EFiled: Apr 18 2019 01:07PM EDT
Filing ID 63182205
Case Number 570,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KNIGHTEK, LLC, Appellant, v. JIVE COMMUNICATIONS, Inc., Appellee.	C.A. No. 570, 2018 Case Below Superior Court of the State of Delaware C.A. No. N18C-04-260 JRJ

APPELLEE JIVE COMMUNICATION INC.'S CORRECTED ANSWERING BRIEF ON APPEAL

Of Counsel

William Trach
LATHAM & WATKINS LLP
200 Clarendon Street
Boston, MA 02116
(617) 880-4514

Rudolf Koch (#4947)
Robert L. Burns (#5314)
Nicole K. Pedi (#6236)
RICHARDS, LAYTON & FINGER P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Appellee Jive Communications, Inc.

Dated: April 18, 2019

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

STATUTES & RULES

NATURE OF PROCEEDINGS

After briefing and argument on Jive Communications, Inc.'s ("Jive") Motion to Dismiss, the trial court dismissed the complaint in this action (the "Complaint") on October 23, 2018, for failure to meet the heightened pleading standard for fraud and failure to state a claim. KnighTek, LLC ("KnighTek") filed a Motion for Clarification on October 31, 2018, and, on November 5, the trial court confirmed that the dismissal was with prejudice. KnighTek appealed those rulings on November 8, 2018.

Jive submits this Answering Brief to affirm the trial court's well-reasoned dismissal, and to put an end to KnighTek's efforts to get a "redo" on a fairly negotiated business transaction. This dispute arises from Jive's purchase of a business ("ComVoice") and a related entity from KnighTek in 2014. The consideration for that purchase included incremental post-closing payments based on ComVoice's monthly revenues up to a contractually defined amount—the "Cap Amount." The purchase agreement provided for a lump-sum payment of the remaining Cap Amount if a Change of Control occurred (defined below, but primarily a merger or an IPO). After three years of payments towards the Cap Amount, and desiring to speed up its receipt of the full amount, KnighTek *proposed to Jive* that they negotiate a buyout in September 2017.

After several rounds of negotiations, KnighTek agreed to a buyout that ended all of Jive's obligations under the 2014 Agreements (defined below) in exchange for a lump-sum payment (the "2018 Letter Agreement"). These negotiations involved sophisticated parties engaging in an arm's-length transaction that resolved a disagreement over the calculation of the Cap Amount. While KnighTek believes the negotiations resulted in a discounted payment, it misquotes the formula for determining the Cap Amount and ignores that Jive explained at the time that it believed it overpaid by $300,000 to resolve the dispute.

Now unhappy with its contract, KnighTek seeks to retrade the 2018 Letter Agreement by alleging fraud based on a purported "misrepresentation" about whether Jive might enter into a merger in 2018, a possibility about which KnighTek *concedes* it never sought any representation. Moreover, as the trial court held, the Complaint does not include any well pled allegations that Jive made a representation about a Change of Control. Jive could not *mis*represent a fact that it did not represent. Further, KnighTek *concedes* it did no diligence into the possibility of a Change of Control event (which possibility it had been on notice of since 2014). Finally, the trial court correctly held there cannot be any "concealment" because Jive had no duty to speak. These holdings conclusively refute KnighTek's claims.

Quite simply, KnighTek has not pled any fraud. Jive respectfully requests that this Court affirm the dismissal.

SUMMARY OF ARGUMENT

1. **Denied**. The trial court correctly held that KnighTek failed to meet the heightened pleading requirements of Delaware Superior Court Rule 9(b). The Complaint's allegations, including vague, conclusory statements by unidentified speakers, lack specificity and fail to come close to the pleading requirements for fraud claims.

KnighTek did not allege any false statements regarding presently existing material facts. Instead, it relies only on (i) snippets of emails from Samuel Simmons, Jive's Vice President of Finance, which statements KnighTek nowhere alleges were knowingly false, and which were non-actionable opinion or puffery-type statements in any event; and (ii) a non-actionable, forward-looking projection regarding the potential time to payoff of the Cap Amount based on the historical rate of payment. KnighTek does not attribute this purported projection to anyone, does not identify the time or place the projection was purportedly made, and does not even allege that it was inaccurate. In short, nowhere in the Complaint does KnighTek make any well-pled allegations that Jive lied in connection with the parties' negotiations.

Instead, KnighTek's claims hinge on the argument that there was a material omission and Jive should have volunteered information about a potential merger, which could, in the future, have qualified as a Change in Control. In other words,

KnighTek claims that Jive had a "duty to speak." However, such a duty does not exist (especially in this type of ordinary business negotiation), absent a fiduciary or other special relationship between the parties. KnighTek fails to identify any basis to impose this atypical duty to speak on Jive.

On a related point, KnighTek mischaracterizes the trial court as having held that KnighTek had a duty to "ask the fraudster whether they are speaking the truth." *See* KnighTek's Opening Appellate Brief, Trans. ID 63058473 ("OB") at 3, 5-6. Not so. The trial court actually held that having failed to ask a single question about a Change of Control, KnighTek cannot later claim fraud based on this purported non-disclosure. That is, KnighTek cannot reasonable rely on purported "facts" that it did not investigate and that Jive did not represent.

Further, KnighTek's fraudulent concealment claim fails for the same reasons as its material omission claim—as a matter of law, Jive did not owe a duty to disclose the *possibility* of a merger (or anything else) as it did not have a duty to speak.[1] The parties were on opposite sides of arm's-length negotiations and did

[1] The Complaint has two counts: misrepresentation and concealment. A16; A18. KnighTek appears to have abandoned arguing its duplicative concealment claim as separate from its misrepresentation claim. KnighTek's Summary of Argument section only mentions misrepresentation, and while its Argument section mentions concealment in a heading, that claim is not separately addressed. OB at 3, 13. The dismissal of the concealment claim should be affirmed on this basis alone, but Jive nonetheless addresses the fatal deficiencies with it herein.

not have a fiduciary or special relationship that would cause the Court to impose a duty to speak.

