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Case Number 219,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BITGO HOLDINGS, INC.,	)	
	)	
Plaintiff Below, Appellant,	)	
	)	
v.	)	No. 219, 2023
	)	
GALAXY DIGITAL HOLDINGS LTD., GALAXY DIGITAL HOLDINGS LP, and GALAXY DIGITAL INC.,	)	Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0808-JTL
	)	
Defendants Below, Appellees.	)	

APPELLANT'S OPENING BRIEF

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Dated: August 4, 2023

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Rules & Statutes

Other Authorities

NATURE OF PROCEEDINGS

Plaintiff-below Appellant BitGo Holdings, Inc. ("BitGo") appeals from an Order of the Court of Chancery dismissing BitGo's amended complaint (the "Complaint") alleging that Defendants-below Appellees (collectively, "Galaxy") repudiated their obligation to complete Galaxy's planned acquisition of BitGo.

At the time they entered into the transaction, the parties estimated that Galaxy would acquire BitGo for cash and stock worth approximately $1.2 billion. After Galaxy suffered massive losses amid the 2022 "crypto winter," Galaxy terminated the deal on the grounds that BitGo had failed to deliver its "Company 2021 Audited Financial Statements" by two, successive deadlines identified in the Amended and Restated Agreement and Plan of Merger (the "Amended Agreement").

Section 13.01(b) of the Amended Agreement required BitGo to attempt to deliver the "Company 2021 Audited Financial Statements" to Galaxy by April 30, 2022. If BitGo failed to deliver the Company 2021 Audited Financial Statements by that date, the Amended Agreement automatically granted BitGo another three months (until July 31, 2022) to deliver the "Company 2021 Audited Financial Statements." If BitGo failed to deliver the Company 2021 Audited Financial Statements by July 31, 2022, Galaxy could terminate the Amended Agreement and walk away. A241-42 §13.01(h).

Everyone agrees that BitGo delivered its 2021 audited financial statements to Galaxy by those deadlines. The parties dispute whether the audited financial statements BitGo delivered met the Amended Agreement's definition of "Company 2021 Audited Financial Statements." According to Galaxy, the audited financial statements failed to satisfy the definition because they were not "in a form that complies with the requirements of Regulation S-X for an offering of equity securities." BitGo contends that the audited financial statements satisfied the definition, the deficiencies Galaxy purported to identify were pretextual, and Galaxy could not fairly invoke those pretextual deficiencies because it caused them by breaching its own obligations under the Amended Agreement. Accordingly, Galaxy's termination violated the Amended Agreement.

Galaxy initially heralded the parties' deal as a promising, record-breaking business combination in the crypto industry. But the crypto market collapsed in the late spring of 2022, and Galaxy sustained massive losses. Soon after signing the Amended Agreement, Galaxy concluded that buying BitGo was no longer affordable or desirable.

Flouting its contractual obligations to "use commercially reasonable efforts" and to do "all things necessary or desirable" to implement the transaction "expeditiously" (A208 §9.01(a)), Galaxy looked for excuses to scuttle the deal and avoid paying BitGo a $100 million reverse termination fee, which it had promised

BitGo as an incentive for BitGo to accommodate Galaxy's request to extend the closing date from March 31, 2022 to December 31, 2022, or potentially to March 31, 2023, at the latest. A46 ¶57.

When BitGo delivered its 2021 audited financial statements to Galaxy on April 29, 2022, together with an unqualified audit opinion stating that BitGo's auditors had conducted their audit in accordance with GAAS, Galaxy claimed those financial statements did not qualify as "Company 2021 Audited Financial Statements" because they did not apply new, unofficial accounting guidance in SEC Staff Accounting Bulletin No. 121 ("SAB 121"), released a few weeks earlier. According to Galaxy, BitGo's audited financial statements had to apply SAB 121 to be "in a form that complies with the requirements of Regulation S-X," as required by the Amended Agreement. That was wrong. The definition of Company 2021 Audited Financial Statements did not require the application of the unofficial staff guidance in SAB 121.

Nevertheless, on July 31, 2022, BitGo delivered updated Company 2021 Audited Financial Statements applying SAB 121, together with an unqualified audit opinion stating that BitGo's auditors at Crowe LLP ("Crowe") had conducted their audit in accordance with GAAS. Because the SEC had recently posed new questions about how companies should report digital asset lending, the audit opinion included a "Restriction on Use" legend which read as follows: "Our report is intended solely

for the information and use of Bitgo Holdings, Inc. and Galaxy Digital Holdings Ltd. and is not intended to be and should not be used by anyone other than these specified parties." A705.

In the cover note to its July 31, 2022 financial statements, BitGo further explained that Crowe would provide its consent for the parties to include Crowe's audit report in the final version of the S-4 to be submitted to the SEC, as soon as the SEC clarified how companies should report digital asset lending. In the many months leading up to July 31, 2022, BitGo had implored Galaxy—which retained the exclusive "right to control and direct all interactions" with the SEC (A209 §9.01(b))—to resolve this regulatory uncertainty by seeking pre-clearance from the SEC. Galaxy refused.

On August 2, 2022, Galaxy asserted two new objections to BitGo's financial statements. *First*, Galaxy asserted, for the first time in the parties' eighteen-month-long dialogue, that the financial statements should have been audited under PCAOB standards, rather than GAAS. *Second*, Galaxy claimed that the July version of the financial statements failed to comply with the definition of Company 2021 Audited Financial Statements due to the audit report's "Restriction on Use" legend.

On August 12, 2022, Galaxy purported to exercise its right under Section 13.01(h) to "terminate the Merger Agreement and abandon the transactions

contemplated thereby." A420. Galaxy's sole justification was BitGo's alleged "failure . . . to deliver to [Galaxy], by July 31, 2022, a copy of the Company 2021 Audited Financial Statements." A242 §13.01(h).

This litigation followed.

On June 9, 2023, the Court of Chancery issued a bench ruling granting Galaxy's motion to dismiss BitGo's Complaint. The Court held as a matter of law that BitGo had failed to deliver financial statements that met the definition of "Company 2021 Audited Financial Statements" by the April 30, 2022 deadline because BitGo's audited financial statements did not apply SAB 121. SAB 121 does not purport to interpret or to have been promulgated under Regulation S-X, the key inquiry under the definition of "Company 2021 Audited Financial Statements." Nor was BitGo required to apply the staff's unofficial guidance in SAB 121 to its April 30 financial statements under some other contractual provision, under GAAP, or in order to receive a clean audit opinion from its auditors, as alleged the Complaint. Still, the Court deemed the financial statements deficient as a matter of law.

The Court also concluded that, although BitGo's subsequent delivery of audited financial statements on July 31, 2022 cured the purported SAB 121 deficiency, those subsequent financial statements did not meet the definition of "Company 2021 Audited Financial Statements" as a matter of law, because BitGo's auditors included the "Restriction on Use" legend. The Court reached this

conclusion based on a 2003 letter from the SEC's then-Acting Chief Accountant and then-Director of Corporate Finance addressing UK financial statements. But nothing in Regulation S-X prevents an auditor from including a "Restriction on Use" legend in an audit report, and the Amended Agreement expressly provides that the auditors would not consent to the use of their audit report until the final version of the S-4 was prepared and ready to be filed with the SEC. *See* A218 §9.07(c). The Court acknowledged that Crowe might have included the legend simply to "make sure [the financial statements] can't be used improperly in the interim," *i.e.*, pending the auditor's timely consent to a filing. Exhibit A (hereinafter, "Tr.") at 35:2–23. But the Court dismissed "that possibility" (*id.*) based on its incorrect conclusion that "there isn't anything" in the record indicating Crowe intended to remove the legend once the uncertainty regarding accounting for digital asset lending dissipated (*id.* at 86:10).

