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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MOBILE INVESTORS, LLC, Defendant Below/Appellant, v. TYGON PEAK CAPITAL MANAGEMENT, LLC (f.k.a. TIGER PEAK CAPITAL HOLDINGS, LLC), Plaintiff Below/Appellee.	)	No. 363, 2023 Case Below: Court of Chancery of the State of Delaware C.A. No. 2019-0847-MTZ

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns a premature and erroneous interpretation of a contract that, if permitted to stand, would entitle Appellee to $300,000 annually, in perpetuity, for no work, despite Appellant's reasonable contrary contractual interpretation. It also concerns the misapplication of the "stringent" standard of review for a motion for judgment on the pleadings where the Court of Chancery erroneously weighed evidence and adjudicated fact-intensive affirmative defenses on the pleadings and without discovery.

As part of a series of transactions (the "Acquisition"), Appellant Mobile Investors, LLC ("Mobile") entered into a Management Services Agreement ("MSA") with Appellee Tygon Peak Capital Management ("Tygon") under which Tygon would provide requested services to Voice Comm, LLC ("VC") in return for a management fee. In mid-2019, due to Tygon's inadequate performance under the MSA, Mobile informed Tygon that it no longer requested its services. Tygon now alleges it was entitled to the management fee even though it no longer performed any services.

At the motion to dismiss stage, the Court of Chancery incorrectly construed the MSA, holding that Tygon was entitled to discovery to prove its right to the management fee—whether or not services were requested by Mobile, and whether or not Tygon actually provided any services, despite the absurd results flowing from

such construction. After granting in part and denying in part the remainder of defendants' motion to dismiss, Mobile answered the complaint and asserted affirmative defenses. Then, on the pleadings, the Court of Chancery recast its prior Rule 12(b) ruling as a dispositive reading of the MSA's meaning, and ruled against Mobile on disputed factual questions relevant to its affirmative defenses, such as whether Tygon was in prior material breach of the MSA, and whether Tygon waived, acquiesced, or was estopped from claiming the management fee. To reach this ruling, the Court of Chancery weighed incomplete evidence included on the pleadings and adjudicated Mobile's fact-intensive defenses in Tygon's favor.

The Court of Chancery also decided, on the pleadings, that Tygon's alleged unregistered brokerage activities were insufficiently related to the MSA to render it voidable under federal and Delaware law, even though Tygon itself conceded the required nexus to allow discovery on these defenses (the "Exchange Act Defenses"). The Court of Chancery improperly granted judgment on the Exchange Act Defenses, finding that ***Mobile*** failed to "carry its burden," even though Tygon, not Mobile, bears the burden under Rule 12(c) and Mobile is entitled to all reasonable inferences on Tygon's motion.

Judgment on the pleadings was clear error. If uncorrected, the decision below would have implications beyond this appeal—injecting uncertainty into settled law regarding the proper standard of review for Rule 12(c) motions and upending settled

law regarding a party's entitlement to support affirmative defenses through discovery. Accordingly, judgment should be reversed and remanded so that the parties' intent concerning the meaning of the MSA can be discerned and so Mobile may obtain discovery to support further its affirmative defenses.

SUMMARY OF ARGUMENT

1. The Court of Chancery incorrectly held that the MSA did not condition Tygon's management fee on requests for, and performance of, services. Compounding this error, the Court of Chancery found Mobile had not advanced a reasonable competing interpretation of the MSA. At a minimum, the Court of Chancery should have found the MSA ambiguous and permitted discovery on the parties' intent.

2. The Court of Chancery erred in rejecting Mobile's affirmative defenses of prior material breach, waiver, acquiescence, and estoppel. On the pleadings, the Court of Chancery impermissibly weighed evidence, such as certain of Tygon's mid-2019 statements following Mobile's decision to cease requesting services from Tygon, and ruled against Mobile on disputed factual questions such as whether Tygon was in prior material breach of the MSA, or whether it waived, acquiesced, or was estopped from claiming the management fee. The Court of Chancery should not have adjudicated disputed factual issues without allowing Mobile to develop these defenses through discovery.

