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IN THE

Supreme Court of the State of Delaware

KNIGHTEK, LLC, an Arizona limited liability company,
Plaintiff Below, Appellant,

v.

JIVE COMMUNICATIONS, INC., a Delaware Corporation,
Defendant Below, Appellee.

NO. 570, 2018
On Appeal from the Superior Court of the State of Delaware
C.A. No.: N18C-04-260 JRJ

APPELLANT KNIGHTEK, LLC'S REPLY BRIEF

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INTRODUCTION

This case is not complicated. Simply put, Jive[1] defrauded KnighTek of nearly one million dollars by making representations it knew to be false at the time they were made. Now Jive seeks to escape responsibility for its scheme by relying upon a flawed interpretation of Delaware's pleading requirements.

KnighTek sold its business to Jive in 2014 for a fixed sum, which Jive was required to pay as a percentage of revenues Jive received from KnighTek's clients. On January 25, 2018, Jive, through its Vice President of Finance, Samuel Simmons, contacted Erik Knight with the proposition that he could either wait five more years for incremental payments of the remaining Cap Amount or agree to a steeply discounted lump sum payable immediately. Unbeknownst to Mr. Knight, when Mr. Simmons initiated this conversation, Jive's Officers had already completed their negotiations to sell Jive to LogMeIn for $345,000,000, and a public announcement of the acquisition was merely days away. Mr. Simmons and Jive's Officers knew that the imminent public announcement of Jive's sale – a transaction constituting a Change of Control that would have entitled KnighTek to full payment of the Cap Amount due. To avoid paying the full amount, Jive repeatedly conjured false urgencies to trick Mr. Knight into believing that failing to act immediately would

[1] Unless otherwise noted, capitalized terms are given the same meaning attributed to them in Appellant's Opening Brief. D.I. 14.

mean that he would have to wait more than five years for full payment.

Jive attempts to escape liability for its fraud by advancing an interpretation of Superior Court Rule of Civil Procedure 9(b) ("Rule 9(b)") that would require KnighTek to prove Jive's fraud at the pleading stage. In reality, KnighTek need only plead the "time, place, and contents of the false representations, the identity of the person(s) making the representation, and what he intended to obtain thereby[,]" to satisfy Rule 9(b).[2] KnighTek's Complaint provides ample, particularized facts to satisfy Rule 9(b). Indeed, not only do the allegations of the Complaint satisfy Rule 9(b), they also address each element required to plead fraudulent misrepresentation and concealment under Utah law.

Mr. Simmons' misrepresentation that KnighTek would have to wait more than five years to receive the full Cap Amount if Mr. Knight did not agree to a one million dollar discount was a misrepresentation of a presently existing material fact, not an unsupported conjecture about the potential of future payments. And when Mr. Simmons and Jive's Officers made the decision to speak regarding the possibility of an imminent Change of Control, they had a duty to speak truthfully and not misrepresent that a Change of Control was not even being remotely contemplated. Jive argues that it was *KnighTek* that had a duty to verify the truthfulness of Jive's representations. Utah law imposes no such requirement. Finally, Jive cannot seek

[2] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 145 (Del. Ch. 2003).

to use its fraudulently obtained release as a shield from liability arising from its fraudulent conduct.

This Court should reverse the judgment of the Superior Court in its entirety; or, in the alternative, direct that the dismissal of KnighTek's Complaint be without prejudice, with leave granted to file an amended complaint.

ARGUMENT

I. KNIGHTEK PLED FRAUDULENT MISREPRESENTATION AND CONCEALMENT WITH PARTICULARITY.

In its Answering Brief, Jive seeks to escape liability for its fraud by disregarding well-established Delaware and Utah law. Jive misconstrues the purpose of Rule 9(b), which is not intended to impose an insurmountable hurdle to bringing valid fraudulent misrepresentation and concealment claims. When drawing all reasonable inferences in KnighTek's favor, the Complaint more than adequately details allegations satisfying Rule 9(b) and supporting each of the nine elements required to plead fraudulent misrepresentation under Utah law.

