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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON FRIED Appellant, v. INTERSECT LABORATORIES INC. and ANKIT GORDHANDAS, Appellees.	:	No. 84,2021 Trial Court Below: Chancery Court Vice Chancellor J. Travis Laster C.A. No. 2020-0408-JTL

APPELLANT'S REPLY BRIEF

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INTRODUCTION

1. The Answering Brief filed by defendants mounts a weak and unpersuasive defense of the decision by the Court of Chancery. Defendants do little more than reiterate their preferred view of the facts without regard to the well-pled allegations of the Complaint. Once again, the defendants have created a narrative that goes beyond the facts and causes of action in the Complaint and its exhibits. Defendants' contentions in their Answering Brief, to the extent based on matters outside of the Complaint are void as a matter of law, accordingly, at this state of the proceedings.

2. Defendants fail to defend the Court of Chancery's conflating of two mutually exclusive provisions - - one applying to an employee and the other applying to a Director who is not an employee - - that formed the foundation of the Court of Chancery's effort to create a forced parallel, leading to an unreasonable interpretation of the disputed provision.

POINT I

CONTRARY TO DEFENDANTS' CONTENTION THAT FRIED'S INTERPRETATION OF THE DISPUTED PROVISION IS "TORTURED CONTRACT CONSTRUCTION" (ANSWERING BRIEF AT P.1), FRIED'S INTERPRETATION IS FULLY REASONABLE.

3. At page 1 of the Answering Brief, defendants assert that Fried has engaged in "tortured contract construction" and "strained construction" of the disputed provision. There is a reason that they use such hyperbolic terms: at the

motion to dismiss stage, a Court "cannot chose between two different reasonable interpretations" of a contract provision - - which is not to concede herein that the defendants' interpretation is somehow reasonable; but can dismiss "only if the defendants' interpretation is the only reasonable construction as a matter of law." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). This is the rule "even where one interpretation is perhaps more reasonable" than the others. *Appriva S'hoder Litig. Co. v. evIII, Inc.*, 937 A.2d 1275, 1292 (Del. 2007). Of course, this is not to suggest that defendants' interpretation is "perhaps more reasonable" than Fried's; or even that defendants' interpretation is reasonable at all. The point, however, is that it is well established that, on a motion to dismiss, defendants cannot prevail unless they show that their interpretation is the only reasonable one as a matter of law.

Not only is it "reasonable" to find that Fried's interpretation of the disputed provision is correct; it is unreasonable to do otherwise. As a practical matter, the Complaint shows two people who started a venture together. One shareholder began with 54 percent of the company and the other shareholder with 46 percent of the company. It was a start-up technology company. It is fully logical to assume that the "Change of Control" language (a second trigger) would apply only if a successor were to take over the company. There is nothing in the factual background pled in the Complaint that would even hint that these two individuals, Fried and

Gordhandas, were going to encounter a change of control under any scenario other than selling the company someday to a successor.

In this context, which is the only context pled, it is reasonable to assume that "change of control" was defining and elucidating the term "successor." Why did the provision refer to a "successor?" Because it was possible that, at some future point in time, the company would have value, and be sold to a "successor" who would put in its own leadership team and have a "change of control." By contrast, there is nothing in the factual background pled in the Complaint that would preponderate in favor of the unsupported assumption that Fried and Gordhandas were already contemplating a "change of control" without the two of them selling the company to a successor.

In practical terms, looking at the disputed provision at the time the RSPA was signed, it is reasonable to assume that Gordhandas, who owned 54 percent of the shares, was essentially saying to Fried, who owned46 percent of the shares, "You are putting in an enormous amount of work for minimal wages, so if I terminate you in the future, then your unvested shares will immediately vest, and you will be compensated accordingly." By contrast, it is unreasonable to assume that Gordhandas was saying to Fried, "If I terminate you after you work exhaustively for minimal wages, your unvested shares will vest only if I relinquish control of the company (a "change of control") to a hypothetical person in circumstances other

than a sale to a successor. The latter interpretation of the disputed provision is unreasonable, and bears no rational relationship to the facts pled in the Complaint.