3. The Court of Chancery erred in rejecting the Exchange Act Defenses, even though Tygon violated federal law by acting as an unregistered broker in connection with the Acquisition. Any required nexus between Tygon's illegal conduct and the MSA inevitably poses disputed issues of fact that the Court of

Chancery wrongly resolved in Tygon's favor at the pleading stage. Indeed, ***Tygon's own pleadings*** establish that an "essential" purpose of the MSA was to provide compensation for the Acquisition. Mobile is entitled to all reasonable inferences at this preliminary stage of the litigation, including inferences suggesting a close nexus between Tygon's illegal unregistered broker activities and the MSA.

STATEMENT OF FACTS

A. The Parties

Tygon is a "private equity firm that raises capital and leads investments on a deal-by-deal basis." A58 ¶ 7.

Mobile is a Delaware limited liability company that owns a 100% interest in VC. *Id.* ¶ 8.

Non-party VC is a Delaware limited liability company that "is a national leader in supply chain management services for the mobile device accessories industry." A59.

B. The MSA

On August 31, 2018, Tygon and Mobile entered into the MSA as part of a series of transactions. A62 ¶ 22; A90 ¶ 131. Under the MSA, Tygon was "to provide certain management and advisory services" to Mobile "at the request of the Company's board of managers." A294. The MSA identified twelve categories of services to be performed by Tygon. A294-96 § 1.A(i)-(xii). Section 2.B provides that payment of the management fee will be made "[i]n exchange for the services provided to the Company hereunder, as more fully described in **Section 1** of this Agreement." A296.

After entering into the MSA, Tygon failed to provide services in accordance therewith. A230 ¶ 74. On July 1, 2019, due to deficiencies in Tygon's performance,

Mobile informed Tygon that it no longer requested its services and that Mobile was therefore no longer required to remit payment. A368.

Three days later, on July 4, 2019, Tygon responded that although it "disagree[d] that [Mobile] is permitted to stop paying Tygon the Annual Management Fee," Tygon was "willing to waive [its] right to receive payment in exchange for not being required to provide any services under the MSA until such time and upon such terms and conditions as are mutually agreed to by [Mobile] and Tygon." A370. Nothing in the July 4 letter disputed that Tygon's performance under the MSA had been deficient.

On August 22, 2019, Tygon confirmed that it had "honored" Mobile's request to "stand down for the time being and not receive payment in exchange for not providing any services under [the MSA]." A230-32 ¶¶ 74-75; A238 ¶ 88; A271-73 ¶ 181; A274-76 ¶¶ 186-87; A373. On August 26, 2019, Tygon, through its principal, Mr. Narulla, "reiterated that [a]lthough I did not agree with the rationale or contractual basis for your request for us to stand down on the management [services] agreement, we have complied (to date) with your request." A230-31 ¶ 74 (alterations in original).[1] Consistent with its "stand down" statements, A373, and that neither party "is or will be in breach of the MSA," A371, Tygon stopped

[1] No party submitted the full text of the August 26, 2019 communication to the Court of Chancery.

providing invoices seeking payment under the MSA following the July 1, 2019 correspondence, A375-86. Since July 1, 2019, Tygon has not performed any services under the MSA (nor have any services been requested), and Tygon and Mobile have not agreed upon the terms and conditions of any services under the MSA. A230-32 ¶¶ 74-75; A271-73 ¶ 181; A274-76 ¶¶ 186-87.

C. Tygon Files This Litigation And Admits Fee-For-Services As An (Unregistered) Broker

This suit, filed in October 2019, A1, describes Tygon as "a private equity firm that raises capital and leads investments on a deal-by deal basis," A58 ¶ 7, and alleges Tygon "secured a letter of intent to consummate the acquisition [the 'Acquisition'] of [VC]" and "invited other equity investors, *including the Defendants*, to back Tygon in the transaction." A56 ¶¶ 1-2 (emphasis added); *see* also A61-62 ¶ 21. Tygon's Second Amended Complaint (the "SAC") further alleged "several restructuring events took place in connection with the Acquisition" which, among others, included the formation of Mobile Investments Investco, LLC ("Investco"), Mobile, and KMD Weiss Investments, LLC ("KMD Weiss"). A63 ¶ 29. According to Tygon, ultimately, these transactions "resulted in Mobile owning 100% of the membership interests in Voice Comm Operations [VC's predecessor] and in Mobile being owned 80% by Investco and 20% by KMD Weiss." A64 ¶ 38.