The Court further concluded that Galaxy had a "clean" right to terminate regardless of its own alleged breaches of the Amended Agreement, including its refusal to seek pre-clearance from the SEC. The Court did not address BitGo's argument that the prevention doctrine foreclosed Galaxy's exercise of a termination right based on BitGo's supposed failure to meet a condition where Galaxy's own breaches materially contributed to that supposed failure.

Finally, the Court of Chancery acknowledged that BitGo's allegations raised a reasonable inference that Galaxy suffered from a severe case of buyer's remorse. Acknowledging the seemingly improbable result of the ruling, the Court emphasized that "[e]ven a desperate man can be an honest winner of the lottery." Tr. 88:3-4.

This appeal followed.

SUMMARY OF ARGUMENT

1. The Court of Chancery incorrectly held as a matter of law that the audited financial statements BitGo delivered on April 29, 2022 failed to meet the definition of "Company 2021 Audited Financial Statements" because they did not apply SAB 121, issued just four weeks earlier. As relevant here, the definition requires only compliance with Regulation S-X and "interpretations promulgated thereunder." The Court looked to the Amended Agreement's sweeping definition of "Applicable Law" as a "signal as to what people thought compliance meant," but the term "Applicable Law" does not appear in the definition of Company 2021 Audited Financial Statements. The Complaint generates a reasonable inference that BitGo met the definition of "Company 2021 Audited Financial Statements," and Galaxy had no basis to terminate, because SAB 121 is not an "interpretation[] promulgated []under" Regulation S-X. SAB 121 does not purport to interpret Regulation S-X, and Regulation S-X does not purport to allow for promulgation via Staff Accounting Bulletins. Regardless, SAB 121 on its own terms did not require application to those financial statements. At a minimum, it is reasonably conceivable that the audited financial statements BitGo delivered on April 29, 2022 did not need to apply the staff's unofficial interpretive guidance in SAB 121 (and issued just four weeks earlier on March 31, 2022) to meet the definition of "Company 2021 Audited Financial Statements."

2. The Court of Chancery incorrectly held as a matter of law that the audited financial statements BitGo delivered on July 31, 2022 (which cured the supposed SAB 121 deficiency) failed to meet the definition of "Company 2021 Audited Financial Statements" because they included a "Restriction on Use" legend. Nothing in the definition of "Company 2021 Audited Financial Statements" indicates that a "Restriction on Use" legend would disqualify otherwise compliant audited financial statements. The Court went outside the contractual definition when it relied on a letter from SEC personnel that (like SAB 121) is not an interpretation promulgated under Regulation S-X. The Court also mistakenly concluded that the Company 2021 Audited Financial Statements had to include not only a clean audit report and opinion but also a report that could be used with any future version of the amended S-4 to be filed as the final registration statement with the SEC. But the definition of "Company 2021 Audited Financial Statements" does not include that requirement, and implying that requirement would conflict with a different provision in the Amended Agreement and the ongoing S-4 amendment process, confirming that the auditors' consent to use their report was not required until Galaxy was ready to file the final version of the S-4 with the SEC, after having addressed any outstanding comments from the SEC staff in response to prior drafts. At a minimum, it is reasonably conceivable that the definition of "Company 2021 Audited Financial

Statements" covers the audited financial statements BitGo delivered on July 31, 2022 with a "Restriction on Use" legend.

3. The Court of Chancery erred in concluding that Galaxy was entitled to terminate regardless of whether it had breached the Amended Agreement and notwithstanding the fact that Galaxy materially contributed to BitGo's supposed failure to deliver Company 2021 Audited Financial Statements. The Court appears to have accepted BitGo's well-pleaded allegations that Galaxy prevented BitGo from submitting audited financial statements without a "Restriction on Use" legend when Galaxy refused to seek pre-clearance from the SEC. Yet the Court ruled that those allegations did not matter given Galaxy's "clean" termination right. This ruling conflicts with Delaware's prevention doctrine, which holds that a party "cannot profit from its misconduct" by exploiting a situation it wrongfully created as a basis for termination. The Court did not address the prevention doctrine.

STATEMENT OF FACTS

A. The Parties Sign The Original Agreement; BitGo Performs Its Obligations While Galaxy Encounters Delay

Founded in 2013, BitGo established the first independent, regulated custodial business for digital assets, and it emerged as a market leader in digital asset financial services. A33 ¶24. Galaxy became a strategic investor in BitGo in 2018. A35 ¶31. When it made that investment, Galaxy gained an observer seat on BitGo's Board of Directors, and it became privy to confidential information about BitGo's business, financial results and financial reporting. *Id.* In December 2020, Galaxy convinced BitGo to forgo other strategic opportunities to pursue a merger with Galaxy (the "Merger"). A36, A39 ¶¶33, 42.

The parties memorialized their deal in an Agreement and Plan of Merger dated May 5, 2021 (the "Original Agreement"). A37 ¶37; *see* A256. The Original Agreement obligated Galaxy to register the stock portion of the merger consideration with the SEC in time to consummate the Merger by an "End Date" of March 31, 2022. A43 ¶48.

The Original Agreement required BitGo to provide Galaxy its "Company 2020 Audited Financial Statements," as defined in the agreement. A41 ¶45. BitGo's audit engagement letter, which it incorporated in the disclosure schedules to the Original Agreement, explained that the audit would be conducted in accordance with GAAS, the standards applicable to private companies like BitGo. A66 ¶104.

In September 2021, BitGo timely provided the Company 2020 Audited Financial Statements, which had been prepared in accordance with GAAS and complied with the requirements of Regulation S-X, as required by the Original Agreement. A43 ¶49. BitGo provided an unqualified opinion from its auditors confirming that the audit was conducted in accordance with GAAS. *Id*. Months later, after Galaxy had completed its initial registration statement and before publicly filing it with the SEC, Galaxy obtained the consent of BitGo's auditors to use their report, and Galaxy executed a written acknowledgement that the audit was conducted in accordance with GAAS. A66 ¶107.

B. BitGo Gives Galaxy Additional Time To Close In Exchange For A $100 Million Reverse Termination Fee

Galaxy confidentially submitted three draft registration statements to the SEC which included BitGo's Company 2020 Audited Financial Statements and the accompanying audit report. A43 ¶50. On January 28, 2022, Galaxy publicly filed a fourth draft registration statement containing BitGo's Company 2020 Audited Financial Statements on Form S-4. A44 ¶52. In response, the SEC staff returned extensive questions and comments relating to Galaxy's business and financial

reporting. A44-A45 ¶¶52–53. None of those comments took issue with the standards applied by BitGo's independent auditor. A45 ¶53.[1]

Galaxy realized it could not address all the SEC staff's comments within the timeframe set forth in the Original Agreement, and it asked BitGo for an extension of the End Date. *Id*. BitGo was reluctant to grant Galaxy's request, because the pendency of the Merger was preventing BitGo from pursuing other, lucrative business opportunities during a boom in the industry. *Id*. BitGo ultimately agreed to extend the End Date in exchange for a commitment by Galaxy to pay BitGo a fee of $100 million (the "Termination Fee") if Galaxy failed to obtain SEC approval and close the Merger by the new deadline. A46 ¶55.