This exercise really does prove a point, as a practical matter. Since Fried was an at-will employee, who could be terminated without cause at any time, an interpretation of the disputed provision that would include a "double trigger" would render the entire provision a mockery of Gordhandas' choosing. It would enable Gordhandas, as majority owner, to terminate Fried's employment when Gordhandas was on the cusp of inviting suitors to purchase the company - - but just before inviting them - - thus causing Fried's unvested shares to lapse immediately, and enabling Gordhandas to cut Fried's legs out from under him. Allowing for this is not a reasonable interpretation of the disputed provision; and it cannot possibly be the only reasonable interpretation even if it is somehow reasonable. This point replies to the misplaced argument in the Answering Brief at p. 20 that "... under Fried's proffered reading, the change of control clause served no purpose in the Employee Accelerated Vested Provision.

Surely, the foregoing interpretation offered by Fried (stated similarly in Fried's Opening Brief) is "reasonable." So long as it is reasonable, then the motion to dismiss should have been denied even if it can be stated that defendants' interpretation is perhaps more reasonable. Again, it is respectfully submitted that defendants' interpretation falls far short, but that is not the standard. Even if

defendants' interpretation is perhaps more reasonable, so long as Fried's interpretation can also be viewed as reasonable, the motion to dismiss should have been denied.

POINT II

DEFENDANTS' ANSWERING BRIEF IS INEXTRICABLY INTERTWINED WITH ALLEGED "FACTS" OUTSIDE OF THE COMPLAINT AND ITS EXHIBITS.

The defendants weave into their Statement of Facts gratuitous allegations that go beyond the allegations in the Complaint, such as: "like many start-up companies, Intersect relied on an online provider of 'form' legal documents" - - as if defendants bear no responsibility for the documentation as well as the concealment of related documentation. (See defendants' Answering Brief at p.7). However, because such allegations are not part of the Complaint, at this stage of the proceedings they should be disregarded.

Similarly, the Answering Brief goes on to assert that "shares with the terms and conditions Fried seeks (a single trigger for accelerated vesting) simply do not exist as a corporate matter." Such an unsupported, self-serving contention is nowhere to be found in the Complaint with attached exhibits. For that reason, and others, its relevance is nowhere to be found at this stage of the case. Further, the Answering Brief goes on to contend that "Exhibit A to the Company's unanimous written consent of the Board was not sent to Fried before signing the RSPA, but he

plainly had access to it shortly thereafter as a director of the company, and arguably had a duty as a director to understand the company's capital structure when the company solicited investments from third parties." These allegations, likewise, are not found in the Complaint and its exhibits.

Undoubtedly, defendants insert the foregoing alleged "facts" - - all of which are nowhere to be found in the Complaint and its exhibits - - because they need to do so in order to press forward with their contentions in opposition to plaintiff's appeal. If such gratuitous insertions outside the scope of the Complaint and its exhibits were not needed, defense counsel would not be presenting them.[1]

An additional component of defendants' Statement of Facts is deliberately confusing in its characterization of the record. At page 7 of the Answering Brief, defendants assert that the document entitled "unanimous written consent of the Company Board" includes in Exhibit A the (undefined) term "double trigger." Defendants go on to say that "Fried apparently claims to have never reviewed this Board-level document . . . ." Answering Brief at p. 8. Yet, defendants flippantly

[1] In defendants' Answering Brief, they refer to, and attach, the transcript of oral argument which, in itself, is certainly unobjectionable. However, they proceed to cite to the transcript as if it is a factual record that supplements the four corners of the Complaint and the exhibits attached to the Complaint. That is an incorrect way to present the "facts" which, on a motion to dismiss the Complaint for failure to state a claim must be limited to the Complaint and its attached exhibits. *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A. 2d 1076, 1079 (Del. 1997).