2. **Denied.** KnighTek's argument that a fraudulently obtained "release" cannot bar a fraud claim misses the gravamen of the trial court's ruling. The trial court did not focus on the "release" language in the 2018 Letter Agreement (though that is an independent basis to dismiss the Complaint). Instead, the trial court focused on the effect of the 2018 Letter Agreement itself. The trial court correctly held that after Jive fulfilled its responsibilities under the 2018 Letter Agreement (by wiring the agreed-to lump sum), all of Jive's obligations under the 2014 Agreements were "deemed fully paid, discharged, satisfied, released and terminated." A60-62. Any claim for additional payments under the Cap Amount was "[c]ontractual[ly] [w]aive[d]." *See* OB, Ex. A (Superior Court's October 23, 2019 Opinion, "Op.") at 21. Thus, the Complaint fails because it seeks to enforce rights that KnighTek no longer had.

As the trial court further held, the fact that Jive's merger was announced two days after the 2018 Letter Agreement was signed is irrelevant because (i) that announcement did not constitute a Change of Control; and (ii) even if it did, KnighTek had released its Change of Control rights when the terms of the 2018 Letter Agreement were fulfilled. *Id.* at 21-22.

STATEMENT OF FACTS

I. JIVE PURCHASES THE COMVOICE BUSINESS

Jive is a leading provider of cloud-based phone systems and it "distributes and sells information and communications services and related equipment." A11, ¶ 5. KnighTek is an Arizona LLC, and Erik Knight is KnighTek's principal. *Id.* ¶ 4. Knight manages KnighTek's affiliate, Eknight Holdings, LLC ("Eknight"). A13, ¶ 16.

Pursuant to an Asset Purchase Agreement, dated March 18, 2014 (the "APA"), Jive purchased ComVoice, and certain other assets, from Eknight. A22-43. At the same time, Jive entered into an Authorized Agent Agreement, dated April 1, 2014, with KnighTek (the "Agency Agreement" and together with the APA, the "2014 Agreements"). A45-58. The APA provided that if a certain revenue hurdle was met, Jive would grant KnighTek warrants to purchase 15,000 shares of Jive's common stock. A24. That hurdle was met, and at KnighTek's direction, the warrants were issued to Eknight. A13, ¶ 16.[2]

Part of the consideration provided for in the APA was contingent payments based on the future revenue of certain ComVoice clients (the "Assigned Customer Accounts"). A46. The total amount of any contingent payments was set at the Cap

[2] This fact section is necessarily drawn from the Complaint and the documents it incorporates by reference. Jive does not concede the accuracy or completeness of the Complaint's allegations.

Amount, which the Agency Agreement defines as "the product of ComVoice's 2013 total revenues *(as reported in the 2013 audited financial statements prepared in accordance with GAAP)* multiplied by 2.7." A57 (emphasis added). The Agency Agreement does not state the amount of ComVoice's audited 2013 revenues,[3] and it does not state the Cap Amount directly; instead, it only includes the formula for calculating it.

The Agency Agreement provides that if Jive has a Change of Control (defined at A52) or an Initial Public Offering (A46) during the term of the Agency Agreement, then Jive shall pay the difference between the Cap Amount and the aggregate amount of all contingent payments already made. A46. A Change of Control, in relevant part, involves the actual "acquisition" of Jive, *see* A52, and not the announcement of a merger that, if completed, would constitute a Change of Control. *See, e.g.*, OB at 11 (conceding closing, and not announcement, of a Jive merger constitutes a Change of Control).

It is undisputed that a Change of Control did not happen before the execution of the 2018 Letter Agreement. *E.g.*, A17, ¶ 40. But through the Change of Control provision, KnighTek was on notice from 2014 forward that a merger, acquisition, or IPO of Jive was a possibility. *See* A13, ¶¶ 14-15; A46; A52.

[3] KnighTek imprecisely describes the Cap Amount as "2.7 times ComVoice's 2013 total revenues," intentionally glossing over the fact that the contract refers to "audited" revenues. *See* A13, ¶ 13 n.1; OB at 7.

The Agency Agreement also contains numerous provisions confirming the commercial nature of the relationship between the parties. KnighTek is defined as an "independent contractor and is not an employee, partner, or co-venturer of, or in any other service relationship with Jive." A45. The Agency Agreement even authorizes Jive and KnighTek to compete with each other. *Id.* Additionally, the Agency Agreement lists the "Responsibilities of Jive," which relate only to the contingent payments and the provision of certain equipment to ComVoice customers. A46 (numbered paragraphs 2-7). As the trial court held, there is nothing in the 2014 Agreements that establishes a fiduciary duty relationship between Jive and KnighTek. Op. at 21. Indeed, the Agency Agreement states, "Except as expressly set forth in this Agreement, Jive shall have no further duties or obligations under this Agreement." A46.

The Agency Agreement also contains a choice of law provison that provides:

> The Agent and Jive agree that the validity, construction and performance of this Agreement shall be governed by the laws of the State of Utah, U.S.A. (excluding any of its conflict of laws principles jurisprudence which might refer to the substantive laws of any other jurisdiction).

A55.

Accordingly, the parties briefed the motion to dismiss, and the trial court decided it, based on Utah substantive law and Delaware procedural law. Op. at 12, n.50.

II. KNIGHT REQUESTS A BUYOUT FROM JIVE, AND THE PARTIES NEGOTIATE THE 2018 LETTER AGREEMENT

In September 2017, *Knight approached Jive* to raise the potential of a buyout. A13-14, ¶ 17. Specifically, Knight "inquired whether Jive would be willing to make an accelerated lump-sum payment in return for a discount on the Cap Amount due." *Id.* In other words, in its view, KnighTek reduced its uncertainty as to how long it would take to receive payments under the Cap Amount and received a lump sum sooner in exchange for giving up the ability to get potentially higher payments in the future. Op. at 22.

In January 2018, Jive offered a lump-sum payment in lieu of any remaining contingent payments owed under the 2014 Agreements. A14, ¶ 20. The Complaint alleges that Jive offered a lump sum of just under $1 million to resolve the contingent payments. *Id.* KnighTek countered with a higher buyout price, and ultimately the parties agreed on a buyout amount of $1.75 million. *See* A14-15, ¶¶ 22-24 (noting that the parties "engaged in negotiations" and the ultimate amount of the buyout was $750,000 more than first proposed).