1. The Allegations of the Complaint Meet Rule 9(b)'s Particularity Requirements.

The purpose of Rule 9(b) is not to prevent legitimate disputes from reaching the court; rather, the heightened pleading standard for fraud "serves to discourage the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude."[3] Rule 9(b) requires that the allegations address the "time, place, and contents of the false representation, the identity of the person(s) making the representation, and what he intended to obtain thereby."[4] Because Rule 9(b) was not intended as a bar to valid claims, a plaintiff

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[3] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993).

[4] *H-M Wexford*, 832 A.2d at 145.

need only plead knowledge of falsity, malice, and intent generally.[5]

In line with Rule 9(b)'s purpose of weeding out only frivolous accusations while allowing valid claims to proceed, Delaware courts have repeatedly upheld complaints with less particularity than KnighTek's Complaint. In *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, the court held that the particularity requirement was met when the complaint detailed that the defendant's representative made misrepresentations in Chicago and Florida in April of 2014.[6] The court in *MicroStrategy Inc. v. Acacia Research Corp.*, held that Rule 9(b) was satisfied when the complaint alleged that on December 9, 2009, at a mediation, the defendant's senior vice president misrepresented certain facts to induce the plaintiff into signing a settlement agreement.[7] Finally, in *Narrowstep, Inc. v. Onstream Media Corp.*, the court held that Rule 9(b) was met when the individual whom plaintiff identified as making the false representations was simply named as the defendant corporation.[8]

KnighTek's fraud claim, like in *Narrowstep, MicroStrategy,* and *TrueBlue*, meets Rule 9(b)'s pleading requirements. KnighTek identifies the specific dates on which Mr. Simmons sent the emails containing the fabrication that if Mr. Knight failed to act quickly, he would need to wait more than five years to receive the full

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5 *Id*. at 145-46.
6 2015 WL 5968726, at *6 (Del. Super. Ct. Sept. 25, 2015).
7 2010 WL 5550455, at *16 & n.121 (Del. Ch. Dec. 30, 2010).
8 2010 WL 5422405, at *12-13 & n.97 (Del. Ch. Dec. 22, 2010).

Cap Amount.[9] Additionally, KnighTek alleges that Mr. Simmons made his misrepresentations via email, which provides greater specificity than did the plaintiff in *TrueBlue*, where plaintiff merely identified the fraud as having been perpetrated in the State of Florida.[10] Despite KnighTek's Complaint detailing the time and place of Mr. Simmons' misrepresentations, Jive would have KnighTek identify the exact second the representations were made and from which computer Mr. Simmons sent the emails. Delaware law does not impose such requirements.[11]

Not only does the Complaint identify the time and place of the misrepresentations, it clearly names Mr. Simmons, Jive's Vice President of Finance, and Mr. King, Jive's General Counsel, as the persons making the misrepresentations.[12] In fact, the Superior Court found that the Complaint identified Mr. Simmons as a person who made misrepresentations.[13] In *Narrowstep*, the plaintiff identified only the corporate defendant as the person making the misrepresentations: "Onstream continued to assure Narrowstep that a Closing was imminent if Narrowstep would just make a further price concession."[14] Here,

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9 A10, A14-15, A17.

10 *TrueBlue*, 2015 WL 5968726, at *6.

11 *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 145 (Del. Ch. 2003) ("Essentially, to satisfy [Rule 9(b)], the plaintiff must allege circumstances sufficient to fairly appraise the defendant of the basis for the claim.").

12 A14-15 at ¶¶21-25, A16-17 at ¶¶ 35-38.

13 Op. at 16.

14 *Narrowstep*, 2010 WL 5422405 at *12 n.97.

