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Case Number 219,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This case is straightforward. When Galaxy Digital Holdings Ltd. and affiliated entities (collectively, "Galaxy") and BitGo Holdings, Inc. ("BitGo") entered into an amended merger agreement in March 2022 governing Galaxy's acquisition of BitGo (the "Amended Agreement"), the parties agreed that Galaxy could terminate that Amended Agreement without penalty if BitGo did not deliver financial statements that met specific contractual requirements by specific deadlines. BitGo failed to deliver contractually compliant financial statements by the April or July 2022 deadlines in the Amended Agreement. This triggered Galaxy's right to terminate the Amended Agreement, a right it exercised in August 2022. Further, Galaxy played no role in BitGo's inability to meet its contractual obligations. BitGo does not like the result arising from its failures to meet its contractual obligations, but that result is the simple consequence of the bargain BitGo struck.

BitGo filed its initial complaint on September 12, 2022 and an amended complaint on November 22, 2022 in response to Galaxy's initial motion to dismiss. The amended complaint asserted claims for wrongful repudiation, breach of two provisions of the Amended Agreement, and breach of the implied covenant of good faith and fair dealing. Galaxy moved to dismiss the amended complaint, and the Court of Chancery held a hearing on that motion on June 9, 2023, following the submission of briefing by the parties. At the conclusion of that hearing, the Court

of Chancery issued a bench ruling ("Ruling" or "Tr.") dismissing BitGo's amended complaint in its entirety.[1]

As the Court of Chancery explained, BitGo's first claim failed because Galaxy did not repudiate the Amended Agreement. Instead, Galaxy exercised a valid termination right after BitGo failed to deliver contractually compliant financial statements in either April or July 2022. As the court held, the April version of BitGo's financial statements failed to meet the contractual definition of "Company 2021 Audited Financial Statements" because they were not prepared in accordance with Staff Accounting Bulletin No. 121 ("SAB 121") issued by the Securities and Exchange Commission. The July version of BitGo's financial statements separately failed to satisfy that contractual definition because of the "restriction on use" that appeared in the auditor's report included with those financial statements. In the Court of Chancery's words, the Amended Agreement required BitGo to deliver "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." Tr. 85:3-6. But what BitGo delivered could *not* be filed with the SEC

[1] The Ruling was attached as Exhibit A to BitGo's opening brief.

because it violated "clear guidance from the SEC about something that is absolutely not permitted." Tr. 85:7-8.

The Court of Chancery also rejected BitGo's claim that Galaxy's alleged breaches of the Amended Agreement prevented Galaxy from exercising its termination right. As the lower court succinctly explained, BitGo's failure was of its own making: Everything BitGo claims Galaxy did or did not do was "separate and independent from the inclusion of the use restriction in the financial statements, which gives r[ise] to a termination right of it[s] own." Tr. 89:12-15.

Finally, the Court of Chancery held that the amended complaint failed to state any claim for breach of the implied covenant of good faith and fair dealing. Tr. 90:1-91:15. BitGo has not appealed this aspect of the Ruling.

BitGo filed its notice of appeal on June 16, 2023 and its opening brief on August 4, 2023. This is Galaxy's answering brief.

SUMMARY OF ARGUMENT

1. *Denied*. The Court of Chancery correctly held that BitGo failed to deliver contractually compliant financial statements in April 2022 because those financial statements had a fatal defect—they were not prepared in accordance with SAB 121, which contained SEC accounting guidance applicable to companies like BitGo that operate in the digital asset custody business. The plain terms of the Amended Agreement required BitGo to deliver "Company 2021 Audited Financial Statements" by April 30, 2022 to avoid an automatic extension of the December 31, 2022 End Date. Those financial statements had to be "in a form that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a non-reporting company and audited in accordance with PCAOB auditing standards." A100-01 § 1.01. The parties expressly understood—and stated as much in the Amended Agreement—that these financial statements had to satisfy this specific definition because Galaxy had to include BitGo's financial statements in a registration statement Galaxy was contractually obligated to file with the SEC as part of the merger.

The Court of Chancery correctly held as a matter of law that BitGo's failure to apply SAB 121 meant that BitGo had not satisfied the plain language of the defined term "Company 2021 Audited Financial Statements." That holding is supported by the express language of SAB 121 and by facts alleged in or

incorporated by reference into the amended complaint, including (i) BitGo's acknowledgement that SAB 121 had to be—but was not—applied to the financial statements, and (ii) BitGo's application of SAB 121 to a subsequent version of its financial statements.

2. *Denied*. The Court of Chancery correctly held that the July version of BitGo's financial statements failed to satisfy the contractual definition of "Company 2021 Audited Financial Statements" because they contained a "restriction on use" that expressly prohibited anybody other than Galaxy and BitGo from relying on them. This restriction on use, which never appeared in any prior financial statements delivered by BitGo, meant that Galaxy's investors—the audience for the registration statement—could not rely on the financial statements. As the lower court observed, the July version of the financial statements could not be filed with the SEC as part of a registration statement for an offering of equity securities given the SEC's longstanding prohibition against including restricted-use auditor reports in such filings.

In reaching its conclusions, the Court of Chancery properly rejected BitGo's argument that the restriction on use was a mere reflection of the fact that BitGo's auditors would have to separately consent to the inclusion of the financial statements and its auditor report in Galaxy's registration statement prior to its submission to the SEC. Among other things, the court below observed that the amended complaint

lacked any allegations supporting BitGo's argument. It further explained that the financial statements would have had to be modified before they were filed with the SEC—"[w]hat is necessary to render the financial statements compliant is the additional and separate step of their reissuance without the use restriction" (Tr. 87:9-12)—further demonstrating that what was delivered by BitGo could not be used by Galaxy. BitGo does not challenge this conclusion. Rather, BitGo concedes that BitGo's auditors would have had to remove the restriction on use before Galaxy could file the financial statements with the SEC. Those concessions plainly demonstrate the shortcomings in the July financial statements.

3. *Denied*. The Court of Chancery correctly held that Galaxy was entitled to terminate the Amended Agreement notwithstanding BitGo's allegations that Galaxy failed to use commercially reasonable efforts. BitGo's own auditors were capable of exercising their professional judgment regarding the correct application of GAAP to BitGo's financial statements but chose not to do so. Any alleged breach by Galaxy (and to be clear there was none) was separate and independent from BitGo's inclusion of a restriction on use in the July financial statements, which triggered Galaxy's clean termination right. As the lower court further explained, "because of the valid termination pursuant to Section 13.[0]1 for the noncompliant financial statements based on the use restriction," it was not reasonably conceivable

that any claimed breach "could lead to some type of causally resulting damages." Tr. 89:2-7.