KnighTek and Jive disagreed on how to calculate the Cap Amount and the total outstanding amount under the 2014 Agreements. B1-21 (email chain between Knight and Simmons).[4] KnighTek calculated the unpaid balance of the Cap

[4] When evaluating a motion under Rule 12(b)(6), the Court may consider the content of documents that are integral to a plaintiff's claim and quoted in the

Amount to be $2,748,442.89, but Jive made clear it thought the $1.75 million agreed-to payment was "$300,000 more than the board thinks they owe you." B6. While Jive disagreed with KnighTek on how to calculate the Cap Amount and the total outstanding payments, Jive agreed to the negotiated buyout amount to fully resolve all obligations under the 2014 Agreements.[5]

Regardless of the calculation of the Cap Amount, KnighTek's agreement to a lump-sum payment eliminated its ability to get a higher amount if a Change of Control occurred at a later date. A60-62. Yet, the Complaint does not allege that KnighTek asked if Jive was in merger discussions or considering an IPO. Nor does the Complaint allege that KnighTek sought a representation on this issue or requested a contractual provision that would require a "true up" or additional payment if Jive was acquired or went public a specified time after the buyout was completed. *Cf.* A13-16, ¶¶ 17-29 (recounting the negotiation of the 2018 Letter Agreement and not alleging that KnighTek asked questions about Jive's future plans, strategic or otherwise). Instead, KnighTek chose to negotiate the buyout price ultimately agreed upon by the parties. *See* A14-15, ¶¶ 22-24.

---

complaint. *See, e.g., Cont'l Fin. Co. v. TD Bank, N.A.*, 2018 WL 565305, at *1 (Del. Super. Ct. Jan. 24, 2018). The trial court determined it was appropriate to consider this email chain because "the emails between Simmons and Knight are integral to KnighTek's claims and are quoted numerous times in the Complaint. Furthermore, the Court is not using the emails to prove the truth of the statements. The emails merely contextualize KnighTek's allegations." Op. at 2, n.6.

[5] If Jive is correct on the calculation of the Cap Amount and the 2018 Letter Agreement is rescinded, *KnighTek would owe Jive* the overpayment.

KnighTek alleges that leading up to the 2018 Letter Agreement, Simmons said Jive was negotiating to resolve other contingent payment contracts, had limited funds, and was interested in completing negotiations by the end of January. *Id.* KnighTek does not allege that any of these statements were incorrect. Indeed, most of these statements are not factual at all, but rather expressions of opinion, including Simmons noting that "we are targeting by the end of January"; Jive would make a decision based on "how beneficial the economics are"; and Jive would like a "speedy" signing. *Id.*

Despite the Complaint's claim that Jive instilled a sense of "urgency" to finish negotiations by the end of January, it is undisputed that Jive continued to negotiate with KnighTek into early February. A15-16, ¶¶ 24-25, 27-29. KnighTek similarly does not allege that it ever asked for or needed more time to consider the buyout offer. Indeed, KnighTek was clear that it wanted to accelerate its receipt of funds under the Agency Agreement. A13-14, ¶ 17.[6]

On February 6, 2018, KnighTek and Jive executed the 2018 Letter Agreement, so that any and all amounts due under the 2014 Agreements would be deemed paid in full, and any and all obligations and liabilities would be deemed

[6] KnighTek says in its Facts section that Simmons "kn[ew] that a Change of Control was imminent," OB at 10, however, the Complaint does not plead that Simmons knew about the merger or the timing of its announcement. Op. at 17. While such an allegation would not change the result here, it is telling that KnighTek seeks improperly to amend its Complaint through its briefing.

"discharged, satisfied, released and terminated" when Jive wired the lump-sum payment. A60-61.

III. JIVE MERGES WITH LOGMEIN IN APRIL 2018

On February 8, 2018, LogMeIn USA, Inc. ("LogMeIn") and Jive announced that they had entered into a merger agreement.[7] That announcement is not a Change of Control as defined in the Agency Agreement, and the announcement itself would not have triggered any additional payments to KnighTek (even assuming *arguendo* that additional payments were due under the Cap Amount). The merger between Jive and LogMeIn closed on April 3, 2018. A16, ¶ 33.

IV. UNHAPPY WITH THE BARGAIN IT STRUCK IN THE 2018 LETTER AGREEMENT, KNIGHTEK ACCUSES JIVE OF FRAUD

On March 19, 2018, KnighTek filed a complaint in the Delaware Court of Chancery alleging the same causes of action and based on the same facts as the Complaint. C.A. No. 2018-0197-AGB, Trans. ID 61816697. On April 20, 2018, KnighTek voluntarily dismissed its first complaint, and on April 25, it filed the Complaint against Jive alleging fraudulent misrepresentation and fraudulent concealment. Trans. ID 61957380. Jive moved to dismiss the Complaint on June 14, 2018. Trans. ID 62142637. At no point after Jive filed its Motion to Dismiss did KnighTek move to amend its Complaint.

[7] Nonparty LogMeIn is a market leader in communications and collaboration. It has a broad portfolio of products, including the popular GoToMeeting service, and is listed on NASDAQ. *See* A16, ¶ 31.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED KNIGHTEK'S COMPLAINT

A. Question Presented

Did the trial court properly dismiss the Complaint for KnighTek's failure to satisfy the heightened pleading standard of Rule 9(b)? A83-96; A134-48.

B. Scope of Review

A dismissal for failure to state a claim is subject to *de novo* review. *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). On a motion to dismiss, the court will not "accept conclusory allegations" or "draw unreasonable inferences in the plaintiff's favor." *Id*. And "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." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

Under Rule 9(b), a "heightened pleading standard" that "requir[es] particularized fact pleading" applies to fraud claims. *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207-08 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007) (TABLE). The "factual circumstances that must be stated with particularity refer to the time, place, and contents of the false representations; the facts misrepresented; the

identity of the person(s) making the misrepresentation; and what that person(s) gained from making the misrepresentation." *Id*.