KnighTek provides greater specificity than naming the corporate entity Jive by identifying Jive's officers and directors. And KnighTek identifies Mr. Simmons as the officer who spearheaded Jive's plot to defraud Mr. Knight by misrepresenting the length of time it would take KnighTek to receive the Cap Amount and the true state of the availability of funds for buyout acquisitions.[15]

KnighTek's Complaint is distinguishable from those filed in the cases cited by Jive. Each of the cases Jive offers to support its argument involved dismissed complaints containing generic and unspecified allegations regarding either the who, where, or when of the fraudulent misrepresentations.[16]

Unlike those cases, the Complaint specifically alleges that Mr. Simmons misrepresented in several emails—the specific dates for which were pled in the Complaint—that Jive had limited funds available for acquisition buyouts and that Mr. Knight needed to act immediately or risk waiting five years to receive the full

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15 A14-15 at ¶¶21-25, A16-17 at ¶¶ 35-38.

16 *See Hauspie v. Stonington P'rs, Inc.*, 945 A.2d 584, 588 (Del. 2008) (Complaint failed to state whether the managing director made misrepresentations, and if he did, whether he knew the representations were false); *Steinman v. Levine*, 2002 WL 31761252 (Del. Ch. Nov. 27, 2002) (Complaint contained conclusory allegations with no mention of the time or place of the misrepresentations or who made the statements); *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371 at *7 (Del. Ch. Jan. 30, 2015) (Complaint deficient because it identified only a 3-1/2 month timeframe during which misrepresentations were made and did not specify which of defendant's directors made the misrepresentations); *Metro Commc'n Corp BVI v. Adv. Mobilecomm Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004) (Court disregarded allegations that "[did] not purport to identify any specific statement by a specific defendant at a specific time.").

Cap Amount.[17] Mr. Simmons' misrepresentations manufactured a false urgency regarding the availability of funds for buyouts and compelled Mr. Knight to agree to a nearly one million dollar discount off of the Cap Amount.[18] Because KnighTek's Complaint details the time, place, and contents of the false representation, the identity of the persons making the representation, and what they intended to obtain thereby, it satisfies Rule 9(b).

2. The Complaint Addresses All Nine Elements of Fraudulent Misrepresentation as Required by Utah Law.[19]

KnighTek's Complaint alleges clearly that Mr. Simmons, while knowing that Jive's Officers had completed their negotiations to sell Jive for $345,000,000, falsely declared in his emails that Mr. Knight needed to act quickly or wait more than five years for the fixed amount Jive had previously agreed to pay KnighTek.[20] Mr. Simmons fabricated this false urgency by proclaiming that Jive was concurrently pursing the buyouts of other companies that Jive had previously acquired.[21]

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17 A10 at ¶ 2, A17 at ¶ 40.

18 A14-15.

19 Of the nine elements identified in *State v. Apotex Corp.*, 282 P.3d 66 (Utah 2012), Jive takes issue with only the elements of whether Jive's misrepresentations were false, pertained to presently existing material facts, and made by a representor knowing them to be false. Ans. Br. 15-23. Jive appears to concede that KnighTek adequately alleged all other elements, because it fails to argue that Mr. Knight did not act reasonably and in ignorance of the pending sale, and did not in fact rely or act upon Jive's misrepresentations that induced him to execute the Acceleration Agreement.

20 A10 at ¶ 2; A14-15, A17.

21 A14-15.

Specifically, Mr. Simmons falsely told Mr. Knight that Jive was "juggling a number of other offers" and that the "availability of funds depends on who moves quickest…"[22]

Mr. Simmons made additional false statements to Mr. Knight when he stated in an email that "[a]s a reminder, we are targeting by the end of January, and I'm juggling a number of other offers (some of which have already been accepted) . . ."[23] Not to be deterred by Mr. Knight's rejection of Jive's initial lowball offer, Mr. Simmons persisted by writing in another email to Mr. Knight "I was able to get your buyout approved conditional on speedy completion, or they want me to move forward with someone else . . . ."[24] A reasonable and proper inference from the timing of these communications, and one that must be drawn in KnighTek's favor at the pleading stage, is that Jive's Officers knew when they instituted the "urgent negotiations" that Jive had finalized the terms of its sale to LogMeIn. KnighTek therefore satisfied the elements that Jive made false representations while knowing they were false.