The SAC alleges further that "[Tygon] was promised an annual management fee and, as is typical for private-equity deals, a 'promote' (or 'carried interest') in

the investment, among other rights and interests." A56-57 ¶ 3. The parties memorialized this deal-related compensation in a series of agreements "executed in connection with the closing of the Acquisition." A62-63 ¶¶ 26-27. The SAC further alleged that "[Tygon]'s entitlement to an ongoing management fee and a 'promote' (*i.e.*, carried interest) constituted *essential consideration*" for its agreement to facilitate the Acquisition. A62-63 ¶ 26 (emphasis added). Indeed, Tygon alleged that it was promised the MSA's management fee "*[i]n consideration for [its] undertaking as the private equity independent sponsor on the deal*," and that the "fee is not conditioned upon and does not vary upon the amount or type of services to be provided" by Tygon. A73 ¶¶ 68–69 (emphasis added). In other words, the SAC alleges—and Tygon argues—that the parties intended the management fee as *transaction-based* compensation for its work on the Acquisition.

For its part, Mobile's Amended Answer alleges, in relevant part, that the MSA and the Investco LLC Agreement constitute "illegal contracts" under federal law because Tygon acted as a "broker" under Section 3(a)(4) of the Exchange Act, 15 U.S.C. § 78c(a)(4)(A). *See* A290-91. The Amended Answer further alleges that Tygon was not "registered" as a broker-dealer, and that the MSA is therefore "voidable by Mobile and unenforceable by Tygon" under the Exchange Act. *Id.*[2]

[2] The parties' competing arguments whether Appellee acted as a "broker" and/or effected transactions in "any security" within the Exchange Act's meaning "***turn[ ] on the facts and circumstances of the matter***" and involve fact-intensive,

D. Procedural History

On February 19, 2021, Tygon filed the SAC. A23. The SAC asserted nine claims; relevant here is Count III for breach of the MSA.

On March 4, 2021, Defendants moved to dismiss the SAC. A25. On January 4, 2022, and February 10, 2022, the Court issued a memorandum opinion and letter decision which together dismissed all claims in the SAC except for Count III and part of Count IV. Exs. A-B.

On April 21, 2022, Tygon moved for partial judgment on the pleadings as to Count III against Mobile. A35. On July 21, 2022, by stipulation and order, Defendants filed their Amended Answer to the SAC. A37. Defendants' third affirmative defense stated that "Plaintiff's claims are barred, in whole or in part, because of Plaintiff's prior material breach of the [MSA]." A289. Defendants' fourth, fifth, and seventh affirmative defenses raised the doctrines of waiver, acquiescence, and estoppel. *Id.* Defendants also asserted the Exchange Act Defenses (defenses 13-16). A290-91.

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multi-factor analysis that is uniquely inappropriate for summary adjudication and should properly be considered below prior to this Court's review. *See, e.g.*, A347; *cf. Quadrant Structured Prods. Co. v. Vertin*, 106 A.3d 992, 1000 (Del. 2013) (remanding issue to Court of Chancery where "record does not adequately lend itself to informed appellate review").

On October 4, 2022, Tygon moved for partial judgment on the pleadings with respect to its entitlement to an annual management fee under the MSA. A39.

E. The Court of Chancery's Decisions

The Court of Chancery denied Mobile's motion to dismiss Count III in January 2022. On July 31, 2023, the Court of Chancery issued its letter opinion, holding that its Rule 12(b) decision represented "law of the case" that precluded consideration of extrinsic evidence and represented instead a dispositive interpretation of the MSA. Ex. C at 5. The letter opinion also dismissed Mobile's affirmative defenses and granted judgment on the pleadings.

As to waiver, the Court of Chancery found that the affirmative defense "fails" because "the identified written correspondence does not support waiver, and Defendants did not plead Tygon orally waived the requirement that the Fee be paid." *Id.* at 10-11. The Court of Chancery denied discovery because it found that Mobile's request for discovery was a new argument offered at the hearing. *Id.* at 10.

As to acquiescence and estoppel, the Court of Chancery ruled that "[t]hese affirmative defenses fail as a matter of law because Defendants failed to plead reliance," and that "in any event, as explained, the July 4 Letter and August 22 Email are not fairly read to wholly release [Mobile] from its obligation to pay the Fee under the MSA" so "[r]eliance on those statements would not have been reasonable." *Id.* at 12.

As to the Exchange Act Defenses, the Court of Chancery found the MSA was not voidable because it was "too far removed" from Tygon's alleged securities violations, and "not 'inseparable' from the 'central purpose' of [Mobile]'s MSA." *Id.* at 16, 18.