Galaxy agreed to the revised terms. On March 30, 2022, the parties executed the Amended and Restated Agreement and Plan of Merger. *Id*. ¶¶56–57; *see* A84. Many of the Amended Agreement's terms matched those in the Original Agreement. The Amended Agreement required BitGo to deliver both the Company 2020 Audited

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[1] Galaxy's obligation to continue preparing a registration statement for the Merger was "[s]ubject to [its] receipt of the Company 2020 Audited Financial Statements." A217 §9.07(a). Galaxy's acceptance of BitGo's 2020 audited financial statements and subsequent effort to finalize the registration statement reflect Galaxy's belief that the 2020 audited financial statements BitGo delivered met the definition of "Company 2020 Audited Financial Statements even though they were audited in accordance with GAAS. A29 ¶14; A43 ¶49. As described below, Galaxy would later argue that the Amended Agreement required application of PCAOB auditing standards to BitGo's financial statements.

Financial Statements and "Company 2021 Audited Financial Statements," subject to identical definitional requirements. A100 §1.01.

Section 13.01(b) of the Amended Agreement required BitGo to attempt to deliver the "Company 2021 Audited Financial Statements" to Galaxy by April 30, 2022 (the "Financial Statements Target Deadline"). If BitGo failed to deliver the Company 2021 Audited Financial Statements by that date, the Amended Agreement automatically granted BitGo another three months (until July 31, 2022) to deliver the "Company 2021 Audited Financial Statements." If BitGo failed to deliver the Company 2021 Audited Financial Statements by July 31, 2022, Galaxy could terminate the Amended Agreement and walk away (the "Financial Statements Delivery Condition"). A242 §13.01(h).

The Amended Agreement extended the End Date to December 31, 2022, subject to a potential further three-month extension. A47 ¶57. Galaxy assumed the risk that the parties failed to secure SEC approval in time to close the transaction (A439), and Galaxy maintained the responsibility to "prepare and file" the "S-4 Registration Statement" for the Merger and the exclusive "right to control and direct all interactions" with the SEC. A217 §9.07(a); A209 §9.01(b)–(c).

As in the Original Agreement, Galaxy agreed:

- to "use *commercially reasonable efforts*", *inter alia*, "to consummate the transactions" and "to take such *other actions as may be necessary or desirable*" to "*implement expeditiously* the transactions" (A208 §9.01(a));

- to have "prior, *good faith consultation* with [BitGo] and . . . consider[], in good faith, [BitGo's] views and comments," regarding interactions with regulators, (A209 §9.01(b)), "in connection" with "the S-4 Registration Statement, . . . and on any responses to comments from the SEC to any of such materials" (A217 §9.07(a); *see also* A211 §9.01(f)(iv));

- to "*keep [BitGo] apprised* . . . and *work cooperatively* in connection with obtaining all required approvals," and "furnish . . . [BitGo] with such *necessary information and reasonable assistance* as [it] may reasonably request" (A211 §9.01(f));

- to "*promptly notify* [BitGo] . . . of *any matter or event* that would or would reasonably be expected to cause any of the [pre-closing] conditions . . . not to be satisfied" and of any "failure of [BitGo] . . . to comply with or satisfy in any material respect any covenant, condition or agreement" (A214 §9.04);

- and to use "*reasonable judgment* after *consultation with [BitGo]*" regarding "the extent" to which BitGo's financial statements and audit reports were "required" "for inclusion . . . in the S-4" (A218 §9.07(c); *see* A217 §9.07(a) (all emphases added)).

The Amended Agreement specified that any party who caused the termination of the Merger by willfully and intentionally breaching the Amended Agreement would be liable for any and all resulting damages. A243 §13.02.

C. BitGo Delivers The Company 2021 Audited Financial Statements, But Galaxy Rejects Them To Buy Itself More Time

On April 29, 2022, BitGo timely delivered the Company 2021 Audited Financial Statements. A50 ¶63.

By this time, broad stress in the cryptocurrency and bitcoin markets had caused Galaxy's share price to plummet by more than 50% in a matter of weeks.

A54 ¶76. In addition, Galaxy doubted whether it would be able to complete SEC review, a Nasdaq listing, and other pre-closing steps in time to close the Merger by the December 31 End Date. A50 ¶65. Having only recently agreed to pay the Termination Fee if it could not do so, Galaxy wanted more time. *Id.*

In an effort to trigger the automatic extension of the End Date to March 31, 2023, Galaxy seized on the SEC staff's March 31 publication of SAB 121, which provided "interpretive guidance for entities to consider when they have obligations to safeguard crypto-assets held for their platform users." A805. Although SAB 121 emphasizes that "[t]he statements in staff accounting bulletins are not rules or interpretations of the Commission, nor are they published as bearing the Commission's official approval" (A804), Galaxy asserted that BitGo's audited financial statements did not meet the definition of "Company 2021 Audited Financial Statements" because they failed to apply SAB 121, even though BitGo's auditor's provided an unqualified audit opinion stating that the financial statements complied with GAAP. According to Galaxy, BitGo's audited financial statements had to apply SAB 121 to comply with SEC Regulation S-X, codified in 17 C.F.R. Part 210. A47 ¶59; A51 ¶¶68–70.[2]

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[2] BitGo's independent auditor understood correctly that the staff's interpretative accounting guidance in SAB 121 did not need to be applied immediately to BitGo's financial statements. That is why it issued an unqualified

To ensure it fully understood Galaxy's position, BitGo asked Galaxy to explain exactly why it believed BitGo's 2021 audited financial statements failed to meet the definition, even though they had been prepared using the same form and content as the Company 2020 Audited Financial Statements which Galaxy had included in a draft S-4 already on-file with the SEC. A52 ¶70. Galaxy's counsel gave a one-line response: "Because they don't comply with SAB 121[.]" *Id*.

Although BitGo disagreed that SAB 121 had to be applied for its financial statements to meet the definition of Company Audited 2021 Financial Statements, pursuant to its obligations under Section 9.01 of the Amended Agreement to prepare documentation Galaxy requested to assist with the registration process, BitGo honored Galaxy's demand that BitGo apply SAB 121. A54 ¶74.

D. The Crypto Market Deteriorates And Galaxy Looks To Escape Its Financial Obligations To BitGo

On May 12, 2022, the "crypto winter" hit Galaxy hard. The Luna cryptocurrency collapsed entirely, wiping out one of Galaxy's cornerstone investments in the crypto sector. A55 ¶77. Indeed, Galaxy's CEO Mike Novogratz had infamously tattooed an image of Luna on his arm to communicate his pre-crash bullishness for this cryptocurrency. *Id.* ¶78.

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audit opinion for the Company 2021 Audited Financial Statements and certified their compliance with GAAS. A51 ¶67.

Amid increasingly dire market sentiment, Galaxy announced an extraordinary mid-quarter update on its capital and liquidity position, including by disclosing that it had suffered a loss of approximately $300 million in the quarter-to-date alone. A56 ¶¶79–80. Galaxy ultimately suffered a total net loss of $554.7 million during the second quarter. *Id*. By June, Galaxy's prospects had worsened even further, and Novogratz warned "the economy is going to collapse." *Id*. ¶80; A58 ¶83.