Jive half-heartedly cites to *Mooney v. Pioneer Natural Resources Company*[25] and *Malpiede v. Townson*[26] to support its argument that KnighTek is not entitled to

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22 A14-15; A107.
23 A14-15; A107.
24 A15.
25 2017 WL 4857133 (Del. Super. Ct. Oct. 24, 2017).
26 780 A.2d 1075 (Del. 2001).

any inferences of falsity because "Jive was in merger negotiations at the time."[27] The reasonable inference to be drawn from KnighTek's allegations is not that Jive was in the midst of merger negotiations, but given the timing of the merger announcement and Mr. Simmons' misrepresentations in the days preceding, that merger negotiations were already *complete*. No such temporal connection existed in *Mooney* and *Malpiede* that would have allowed reasonable inferences of knowledge of falsity. The detailed allegations in the Complaint demonstrate that Mr. Simmons knew that his representations were false and that he made those representations in order to defraud KnighTek of the full payment due upon the merger announcement.[28]

3. Jive's False Statements Involved Presently Existing Material Facts.

The false urgency conjured by Jive's Officers that forced Mr. Knight into an immediate decision arose from their knowledge that only a precious few days remained to defraud Mr. Knight prior to the merger announcement. When Mr. Simmons contacted Mr. Knight on January 25, 2018, the LogMeIn merger was a *fait accompli*.[29] The emails that followed from Mr. Simmons bolstered Jive's scheme to bamboozle Mr. Knight of nearly one million dollars that Jive would have

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27 Ans. Br. 17.
28 A16-17.
29 A10 at ¶ 2.

immediately owed KnighTek upon the Change of Control.[30]

Despite the aforesaid facts and reasonable inferences, Jive argues that Mr. Simmons' misrepresentations were forward-looking opinions.[31] The cases cited by Jive deal with statements of puffery, trader's talk, value estimations, and statements of future events, none of which are present here. *Wright v. Westside Nursery* dealt with statements of property value.[32] *Boud v. SDNCO, Inc.* addressed puffery statements made in a yacht sales brochure.[33] And *Thornton v. Countrywide Mortg. Ventures, LLC*, involved a lender's alleged misrepresentation regarding a borrower's ability to repay a loan.[34] Not one of these cases addressed the situation here, in which a corporate officer made concrete misrepresentations that incorporate a historically accurate payout rate through which a bought-out company could reasonably expect to realize the full value of a buyout agreement.

Mr. Simmons' representation to Mr. Knight regarding KnighTek having to wait over five years to be fully paid was undoubtedly false at the time it was made considering the historical payoff rate.[35] Mr. Simmons' misrepresentation was based on the presently existing material fact of the historical payoff rate and on Jive's other

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30 *Id.*
31 Ans. Br. 18.
32 787 P.2d 508 (Utah Ct. App. 1990).
33 54 P.3d 1131 (Utah 2002).
34 2011 WL 4964275, at *1 (D. Utah Oct. 19, 2011).
35 A16-17 at ¶¶35-38.

repeated false claims that it had limited funds for only a select few potential buyouts. A fair inference from the facts pled in the Complaint would have been that, when viewed in the light most favorable to KnighTek, LogMeIn's buyout was complete when Mr. Simmons made his repeated false misrepresentations to Mr. Knight.[36] Mr. Simmons' misrepresentations regarding the historical payoff rate induced Mr. Knight's agreement to a discount of nearly one million dollars that KnighTek would have been entitled to several days later upon a Change of Control.[37]

Jive also argues that because "the parties continued to negotiate for nearly a week after the date KnighTek alleges Jive targeted to complete [the] deal" and KnighTek did not "allege that it asked for or needed more time[,]" KnighTek's allegations do not involve material facts existing at the time of the misrepresentation.[38] Jive's argument improperly places the onus on Mr. Knight to withstand Mr. Simmons' onslaught of pressure-inducing misrepresentations. That negotiations between Mr. Simmons and Mr. Knight continued after the manufactured deadline in no way means that a false urgency did not exist. Rather, Mr. Simmons ramped up the false urgency after the manufactured deadline's passage to further foster Mr. Knight's belief that he was on the verge of having to wait over five years for KnighTek to receive its full payout.