STATEMENT OF FACTS

A. THE ORIGINAL MERGER AGREEMENT

On May 5, 2021, Galaxy agreed to acquire BitGo, a privately held Delaware corporation that provides digital asset financial services, for 33.8 million shares of stock and $265 million in cash pursuant to the terms and conditions set forth in an Agreement and Plan of Merger (the "Original Agreement"). A26, A33, A39-40 ¶¶ 3, 23, 41-42. One condition to the merger was that Galaxy, which provides financial and investment management services in the digital asset, cryptocurrency, and blockchain technology sectors, would redomicile as a Delaware corporation and list its shares on Nasdaq. A34, A38 ¶¶ 26, 38. This reorganization required Galaxy to file a registration statement for its newly issued shares and have the registration statement declared effective by the SEC. A38-39 ¶ 40. Galaxy bargained for the right, subject to consultation with BitGo, to control all interactions with the SEC and other regulators regarding the registration statement and any other approvals required to consummate the merger. *Id.*; A377 § 9.01(b).

Both parties understood that Galaxy's registration statement would include BitGo's financial statements. A40 ¶ 44; *see also* Tr. 84:21-85:6. Section 9.07(c) of the Original Agreement obligated BitGo to furnish to Galaxy for inclusion in the registration statement what the parties defined as the "Company 2020 Audited Financial Statements." A384 § 9.07(c). Separately, BitGo was required to deliver

consents from its auditors to use those financial statements and the related auditor's report, and to be named as experts, in the registration statement. *Id.*

The Original Agreement's "End Date" was March 31, 2022, and each party had the right to terminate the contract under certain conditions, including if the transaction had not closed by that date. A43 ¶ 48; A406 § 13.01(b).

In September 2021, BitGo delivered its 2020 audited financial statements to Galaxy for inclusion in the registration statement. A66 ¶ 105. The auditor's report accompanying those financial statements did not contain any restriction on use. BitGo later delivered the separately required consent from its auditor to use those financial statements in a submission with the SEC. A43 ¶ 49. Galaxy and BitGo submitted the registration statement and responded to multiple rounds of SEC comments and revisions. A43-44 ¶¶ 50-51.

Galaxy filed the registration statement on January 28, 2022. A44 ¶ 52; A481-669. The registration statement contained BitGo's 2020 audited financial statements, which included an auditor's report dated September 7, 2021 (A609), and a separate auditor's consent, dated January 28, 2022 (A669). The SEC responded with additional comments, making clear that the transaction could not close by the March 31, 2022 End Date. A45 ¶¶ 53-54. Following negotiations, on March 30, 2022, the parties entered into the Amended Agreement. A46-47 ¶ 57.

B. THE AMENDED MERGER AGREEMENT

1. The Key Terms

The Amended Agreement required BitGo to furnish to Galaxy for inclusion in the registration statement the "Company 2021 Audited Financial Statements" (including an auditor's report) and consents from BitGo's auditors "to use such financial statements and to be named as 'experts.'" A218 § 9.07(c); *see also* Tr. 77:9-16, 84:21-85:6. The Amended Agreement set a new End Date of December 31, 2022. A46-47 ¶ 57. If BitGo did not deliver the "Company 2021 Audited Financial Statements" by April 30, 2022, the End Date would automatically extend by three months—to March 31, 2023. A47 ¶ 58; A241-42 § 13.01(b); Tr. 81:2-9.

The Amended Agreement defined "Company 2021 Audited Financial Statements" as:

> the audited financial statements of [BitGo] and its Subsidiaries as of and for the year ended December 31, 2021, . . . prepared in accordance with GAAP and in a form that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a non-reporting company and audited in accordance with PCAOB auditing standards by a PCAOB-qualified accounting firm . . . together with auditor's reports from such independent accounting firm (which reports shall include an unqualified opinion that such financial statements present fairly, in all material respects, the consolidated financial position of [BitGo] and its Subsidiaries as of December 31, 2021 and the results of their operations and their cash flows for the year then ended in accordance with GAAP).

A47-48 ¶ 59; A100-01 § 1.01; Tr. 77:9-16. Like the Original Agreement, the Amended Agreement required BitGo to deliver unaudited quarterly financial statements for each fiscal quarter ending after December 31, 2020 "no later than 30 days following the end of each quarterly period." A218 § 9.07(c). The parties expressly "acknowledge[d] and agree[d]" that the "Company 2021 Audited Financial Statements" and the unaudited quarterly financial statements were required to be included in Galaxy's registration statement "under the Securities Act and the rules and regulations promulgated thereunder in order for any such registration statement to be declared effective by the SEC." *Id*.; *see also* Tr. 84:21-85:6.

The Amended Agreement authorized Galaxy to control all regulatory interactions related to the transaction. A209-10 § 9.01(b). Like the Original Agreement, the Amended Agreement set forth specific termination rights, including the right of either party to terminate if the transaction did not close by the new End Date. A241-42 § 13.01(b). The parties added a $100 million termination fee payable by Galaxy under certain circumstances. A46 ¶ 55; A243-44 § 13.03. But the Amended Agreement also provided Galaxy with an additional termination right—if BitGo did not deliver "Company 2021 Audited Financial Statements" by July 31, 2022, Galaxy would have a 15-day window in which it could terminate the Amended Agreement without paying any termination fee. A242 § 13.01(h). In addition, the

parties agreed that the termination fee would not be payable if BitGo failed to deliver any unaudited quarterly financial statements by the specified deadlines. A243-44 § 13.03.

2. The SEC Announces New Cryptocurrency Accounting Guidance.

The day after the parties signed the Amended Agreement, the SEC published SAB 121, announcing new accounting guidance for "entities that have obligations to safeguard crypto-assets held for their platform users." A51 ¶ 66; A806; *see also* Tr. 77:17-20. SAB 121 differentiated between (i) ordinary-course SEC-reporting companies, which had to apply the guidance "no later than its financial statements covering the first interim or annual period ending after June 15, 2022, with retrospective application as of the beginning of the fiscal year to which the interim or annual period relates," and (ii) "all other entities" falling within SAB 121's scope (like BitGo), "including but not limited to entities conducting an initial registration of securities under the Securities Act or Exchange Act" and "private operating companies entering into a business combination transaction with a shell company," which had to apply the guidance "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 beginning of the most recent annual period ending before June 15, 2022 . . . ." A808; *see also* Tr. 79:11-18.

C. BITGO DOES NOT DELIVER CONTRACTUALLY COMPLIANT FINANCIAL STATEMENTS AND GALAXY VALIDLY TERMINATES THE AMENDED AGREEMENT.