C. Merits of Argument

1. KnighTek failed to state a claim for fraudulent misrepresentation

To establish a claim for fraudulent misrepresentation under Utah law, a plaintiff must show:

> (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Larsen v. Exclusive Cars, Inc., 97 P.3d 714, 716 (Utah Ct. App. 2004) (citation omitted). A material omission may be actionable as a fraudulent misrepresentation under Utah law, but only where the defendant has a duty to disclose the omitted information. *Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369, 1373 (Utah 1980); *DeBry v. Valley Mortg. Co.*, 835 P.2d 1000, 1008 (Utah Ct. App. 1992).

Here, the trial court correctly dismissed KnighTek's claim for fraudulent misrepresentation because KnighTek failed to plead a single allegation of a false representation of a presently existing material fact, failed to plead with particularity that Simmons or any person made a knowingly false statement, and

failed to plead reasonable reliance. A85-92; A134-41. Moreover, KnighTek's material omission and concealment claims fail because Jive did not have a duty to speak. *See* A92-95; A142-46.

a. None of the alleged "misrepresentations" in the Complaint refer to presently existing material facts

The alleged misrepresentations fall into two categories. Op. at 13-15 (citing A10-11, ¶¶ 2-3; A14-15, ¶¶ 21-24; A16-17, ¶¶ 35-38). The first category consists of short excerpts of emails between Knight and Simmons. A14-15, ¶¶ 22-24. The second category consists of only one alleged projection on the length of time to pay off the Cap Amount, and vague, generalized claims about a purported false sense of urgency or alleged "scheme." *See* A10-11, ¶¶ 2-3; A16-17, ¶¶ 35-38. As the trial court correctly recognized, neither category includes any misrepresentation of a presently existing material fact. Op. at 15-17.

Simmons email statements:

As an initial matter, the Complaint does not allege that Simmons' statements were false. A79; A85-86; A135. Specifically, KnighTek alleges that Simmons said that there was a "goal to complete [the negotiations] by the end of January," that Simmons was "juggling a number of other offers . . . so the sooner the better as availability of funds depends on who moves quickest and how beneficial the economics are," and the buyout was "conditional on speedy completion." A14-15,

¶¶ 21-24. But KnighTek does not allege that these statements were false. Op. at 17 & n.60.

KnighTek attempts to evade this baseline failure by claiming that it is entitled to an inference of falsity because Jive was in merger negotiations at the time. OB at 15-17, 21. This kind of circular reasoning is contrary to the heightened pleading standard of Rule 9(b) and is insufficient to support a claim for fraud. *See Mooney v. Pioneer Nat. Res. Co.*, 2017 WL 4857133, at *6 (Del. Super. Ct. Oct. 24, 2017) ("What Plaintiff fails to adequately allege is whether [the speaker] knew of the statements' falsity, as required to make out a claim for fraud."); *Malpiede*, 780 A.2d at 1083. Moreover, nothing about the future possibility of a merger suggests that Simmons was not in fact negotiating other buyouts or that Jive had limited funds to put to this particular endeavor.[8] A85-87.

Separately, this claim fails because these alleged misrepresentations are at most opinion-type statements about Jive's goals and subjective opinions. *See* Op. at 16 & n.59. These "mere expressions of opinion[s]" are not actionable as a basis for fraud under Utah law. *See, e.g.*, *Wright v. Westside Nursery*, 787 P.2d 508,

[8] Indeed, KnighTek argues that the then potential merger meant that Jive would soon be "flush" with cash. OB at 5. This argument makes no sense. KnighTek does not allege that when LogMeIn acquired Jive the proceeds of the merger would go to Jive directly. *See* A16, ¶ 31. Indeed, this is not how mergers work, the proceeds would go to Jive's owners.

512-13 (Utah Ct. App. 1990); *Boud v. SDNCO, Inc.*, 54 P.3d 1131, 1135-36 (Utah 2002).

Purported payoff projection and general claims of a false sense of urgency:

KnighTek's claim that "Jive misrepresented that unless KnighTek immediately accepted its offer, KnighTek would likely have to wait more than five more years, based on Jive's historical paydown record, before KnighTek would receive full payment of the Cap Amount" (A10, ¶ 2), fails to state a claim for several independent reasons, including because, as addressed below, the Complaint does not actually attribute it to anyone, let alone a representor that makes a knowingly false statement. But most basically, this allegation is not a presently existing material fact. Instead, it is a prediction regarding the future that cannot sustain a fraud claim. *See, e.g.*, *Thornton v. Countrywide Mortg. Ventures, LLC*, 2011 WL 4964275, at *3 (D. Utah Oct. 19, 2011) (citing *Andalex Res., Inc. v. Myers*, 871 P.2d 1041, 1047 (Utah Ct. App. 1994)) ("However, to the extent that Plaintiff is claiming that Countrywide should have known of his ability to pay in the future, it is not a presently existing fact. Therefore, Plaintiff's claim as to a future ability to repay is not actionable.").

KnighTek also alleges that Jive intended to create a "sense of urgency." A14, ¶ 21. This vague allegation is not a presently existing material fact. Op. at 17. In fact, this generalized allegation is not well-pled at all. A88-89. Despite the

mention of a potential January 31 closing date, which Simmons described as a "target" and a "goal" (A14-15, ¶¶ 21, 23, 24), it is undisputed that the parties continued to negotiate for nearly a week after the date KnighTek alleges Jive targeted to complete their deal. A16, ¶ 29. Moreover, KnighTek does not allege that it asked for or needed more time to complete the 2018 Letter Agreement negotiations. Thus, the "urgency" allegation does not support any fraud claim.

b. KnighTek does not plead that any alleged misrepresentations were knowingly false

As to the first category of alleged misrepresentations, KnighTek does not allege that any of Simmons' statements "were false, that Simmons knew them to be false, or made them recklessly, knowing he had insufficient knowledge upon which to base such a representation." Op. at 17; *see also* A14-15, ¶¶ 20-24; A16-17, ¶¶ 36-38 (failing to allege these statements are inaccurate). Equally fatal, there is not even an allegation that Simmons was aware of the potential merger or the announcement timing. Op. at 17; *see also* A90.