To reassure investors, Novogratz vowed to conserve liquidity and retrench Galaxy's balance sheet. A57 ¶81. As part of that strategy, Galaxy secretly decided to renege on its merger commitments to BitGo. A58 ¶¶84–85. To maintain the facade, Galaxy dodged BitGo's questions about the status of Galaxy's next draft of the amended registration statement even as it set sham internal deadlines for BitGo's deliverables. A62-A63 ¶¶94–95. Yet, as a senior Galaxy officer later admitted in a private meeting with BitGo, Galaxy was looking for a way to break up the Merger and blame BitGo. A64 ¶98.

E. Galaxy Secretly Suspends Its Efforts To Close The Deal As It Faces Mounting Challenges

In mid-May, the parties learned that the SEC staff had raised new questions about how it wanted companies to report transactions involving digital asset lending in their financial statements and would be issuing new guidance in the future. A60 ¶88. The lack of clarity around the timing and nature of the SEC's forthcoming

financial reporting guidance threatened to further delay Galaxy's completion of a final registration statement for the Merger. *Id.*

Under these circumstances, the SEC staff actively encourages companies to seek "pre-clearance" for a particular interpretive accounting question. A61 ¶91. Pre-clearance allows a company to directly resolve regulatory, financial reporting uncertainty instead of waiting for the SEC's rule-making process to unfold or waiting for an industry consensus to emerge within the accounting profession. *Id.* Because the SEC was unlikely to provide wide-scale regulatory clarity on how it wanted companies to report transactions involving digital asset lending before the End Date, BitGo urged Galaxy to seek SEC pre-clearance of the combined company's proposed accounting treatment in order to clear the way for the Merger. *Id.* ¶90.

By this time, however, Galaxy had decided it did not want to go forward with the Merger, and it ignored BitGo's pre-clearance proposal, hamstringing its own auditors and effectively putting the next Amended S-4 filing on hold. A61-A62 ¶¶92-93. Instead of considering BitGo's suggestion in good faith, Galaxy professed to believe that it was better to wait for the SEC to form a consensus after protracted discussions with an ad hoc working group of the American Institute of Certified Public Accountants ("AICPA"). A61-A62 ¶¶90–93. Because the Amended Agreement assigned Galaxy the right to control interactions with the SEC, BitGo

could not override Galaxy's unwillingness to seek pre-clearance. A61 ¶92; *see* A209 §9.01(b). Galaxy knew that, by not moving expeditiously to resolve the newfound regulatory uncertainty, it could preclude the Merger from going forward. A61 ¶92; A63 ¶96.

During June and July, Galaxy pretended to continue working on an amended S-4 registration statement. A62-A63 ¶¶ 93–96. In reality, that was a ruse; it kept up the appearance of progress for the sole purpose of blaming BitGo for delay. A63 ¶95.

F. BitGo Provides Updated 2021 Audited Financial Statements But Galaxy Professes To Find New Flaws

Over the summer of 2022, BitGo updated its 2021 financial statements to reflect the application of SAB 121. On July 31, 2022, BitGo delivered updated financial statements that applied SAB 121. A65 ¶100. BitGo also delivered an unqualified audit opinion from Crowe, explaining that the auditors had conducted their audit in accordance with GAAS, just as they had done in the past. *Id*. Because of the newly-developing regulatory uncertainty over how the SEC wanted companies to account for transactions involving digital asset lending, Crowe included a "Restriction on Use" legend which read as follows: "Our report is intended solely for the information and use of Bitgo Holdings, Inc. and Galaxy Digital Holdings Ltd. and is not intended to be and should not be used by anyone other than these specified parties." A705.

In its cover email, BitGo explained that it would provide Crowe's consent to include its audit report in the final S-4—which necessarily would require Crowe to remove the "Restriction on Use" legend—as soon as the SEC clarified its views on accounting for digital asset lending. A733-34. Again, BitGo encouraged Galaxy to resolve that uncertainty directly by seeking pre-clearance from the SEC. *Id.*

Because BitGo had cured the SAB 121 "deficiency" Galaxy had raised three months earlier, Galaxy needed a new pretext to scuttle the Merger. On August 2, 2022, for the first time in the parties' eighteen-month-long dialogue, Galaxy argued that BitGo's financial statements should have been audited under PCAOB standards, rather than GAAS. A65 ¶102. Applying PCAOB standards would have had no material impact on BitGo's financial statements. Galaxy's insistence on PCAOB auditing standards reversed Galaxy's consistent, ongoing acceptance and use of BitGo's audit reports referencing GAAS. A68 ¶¶111–112.

Galaxy also seized on Crowe's "Restriction on Use" legend. According to Galaxy, the legend disqualified BitGo's 2021 audited financial statements from satisfying the definition of "Company 2021 Audited Financial Statements." Remarkably, Galaxy acknowledged that Crowe had included that legend because of regulatory uncertainty regarding the reporting of digital asset lending but steadfastly *refused* to resolve that regulatory uncertainty by seeking pre-clearance from the SEC. A730-31. The Amended Agreement also makes clear that Crowe ultimately

would consent to use of its audit report when the parties had completed the amended final S-4 registration statement and were ready to file it with the SEC. Specifically, BitGo would provide "consents from the independent registered accounting firm to use such financial statements and reports" *in addition to* "the Company 2021 Audited Financial Statements" *and at a different time*: "prior to any filing of an amended S-4 Registration Statement or S-1 Registration Statement." A218 §9.07(c) (emphases added).

G. Galaxy "Abandon[s]" The Merger And Repudiates Its Obligations To BitGo

On August 12, 2022, Galaxy sent a letter to BitGo purporting to exercise Galaxy's right under Section 13.01(h) to "terminate the Merger Agreement and to abandon the transactions contemplated thereby." A71 ¶119. Galaxy's purported justification was BitGo's alleged "failure . . . to deliver to [Galaxy], by July 31, 2022, a copy of the Company 2021 Audited Financial Statements." A242 §13.01(h).

On August 15, 2022, Galaxy issued a press release publicizing its termination of the Merger, accusing BitGo of failing to deliver the proper financial statements, and repudiating any further obligation or liability to BitGo. A72 ¶120.[3]

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[3] Galaxy initially made the PCAOB issue the primary focus of its purported justification for terminating the Merger. A68-69 ¶¶113-14. After BitGo filed its original complaint in this action, which revealed the flaws in Galaxy's position, Galaxy deemphasized its about-face objection to GAAS and placed greater emphasis the "Restriction on Use" legend. A445-46; *compare id. with* A730.