On April 29, 2022, BitGo delivered 2021 financial statements that did not apply SAB 121's accounting guidance. A50 ¶ 63; Tr. 81:2-6. Note 2 to the financial statements delivered by BitGo acknowledged the SEC staff's expectation that BitGo would apply SAB 121 to its financial statements and conceded that "SAB 121 will likely require [BitGo] to record an obligation to the balance sheet relating to its obligation to safeguard any crypto-assets." A688; *see also* Tr. 80:15-21. But rather than apply SAB 121's guidance, BitGo merely noted that "[t]he Company is currently evaluating the effect this new guidance will have related to obligations to safeguard crypto-assets, corresponding indemnification asset and its consolidated financial statements." A688.

Galaxy responded to BitGo the next day, providing notice that BitGo's financial statements did not "give effect to SAB 121, despite the company's acknowledgement in Note 2 that application of SAB 121 is required," and therefore did not constitute "Company 2021 Audited Financial Statements" as defined in the Amended Agreement. A699; A52 ¶ 69. Galaxy requested that BitGo deliver

financial statements "in proper form as soon as possible" and make any other changes necessary to comply with the contractual definition. A699.[2]

As a result of BitGo's failure to deliver "Company 2021 Audited Financial Statements" by April 30, 2022, the End Date automatically extended to March 31, 2023, and BitGo had an additional 90 days (until July 31, 2022) to deliver contractually compliant financial statements or else trigger Galaxy's termination right. A242 § 13.01(h); Tr. 81:2-9. In the evening of July 31, BitGo sent Galaxy a new version of its 2021 financial statements. A65 ¶ 100; A702-28. This version said that BitGo had adopted SAB 121 "[e]ffective January 1, 2021" and conceded that "SAB 121 requires [BitGo] to recognize a liability for its obligation to safeguard digital intangible assets." A713; *see also* Tr. 80:22-81:1. BitGo's consolidated balance sheet changed dramatically, with its total liabilities increasing by more than 300% and its total assets increasing by more than 600% to reflect more than $49 billion of customer digital assets. *Compare* A676, *with* A706.

Although BitGo fixed one fatal defect in its financial statements by applying SAB 121, it introduced another. The auditor's report accompanying the July version

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[2] BitGo separately failed to deliver quarterly unaudited financial statements for the period ended March 31, 2022, which meant that Galaxy was no longer subject to the $100 million termination fee. A244 § 13.03(b)(v).

added a new paragraph, titled "***Restriction on Use***," which stated that the "report [was] intended solely for the information and use of BitGo Holdings, Inc. and Galaxy Digital Holdings Ltd. and [was] not intended to be and *should not be used by anyone* other than these specified parties." A705 (second emphasis added); *see also* Tr. 82:7-12. Nothing like this had been included in any of the reports previously provided by BitGo's auditors (*compare* A705, *with* A675, *and* A609), and it made the financial statements incapable of being included in a registration statement for an offering of equity securities. *See* Tr. 85:7-14.

Galaxy promptly notified BitGo that the July financial statements did not satisfy the Amended Agreement's requirements due to the restriction on use. A65-66 ¶¶ 102, 115-16; Tr. 85:15-19. Galaxy explained that the restriction on use meant that the financial statements "were not 'in a form that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a non-reporting company.'" A730-31; *see also* Tr. 84:21-85:14. Galaxy also explained that the restriction on use contravened Section 9.07(c), where the parties acknowledged that the financial statements were required to be included in Galaxy's registration statement in order for the registration statement to be declared effective by the SEC. A730-31; Tr. 87:1-12.

BitGo's failure to deliver contractually compliant "Company 2021 Audited Financial Statements" by July 31, 2022 triggered Galaxy's right to terminate the

Amended Agreement. A242 § 13.01(h); Tr. 75:18-76:5, 87:13-18, 90:14-19. Galaxy exercised that right on August 12, 2022. A71 ¶ 119; A419-20. BitGo never attempted to remove or otherwise address the restriction on use between August 2 (when Galaxy notified BitGo of the defect) and August 12 (when Galaxy terminated the Amended Agreement).

D. BITGO FILES THIS ACTION

BitGo filed its initial complaint on September 12, 2022. In response to Galaxy's motion to dismiss and opening brief in support thereof, BitGo filed the amended complaint on November 22, 2022, asserting claims of wrongful repudiation, breach of contract, and breach of the implied covenant of good faith and fair dealing. Galaxy moved to dismiss the amended complaint. Following briefing and a hearing on Galaxy's motion on June 9, 2023, the Court of Chancery issued its Ruling dismissing the amended complaint in its entirety with prejudice, and it entered an Order and Final Judgment implementing its decision later that day.[3]

[3] The Order and Final Judgment was attached as Exhibit B to BitGo's opening brief.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT BITGO DID NOT DELIVER CONTRACTUALLY COMPLIANT FINANCIAL STATEMENTS BY APRIL 30, 2022.

A. Question Presented

Did the Court of Chancery correctly conclude that the financial statements BitGo delivered in April 2022 were not "Company 2021 Audited Financial Statements" because they did not apply SAB 121?

B. Scope of Review

The Court of Chancery's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6) is subject to *de novo* review. *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013).

C. Merits of the Argument

The Court of Chancery correctly held that BitGo did not deliver financial statements on April 29, 2022 that satisfied the Amended Agreement's definition of "Company 2021 Audited Financial Statements," because those financial statements did not apply SAB 121. BitGo's arguments to the contrary are unavailing and provide no basis to reverse the Ruling.

1. The Definition of "Company 2021 Audited Financial Statements" Required the Application of SAB 121.

The Amended Agreement required BitGo to deliver audited financial statements for 2021 that were "prepared in accordance with GAAP and in a form

that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a non-reporting company." A100-01 § 1.01; *see also* Tr. 77:9-16. As the parties expressly acknowledged and agreed, these "Company 2021 Audited Financial Statements" were "required to be included in the [registration statement] under the Securities Act and the rules and regulations promulgated thereunder in order for any such registration statement to be declared effective by the SEC." A218 § 9.07(c).

In other words, the financial statements had to be in a form that could actually be filed with—and accepted by—the SEC as part of Galaxy's forthcoming registration statement. As the Court of Chancery explained:

> What is the definition of Company 2021 Audited Financial Statements talking about when it talks about them being in a form that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a nonreporting company? It 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.

Tr. 84:21-85:6 (emphasis added).