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36 A10 at ¶ 2.
37 A17 at ¶¶ 38-40.
38 Ans. Br. 19.

4. KnighTek Had No Duty to Independently Verify the Truthfulness of Jive's False Statements.

Jive further attempts to validate its fraudulent scheme by arguing that KnighTek had an affirmative duty to "take reasonable steps to inform itself with respect to its preexisting contractual rights," as purportedly required by *Sugarhouse Fin. Co. v. Anderson*.[39] Jive misinterprets *Sugarhouse* as requiring due diligence beyond seeking only publicly available information.[40] To the contrary, *Sugarhouse* specifically held that reasonable reliance would not be found "in light of the fact that defendant's interest in the property in question was a matter of public record."[41] Jive's novel interpretation imposes a broad duty of due diligence not contemplated in *Sugarhouse*.

While Jive concedes that "the merger announcement was obviously not public beforehand," it argues that KnighTek was somehow still required to inquire regarding a Change of Control.[42] Jive's concession that the merger was not publicly available confirms that, under the circumstances, it was impossible for Mr. Knight to have uncover the imminent Change of Control, regardless of his efforts in due diligence. Jive acknowledges that the only way Mr. Knight could have uncovered the imminent Change of Control was to inquire directly with Jive, assuming Jive's

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39 610 P.2d 1369 (Utah 1980); Ans. Br. 35; Op. at 18; *see also* Ans. Br. 24-26.
40 *See Sugarhouse*, 610 P.2d at 1373-74.
41 *Id.* at 1374.
42 Ans. Br. 25.

officers were not subject to a strict non-disclosure agreement.

Despite Jive's concession that the merger was not publicly available and the reasonable inference flowing therefrom that Mr. Simmons and every other Jive officer was subject to a strict non-disclosure agreement that would have prohibited disclosure of the imminent Change of Control, Jive argues that KnighTek should have nonetheless engaged in due diligence by inquiring directly with Jive as to the possibility of a Change of Control.[43] Jive offers no authority supporting its proposition that KnighTek was required to engage in unnecessary due diligence by seeking a representation from Jive's Officers regarding an event that they were almost certainly prohibited from discussing.

In *Pace v. Parrish*, the Supreme Court of Utah held that a party cannot point to a victim's lack of due diligence to avoid liability for fraud.[44] "It is strange and inconsistent for defendants to urge the necessity for the plaintiffs to cross-examine Mr. Parrish and to doubt and verify his representations."[45] Jive acknowledges that "[t]he full measure of the plaintiffs' duty was to use reasonable care and observation in connection with these representations."[46] It defies logic to argue that "reasonable care" in this case required KnighTek to engage in due diligence that could never

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43 *Id.* 26.
44 247 P.2d 273, 276-77 (Utah 1952),
45 *Id.* at 276.
46 *Id.*; Ans. Br. 27.

have revealed the imminent Change of Control under the circumstances.

5. Jive Had a Duty to Act in Good Faith and Disclose Truthful Information.

In arguing that it did not have a duty to act in good faith and to disclose truthful information regarding the imminent Change of Control and whether there were in fact limited funds available for buyout acquisitions, Jive intentionally misinterprets Utah's totality of the circumstances analysis in favor of an improper, one-off analysis to determine the existence of a duty to disclose.[47] Jive approaches each factor individually, and claims that if an individual factor does not *per se* create a fiduciary or special relationship, then a duty to disclose truthful information apparently does not exist.[48] This piecemeal analysis is incompatible with and was expressly rejected by *Elder v. Clawson*[49] and its progeny, including *Yazd v. Woodside Homes Corp*.[50]