H. The Trial Court Dismissed BitGo's Claims and BitGo Filed This Appeal

On September 12, 2022, BitGo filed suit in the Court of Chancery, asserting claims for wrongful repudiation, breach of Sections 9.01 and 9.04 of the Amended Agreement and breach of the implied covenant of good faith and fair dealing. BitGo filed an amended complaint on November 22, 2022. A25. On December 8, 2022, Galaxy moved to dismiss, which the parties subsequently briefed. On June 9, 2023, the Court of Chancery heard oral argument and issued the bench ruling dismissing BitGo's Complaint with prejudice. Exhibit B. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY INCORRECTLY HELD THAT BITGO'S APRIL 29, 2022 AUDITED FINANCIAL STATEMENTS FAILED TO MEET THE DEFINITION OF "COMPANY 2021 AUDITED FINANCIAL STATEMENTS" BECAUSE THEY DID NOT APPLY SAB 121

A. Question Presented

Whether the Court of Chancery erred when it ruled as a matter of law that the audited financial statements delivered by BitGo on April 29, 2022 did not meet the definition of "Company 2021 Audited Financial Statements." BitGo raised this issue below (A765-69), and the Court of Chancery considered it (Tr. 76-88).

B. Scope Of Review

The Court reviews decisions made on a motion to dismiss under Chancery Court Rule 12(b)(6) *de novo*. *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020).

C. Merits Of Argument

1. The Definition Of "Company 2021 Audited Financial Statements" Did Not Require The Application Of SAB 121

The Court of Chancery held that the audited financial statements BitGo delivered on April 29, 2022 did not qualify as "Company 2021 Audited Financial

Statements" because they did not apply SAB 121. BitGo respectfully submits that that was legal error.

To qualify as "Company 2021 Audited Financial Statements," the financial statements needed to be "in a form that complies with the requirements of Regulation S-X." A100 §1.01. Regulation S-X governs matters such as: when a registrant is required to file financial statements for an acquisition target (17 C.F.R. §210.3-05), how pro forma financials should be presented (*id.* §210.11-02) and which balance sheets should be included (*id.* §210.3-01). Nothing in the text of Regulation S-X required BitGo to apply SAB 121.

The Court of Chancery nevertheless concluded that the requirement to comply with Regulation S-X extended to SAB 121 in part based on a "signal" provided by the Amended Agreement's definition of "Applicable Law." The Amended Agreement defines "Applicable Law" broadly to mean:

> with respect to any Person, any transnational, domestic or foreign federal, state, provincial or local law (statutory, common or otherwise), constitution, treaty, convention, ordinance, code, rule, regulation, order, injunction, judgment, decree, ruling or other similar requirement enacted, adopted, promulgated or applied, in each case, by a Governmental Authority, *and authoritative interpretations of each of the foregoing*, in each case that is binding upon *or applicable to such Person or its properties*.

A96 §1.01 (emphases added). According to the Court, this definition is "a signal as to what people thought compliance meant" and "what that definition indicates is that

is when there is a law to be complied with, the obligation extends not only to the regulations themselves but also to interpretations like SAB 121." Tr. 80.

However, the definition of "Applicable Law" does not apply here under the plain terms of the Amended Agreement. As the Court recognized, "[t]he definition of 'Company Financial Statements' *doesn't say* 'compliance with the requirements of Applicable Law.'" Tr. 79:24-80:1, 80:7-9 (emphasis added). The definition requires only compliance with "the requirements of Regulation S-X," which Section 1.02 expands to include "regulations promulgated thereunder."

The definition of Company 2021 Audited Financial Statements does not reference "Applicable Law" anywhere. *Other* sections do so expressly. *See*, *e.g.*, A208 §9.01 (concerning the parties' obligations to use commercially reasonable efforts to comply with Applicable Law).

Moreover, the Court of Chancery did not need to rely on a "signal" from the "Applicable Law" definition because Section 1.02 of the Amended Agreement expressly states that "[r]eferences to any . . . regulation . . . shall be deemed to refer to such . . . regulation . . . and to any . . . *interpretations promulgated thereunder*." A129 §1.02 (emphasis added). This definition is far different from that of "Applicable Law." Instead of covering any "rule, regulation, order, ruling … promulgated or applied … and authoritative interpretations of each of the foregoing … binding upon or applicable to such Person or its properties," A96 §1.01, this text

expands references to "regulations" to include only "interpretations promulgated thereunder." A129 §1.02. Delaware law required the Court to honor the Amended Agreement's distinction between "regulations" and "Applicable Law." *See, e.g.*, *Black Horse Cap., LP v. Xstelos Hldgs., Inc.*, 2014 WL 5025926, at *29 (Del. Ch. Sept. 30, 2014); *Allied Cap. Corp. v. GC–Sun Hldgs., L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.").

Contrary to the Court of Chancery's suggestion (Tr. 84), BitGo has never argued that only the text of Regulation S-X applies. BitGo acknowledges that the Company 2021 Audited Financial Statements must comply with the text of Regulation S-X and interpretations promulgated thereunder. Tr. 50-51. The dispositive question here—which the Court did not address—is whether SAB 121 is an "interpretation promulgated under" Regulation S-X. It is not.

First, SAB 121 does not, on its face, purport to interpret—let alone suggest it was promulgated under—Regulation S-X. SAB 121 does not even mention Regulation S-X (or the CFR provision in which it is codified, 17 C.F.R. Part 210). If SAB 121 were interpreting Regulation S-X, it would interpret words within Regulation S-X. It does not. By contrast, Staff Accounting Bulletins that *do* purport to interpret Regulation S-X say so expressly. *See, e.g.*, A856, Staff Accounting

Bulletin No. 69 (May 8, 1987) (expressing staff views regarding "[t]he use of Article 9 of Regulation S-X"); A852, Staff Accounting Bulletin No. 53 (June 13, 1983) ("express[ing] the staff's views with respect to certain disclosure and reporting requirements relating to the issuance of securities guaranteed by affiliates of the issuer and to Rule 3-10 of Regulation S-X").

Second, Regulation S-X does not provide for the promulgation of Staff Accounting Bulletins. An entirely separate section of the CFR addresses Staff Accounting Bulletins: part 211 Subpart B. Indeed, Galaxy conceded at oral argument that "SAB 121 was issued under Part 211," Tr. 73:9-15, **not** Part 210, *i.e.*, Regulation S-X. Regulation S-X does refer to "Financial Reporting Releases" in Part 211, *see* 17 C.F.R. §210.1-01, but that only underscores the fact that it does *not* refer to Staff Accounting Bulletins. Nothing in Regulation S-X suggests that SEC staff "promulgates" Staff Accounting Bulletins under Regulation S-X, and nothing in SAB 121 indicates it was an interpretation promulgated under Regulation S-X.

Third, SAB 121 was not "promulgated" at all because it has no force of law. "Unlike a rule promulgated by the SEC pursuant to its ruling-making authority . . . an SEC Staff Accounting Bulletin 'does not carry with it the force of law.'" *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 478 (5th Cir. 2008) (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000)); *accord Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1118 (N.D. Cal. 2003) (holding that Staff Accounting

Bulletins "are not rules or interpretations of the SEC and do not have the force of law") (citing *Christensen v. Harris Cnty.,* 529 U.S. 576, 587 (2000)); A1096, Howard B. Levy, "Disclosure of Impending Accounting Changes," *CPA Journal* (Nov. 2018) ("It should be noted that SABs are technically nonauthoritative, interpretive views of the SEC staff on various accounting matters, and theoretically are neither GAAP nor legal requirements such as they would be under Regulation S-X."). As SAB 121 itself states, it provides only "interpretive guidance for entities to consider," and those considerations "*are not rules or interpretations of the Commission, nor are they published as bearing the Commission's official approval*." A746-47; A804-05 (emphasis added).