The plain language of the Amended Agreement required the application of SAB 121 to BitGo's financial statements. Rule 3-01 of Regulation S-X requires that "[t]here shall be filed, for the registrant and its subsidiaries consolidated, audited balance sheets as of the end of each of the two most recent fiscal years," and Rule 3-05 of Regulation S-X (titled "Financial statements of businesses acquired or to be

acquired") imposes the requirements of Rule 3-01 on entities, such as BitGo, being acquired. 17 C.F.R. §§ 210.3-01(a), 210.3-05(b) (2018). SAB 121, in turn, provides accounting guidance to entities that "have obligations to safeguard crypto-assets held for their platform users," including those "entities that have submitted or filed a registration statement under the Securities Act of 1933" and "private operating companies whose financial statements are included in filings with the SEC in connection with a business combination." A805-06. SAB 121 reflects the SEC staff's expectation that an entity that meets these criteria, such as BitGo, will "present a liability on its balance sheet to reflect its obligation to safeguard the crypto-assets held for its platform users" and "recognize an asset at the same time that it recognizes the safeguarding liability." A807. SAB 121 thus provides guidance regarding the contents of a balance sheet required by Regulation S-X to be filed with the SEC in a registration statement.

The Court of Chancery correctly recognized that BitGo's financial statements would be in a form that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a non-reporting company—and therefore could actually be used for an offering of equity securities pursuant to a registration statement—*only* if they applied SAB 121. The lower court explained that SAB 121:

> is an interpretation by the SEC staff about what financial statements have to contain to properly account for crypto

> assets. It specifically refers in the Staff Accounting Bulletin to the staff having expectations that entities conducting initial registrations of securities under the Securities Act or the Exchange Act will comply with this Staff Accounting Bulletin. . . . [I]t's calling on companies to apply this guidance, including companies that are conducting [an] initial registration of securities.

Tr. 77:17-78:13.

There is no real dispute that BitGo had to apply SAB 121 in April. Indeed, BitGo acknowledged SAB 121's required application, stating in its April financial statements that SAB 121 "will likely require [BitGo] to record an obligation to the balance sheet relating to its obligation to safeguard any crypto-assets held for their platform users and a corresponding indemnification asset held under custody." A688. But rather than apply SAB 121, BitGo explained that it was merely "evaluating" the effect of SAB 121's guidance, including with respect to "its consolidated financial statements." A688. In July, BitGo again concluded that SAB 121 "requires" the recognition of liabilities and assets relating to crypto holdings on its balance sheet and stated that BitGo had adopted SAB 121 "[e]ffective January 1, 2021." A713-17; *see also* Tr. 80:15-81:1. The effect was dramatic; billions of dollars of additional assets and liabilities appeared on BitGo's July financial statements as a result of SAB 121's application. *Compare* A676, *with* A706.

BitGo now makes an about-face and flails for *any* reason as to why SAB 121 did not apply, notwithstanding the plain language of the Amended Agreement,

Regulation S-X, and SAB 121, and BitGo's own contrary contemporaneous views incorporated by reference into the amended complaint. Each of the four arguments advanced by BitGo fails.

First, BitGo isolates a snippet from the Ruling concerning the term "Applicable Law." Br. 25-27. But the lower court's comment was entirely appropriate—and, regardless, was not the basis of its decision. As the court below explained, "I don't think that provision is directly applicable. The definition of 'Applicable Law' is just that, a defined term, 'Applicable Law.'" Tr. 79:21-24. The court noted, however, that the term served as a "signal" about what the parties intended compliance with laws to mean. Tr. 80:9-11. That observation merely followed this Court's repeated instructions to read contracts as a whole to give effect to all of their provisions. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. Shell Oil Co*., 498 A.2d 1108, 1113 (Del. 1985); *see also Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913-14 (Del. 2017) ("In giving sensible life to a real-world contract . . . the specific provisions of the contract" must be read "in light of the entire contract."); *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014) ("When interpreting a contract, this Court 'will give priority to the parties' intentions as reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions." (quoting *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012))).

In any event, when the Court of Chancery briefly mentioned the term "Applicable Law," it had already concluded that the definition of "Company 2021 Audited Financial Statements" required the application of SAB 121. Moreover, the court below commented on the term "Applicable Law" in the course of *rejecting* an argument advanced by Galaxy that the court found relied on that definition. In short, the comments BitGo references played no role in the Court of Chancery's analysis of the applicability of SAB 121.

Second, BitGo contends that SAB 121 was not an interpretation of Regulation S-X because it "does not even mention Regulation S-X." Br. 27. This ignores that SAB 121 states that it provides SEC staff "interpretations" applicable to the financial statements of companies charged with safeguarding crypto assets (like BitGo) that will be included in filings with the SEC—including registration statements like the one Galaxy was contractually obligated to file. A805. BitGo disregards that the interpretations in SAB 121 necessarily apply to Regulation S-X because Regulation S-X governs the form, content, and requirements of financial statements filed with registration statements. *See* 17 C.F.R. Part 210.[4]

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[4] Industry professionals, including BitGo's auditors at Crowe and Deloitte & Touche, readily understand that SAB 121 interprets and applies to Regulation S-X. *See* Sean C. Prince & Nicholas G. Topoll, *SAB 121 frequently asked questions*, Crowe (June 24, 2022), *available at* https://www.crowe.com/insights/sab-121-frequently-asked-questions ("7. Does SAB 121 apply to financial statements

Third, BitGo asserts that SAB 121 does not apply because "Regulation S-X does not provide for the promulgation of Staff Accounting Bulletins." Br. 28. This is meritless. Staff accounting bulletins are codified at 17 C.F.R. Part 211 (titled "Interpretations Relating to Financial Reporting Matters"). Courts accept these bulletins as "interpretations and practices followed by the SEC's Division of Corporation Finance and the Office of the Chief Accountant in administering disclosure requirements of federal securities law." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000).

BitGo suggests that, because Regulation S-X expressly refers to "Financial Reporting Releases" codified at Subpart A of 17 C.F.R. Part 211 but not staff

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furnished under Rule 3-05 and Rule 3-09 of Regulation S-X? Yes. While SAB 121 is silent on whether SAB 121 should be applied to financial statements that are furnished under Rule 3-05 and Rule 3-09 of Regulation S-X, we understand from conversations with the SEC staff that SAB 121 would apply. This conclusion is consistent with the historical application of SABs to such financial statements."); Amy Park et al., *Financial Reporting Alert 22-2: SEC Issues Staff Accounting Bulletin on Accounting for Obligations to Safeguard Crypto-Assets*, Deloitte (July 28, 2022), *available at* https://dart.deloitte.com/USDART/pdf/995bc949-b5da-11ec-b3d5-57d777a5bf71 ("Further, SAB 121 applies when an entity's financial statements are filed with the SEC in accordance with SEC Regulation S-X, Rules 3-05 and 3-09 (citing Question 9 in Appendix B of the AICPA Practice Aid); *see* AICPA Practice Aid, *Accounting for and auditing of digital assets*, Appendix B ("Question 9: "When an entity's financial statements are filed with the SEC in accordance with Rule 3-09 and Rule 3-05 of Regulation S-X, are those financial statements subject to SAB No. 121? Response 9: Yes.").

accounting bulletins codified at Subpart B, that somehow means that the SEC staff lacked authority to issue interpretive guidance relating to Regulation S-X. In BitGo's view, the SEC was authorized to promulgate binding guidance under Regulation S-X through Financial Reporting Releases but not interpretive guidance of its staff through staff accounting bulletins. But BitGo's approach to the interpretation of federal securities rules and regulations finds no support anywhere and disregards nearly a half-century of interpretive guidance issued by the SEC staff under Part 211. *See* 17 C.F.R. 211 Subpart B (cataloging staff accounting bulletins dating to 1980).