Having failed to plead a knowingly false statement by Simmons, on appeal KnighTek tries to create one by misstating its Complaint, specifically by claiming that "*Mr. Simmons* falsely represented . . . that Jive would take more than five years to fulfill its payment obligations under the Agency Agreement." OB at 15 (emphasis added); *see also id*. at 16, 19, 20. In reality, nowhere in the Complaint does KnighTek allege that Simmons made this statement, as the trial court held

below. *See* Op. at 15-17; A10, ¶ 2; A17, ¶ 37. KnighTek may not amend its Complaint through its appellate brief. *See Zucker v. Andreessen*, 2012 WL 2366448, at *2 (Del. Ch. June 21, 2012).

In addition, the Complaint does not allege that Simmons knew about the merger or the timing of its announcement. *Cf.* A16, ¶ 35 (alleging only that "[u]pon information and belief, the officers and directors of Jive" knew about a Change of Control); A90.[9] That is, even if the Complaint did allege that Simmons made this statement, there would still not be a knowingly false statement. Finally, assuming *arguendo* that this statement could be attributed to Simmons, it still fails because it is a non-actionable projection. *See* Section I.A. above.

As for the second category of alleged misrepresentations, KnighTek does not identify who made these purported statements, or the time or place they were purportedly made. A10, ¶ 2; A17, ¶ 37. Delaware courts require fraud to be pled with particularity "to discourage the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993) (citation omitted). Accordingly, when

[9] KnighTek claims in its Opening Brief that "Mr. Simmons, as Jive's Vice President of Finance, was well aware that Jive and LogMeIn had completed its negotiations and were on the cusp of making a joint public announcement of the sale." OB at 20. But the Complaint contains no such allegation about Simmons, as the trial court held. Op. at 17.

fraud is alleged, it is insufficient to merely "make a general statement of the facts which admits of almost any proof to sustain it." *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990) (citation omitted). Allegations regarding a purported sense of urgency or generalized statements about an undefined "scheme" fail to meet any pleading standard, and certainly do not meet the Rule 9(b) particularity requirements. A87-89.

Indeed, as the trial court correctly held, having failed to identify any representor for these alleged statements, the Complaint fails to plead with particularity that they were knowingly or recklessly false. *See* Op. at 17; *see also* A10, ¶ 2; A17, ¶ 37. Similarly, KnighTek does not identify the time or place of these purported statements. As a result, these allegations fail to satisfy the pleading requirements of Rule 9(b). *See Hauspie v. Stonington P'rs, Inc.*, 945 A.2d 584, 587-88 (Del. 2008) (fraud requires pleading with particularity that the representor knows the statement is false, which is impossible when a plaintiff fails to allege who made a representation); *Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002) ("[Plaintiff] is required to identify specific acts of individual defendants for his negligent misrepresentation claim to survive."), *aff'd*, 822 A.2d 397 (Del. 2003) (TABLE). This second category threatens the same "frivolous accusations of moral turpitude" that Rule 9(b) was created to avoid, and accordingly, the allegations fail to state a claim.

KnighTek cites to *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405 (Del. Ch. Dec. 22, 2010), to argue that it need not identify a specific representor to satisfy its pleading obligations under Rule 9(b). *See* OB at 30, n.119. KnighTek entirely misses the point of *Narrowstep*. In that case, the complaint cited to statements made by a corporate defendant in a merger agreement, in a press conference, in the first and second amendments to the merger agreement, and in public filings. OB Ex. C, ¶¶ 8-40.

That is, *Narrowstep* does not undo the well-established Delaware rule (even cited in *Narrowstep*) that the time, place, and speaker of allegedly false statements must be identified with particularity. *See Narrowstep*, 2010 WL 5422405, at *12; *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *8 (Del. Ch. Jan. 30, 2015) ("[T]he complaint fails to identify who made any particular misrepresentation and to whom they were made."); *Metro Commc'n Corp. BVI v. Adv. Mobilecomm Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004) (dismissing fraud claim that failed to "identify any specific statement by a specific defendant at a specific time"). To the contrary, the plaintiff there based its fraud claim on specific contractual and public statements made by the corporate entity on specific dates.

Unlike the specific statements relied on in *Narrowstep*, KnighTek tries to escape its pleading deficiency by claiming that the statements addressed above

were made by "Jive's Officers." OB at 15-20, 28-30. KnighTek includes Simmons and Benjamin King, Jive's General Counsel, in this undifferentiated group. *Id.* KnighTek does not use this term in its Complaint, where it instead uses the equally generic phrase "the officers and directors of Jive." A16, ¶ 35. But this new gambit fails to help: KnighTek cannot dodge its failure to identify who made statements (and whether those individuals made knowingly false statements) with the simple trick of claiming that all of the allegedly false statements were made by one or more unidentified members of the collective term "Jive Officers." *See Trenwick*, 906 A.2d at 207-08; *Northpointe Hldgs., Inc. v. Nationwide Emerging Managers, LLC*, 2010 WL 3707677, at *8 (Del. Super. Ct. Sept. 14, 2010). Indeed, the trial court already correctly rejected KnighTek's attempt to use this type of imprecise group pleading below. Op. at 15.

Moreover, when defining "Jive's Officers," KnighTek refers to Simmons as Jive's Chief Financial Officer, and earlier refers to him as the President of Finance. OB at 8, 15. However, the Complaint actually says that Simmons is Jive's Vice President of Finance. A14, ¶ 17.[10] And, contrary to KnighTek' the Complaint does not attribute a single statement (let alone an allegedly false statement) to King; it solely alleges that he prepared the 2018 Letter Agreement. *Id.* ¶ 22. Once

[10] KnighTek also correctly refers to Simmons as a Vice President at times, so it is unclear what KnighTek means when arguing that the trial court should have realized that "Mr. Simmons was identified as an officer of Jive." OB at 30. It is KnighTek, not the trial court, that mistakes Simmons' title.

again, the appeal brief (*e.g.*, OB at 15, 29) includes arguments contrary to the actual allegations of the Complaint, and they should be rejected on that basis.