The plain meaning of "promulgated" does not include the SEC's unofficial guidance. "[P]romulgate" means "(Of an administrative agency) to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal." Black's Law Dictionary (9th ed. 2009); *see also Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 862-63 (8th Cir. 2013) (holding that only actions that are "binding" constitute "promulgation"); *Cement Kiln Recycling Coal. v. E.P.A.*, 493 F.3d 207, 226-28 (D.C. Cir. 2007)

(holding that it lacked jurisdiction to consider a purported agency "promulgation" because the document was not binding).

This authority aligns with how the SEC uses the term "promulgate" in its own regulations. *See* 17 C.F.R. §202.1(b) ("In addition to the Commission's rules of practice set forth in part 201 of this chapter, the Commission has promulgated rules and regulations pursuant to the several statutes it administers (parts 230, 240, 260, 270 and 275 of this chapter)."). The Amended Agreement reflects this distinction. The Applicable Law definition includes not only items that are "promulgated" but also items that are "enacted, adopted, promulgated *or applied*" *and* "authoritative interpretations" that are "binding upon *or applicable*" to the parties. A96 §1.01 (emphasis added). This definition would be duplicative several times over if "promulgated" referred to *non*-authoritative bulletins from the SEC staff. To give effect to the distinctly narrower interpretative principles articulated in Section 1.02 of the Amended Agreement, "promulgated" should be accorded its plain meaning, which excludes SAB 121.

Because SAB 121 is not an interpretation promulgated under Regulation S-X, and because the definition of Company 2021 Audited Financial Statements does not require the financial statements to apply "Applicable Law" (as the Court of Chancery recognized), the financial statements delivered by BitGo on April 29, 2022 satisfied the definition of "Company 2021 Audited Financial Statements."

2. Questions Of Fact Preclude The Court Of Chancery's Conclusion That BitGo Needed To Comply With SAB 121 By April 29, 2022

BitGo did not need to apply SAB 121 to comply with the definition of Company 2021 Audited Financial Statements for the additional and independent reason that SAB 121, by its own terms, did not require compliance by April 30, 2022. The Court of Chancery's ruling that SAB 121 would apply to "those company financial statements that were required to be delivered by April 30, 2022" was erroneous. Tr. 79:16–17. SAB 121 expressly addresses the timing issue. "The staff expects all other entities, including . . . private operating companies entering into a business combination transaction with a shell company . . . to apply the guidance in [SAB 121] *beginning with their next submission or filing with the SEC* (e.g. the initial or *next amendment of the registration statement*), with retrospective application, at a minimum, as of the most recent annual period ending before June 15, 2022 . . . ." A808 (emphasis added). On its face, SAB 121 did not require application by BitGo until Galaxy's "next submission or filing of the next amendment of the registration statement," which as of April 30, 2022, was not anticipated by the parties for several months.

Although the Court recognized that SAB 121 "would apply *retrospectively*," it misapprehended the implications of that phrase as applied to BitGo's financial statements. Tr. 79:6 (emphasis added). "Retrospective Application" is a term of art

in the accounting profession that refers to "the application of a different accounting principle to one or more *previously issued* financial statements."[4] Because SAB 121 was issued *after* the end of the fiscal year, BitGo's financial statements for the fiscal year needed to include only a disclosure designed "to (1) notify the reader . . . that a standard has been issued which the registrant will be required to adopt *in the future* and (2) assist the reader in assessing the significance of the impact that the standard will have on the financial statements of the registrant *when adopted*." SEC Staff Accounting Bulletin Codification, Topic 11.M (emphasis added). Thus, BitGo's financial statements were appropriately "prepared on the basis of accounting principles that were acceptable *at the financial statement date*," *i.e.*, December 31, 2021, and would be "retrospectively adjusted *in the future* as a result of the change." *Id.* (emphasis added). Without the benefit of expert testimony to elucidate these esoteric accounting practices, the Court of Chancery mistakenly concluded that it was "plain as a matter of SAB 121," Tr. 79:18, that BitGo was effectively required to apply SAB 121 *contemporaneously*, not retrospectively. Other issuers likewise retrospectively applied SAB 121 as of FY2021 for the first time in their future filings

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[4] A850, ASC Topic 250-20 (definition of "Retrospective Application") (emphasis added); *see, e.g.*, A851, FASB, Statement No. 154 ("This Statement defines *retrospective application* as the application of a different accounting principle to prior accounting periods as if that principle had always been used or as the adjustment of previously issued financial statements to reflect a change in the reporting entity.").

with the SEC, long after SAB 121 was released. A1449, The Goldman Sachs Group, Inc., Form 10-Q (filed 8/4/2022); A1607, Galaxy Digital Inc., Form S-4/A Registration Statement (filed 2/9/2023) at F-41, F-65.[5]

The Court of Chancery's ruling is also inconsistent with the text and structure of the Amended Agreement. Tr. 79:14. FASB expressly distinguishes the need to apply a new accounting principle (such as SAB 121) retrospectively in the future from a "*restatement*," which it defines "as the revising of previously issued financial statements to reflect the correction of an error." A851, FASB, Statement No. 154; *accord* A849, ASC Topic 250-10-05-4 ("The correction of an error in previously issued financial statements is *not* an accounting change.").

The text and structure of the Amended Agreement embeds the distinction between a *retrospective application* and a prior-period *restatement*. Under Section 13.01(b), the parties agreed that BitGo would not meet the Financial Statement Target Deadline "in the event either (i) the Company [*i.e.*, BitGo] does not deliver [the Company 2021 Financial Statements by April 30] . . . or (ii) the Company's independent auditors withdraw . . . any audit opinion . . . or the Company otherwise determines that it is required to restate any financial statements . . . in order for such financial statements to comply with GAAP . . . ." Put differently, BitGo would fail

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[5] This Court may take judicial notice of these public filings. *See Hazout v. Tsang Mun Ting*, 134 A. 3d 274, 280 n.13 (Del. 2016).

to meet the Financial Statement Target Deadline if the financial statements required a *restatement*, but not if those financial statements required *retrospective* application of new accounting guidance. The same distinction appears in the Financial Statement Delivery Condition memorialized in Section 13.01(h), which permits termination for a restatement that is not completed by July 31, 2022, but does not permit termination based on a requirement to provide retrospective application of a new accounting principle.

In holding that the financial statements BitGo delivered on April 29 were deficient because they failed to apply SAB 121, the Court of Chancery erred by effectively rejecting Crowe's understanding of the applicable accounting standards as a matter of law. The Complaint alleges that "BitGo had timely delivered all its audited financial statements under the merger agreement – financial statements with clean audit opinions from highly regarded independent accounting firms applying generally accepted auditing standards ('GAAS')." A26 ¶6. "With respect to financial statement disclosure, GAAS specifically address the need for the auditor to consider the adequacy of the disclosure of impending changes in accounting principles." A1092, SEC Staff Accounting Bulletin Codification, Topic 11.M (footnote omitted) (citing AU 9410.13–18).

Here, Crowe determined that BitGo's financial statements contained appropriate disclosures related to the issuance of SAB 121.[6] The Court of Chancery erred when it concluded that it was not reasonably conceivable that the disclosures related to SAB 121 in BitGo's financial statements were sufficient. *See, e.g.*, *Wiener v. S. Co.*, 1992 WL 12801, at *10 (Del. Ch. Jan. 24, 1992) ("Whether or not the acts alleged . . . constitute violations of GAAP is a mixed question of fact and law that cannot be resolved on this Rule 12(b)(6) motion."); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1421 (3d Cir. 1997) (overturning dismissal because "it is a factual question whether [defendant's] accounting practices were consistent with GAAP").