Fourth, BitGo contends that SAB 121 is not an interpretation promulgated under Regulation S-X because it "was not 'promulgated' at all." Br. 28. BitGo's argument turns on its view that, in order for SAB 121 to have been "promulgated," it must have the force of law. This argument finds no support in the Amended Agreement. Nor would such an interpretation be consistent with how the SEC views interpretive guidance issued by its staff. *See* SEC Release Nos. 33-8957; 34-58597, at 47 n.146 (Sept. 19, 2008), *available at* https://www.sec.gov/files/rules/final/2008/33-8957.pdf ("Where we refer to 'interpretive guidance,' we mean oral positions taken by the staff or *written*

interpretations ***promulgated*** *by the Division of Corporation Finance*" (emphasis added)).[5]

In summary, BitGo's arguments boil down to an assertion that it could satisfy the definition of "Company 2021 Audited Financial Statements" by delivering financial statements in April that could not actually be included in a registration statement filed with the SEC for an offering of equity securities—the very purpose for the financial statement delivery obligation in the first place. That interpretation of "Company 2021 Audited Financial Statements" is implausible on its face, gives no real-world life to the parties' commercial agreement, and is legally incorrect, as the Court of Chancery correctly held. This Court should reach the same conclusion.

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[5] BitGo contends that, under its plain meaning in the context of administrative agency actions, "promulgated" must be interpreted solely as referring to agency actions that have undergone formal rulemaking and therefore are binding. Br. 29. But the plain meaning of "promulgate" is more expansive than the definition concerning binding agency action advocated by BitGo here. *See, e.g.*, Black's Law Dictionary (11th ed. 2019) (defining "promulgate" to mean "[t]o declare or announce publicly; to proclaim"). Indeed, the cases on which BitGo relies—inapposite in all substantive respects—deviate from the "narrow interpretation" of "promulgate" that BitGo contends should be read into the Amended Agreement. *See, e.g.*, *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 862-63 (8th Cir. 2013) (rejecting the "narrow" interpretation of "promulgate" advanced here in favor of a definition that ensures broader judicial review of agency actions).

2. No Questions of Fact Exist Concerning the Timing of SAB 121's Application.

BitGo next challenges the Court of Chancery's ruling on the ground that, even if SAB 121 generally fell within the requirements of the term "Company 2021 Audited Financial Statements," questions of fact precluded the lower court from concluding that SAB 121 had to be applied to the financial statements that BitGo delivered in April 2022. Br. 31-35. BitGo's arguments are baseless.

SAB 121 sets forth in plain terms the timing requirements for the application of its accounting guidance to financial statements to be included in SEC filings. For entities falling within SAB 121's scope (*i.e.*, entities responsible for safeguarding crypto assets) with periodic and current report filing obligations, the guidance had to be applied by the issuer "no later than its financial statements covering the first interim or annual period ending after June 15, 2022, with retrospective application as of the beginning of the fiscal year to which the interim or annual period relates." A808.[6] For other entities covered by SAB 121, including entities like BitGo whose financial statements would be included in a registration statement filed with the SEC

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[6] BitGo identifies a Form 10-Q filed by The Goldman Sachs Group, Inc. on August 4, 2022 as an example of an issuer that "retrospectively applied SAB 121 as of FY2021 for the first time in their future filings with the SEC, long after SAB 121 was released." Br. 32-33. It is not clear what point BitGo is trying to make with this reference, as the Form 10-Q there complied with the timing requirements of SAB 121.

for an initial registration of securities and "private operating companies entering into a business combination transaction with a shell company," SAB 121's guidance had to be applied "beginning with the[] next submission or filing with the SEC (e.g., the initial or next amendment of the registration statement, proxy statement, or Form 1-A), with retrospective application, at a minimum, as of the beginning of the most recent annual period ending before June 15, 2022." A808; Tr. 78:19-79:2.

The Court of Chancery had no trouble interpreting this guidance. After summarizing the timing discussed above, the court below explained:

> So what this means is that this Staff Accounting Bulletin would apply to the S-1 that was contemplated by the contract, and when that happened, it would apply retrospectively, at a minimum, as of the beginning of the most recent annual period ending before June 15, 2022. For BitGo, what was that most recent annual period ending before June 15, 2022? That was the annual period ending December 31, 2021.
>
> Therefore, under the plain language of SAB 121, BitGo had to comply in its next filing with the SEC, i.e., the contemplated S-1, and that compliance obligation was retrospective back to the financial statements for the year ending December 31, 2021, namely, those company financial statements that were required to be delivered by April 30, 2022. I think that's plain as a matter of SAB 121.

Tr. 79:3-18.

Faced with the plain language of SAB 121 and the lower court's cogent summary of its timing requirements, BitGo attempts to obfuscate. BitGo contends that the Court of Chancery misunderstood "esoteric accounting principles" in SAB

121, a misunderstanding that BitGo asserts led the court to require the application of SAB 121 "*contemporaneously*, not retrospectively." Br. 32. Again, however, BitGo ignores that it "self-acknowledge[d]" in the April version of the financial statements "that there is a need to comply with SAB 121," and that it "acknowledged its own adoption of SAB 121 as an accounting policy effective as of January 1, 2021" in its July financial statements. Tr. 80:20-81:1; *see also* A713. These "esoteric accounting principles" did not stymie BitGo's own contemporaneous analysis as to the timing requirements of SAB 121.[7]

BitGo's argument also makes no substantive sense. BitGo had an obligation under the Amended Agreement to deliver "Company 2021 Audited Financial Statements" in a form that complied with the requirements of Regulation S-X and that could be included in a registration statement for an offering of equity securities. The purpose of this requirement, as explained above, was so Galaxy could take the financial statements provided by BitGo and include them in Galaxy's forthcoming

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[7] BitGo argues that "the Court of Chancery erred by effectively rejecting Crowe's understanding of the applicable accounting standards as a matter of law." Br. 34. BitGo ignores that the lower court *credited* Crowe's (and BitGo's) contemporaneous acknowledgements of the application and timing requirements of SAB 121. Moreover, BitGo is incorrect (Br. 35) that the Court of Chancery could not resolve purely legal questions involving accounting at the pleading stage. *See, e.g.*, *Golden Rule Fin. Corp. v. S'holder Representative Servs. LLC*, 2021 WL 305741, at *6 (Del. Ch. Jan. 29, 2021).

amendment to its registration statement. That amendment was the "next submission or filing" contemplated by SAB 121. A808. In order to be compliant with SAB 121 and therefore capable of being included in Galaxy's registration statement, BitGo had to apply SAB 121 to the April financial statements, and had to apply it going back to the beginning of the most recent annual period ending prior to June 15, 2022—that is, for 2021. No amount of post-hoc litigation-driven references to "retrospective," "contemporaneous," and "future" accounting requirements can mask this straightforward analysis. Nor did the Court of Chancery need expert testimony to understand the plain language of SAB 121 and its application to the "Company 2021 Audited Financial Statements" required by the Amended Agreement.