In short, KnighTek fails in its attempt to turn generalized and conclusory allegations by "Jive's Officers" into well-pled Rule 9(b) allegations.

c. KnighTek cannot reasonably rely on a representation that Jive did not make and KnighTek failed to seek

KnighTek argues that "[e]ven if Jive did not have an affirmative duty to disclose [the possible merger announcement], Jive is not excused from liability for swindling KnighTek out of nearly one million dollars by falsely representing to Mr. Knight that *no sale was even remotely being contemplated*." OB at 24 (emphasis added). But the allegation that Jive represented "that no sale was even remotely being contemplated" is wholly absent from the Complaint. In fact, there is not a single well-pled allegation that anyone from Jive made any representation about a potential merger or sale. Op. at 16-17. Simply put, Jive could not *mis*represent the future possibility of a Change of Control when there is no allegation of *any* representation on this issue. A91-92.

Also notably absent from the Complaint is any allegation that KnighTek asked for a representation that Jive was not engaged in a strategic transaction or that KnighTek did even the slightest diligence regarding a sale or an IPO. A140-41. As the Utah Supreme Court held in *Sugarhouse Finance Co. v. Anderson*, if a party fails "to make inquiry" concerning a matter during negotiations, it may not

later "lay its failure to protect its own interests at defendant's feet in the form of an allegation of fraud." 610 P.2d at 1374; *see also Yazd v. Woodside Homes Corp.*, 143 P.3d 283, 286-87 (Utah 2006).

KnighTek argues that *Sugarhouse* does not apply because "the information on the pendency of Jive's sale was unavailable to the public," and according to KnighTek, the holding in *Sugarhouse* is limited to publicly available information. OB at 21-22. To the contrary, there is nothing in *Sugarhouse* that says the opinion is so limited, and in fact, part of the allegedly non-disclosed information in that case was the non-public pending sale of certain real estate. 610 P.2d at 1374. And KnighTek's reading on this case is directly contrary to Utah's well-established rule that there is generally no duty to disclose in arm's length deals. *See* Section I.2.a below.

Separately, KnighTek's reference to a lack of public information regarding the pendency of a possible Jive merger is a red herring. OB at 22. While the merger announcement was obviously not public beforehand, KnighTek ignores that it was aware, *because of its own negotiations of them*, that the 2014 Agreements had Change of Control rights that KnighTek relinquished in the 2018 Letter Agreement. KnighTek's principal even noted that he had expected a Change of Control event three to five years after the 2014 deal (B7), and yet he did not ask if a merger, IPO, or sale of substantially all of the Jive's assets was being

pursued. KnighTek knew that these limited number of events would trigger an acceleration of the remaining Cap Amount (whatever that amount was). A45-58. KnighTek was also aware that the parties disputed the calculation of the Cap Amount, and that the dispute would be resolved through the 2018 Letter Agreement. A60-62. KnighTek plainly regrets that it failed to investigate the possibility of Change of Control, but that does not transform this ordinary commercial transaction into a fraud.

In this regard, KnighTek makes a strange argument that because Jive was likely under a non-disclosure agreement, and so could not disclose the Jive-LogInMe merger, then its diligence could not have uncovered the merger. OB at 22. This makes no sense. KnighTek cannot defend its failure to investigate this issue by claiming if—counterfactually—it had inquired about a Change of Control supposedly Jive would not have been able to disclose the relevant information because there is nothing in the Complaint about *any* diligence. This claim deserves no more attention, but plainly, KnighTek could have protected itself by seeking a representation that no Change of Control was imminent, among a myriad other options. The point is that it did not.

Indeed, as the trial court held, KnighTek received exactly what it bargained for here—a lump-sum payment that resolved a dispute over the Cap Amount, and from Plaintiff's view an accelerated payment now rather than potentially higher

payments later. Op. at 22. KnighTek cannot undo that contractual risk allocation by crying fraud.

For the first time on appeal, KnighTek cites to *Pace v. Parrish* to try to excuse its failure to ask Jive if a sale or an IPO was imminent. OB at 23. But *Pace* is completely inapposite. There, the court rejected the defendants' argument that a plaintiff had to verify a defendant's affirmative representations. *Pace v. Parrish*, 247 P.2d 273, 276-77 (Utah 1952). Instead, "[t]he full measure of the plaintiffs' duty was to use reasonable care and observation in connection with these representations [by the defendant]." *Id*. at 276. Here, KnighTek did not even seek the representation from Jive that it now claims was misrepresented. In sum, there is no affirmative misrepresentation for KnighTek to reasonably rely on when KnighTek failed to obtain one from Jive to begin with.

d. KnighTek's material omission allegations fail absent a duty to speak

Utah law provides that a material omission may be actionable as a misrepresentation, but only where the defendant has a duty to speak. *DeBry*, 835 P.2d at 1008. KnighTek claims that the trial court misunderstood "whether KnighTek's claim can be sustained without a finding that Jive had an affirmative duty to disclose its pending sale to LogMeIn." OB at 23-24. In fact, the trial court accurately noted that under Utah law, absent such a duty, KnighTek's claim for fraudulent concealment and the portion of its claim for fraudulent

misrepresentation based on a material omission both fail because here Jive had no duty to speak. Op. at 17-18; *see also Sugarhouse*, 610 P.2d at 1373. Since the concealment and material omission claims rely on the same legal theory (which KnighTek appears to have conceded by not briefing its concealment count separately on appeal), these claims are addressed together next.

2. KnighTek Failed to State a Claim for Fraudulent Concealment

In order to establish a claim for fraudulent concealment under Utah law a plaintiff must allege that "(1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate." *Smith v. Frandsen*, 94 P.3d 919, 923 (Utah 2004) (quoting *Hermansen v. Tasulis*, 48 P.3d 235, 242 (Utah 2002)). "Fraudulent concealment ***requires*** that ***one with a legal duty or obligation*** to communicate certain facts remain silent or otherwise act to conceal material facts known to him." *McDougal v. Weed*, 945 P.2d 175, 179 (Utah Ct. App. 1997) (emphasis added) (citation omitted). Addressed below, Jive did not have a "legal duty," or "duty to speak," and the trial court correctly dismissed the concealment and material omission claims.

a. The concealment claim fails because Jive did not have a duty to disclose the possibility of a merger

"[W]hether a duty [to speak] exists is a question of law" that involves the "examination of the legal relationships between the parties" and "an analysis of the duties created by these relationships." *Yazd*, 143 P.3d at 286 (citation omitted). Specifically, the question is whether there is a fiduciary duty or special relationship between the parties that gives rise to an independent duty to speak. *See, e.g., id*. at 286-87; *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 247 (Utah 2009). When deciding whether there is a special relationship, Utah courts will consider factors such as "[a]ge, knowledge, influence, bargaining power, sophistication, and cognitive ability." *Yazd*, 143 P.3d at 286. Absent a duty to speak, KnighTek's claim for fraudulent concealment against Jive cannot survive. *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989).