[6] *See* AU 9410.14 ("Where the accounting principles being followed are currently acceptable, the auditor should not qualify his opinion if a company does not adopt before an FASB Statement becomes effective accounting principles that will be prescribed by that Statement.").

II. THE COURT OF CHANCERY INCORRECTLY HELD THAT BITGO'S JULY 31, 2022 AUDITED FINANCIAL STATEMENTS FAILED TO MEET THE DEFINITION OF "COMPANY 2021 AUDITED FINANCIAL STATEMENTS" BASED ON THE "RESTRICTION ON USE" LEGEND

A. Question Presented

Whether the Court of Chancery erred when it ruled as a matter of law that the audited financial statements BitGo delivered on July 31, 2022 did not meet the definition of "Company 2021 Audited Financial Statements" because they included a "Restriction on Use" legend. BitGo raised this issue below (A779-82), and the Court of Chancery considered it (Tr. 76-88).

B. Scope Of Review

The Court reviews decisions made on a motion to dismiss under Chancery Court Rule 12(b)(6) *de novo*. *City of Fort Myers Gen. Emps.' Pension Fund*, 235 A.3d at 717.

C. Merits Of Argument

The Amended Agreement required BitGo to deliver the Company 2021 Audited Financial Statements together with an auditor's report containing an unqualified opinion that the financial statements fairly presented BitGo's financial position and results in accordance with GAAP. A100 §1.01. When BitGo cured the supposed SAB 121 deficiency Galaxy had previously identified by delivering revised financial statements on July 31, 2022, BitGo also delivered a report from Crowe containing an unqualified audit opinion confirming that BitGo's financial

statements fairly presented BitGo's financial position and results in accordance with GAAP. A65 ¶100. The report from Crowe contained a "Restriction on Use" legend. A705.

The Court of Chancery ruled that this legend made the July financial statements non-compliant because "a set of financial statements containing that restriction would not comply with the requirements of Regulation S-X." Tr. 85:9-11. But nothing in Regulation S-X prohibits a restriction on use. *See* 17 C.F.R. §210.1-02(a)(1) (definition of "accountant's report"); *id.* §210.2-02(a) ("Technical requirements for accountants' reports," such as that "[t]he accountants' report . . . [s]hall be dated" and "[s]hall be signed manually"); *id.* §210.2-02(b) ("Representations as to the audit"); *id.* §§210.2-02(c)–(d) ("Opinions to be expressed" and "[e]xceptions identified").[7]

The Court of Chancery recognized that Crowe may well have included the restriction on use legend to "make sure [the financial statements] can't be used improperly in the interim" (Tr. 35:2–23), *i.e.*, pending the auditor's timely consent to the final S-4 filing. But the Court dismissed that possibility based on its

[7] Numerous companies have included the same or similar use restrictions in their SEC filings. *See, e.g.*, A862, Amazon.com, Inc. Form S-4 Registration Statement (filed 7/27/2009) at E-2; A1100, First Trinity Financial Corporation Form S-4 Registration Statement (filed 10/25/2019) at F-109. This Court can take judicial notice of public filings. *Supra* n.5.

determination that "there isn't anything" in the record indicating that Crowe would have removed the legend once Galaxy resolved the uncertainty regarding the accounting for digital asset lending. Tr. 86:10. That was error.

In the cover note to its July 31, 2022 financial statements, and again on August 1, 2022, BitGo explained that it would provide Crowe's consent to include BitGo's the auditor's report in the final amendment to the S-4, "as promptly as practicable after the SEC clarifies its views on accounting for digital asset lending." A732-34. The Complaint and these documents generate a reasonable inference that Crowe included the "Restriction on Use" legend to make sure the financial statements were not "used improperly in the interim" (Tr. 35:2–23) and that Crowe would remove the legend and consent to the use of its audit report as soon as Galaxy resolved the regulatory uncertainty with the SEC.

Instead of relying on the text of Regulation S-X, the Court of Chancery based its ruling on a 2003 letter from the SEC's then-Acting Chief Accountant and then-Director of Corporate Finance, arising in a different context related to the practices of UK accounting firms. Tr. 82:13-84:11; *see* A860, Letter from Jackson M. Day to Peter Wyman (Feb. 28, 2003) ("2003 Letter").

As discussed *supra* at pp. 26-27, the Amended Agreement's interpretative principles expand the definition of Regulation S-X to include "interpretations promulgated thereunder." But the SEC did not "promulgate" the 2003 Letter under

Regulation S-X. The 2003 Letter does not reference Regulation S-X or refer to any language therein. Regulation S-X does not say anything on this issue or authorize the promulgation of interpretations through letters. Moreover, nothing about the issuance of a letter is "promulgation," because an SEC letter is not a binding statement of law. Simply put, the Amended Agreement does not say that the Company 2021 Audited Financial Statements must comply with every SEC rule, let alone every staff interpretation or letter. It says that they must comply with Regulation S-X and interpretations promulgated thereunder. Effectively, the Court of Chancery imposed a requirement that BitGo deliver audited financial statements as of the April 30 and July 31 interim deadlines that needed to comply with every SEC rule, staff interpretation, comment or letter applicable to the final registration statement, which was still subject to further SEC staff review and comment, and far from being final and ready to file. That was error.

The Amended Agreement confirms that the delivery of the Company 2021 Financial Statements would be part of a longer iterative regulatory process involving the preparation, finalization, approval and dissemination of Galaxy's S-4. A218 §9.07(c). Section 9.07(c) makes this timing clear where it specifies that BitGo must provide "the Company 2021 Audited Financial Statements *and prior to any filing of an amended S-4 Registration Statement or S-1 Registration Statement* that Parent has determined will include such Company 2021 Audited Financial Statements, as

applicable, *consents from the independent registered accounting firm to use such financial statements and reports*." *Id.* (emphases added). The consent to use the auditors' reports in financial statements is both separate from and can be completed later than the delivery of the Company 2021 Audited Financial Statements.

The Court of Chancery concluded that Section 9.07(c) was irrelevant: "Having financial statements with a use restriction is one thing. Consent to use financial statements in a Form S-1 is another thing." Tr. 86:22-87:1. However, a restriction on use and consent to use are two sides of the same coin. If consent to use need not happen until later, then there can be restriction (*i.e.*, non-consent) on use beforehand. By interpreting the Amended Agreement as prohibiting the Company 2021 Audited Financial Statements from including the "Restriction on Use" legend, the Court rendered superfluous the contract language allowing the delivery of the auditor's consent *after* the Company 2021 Audited Financial Statements. *See Hill v. LW Buyer, LLC*, 2019 WL 3492165, at *7 n.70 (Del. Ch. July 31, 2019) ("[A] contract should be read to give effect to all the provisions of the contract and not render one provision superfluous or redundant.") (citation omitted).