BitGo's criticism of the Court of Chancery's ruling based on the "text and structure of the Amended Agreement" fares no better than its other arguments. Br. 33. Under Section 13.01(b) of the Amended Agreement, the End Date automatically extended if either (i) BitGo failed to deliver "Company 2021 Audited Financial Statements" by April 30, 2022 or (ii) BitGo's auditors withdrew any audit opinion or BitGo determined that it had to restate any "Required Financial Statements" that had previously been delivered. A241-42 § 13.01(b). In BitGo's view, Section 13.01(b), and the similar provision in the termination right contained at Section 13.01(h), reflects a dispositive distinction between a "*retrospective application* and

a prior-period *restatement*." Br. 33. BitGo would fail to meet its contractual obligations "if the financial statements required a *restatement*, but not if those financial statements required *retrospective* application of new accounting guidance." *Id*. at 32-33. But even if that is correct, the argument misses the mark because it addresses scenarios that arise *after* April 30, 2022 (or July 31, 2022, in the case of Section 13.01(h)) and *after* BitGo has already delivered *contractually compliant* financial statements. Here, BitGo never delivered "Company 2021 Audited Financial Statements" by April 30, 2022, so any separate treatment that might arise with respect to contractually compliant financial statements *after* April 30, 2022 is irrelevant.

Each of BitGo's arguments about the requisite timing for the application of SAB 121 contravenes the very purpose of the financial statement delivery obligation reflected in the Amended Agreement, which was to give Galaxy appropriate assurances, meaningfully in advance of any SEC filing, that BitGo had delivered financial statements that could be included in a registration statement that would be filed with, reviewed, and declared effective by the SEC. This assurance was critically important to Galaxy at the time the parties negotiated the Amended

Agreement, because Galaxy otherwise had agreed to pay a $100 million termination fee under certain circumstances if the transaction failed to close by the End Date.[8]

BitGo has advanced a litany of arguments throughout this litigation that disregard this fundamental premise and seek to avoid the clear conclusion that the version of the financial statements it delivered to Galaxy in April 2022 did not constitute "Company 2021 Audited Financial Statements." None of the arguments advanced on appeal provides any basis to reverse the Court of Chancery's ruling. Accordingly, this aspect of the Court of Chancery's decision should be affirmed.

[8] As noted above, the termination fee fell away when BitGo separately failed to deliver unaudited quarterly financial statements for the quarter ending March 30, 2022 by April 30, 2022.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT BITGO DID NOT DELIVER CONTRACTUALLY COMPLIANT FINANCIAL STATEMENTS BY JULY 31, 2022.

A. Question Presented

Did the Court of Chancery correctly conclude that the financial statements BitGo delivered on July 31, 2022 failed to satisfy the definition of "Company 2021 Audited Financial Statements" because they contained a restriction on use that prevented them from complying with the requirements of Regulation S-X or being included in a registration statement filed with the SEC in connection with a public offering of equity securities?

B. Scope of Review

The Court of Chancery's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6) is subject to *de novo* review. *Allen*, 72 A.3d 93 at 100.

C. Merits of the Argument

The Court of Chancery correctly held that the July version of BitGo's financial statements were not "Company 2021 Audited Financial Statements" because the auditor's report included therein contained a restriction on use legend that prevented Galaxy from including the financial statements in a registration statement to be filed with the SEC in connection with an offering of equity securities. BitGo now argues that the restriction on use was merely an acknowledgement that BitGo's auditors would later have to consent to the inclusion of the financial statements with the

registration statement when it was filed with the SEC. But, as the Court of Chancery recognized, BitGo conflates two different legal concepts.

1. The "Restriction on Use" Was a Fatal Contractual Defect.

The revised set of financial statements BitGo sent to Galaxy during the evening hours of July 31, 2022 applied SAB 121 (giving lie to BitGo's argument that SAB 121 did not need to be applied) but introduced a different fatal flaw. The auditor's report that accompanied the financial statements (a requirement under the definition of "Company 2021 Audited Financial Statements") contained a new provision with the header "***Restriction on Use***," which read: "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.

This type of restriction had not appeared in any prior auditor's report delivered by BitGo and rendered the financial statements incapable of fulfilling their intended purpose of being filed in a registration statement for the use of Galaxy's investors. The SEC has long explained that "audit reports contained in Commission filings are intended to be general use reports rather than restricted reports, and [that the SEC staff] would not accept a filing that contained an audit opinion prepared in accordance with U.S. generally accepted audit standards (GAAS) that contained" a restricted use qualifier. A860 ("In no circumstances, however, should an audit

opinion containing restrictions . . . be included as part of, or incorporated into, . . . any [] report filed with the Commission."). As the Court of Chancery correctly observed, these instructions from the SEC are "about as clear a statement of policy on this issue as you can get." Tr. 84:10-11.

BitGo contends that "nothing in Regulation S-X prohibits a restriction on use" in an auditor's report and that the SEC's position plays no role in understanding the requirements of Regulation S-X. Br. 37. But the Amended Agreement required BitGo to deliver financial statements "in a form that complies with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on Form S-1 for a non-reporting company," because those financial statements were required to be included in Galaxy's registration statement in order for it to be declared effective by the SEC. A100-01 § 1.01. Regulation S-X requires both a balance sheet and an audit report (17 C.F.R. §§ 210.2-02, 210.3.01(a), 210.3-05(a)(1)), and a balance sheet or audit report that ignores SEC rules plainly cannot be filed with the SEC to satisfy the Regulation S-X requirement.