Jive first mischaracterizes KnighTek's argument as advocating for the existence of a duty to speak in every contractual relationship.[51] KnighTek never argued that the Agency Agreement created a *per se* special relationship that would have therefore given rise to Jive's duty to disclose or otherwise speak truthfully

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47 Ans. Br. 29-32; Op. at 19-21.
48 Ans. Br. 29-32.
49 384 P.2d 802 (Utah 1963).
50 143 P.3d 283 (Utah 2006).
51 Ans. Br. 31.

regarding the Change of Control.[52] But, in the context of good faith and fair dealing, "each party impliedly promises that it will not intentionally or purposely do anything [that] will destroy or injure the other party's right to receive the fruits of the contract."[53] Accordingly, Jive had a duty, under Utah law, to "refrain from actions that will intentionally 'destroy or injure the other party's right to receive the fruits of the contract.'"[54] Such a duty advances the core function of the covenant, as no one would reasonably accede to a contract that left one vulnerable to another's opportunistic interference with the contract's fulfillment.[55]

Here, Jive violated its duty under Utah law to act in good faith and deal fairly with Mr. Knight by intentionally misleading him to believe that if he refused to accept a steep discount off of the remaining Cap Amount, KnighTek would have to wait more than five years before receiving full payment.[56] Under the *Elder* and *Yazd* totality of the circumstances analysis, Jive's duty to act in good faith is only one factor weighing in favor of finding a duty of honesty and disclosure.[57]

Jive similarly contends that because a holder of warrants is not owed fiduciary

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52 *See* A194-197.

53 *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998) (quoting *St. Benedict's Dev. Co. v. St. Benedict's Hosp.,* 811 P.2d 194, 199 (Utah 1991)).

54 *Oakwood Vill. LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1239 (Utah 2004) (quoting *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199-200 (Utah 1991)).

55 *Young Living Essential Oils, LC v. Marin*, 266 P.3d 814, 817 (Utah 2011).

56 A18-19 at ¶¶ 49-51.

57 A196-197.

duties *per se*, a duty to disclose or to otherwise be truthful cannot therefore be found even if other factors properly considered under the Utah totality of the circumstances analysis weigh in favor of imposition of a duty.[58] As with the duty of good faith and fair dealing, KnighTek maintains that the relationship created by the warrants is but another factor weighing in favor of finding in Jive a duty to speak honestly, not a dispositive factor creating a *per se* fiduciary relationship.

Jive disregards of the totality of the circumstances analysis articulated in *Elder* and *Yazd* and mischaracterizes KnighTek's argument: KnighTek does not argue that the materiality of the imminent Change of Control alone gives rise to Jive's duty to speak honestly.[59] Jive has also repeatedly cited to *Yazd's* holding that the materiality of a fact does not *per se* give rise to a duty to disclose.[60] In doing so, Jive ignores the clear language in *Yazd* providing the factors that a court *can* consider when determining, as a threshold matter, whether a duty to disclose exists:

> Age, **knowledge**, influence, bargaining power, sophistication, and cognitive ability are but the more prominent among a multitude of life circumstances that a court may consider in analyzing whether a legal duty is owed by one party to another. **Where a disparity in one or more of these circumstances distorts the balance between the parties in a relationship to the degree that one party is exposed to unreasonable risk, the law may intervene by creating a duty on the advantaged party to conduct itself in a manner that does not reward exploitation of its advantage.**[61]

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58 *See* Ans. Br. 31-32.

59 *Id*. 33.

60 *Id*.