ARGUMENT

I. The Court of Chancery's Interpretation of the MSA is Erroneous, Not the Only Reasonable Interpretation, and Leads to Absurd Results

A. Question Presented

Whether the Court of Chancery erroneously concluded that the MSA required Mobile to remit payment of the annual fee to Tygon regardless of whether Tygon was asked to provide services or provided any services at all. Ex. A at 42-43; Ex. C at 5, 7.

B. Scope of Review

Issues of contract interpretation and legal conclusions are reviewed *de novo*. *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1261 (Del. 2007).

C. Merits of Argument

1. Mobile Proffered A Reasonable Interpretation Precluding Judgment On The Pleadings

When interpreting a contract under Delaware law "the role of a court is to effectuate the parties' intent." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). In addition, the plain language of the contract must be "situated in the commercial context between the parties." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017). In contractual disputes at the motion to dismiss or pleading stage, a court cannot choose between two differing reasonable interpretations of a contract; rather, judgment is proper only

if the plaintiff's interpretation is the only reasonable construction as a matter of law. *Textron, Inc. v. Acument Glob. Techs., Inc.*, 2011 WL 1326842, at *5 (Del. Super. Ct. Apr. 6, 2011) ("If the Court finds both parties' interpretations reasonable, then the Court cannot grant judgment on the pleadings.").

Mobile proffered a reasonable interpretation of the MSA.

First, the plain language of the MSA states that the annual management fee is required "[*i*]*n exchange for the services provided to the Company hereunder*, as more fully described in Section 1." A296 § 2.B. In addition, services are only due when a "request" is made by the "Company's board of managers." A294 § 1.A. "Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court." *NAMA Hldgs., LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE). Here, the Court of Chancery's interpretation renders superfluous the MSA's terms that (1) payment is "in exchange" for services, and (2) services are provided "at the request of" Mobile. The Court of Chancery's interpretation instead finds that even in the absence of any services requested or performed, the management fee is due. Ex. A at 41-43; Ex. C at 7. Such a reading impermissibly renders the langue of the MSA mere surplusage. *See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010) ("We will read a contract as a whole and we will give

each provision and term effect, so as not to render any part of the contract mere surplusage.").[3]

The Court of Chancery's interpretation is also inconsistent with even Tygon's argument which recognized: "The specific services [Tygon] provided to Defendants during the Term of the MSA are questions for the trier of fact to be developed in discovery." A178. If payment was required absent a request for services and any work performed, there would be no need for the Court of Chancery to determine "[t]he specific services [Tygon] provided to Defendants during the Term of the MSA." *Id.*

Further, to reach this result, the Court of Chancery erroneously supplied a new term to the MSA not found in the parties' agreement. The Court of Chancery found that its interpretation did not rob Section 1(A) of meaning because "[p]art of [Tygon]'s service is its constant obligation and readiness to respond to the Mobile Board's requests." Ex. A at 42 (citing A294-96 § 1(A)(i)–(xii)). But nowhere in the

[3] While "'[c]onditions precedent are not favored in contract interpretation because of their tendency to work a forfeiture,'" Ex. A at 42 n.159 (quoting *Stoltz Realty Co. v. Paul*, 1995 WL 654152, at *9 (Del. Super. Ct. Sept. 20, 1995)), here, the opposite is true—Tygon would reap a windfall if payment is required regardless of whether there has been a request from Mobile for services or whether Tygon has performed any work. The Court of Chancery's ruling that "Part of [Tygon]'s service is its constant obligation and readiness to respond to the Mobile Board's requests," Ex. A at 42, cites only generally to Sections 1(A)(i)-(xii) of the MSA and is not supported by the plain language of the MSA.

MSA or the sections cited by the Court of Chancery does it state that Tygon must constantly be ready to respond to a request from Mobile. Nor does the MSA provide that payment is in exchange for this supposed constant readiness. Rather, the plain terms of the MSA provide that payment is exchange for "services provided to the [c]ompany." A296 § 2(b). The Court of Chancery's decision to supply a term not found in the agreement was error. *Conner v. Phx. Steel Corp.*, 249 A.2d 866, 868 (Del. 1969) (finding it "axoiomatic [sic] that a court may not, in the guise of construing a contract, in effect rewrite it to supply an omission in its provisions."); *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020) (similar); *cf. id.* at 350 n.61.