Financial statements that contained a restriction expressly precluding reliance by any Galaxy investors plainly did not satisfy BitGo's contractual obligations for these reasons. In the Court of Chancery's words, "[w]hen you have clear guidance from the SEC about something that is absolutely not permitted in any filing with the SEC, it is clear that a set of financial statements containing that restriction would not

comply with the requirements of Regulation S-X for an offering of equity securities pursuant to a registration statement on [F]orm S-1 for a nonreporting company." Tr. 85:7-14. None of BitGo's arguments to the contrary provides any basis to question this conclusion.[9]

2. BitGo Conflates Auditor Consent with the "Restriction on Use."

BitGo seeks to avoid the implication of the restriction on use by claiming that it was merely a reflection of the fact that BitGo's auditors separately had to provide their consent to the inclusion of the auditor's report and financial statements before Galaxy could file its registration statement with the SEC. But this "nothing to see here" argument conflates a restriction on use with the auditor's consent—a

[9] BitGo claims that "numerous companies have included the same or similar use restrictions in their SEC filings." Br. 37 n.7. Not so. In one of the two examples BitGo provided (First Trinity Financial Corporation), the issuer's financial statements were not prepared in accordance with GAAP (A1335), and, in any event, these financial statements were removed from the registration statement before the SEC declared it effective. *See* Letter from Reid A. Godbolt to David Gessert (Dec. 5, 2019), *available at* https://www.sec.gov/Archives/edgar/data/1395585/000143774919023954/filename1.htm. In the other example (Amazon), the financial statements containing the restriction on use were not required in the SEC filing. *See* A884 ("Pursuant to SEC rules, Amazon's acquisition of Zappos will not require Amazon to file financial information with the SEC on Zappos as a significant subsidiary since none of the financial criteria conditions under SEC Regulation S-X Rule 3-05 will be met at the twenty percent level.").

conflation that is belied by the text of the Amended Agreement, the statutory purpose of the auditor's consent, and the facts BitGo alleged.

The requirement that BitGo deliver annual financial statements, including an auditor's report, by specific deadlines is a contractual obligation independent from the requirement that BitGo subsequently obtain its auditor's consent to use those financial statements in any registration statement. The auditor's *report* is a definitional component of "Company 2021 Audited Financial Statements." A100-01 § 1.01. The auditor's *consent* is not mentioned in that definition, but rather, is addressed separately. A218 § 9.07(c) (providing that "[BitGo] shall as promptly as practicable furnish to [Galaxy] . . . the Company 2021 Audited Financial Statements and *prior to any filing of an amended S-4 Registration Statement or S-1 Registration Statement* . . . consents from the independent registered accounting firm to use such financial statements and reports and to be named as 'experts' in such registration statements" (emphasis added)).

The distinct treatment of the auditor's report compared to the auditor's consent is intentional, as the two items serve different purposes under the federal securities laws. The auditor's *report* includes the auditor's opinion as to whether the financial statements present fairly, in all material respects, the company's financial condition, results of operations, and cash flows in accordance with GAAP. *See, e.g.*, A674. By contrast, the "primary purpose of obtaining [auditor] *consent* . . . is to

assure that the auditor is aware of the use of its report and the context in which it is used." SEC Financial Reporting Manual § 4810.1 (2009), *available at* https://www.sec.gov/corpfin/cf-manual/topic-4 (emphasis added). That is consistent with the fact that, under Section 11 of the Securities Act of 1933, purchasers of securities may file suit, in connection with an allegedly misleading registration statement, against not only the issuer but also "every accountant . . . who has *with his consent* been named as having prepared or certified any part of the registration statement." 15 U.S.C. § 77k(a) (emphasis added). Rule 436 under the Securities Act, in turn, requires the auditor's consent to be filed as an exhibit to the registration statement in which its audit report appears, thus cementing the auditor's potential liability for errors in audited financial statements included in the registration statement. *See* 17 C.F.R. § 230.436 (2018).

BitGo's attempt to conflate these distinct requirements is belied by the fact that the auditor's reports accompanying BitGo's previously delivered financial statements had never contained any restriction on use. The auditor's report accompanying the April version of BitGo's 2021 financial statements contained no restriction on use. A675. The same is true of the auditor's report accompanying BitGo's 2020 financial statements. A609. Indeed, although that audit report was dated September 7, 2021, BitGo's then-auditor (Deloitte) did not provide its consent to be referred to in the registration statement as an "expert" until a few months later,

on January 28, 2022, the same day that the registration statement including those financial statements was filed with the SEC. A669.

BitGo tries to save its argument by contending that "a restriction on use and consent to use are two sides of the same coin." Br. 40. But BitGo's own brief contradicts this position. BitGo concedes that the restriction on use was not some administrative item, but rather a substantive restriction to prevent the filing of the financial statements with the SEC before "the SEC clarifies its views on accounting for digital asset lending." *Id.* at 38. This is precisely why the Court of Chancery rejected BitGo's attempt to conflate the two distinct issues:

> Having financial statements with a use restriction is one thing. Consent to use financial statements in a Form S-1 is another thing. If 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.
>
> The financial statements that the auditor would consent to be used under Section 9.07(c) would be noncompliant. What is necessary to render the financial statements compliant is the additional and separate step of their reissuance without the use restriction.

Tr. 86:22-87:12.

In trying to refute the Court of Chancery's reasoning, BitGo acknowledges that "once the auditor gave its consent to use the financial statements in a [registration statement] pursuant to Section 9.07(c), it *necessarily* would have to

remove the 'Restriction on Use' legend." Br. 41 (emphasis in original); *see also id.* at 21. But under the Amended Agreement, BitGo was required to deliver to Galaxy by July 31 a set of audited 2021 financial statements (and an auditor's report) that were in a form that could be included in a registration statement filed with the SEC. BitGo's multiple concessions that what it actually delivered on July 31 would have to be modified after July 31 in order to be filed with the SEC are dispositive. *See, e.g.*, *id.* at 9-10, 37-38, 40-42. BitGo's own arguments demonstrate that it had *not* delivered financial statements that could be included in a registration statement filed with the SEC.

In a last-ditch effort to save its claim, BitGo argues that the Court of Chancery relied on the "erroneous premise that the July financial statements were 'going to appear' as-is, without any modification, in the final SEC registration statement." *Id.* at 41. But there is nothing erroneous about that premise at all. The definition of "Company 2021 Audited Financial Statements" and the plain terms of Section 9.07(c) *required* BitGo to deliver financial statements that Galaxy could include in a registration statement "as-is"—in the Court of Chancery's words, that "actually could be used for an offering of equity securities pursuant to a registration statement on Form S-1 for a nonreporting company." Tr. 85:3-6. BitGo's breezy characterization of this fundamental contractual premise as "erroneous" is

remarkable and elucidates why its arguments are contrary to the plain terms of the Amended Agreement—and the parties' intent reflected by those plain terms.