61 *Yazd v. Woodside Homes Corp.*, 143 P.3d 283, 286 (Utah 2006) (emphasis

Despite the clear language in *Yazd* providing that a disparity in knowledge can give rise to a duty to disclose or otherwise engage truthfully, Jive insists that even considering a disparity in knowledge "is precisely the flawed analytical process that the *Yazd* court cautioned against."[62] The disparity in knowledge regarding the imminent Change of Control, which Jive's Officers were aware of when initiating their scheme to defraud KnighTek, distorted the knowledge balance between Jive and KnighTek to such a degree that KnighTek was exposed to unreasonable risk. *Yazd* expressly holds that a court may consider disparity in knowledge when determining whether a duty to disclose exists.[63] In this situation, the law may impose a duty on Jive "to conduct itself in a manner that does not reward exploitation of its advantage."[64] Jive was rewarded for exploiting its advantage over KnighTek: it paid nearly one million dollars less than it otherwise would have under a Change of Control. Rather than receive a reward for its exploitation, Jive was under a legal duty to speak truthfully.[65]

Jive asserts that the Superior Court "considered the factors that KnighTek claims on appeal were ignored, and none of them supported finding a duty to

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added).

62 Ans. Br. 33.

63 *Yazd*, 143 P.3d at 286.

64 *Id.*

65 *See id.*; *Elder v. Clawson*, 384 P.2d 802, 804-05 (Utah 1963).

speak."[66] Despite Jive's insistence that the Superior Court conducted a proper totality of the circumstances analysis, under the heading of "Fiduciary Duties," the Superior Court proceeded to analyze only the warrants, duty of good faith and fair dealing, and the non-dispositive designation in the Agency Agreement of Jive as an independent contractor.[67] The Superior Court did not articulate that it was conducting an analysis pursuant to *Yazd*, and it did not consider the gross disparity in knowledge *Yazd* deemed highly relevant to a duty analysis.[68] The disparity of information, including Jive's exclusive knowledge of the imminent $345,000,000 Change of Control that KnighTek never could have discovered through due diligence, created in Jive a duty to be honest with KnighTek regarding the imminent Change of Control. Jive disregarded that duty when Mr. Simmons represented to Mr. Knight that should he delay in agreeing to a steep discount, KnighTek would not see the full amount due under the Acceleration Agreement for at least five years.

66 Ans. Br. 34.
67 Op. at 19-21.
68 *Id.*

II. A RELEASE PROCURED BY JIVE UNDER FRAUDULENT PRETENSES CANNOT SHIELD JIVE FROM LIABILITY ARISING FROM ITS FRAUDULENT CONDUCT.

Jive maintains that the release it procured as part of a comprehensive scheme to defraud is invalid because KnighTek failed to allege "any fraud at all."[69] KnighTek sufficiently alleged that the release of all of KnighTek's known and unknown claims was a key component of the Acceleration Agreement, the latter of which is the centerpiece of Jive's comprehensive scheme to defraud KnighTek of nearly one million dollars.[70] Utah law clearly holds that a release is voidable when it is "an integral part of a scheme to defraud."[71]

Jive attempts to argue that once the Acceleration Agreement was executed and "when the terms of the [Acceleration Agreement] were fulfilled, KnighTek released its Change of Control rights . . . ."[72] This argument ignores the plain fact that the Acceleration Agreement was the primary instrument of Jive's fraudulent scheme. Jive appears to argue that because KnighTek released any and all of its claims via the Acceleration Agreement, it is now precluded from challenging the Acceleration Agreement due to fraud.[73] Utah law prohibits the fraudster from profiting from a fraudulently obtained release: "a contract clause limiting liability

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69 Ans. Br. 36.
70 A60-61.
71 *Ong Intern. (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 453 (Utah 1993).
72 Ans. Br. 37.
73 *Id.*

will not be applied in a fraud action."[74] Jive is precluded from utilizing its fraudulently obtained release as a shield against liability for the fraudulent conduct that procured it.[75]

[74] *Lamb v. Bangart*, 525 P.2d 602, 608 (Utah 1974).
[75] *See Ong Intern.*, 850 P.2d at 453.

CONCLUSION

For the reasons set forth above, KnighTek respectfully requests that this Court reverse the judgment of the Superior Court in its entirety; or, in the alternative, direct that the dismissal of KnighTek's Complaint be without prejudice, with leave granted to file an amended complaint.

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