The Court of Chancery's ruling incorrectly found that Mobile's reading ignores the "practical and common structure" of the MSA. Ex. A at 43. First, the plain language of the agreement does not support an unwritten "constant obligation and readiness" that the Court grafted onto the agreement. Second, Mobile and Tygon did not enter into a "common structure" to govern their relationship. In a typical private equity sponsored transaction, Tygon (as equity sponsor) would control the investment vehicle and seek management services from itself on the vehicle's behalf. But that did not happen here, as Tygon did not bargain for, or obtain, control over Mobile. Ex. A at 1 (Tygon "does not control the investment vehicle"). Thus, even if an annual management fee in return for no work requested or performed could be

a practical and common "structure" in another private equity setting, such a structure is inapplicable here.

Further, if the parties had intended the annual management fee to be "a fixed retainer, neither conditioned on nor varying with Mobile's requests for services," Ex. A at 43, they could have expressly provided that in the contract. Instead of agreeing that payment will be made "in exchange for the services provided to [Mobile] hereunder," the parties could have agreed that payment was in exchange for Tygon's obligation to constantly be ready and prepared to respond to a request from Mobile, whether a not any request was made. Instead of providing that Tygon will perform enumerated services "at the request of the Company's board of managers," the parties could have provided that payment was required in the absence of a request for services. The parties did no such thing, and instead agreed that payment will be made "in exchange for the services provided to [Mobile] hereunder." A296 § 2(b).

Tygon's conduct supports Mobile's interpretation. After Mobile informed Tygon that "the Board is not requesting services from [Tygon] pursuant to Section l(A) of the MSA from the date of this notice until otherwise indicated by the Board" and that "[a]s a result, the Company is not required to pay to [Tygon] the Annual Management Fee (as defined in the MSA) pursuant to Section 2(B) of the MSA until and unless such time that services are hereafter requested by the Board," (A368;

A74-75 ¶ 74), Tygon responded that it was "willing to waive [its] right to receive payment in exchange for not being required to provide any services under the MSA until such time and upon such terms and conditions as are mutually agreed to by [Mobile] and Tygon." A370 (emphasis added). Similarly, on August 22, 2019, Tygon stated that it had "honored" Mobile's request that it "stand down for the time being and not receive payment in exchange for not providing any services under [the MSA]." A373; A230-32 ¶¶ 74-75; A238 ¶ 88; A271-73 ¶ 181; A274-76 ¶¶ 186-87.

Tygon also ceased providing invoices for the management fee, further confirming its shared contemporaneous understanding that payment would not be required absent services. A320. Tygon had provided invoices for management fees in the fourth quarter of 2018, and the first two quarters of 2019, but stopped doing so following the July 2019 correspondence. *Id.* In addition, Tygon's invoices always listed the quarterly fee as part of a "*Maximum* Year One Management Fee," implying that a smaller fee could be owed if fewer or no services were provided. A331; A375-86 (emphasis added). The Court of Chancery did not address these allegations, which undermine its premature and erroneous contractual interpretation.

Accordingly, Mobile's interpretation of the MSA is reasonable and judgment on the pleadings should not have been granted. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) (reversing dismissal and explaining "[b]ecause the provisions at issue in the Agreement are susceptible to more than one

reasonable interpretation, for purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party").

2. The Court of Chancery's Interpretation of the MSA Leads to Absurd Results

Courts refuse "to enforce highly literal readings that lead to absurd results." *Pike Creek Recreational Servs., LLC v. New Castle Cnty.*, 238 A.3d 208, 213 (Del. Super. Ct. 2020), *aff'd*, 259 A.3d 724 (Del. 2021) (TABLE); *cf. Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 343 (Del. 2012) ("According to the golden rule of statutory interpretation, 'unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.'").

As this Court has explained, "[a]n interpretation is unreasonable if it produces an absurd result or a result that no reasonable person would have accepted when entering the contract." *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1208 (Del. 2021) (internal quotations marks and citation omitted); *see also Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) (same). This Court also recently affirmed that "a contract's construction should be that which would be understood by an objective, reasonable third party." *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023). Additionally, a court's interpretation must reconcile all of the provisions of the agreement so that they are reasonable when read together.

Council of Dorset Condo. Apartments v. Gordon, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.").