admit in the ensuing sentence that "Exhibit A to the Company's unanimous written consent of the Board was not sent to Fried before [Fried's] signing [of] the RSPA." Defendants admit that this document with the undefined "double trigger" phrase was withheld from Fried when he signed the RSPA, yet they go on to argue that Fried should have read it, and been bound by it, at some point thereafter. Although defendants admit that the document was withheld from Fried, they blame him for allegedly failing to fulfill "his fiduciary duties to be informed." Answering Brief at p. 8. Of course, an alleged failure to fulfill his fiduciary duties was obviously not pled in the Complaint, and is counterintuitive.[2]

POINT III

DEFENDANTS' ANSWERING BRIEF MISAPPREHENDS THE FUNDAMENT OF FRIED'S ARGUMENT REGARDING CONCEALMENT OF EXHIBIT A TO THE UNANIMOUS CONSENT FORM WHICH WAS WITHHELD BY DEFENDANTS AT THE TIME FRIED SIGNED THE RSPA.

It is not only that Fried pled in the Complaint - - which must be accepted as true on a motion to dismiss - - that the RSPA and the MAP Summary deliberately omitted certain provisions assuming *arguendo* that the double trigger interpretation

[2] Similarly, at p. 24 of the Answering Brief, defendants refer to an unsigned document (A0098) that pertains to election under Section 83(B) of the IRC of 1986. In this unsigned document, it refers to "termination of taxpayer's employment or consulting relationship" at paragraph 4. It does not refer to "termination without cause," so it is factually inapplicable. It refers to a "consulting relationship," which is also factually inapplicable. This unsigned document is of no moment to the issues at bar.

were to be upheld. More to the point, Fried pled that Exhibit A to the Unanimous Consent was purposely concealed from him, which is noteworthy because it referred to "double trigger," albeit failing to define that term. (Fried's Opening Brief in this court, at p. 24-25).

Finally, defendants erroneously assert in their Answering Brief that Fried did not dispute Vice Chancellor Laster's alternative reasoning in dismissing Court IV (Equitable Fraud) and Count VI (Negligent Misrepresentation). Fried's Opening Brief in this court most assuredly challenges the ruling below for its misplaced evaluation of the claims for Equitable Fraud and Negligent Misrepresentation. (Fried's Opening Brief in this court, p. 24-27). Fried cited, by way of example, *Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725 (Del. Ch. 2014). Therein, the Court recognized that the providing of misleading information by a defendant who expected to profit from the course of conduct in which he provided the information supports a claim for negligent misrepresentation. The defendants incorrectly state that Vice Chancellor Laster offered an alternative theory of dismissal as to the Counts for Equitable Fraud and Negligent Misrepresentation. Apparently, they are referring to his primary reason for dismissal being paragraph 10 of his Order, and his alternative ruling being at paragraph 11 of his Order. In fact, Vice Chancellor Laster's alternative grounds, at paragraph 11, pertain to dismissal of the equitable

fraud claim, wherein he cites *Envo Inc. v. Walters*, 2009 WL 5173807, at *6 (Del. Ch. December 30, 2009).[3]

Plaintiff has not waived a challenge to Vice Chancellor Laster's legal conclusion at paragraph 11. To the contrary plaintiff has cited to the applicable caselaw showing that the counts of Equitable Fraud and Negligent Misrepresentation are well founded, and should be upheld. As aforesaid, plaintiff did to at pages 24-25 of his opening Brief in this Court.

CONCLUSION

For the foregoing reasons, and the reasons stated in Fried's Opening Brief, this Court should reverse the Judgment of the Court of Chancery, and remand with instructions that Fried's Complaint be reinstated in its entirety.

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[3] Vice Chancellor Laster does, in fact, conclude paragraph 11 stating that there are no grounds for involving equitable fraud and negligent misrepresentation.

CERTIFICATE OF SERVICE

I, Andrew L. Cole, Esquire, hereby certify that on the 1st day of July, 2021, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was sent to the following, in the manner indicated below:

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