III. THE COURT OF CHANCERY CORRECTLY DISMISSED BITGO'S BREACH OF CONTRACT CLAIM.

A. Question Presented

Did the Court of Chancery correctly dismiss BitGo's claim for breach of contract because Galaxy had a valid termination right after BitGo failed to deliver contractually compliant Company 2021 Audited Financial Statements by July 31?

B. Scope of Review

The Court of Chancery's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6) is subject to *de novo* review. *Allen*, 72 A.3d 93 at 100.

C. Merits of the Argument

The Court of Chancery properly dismissed BitGo's claim that Galaxy failed to use commercially reasonable efforts to obtain accounting guidance from the SEC in breach of its obligations under the Amended Agreement. As the lower court explained, "because of the valid termination pursuant to Section 13.[0]1 for the noncompliant financial statements based on the use restriction," it was not reasonably conceivable that BitGo's claimed breach "could lead to some type of causally resulting damages." Tr. 89:2-7.

BitGo contends that the amended complaint and documents incorporated therein by reference "generate a reasonable inference that the restriction on use legend resulted from Galaxy's failure to seek pre-clearance from the SEC." Br. 45. The crux of BitGo's argument is that, in mid-May 2022, the SEC raised questions

about the accounting treatment for certain digital asset lending transactions, an issue that impacted both Galaxy and BitGo. BitGo contends that Galaxy therefore should have sought "pre-clearance" from the SEC on the appropriate accounting treatment but instead decided to wait for an industry consensus to develop regarding that accounting treatment through discussions between the SEC and a digital asset working group of the American Institute of Certified Public Accountants ("AICPA"). A60-61 ¶¶ 88, 90-92. BitGo now claims that the only commercially reasonable approach was to seek pre-clearance from the SEC, and that Galaxy's failure to do so breached its contractual obligations. Br. 45-46.

The Court of Chancery correctly rejected this argument for multiple reasons. As an initial matter, BitGo's argument relies on a false dichotomy between two potential avenues to obtain guidance from the SEC on a matter of GAAP accounting relating to digital asset lending, and suggests, without support, that Galaxy made the wrong choice. But Galaxy had no obligation to pursue either path. BitGo engaged experienced auditors who could have applied their own learning and professional judgment to reach a determination as to the proper application of GAAP. BitGo and its auditors may have preferred to wait until the SEC expressed its view on the matter before exercising that judgment, but Galaxy had no obligation to ensure that they had such guidance from the SEC or to otherwise advise BitGo or its auditors on matters of GAAP accounting. No action by Galaxy prevented BitGo's auditors from

exercising their professional judgment to form their own view on the correct application of GAAP to BitGo's financial statements, consistent with their obligations. Accordingly, any alleged breach by Galaxy of its efforts obligations "did not materially contribute to the failure of the transaction." *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 273 (Del. 2017). BitGo's inability to plausibly allege any causal link between Galaxy's alleged conduct and BitGo's inability to provide its financial statements in the form called for by the Amended Agreement demonstrates why the Court of Chancery properly dismissed BitGo's claim.

The Court of Chancery's decision is bolstered by BitGo's own allegations and contemporaneous statements incorporated by reference into the amended complaint. Although BitGo alleged that seeking guidance from the SEC through the AICPA digital asset working group was "unlikely" to resolve the accounting treatment issues so that the parties could close their merger before the End Date (A61 ¶ 91), the amended complaint was entirely devoid of any allegation that either the AICPA discussions or seeking pre-clearance would have resulted in any guidance from the SEC by July 31, 2022, when BitGo had to deliver the "Company 2021 Audited Financial Statements." Moreover, when BitGo sent the contractually noncompliant financial statements on July 31, BitGo noted only that the "AICPA efforts to date ha[d] been cumbersome and slow-moving" and that BitGo believed that seeking

pre-clearance from the SEC was "the more efficient way to resolve this issue." A734. Notably absent from BitGo's contemporaneous statements (or any well-pleaded allegations in the amended complaint) is any suggestion that Galaxy had chosen the wrong path, that pre-clearance would have resulted in obtaining SEC guidance prior to July 31, or that pre-clearance was the only commercially reasonable—as opposed to more efficient (with the benefit of approximately ten weeks of hindsight)—approach.[10]

The Court of Chancery took all of this into account in dismissing BitGo's breach claim. This is the import of the court's comments below that "causation can't happen temporally, because a lot of this stuff happened after the clean termination right arose, but to the extent things happened before or in conjunction with, *the[s]e are timelines that are separate and independent from the inclusion of the use restriction in the financial statements*, which gives r[ise] to a termination right of it[s] own." Tr. 89:8-15 (emphasis added). Galaxy pursued a path to obtain guidance from the SEC regarding the accounting treatment for digital asset lending transactions, as was its contractual right. In parallel, BitGo's auditors could have

[10] Indeed, BitGo's unsubstantiated assertion that, in "the many months leading up to July 31, 2022, BitGo had implored Galaxy" to seek pre-clearance from the SEC (Br. 4) ignores the reality that there were not "many months" between when the accounting issue arose in mid-May 2022 and July 31, 2022.

exercised their professional judgment regarding this issue but instead opted to include a restriction on use in the auditor's report attached to the July version of BitGo's financial statements. That restriction on use, which was not the result of anything Galaxy did, triggered Galaxy's termination right, which it validly exercised. A242 § 13.01(h). As a result, it was not reasonably conceivable "that the elements of the claim for breach of contract could be pled because of a valid exercise of a termination right based on the use restriction in the financial statements." Tr. 89:20-24.

For all of these reasons, and contrary to BitGo's assertions on appeal, the Court of Chancery's decision does not conflict with Delaware's prevention doctrine. Under that doctrine, "where a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." *Snow Phipps Grp., LLC v. Kcake Acquisition, Inc*., 2021 WL 1714202, at *52 (Del. Ch. Apr. 30, 2021) (internal quotation marks omitted). The court below correctly held that, even if it credited BitGo's allegations of breach by Galaxy, BitGo failed to demonstrate that any action or inaction by Galaxy contributed at all, much less materially, to BitGo's own failure to timely deliver the

contractually compliant "Company 2021 Audited Financial Statements."[11] Contrary to BitGo's claim, the lower court considered, and properly rejected, the application of the prevention doctrine.

[11] The Court of Chancery did not "accept that BitGo's allegations satisfied all but the damages element" of its breach claim. Br. 43.

CONCLUSION

The judgment of the Court of Chancery dismissing the Amended Complaint should be affirmed.

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CERTIFICATE OF SERVICE

I, S. Michael Sirkin, hereby certify that on August 31, 2023, I caused a true and correct copy of the foregoing *Appellees' Answering Brief* to be served through File & Serve*Xpress* on the following counsel of record:

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