No such fiduciary or special relationship exists between KnighTek and Jive. *See* Op. at 20-21 (rejecting KnighTek's suggestion that the duty of good faith in every contract is sufficient to create a special relationship "on par with a fiduciary relationship"); *id* at 19-20 (rejecting KnighTek's attempt to establish a fiduciary duty on the part of Jive based on warrants held by a different entity, including because under Delaware law warrants do not create a fiduciary relationship). None of the special relationship factors favor imposing a duty on Jive. Indeed, Utah

courts avoid imposing a duty to speak where sophisticated business entities engage in arm's-length negotiations. *See First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1334 (Utah 1990); *Arnson v. My Investing Place L.L.C.*, 2013 WL 5724048, at *4 (D. Utah Oct. 21, 2013).

Further, the trial court recognized (and KnighTek's counsel admitted, A199) that there is no contractual language in the 2014 Agreements that requires Jive to make affirmative disclosures concerning the possibility of a merger, nor is there contractual language that establishes a special or fiduciary relationship between the two parties. Op. at 20-21. In fact, the language makes clear that the 2014 Agreements ***do not*** impose such relationships. *See, e.g.*, A45 (KnighTek is an "independent contractor and is not an employee, partner, or co-venturer of, or in any other service relationship with Jive."); A46 ("Except as expressly set forth in this Agreement, Jive shall have ***no further duties or obligations*** . . . ." (emphasis added)).

b. KnighTek fails to identify any error in the trial court's ruling that there was no duty to speak

On appeal, KnighTek claims that the trial court did not correctly determine whether there was a duty to speak. OB at 23-24. However, KnighTek simply repeats its already rejected claims that (i) the duty of good faith and fair dealing; (ii) KnighTek's affiliate's status as a Jive warrant holder; and (iii) an alleged disparity of knowledge somehow create a duty to speak. *Id.* at 23-28. KnighTek is

wrong on each point, and three incorrect arguments, even when considered collectively as KnighTek argues for, offer no more reason to find a duty to speak than the individually flawed arguments. A92-95; A142-46.

On the duty of good faith and fair dealing, KnighTek does not offer a single citation (here or in the court below) to support the theory that the implied covenant, present in every contract relationship, creates a duty to speak. A122-23. KnighTek cannot do so because the argument is contrary to Utah law, and if accepted, this theory would completely reshape every ordinary business contract into a fiduciary or special relationship. *See, e.g., First Sec. Bank of Utah N.A.*, 786 P.2d at 1334; A94-95.

On the warrants, KnighTek claims that the trial court limited its analysis to whether the warrants created a fiduciary relationship. OB at 25. First, the trial court examined that claim because that is exactly what KnighTek pled—"Jive had a fiduciary duty to Erik, KnighTek and EKnight . . . due to their relationship as holders of [Jive w]arrants." A18, ¶ 48. Second, as the trial court held, that argument is simply wrong. Op. at 19-20 & n.73. The warrants create only a contract right, *e.g.*, *In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 771897, at *7 (Del. Ch. Feb. 28, 2013) ("[t]he holders of . . . warrants are not stockholders and are not owed fiduciary duties"), and the warrants are not even held by KnighTek. A92-95; A145. On the alleged disparity of knowledge, Utah law is

clear that one party's possession of knowledge in a commercial transaction is not sufficient on its own to create a duty to disclose. *See, e.g.*, *Yazd*, 143 P.3d at 286-87.

KnighTek claims that the trial court "limited the imposition of a duty to be forthright or disclose to only situations in which there is a *per se* fiduciary or special relationship." OB at 27. While nowhere in the opinion does the trial court articulate a *per se* rule or hold that KnighTek's arguments were considered in isolation, that is beside the point. The trial court rejected each of KnighTek's arguments (and all them together) because each one is simply incorrect. Op. at 19-21.

KnighTek also claims that the "Superior Court improperly constrained Utah's totality of the circumstances analysis for determining whether a duty to disclose exists" by focusing on the lack of a fiduciary or special relationship between the parties. OB at 25. KnighTek points to a single Utah opinion, *Elder v. Clawson*, 384 P.2d 802 (Utah 1963), to support this claim. OB at 26. However, *Elder* is factually inapposite; and to the extent it is relevant on the legal standards, it supports Jive. A142-44.

First, the analysis applied in *Elder* is simply an earlier articulation of the same relationship and duty principles that the trial court employed when determining whether Jive owes a duty to speak to KnighTek. *See* Op. at 19-21.

Elder is consistent with and cited within the Utah cases that the trial court relied on to support its holding that Jive did not have a duty to make affirmative disclosures on issues that KnighTek did not ask about. *See, e.g.*, Op. at 18-19, nn.65, 68, 69 (citing *DeBry*, 835 P.2d at 1007, *Chapman*, 784 P.2d at 1186, and *Yazd*, 143 P.3d at 286-87).

In *Yazd*, the Utah Supreme Court held that "[a] person who possesses important, even vital, information of interest to another has no legal duty to communicate the information where no relationship between the parties exists." *Yazd*, 143 P.3d at 287. Moreover, the *Yazd* court clarified that in order to avoid a "flawed analytical process," when evaluating a claim for fraudulent concealment, courts must consider the threshold question of whether there is "a legal duty to communicate" ***before*** they can consider the materiality of a fact and whether only one party knows that fact. *Id*. at 286. The *Yazd* court reversed the lower court to stress that "*the court of appeals' opinion not be read to suggest that the materiality [of a fact] created [defendant's] duty to disclose* [it]." *Id.* (emphasis added). Rather, "materiality becomes an issue only after a legal duty has been established." *Id.*

KnighTek's reliance on the alleged "disparity in knowledge" between the parties as creating a duty for Jive to disclose (OB at 27) is precisely the flawed analytical process that the *Yazd* court cautioned against. That is, KnighTek looked

first (and only) to the materially of the purported non-disclosure, and did not first establish any legal duty requiring disclosure. *Yazd*, 143 P.3d at 287. There is no such duty here, and so the purported materiality of the non-disclosed possibility of a merger is irrelevant.