The Court of Chancery concluded that, "[i]f the auditor in this case gave its consent to use the financial statements in the form provided, which is what Section 9.07(c) contemplates, then what would be used in the Form S-1 is a set of financial

statements that contains a restriction on their use." Tr. 87:1-6. But once the auditor gave its consent to use the financial statements in a Form S-4 pursuant to Section 9.07(c), it *necessarily* would have to remove the "Restriction on Use" legend. The Court stated it "probably would have let this [Complaint] survive" if there were allegations on this point. *Id.* at 86:2-10. But there is no requirement to allege what is plain from the Amended Agreement, *i.e.*, that consent to use would mean no restriction on use when there was an SEC filing. In fact, that is exactly what BitGo said in its July 31, 2022 cover email to Galaxy. *See supra* at p. 21. Regardless, it is at least reasonably conceivable that the "Restriction on Use" legend would be removed, precluding dismissal at the pleading stage.

Finally, the Court's conclusion that the legend was "unacceptable in terms of financial statements that are going to appear in an SEC filing" (Tr. 82) rests on the erroneous premise that the July financial statements were "going to appear" as-is, without any modification, in the final SEC registration statement. According to the Court of Chancery, the definition of Company 2021 Audited Financial Statements "is talking about a set of financial statements that actually could be used for an offering of equity securities pursuant to a registration statement on Form S-1 for a nonreporting company." *Id.* at 85. However, the Court readily acknowledged that the April 30 and July 31 delivery dates were interim deadlines that did not correspond to an actual final S-4. And the Amended Agreement contemplates a

different sequence. When BitGo delivered its audited financial statements on July 31, the auditor's consent to use the audited financial statements in a public filing was not yet due. Galaxy had not completed an amended registration statement that could be submitted to the auditor for consent. A30-31 ¶18, A70 ¶116. In fact, as of July 31, 2022, Galaxy was far from completing an Amended S-4. A63 ¶95. Professional standards require auditors to understand the nature and context of an SEC filing and its relationship to the audited financials *before* they provide their consent. A30-31 ¶18, A70 ¶116. That is precisely why the definition of Company 2021 Audited Financial Statements does *not* refer to the auditor's consent, which becomes an important item only later in the sequence.

III. THE COURT OF CHANCERY ERRED IN DISMISSING BITGO'S CLAIMS BASED ON GALAXY'S BREACH OF THE AMENDED AGREEMENT

A. Question Presented

Whether the Court of Chancery erred as a matter of law when it dismissed BitGo's claim that Galaxy's breach of the Amended Agreement materially contributed to BitGo's alleged failure to meet the Financial Statement Delivery Condition. BitGo raised this issue below (A782-83), and the Court of Chancery considered it (Tr. 76:6–11, 88:21–91:21).

B. Scope Of Review

The Court reviews motion to dismiss decisions under Chancery Court Rule 12(b)(6) *de novo*. *City of Fort Myers Gen. Emps.' Pension Fund*, 235 A.3d at 717.

C. Merits Of Argument

BitGo alleged that Galaxy failed to use commercially reasonable efforts to resolve regulatory financial reporting question issues in breach of the Amended Agreement. A60-63 ¶¶88-96; A75. The Court of Chancery appeared to accept that BitGo's allegations satisfied all but the damages element of this claim. According to the Court of Chancery, "even if I credit that [allegation of breach of contract], it's not possible that the elements of the claim for breach of contract could be pled because of a valid exercise of a termination right . . . ." Tr. 89:20–23; *see id.* 76:8–11 ("With Galaxy having a clean contractual basis for termination that there isn't a reasonably conceivable basis to contest . . . everything else falls away.").

However, the Court of Chancery's conclusion conflicts with Delaware's prevention doctrine. *See Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc*., 2021 WL 1714202, at *52 (Del. Ch. Apr. 30, 2021). Under the prevention doctrine, Galaxy "cannot profit from its misconduct" by exploiting a situation it wrongfully created as a basis for termination. *Murphy Marine Servs. of Del., Inc. v. GT USA Wilm., LLC*, 2022 WL 4296495, at *13 (Del. Ch. Sept. 19, 2022) (prevention doctrine applied where defendant's conduct "made it less likely that [audit firm] would finalize the valuation, in satisfaction of the [agreement's] terms, and more likely that [audit firm] would withdraw").

The Court of Chancery did not address the prevention doctrine, and its reasoning that the termination right is "clean" regardless of any breach cannot be reconciled with the doctrine. The Court cited Section 13.01, but nothing in that section suggests Galaxy could terminate based on BitGo's failure to satisfy the Company 2021 Audited Financial Statements requirement even if Galaxy was the cause of that failure. Rather, this case falls squarely within the prevention doctrine cases: there was a condition (Company 2021 Audited Financial Statements) for exercise of a duty (completing the merger), and a party's breach (Galaxy's failure to use reasonable efforts) contributed materially to the non-occurrence of the condition. The Amended Agreement evinces no intent to alter this well-established common law doctrine.

Indeed, Section 13.02 expressly states that even a valid exercise of a termination right shall not preclude a claim for damages if the termination results from "[a] willful and intentional breach." A243 §13.02.

The allegations of the Complaint, and the documents incorporated therein, generate a reasonable inference that the restriction on use legend resulted from Galaxy's failure to seek pre-clearance from the SEC. A31 ¶19; A62 ¶93; A70 ¶117. Galaxy had the exclusive "right to control and direct all interactions" with the SEC (A209 §9.01(b)), and BitGo urged Galaxy to seek pre-clearance from the SEC, but Galaxy refused to do so. A61 ¶90.

The Complaint alleges that Galaxy's refusal to seek pre-clearance from the SEC "hamstrung Galaxy's auditors and effectively put the Amended S-4 filing on hold" and prevented BitGo from seeking its auditors' consent to include its audited financial statements in the amended S-4. A62 ¶93. By refusing to seek pre-clearance from the SEC, Galaxy breached its covenants to use "commercially reasonable efforts" and take "necessary or desirable" actions to move things along, "to have the S-4 Registration Statement declared effective . . . as promptly as practicable," or to "consider in good faith all comments of [BitGo] and its counsel in connection" with "the S-4 Registration Statement." A208 §9.01(a); A217 §9.07(a). When the SEC posed "new questions about how to account for digital lending assets" (A60 ¶88), the Amended Agreement required Galaxy to exercise its discretion to resolve those

issues expeditiously and move towards closing. The Complaint alleges that Galaxy knowingly did the opposite. A60-62 ¶¶89–93.

Making matters worse, Galaxy *knew* that Crowe included the "Restriction on Use" legend precisely *because* of the regulatory uncertainty regarding the reporting of digital asset lending—uncertainty that continued to linger due to Galaxy's refusal to seek pre-clearance from the SEC. In the cover note to its July 31, 2022 financial statements, and again on August 1, 2022, BitGo explained that it would provide Crowe's consent to include BitGo's financial statements in the S-4, "as promptly as practicable after the SEC clarifies its views on accounting for digital asset lending." A732-34. At the same time, BitGo criticized Galaxy's continued refusal to resolve the digital asset lending issue directly with the SEC, observing that "[t]he AICPA efforts to date ha[d] been cumbersome and slow-moving" and had yielded no guidance from the SEC. A734. In sum, even assuming the "Restriction on Use" legend violated the requirements for Company 2021 Audited Financial Statements, Galaxy contributed to that violation by breaching its own obligations. Accordingly, as a matter of law, Galaxy could not use that violation as the basis for its own termination.

CONCLUSION

The judgment should be reversed.

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