 21.

[61] A087 (Reply Br. at 5).

[62] Op. Br. at 28.

> account is "[c]lose[d]" and "[transfer[red]" to [a] Successor[63]

Equity Trust's argument fails because it is based only on the language of the Amended Fee Schedule (Exhibit B), and fails to take into account the timing provision in Section 2(k), which, if applicable, would have required Interactive Brokers to:

> 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) . . .[64]

The Trial Court correctly read the language of Section 2(k) of the Agreement in conjunction with the language of the Amended Fee Schedule to determine the "clear meaning of calendar quarter[,]" and found that the Accounts were not closed prior to December 31, 2016 (and therefore not during the "calendar quarter") because Interactive Brokers' Notice of Non-Renewal (attached as Exhibit 2 to the Complaint and properly considered even on the limited record available for a Motion to Dismiss[65]) "acknowledged its continuing obligations in

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[63] Op. Br. at 28, citing A037 ([Amended] Fee Schedule)

[64] A023 (emphasis added).

[65] Opinion at 6 ("Certain documents that are 'integral to a plaintiff's claims . . . may be incorporated by reference without converting the motion to a summary judgment.'") (*citing In re USA Cafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991)).

the Agreement through December 31, 2016." [66] Consideration of the Notice of Non-Renewal was not, as Equity Trust suggests, an improper inference drawn in Interactive Brokers' favor; rather, in the absence of an allegation in the Complaint regarding the date when the 46,317 Accounts were "closed," or "transferred," it is the only information in the record from which the Court could infer a timeline. As noted above, timing is important, and the Court need not credit the unsupported (and for this circumstance, unalleged) contentions by which Equity Trust argues the purported reasonableness of the inference that Interactive Brokers "actually closed and transferred the Accounts at some point prior to the close of 2016."[67]

Similarly, the timing makes a difference with respect to Equity Trust's alleged entitlement to recover the Bulk Closing Fees from Interactive Brokers. The Amended Fee Schedule temporally limited the payment of the Bulk Closing Fees as follows:

> If more than 20% of the Account base terminates **in any Agreement year** the Non-Bulk Closing Fee and the Bulk Closing Fee are applicable and will be billed.[68]

The Trial Court found that "Agreement year" was defined in the original Fee Schedule to mean January 1 to December 31. As with the analysis pertaining to

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[66] Opinion at 13.

[67] Op. Br. at 23.

[68] A037 (emphasis added).

the Non-Bulk Closing Fee, the reasonable inference drawn from the Notice of Non-Renewal is that the Accounts did not "terminate[] in any Agreement year" because they continued to be serviced up until the Agreement expired at the end of December 31, 2016.[69]

Equity Trust would like this Court to reverse the Trial Court's careful, timing-dependent analysis focused on the specific language in Section 2(k) and the Amended Fee Schedule by creating confusion where there is none in the Opinion, and by striking the timing provisions in Section 2(k) and the Amended Fee Schedule to allow Equity Trust to recover the Closing Fees. But this Court must look to the entire Agreement, "read as a whole, in order to divine [ ] intent," and "giv[e] effect to each and every term . . . in a manner that does not render any provision 'illusory or meaningless.'"[70] Applying that well-established standard, the Trial Court correctly ruled that, interpreting the Agreement in conjunction with the facts as pleaded in Equity Trust's Complaint and the "integral" documents incorporated by reference, Interactive Brokers does not owe any of the Closing Fees. This Court should uphold the Trial Court's ruling.

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[69] Opinion at 13.

[70] *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *5 (Del. Ch. Dec. 30, 2010) (internal citations omitted); *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *6-7 (Del. Ch. Dec. 22, 2010).

CONCLUSION

For the foregoing reasons, Appellee/Defendant-Below Interactive Brokers LLC respectfully requests that this Court affirm the Superior Court's ruling dismissing Equity Trust's complaint with prejudice.

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CERTIFICATE OF SERVICE

I, Mary F. Dugan, Esquire, hereby certify that on June 20, 2018, I caused a copy of Appellee's Answering Brief to be served on the following counsel in the manner indicated below:

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