Second, the circumstances here are distinct from those in *Elder*. In *Elder*, individuals with no experience in farming contacted the defendants' real estate broker to purchase a farm, but were not informed that the farm was quarantined and thereby unsuitable for its intended purpose. *See Elder*, 384 P.2d at 803. In contrast, the case at hand features two businesses negotiating a settlement to resolve their obligations under the 2014 Agreements. A12-14, ¶¶ 10, 17. Both parties had full knowledge of the Change of Control provisions, had access to the 2014 Agreements, and could equally understand any risks and benefits that accompanied a settlement thereof in the form of a buyout. *See* A13, ¶ 15; A45-58. In fact, it was *KnighTek* who originally approached Jive with an interest in entering into an accelerated buyout. A13-14, ¶ 17. And KnighTek does not plead that it lacks sophistication or was unable to understand the business decisions it made.

Indeed, the trial court considered the factors that KnighTek claims on appeal were ignored, and none of them supported finding a duty to speak. *Cf.* OB at 26 *with* Op. at 20-21. For example, KnighTek says the trial court ignored Jive's exclusive, superior knowledge. OB at 26. In actuality, the trial court held that Jive

was "better positioned to know the relevant information," but there was no duty to speak because (i) "KnighTek was on notice from April 2014 forward that an acquisition or IPO of Jive was a possibility"; (ii) "KnighTek, negotiating at arms-length with Jive, was obligated to take reasonable steps to inform itself with respect to its preexisting contractual rights, and thus protect its own interests"; and (iii) "KnighTek, a sophisticated party, could have inquired prior to the execution of a new agreement about events that would impact it interests, but it did not." Op. at 18. Similarly, KnighTek claims the trial court ignored the parties' privity of contract. OB 26. In fact, the trial court analyzed the contents of the 2014 Agreements and rejected KnighTek's argument. Op. at 20-21.[11]

In short, the trial court's finding that no duty to speak existed, after weighing all of the relevant factors, should be affirmed.

[11] To the extent KnighTek argues that *Elder* creates a different standard that conflicts with *Yazd*, by KnighTek's own admission, Utah's duty-to-speak case law has evolved since *Elder* was decided (OB at 26), and *Yazd*, which is more directly applicable and was decided 40 years more recently, controls.

II. THE 2018 LETTER AGREEMENT PRECLUDES THE RELIEF KNIGHTEK NOW SEEKS

A. Question Presented

Did the trial court properly dismiss the Complaint because KnighTek contractually waived the Change of Control rights it seeks to enforce through the 2018 Letter Agreement? A125-26; A65; A128.

B. Scope of Review

The trial court's ruling that KnighTek released or waived its claims and so failed to state a claim is subject to *de novo* review. *Clinton*, 977 A.2d at 895.

C. Merits of Argument

KnighTek claims the trial court erred when holding that the 2018 Letter Agreement waived KnighTek's claim because the trial court purportedly ignored Utah law holding that a release "obtained as part of a comprehensive scheme to defraud is voidable." OB at 32. KnighTek is wrong for at least two distinct reasons. First, KnighTek cannot claim that a release is voidable due to fraud here because, as set forth at length above, and as the trial court correctly held, KnighTek failed to allege a "comprehensive scheme to defraud," or in fact any fraud at all. *See* Argument Section I, *see also generally* Op.; A65; A128.

Second, the trial court did not look to the release language in the 2018 Letter Agreement itself when dismissing the Complaint. *See* Op. at 21. Instead, the trial court held that when the parties entered into the 2018 Letter Agreement, KnighTek

contractually agreed that "the Payment Amount [in the 2018 Letter Agreement] . . . is in lieu of, and is full satisfaction of, any amounts owed or due (or that may become due) to [KnighTek and Eknight] under the Agreements." A60. That is, when the terms of the 2018 Letter Agreement were fulfilled, KnighTek released its Change of Control rights (whatever they may be), and any dispute between the parties over the Cap Amount was resolved in favor of a single, lump-sum payment (which Jive paid). There were no Change of Control rights to be triggered when the Jive-LogMeIn merger closed in April 2018, two months after the 2018 Letter Agreement was signed, and no basis for KnighTek to bring a fraud claim. Op. at 21-22.

Moreover, there was in fact a release in the 2018 Letter Agreement. A60-61 (KnighTek released Jive "from any and all claims . . . which arise out of, upon or by reason of the Agreements ***with respect to such contingent payments*** and obligations" (emphasis added)). This release should bar KnighTek's claims. A98.

1. Dismissal with prejudice was appropriate and should be affirmed

KnighTek takes issue with the trial court's decision to grant dismissal with prejudice. OB at 12. KnighTek claims that by dismissing the Complaint with prejudice, the trial court denied KnighTek "the opportunity . . . to file an amended complaint to address any of the perceived deficiencies raised by the Superior Court." *Id*. However, KnighTek had the opportunity to amend its Complaint (or

move to amend its Complaint) to fix perceived deficiencies after Jive filed its Motion to Dismiss brief on June 14, 2018. Instead, KnighTek made the tactical decision to continue and brief that motion. Moreover, KnighTek filed a complaint in the Court of Chancery, and choose to dismiss it and file in the Superior Court. KnighTek has not been "denied" anything. It had ample opportunity to plead its claims; it simply did not successfully do so.

CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's dismissal of the Complaint with prejudice.

/s/ Robert L. Burns
Rudolf Koch (#4947)
Robert L. Burns (#5314)
Nicole K. Pedi (#6236)
RICHARDS, LAYTON & FINGER P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Appellee Jive Communications, Inc.

Of Counsel

William Trach
LATHAM & WATKINS LLP
200 Clarendon Street
Boston, MA 02116
(617) 880-4514

Dated: April 18, 2019