The Court of Chancery's ruling provides an absurd windfall to Tygon, effectively entitling it to hundreds of thousands of dollars annually and in perpetuity (unless limited conditions are met), even if Tygon is not asked to perform a single minute of work. The MSA's termination provision does not give Mobile unilateral ability to terminate the agreement absent material breach by Tygon. A297 § 3. Under the Court of Chancery's construction, the MSA thus entitles Tygon to annual management fees *in perpetuity*, regardless of whether Mobile needs *any work performed* and regardless of whether Tygon *performs any work*, unless (1) Mobile is sold, (2) Tygon's principal (Haran Narulla or his affiliates) are no longer affiliated with and in control of Tygon, or (3) Tygon is found in material breach. *Id.* Mobile asserts, and will prove, that "no reasonable person would have accepted [this result] when entering the contract." *Authentix*, 261 A.3d at 1208. This also is not a result that "would be understood by an objective, reasonable third party" when entering into the agreement. *Osborn*, 991 A.2d at 1159. Further, to provide for payment obligations in the absence of the provision of services would render the agreement illusory. To the extent Tygon would respond that its obligation was its constant

readiness to respond, that too leads to an absurd result: no reasonable observer would believe that Tygon has an obligation to be ready to respond to requests that Mobile has told Tygon *it is not going to make*.

The Court of Chancery thus erred in concluding that Tygon is entitled to the management fee in the absence of Mobile requesting any services and in the absence of Tygon performing any services. The Court of Chancery should have, at a minimum, permitted the parties to develop the record on the MSA so that the parties' intent could be determined and enforced.

II. The Court of Chancery Erred in Rejecting Mobile's Affirmative Defenses of Prior Material Breach, Waiver, Estoppel, and Acquiescence

A. Question Presented

Whether the Court of Chancery erred as a matter of law by construing the meaning of disputed communications in the movant's favor, refusing to permit Mobile to obtain discovery to further support its defenses, and concluding that Mobile's affirmative defenses of prior material breach, waiver, acquiescence, and estoppel failed. Ex. C at 6-13.

B. Scope of Review

A grant of a motion for judgment on the pleadings is reviewed *de novo*. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993) ("[O]ur review of the trial court's grant of a motion for judgment on the pleadings presents a question of law, which we review *de novo*.").

C. Merits of Argument

When evaluating a motion for judgment on the pleadings, the Court of Chancery "is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Id.* at 1205. "A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Id.*

"The standard for granting a motion for judgment on the pleadings is stringent." *Artisans' Bank v. Seaford IR, LLC*, 2010 WL 2501471, at *2 (Del. Super.

Ct. June 21, 2010). A motion for judgment on the pleadings may not be granted if there exists even one single set of conceivable circumstances under which Mobile could prevail. *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch.) (motions for judgment on pleadings should be denied "unless it appears to a reasonable certainty that under no set of facts that could be proven under the allegations of the Answer would plaintiffs' claim be defeated"), *aff'd*, 567 A.2d 419 (Del. 1989) (TABLE).

Here, even if this Court were to find Tygon's reading of the MSA the only reasonable reading, the Court of Chancery's decision must be reversed because Mobile asserted fact-intensive affirmative defenses of prior material breach, waiver, estoppel, and acquiescence that should not have been adjudicated on the pleadings. *See, e.g.*, *Sanders v. Wang*, 1999 WL 1044880, at *1 (Del. Ch. Nov. 8, 1999); *Xu Hong Bin v. Heckmann Corp.*, 2009 WL 3440004, at *13 (Del. Ch. Oct. 26, 2009).

1. Prior Material Breach

Mobile pled that Tygon's "claims are barred, in whole or in part, because of [Tygon's] prior material breach of the [MSA]." A289. As Mobile pled in its Amended Answer, "[Tygon] failed to provide services in accordance with the [MSA]." A230-31 ¶ 74. Further, Tygon alleged that Mobile's July 1, 2019 letter was sent due to disputed "deficiencies with [Tygon]'s services." *Id.* In opposing dismissal, Tygon further recognized that "[t]he specific services [Tygon] provided

to Defendants during the Term of the MSA are questions for the trier of fact to be developed in discovery." A178. Because the pleadings raised a dispute of fact regarding whether Tygon's performance was adequate and whether it was in prior material breach of the MSA, judgment on the pleadings should have been denied. *Desert Equities*, 624 A.2d at 1207 (reversing judgment on the pleadings and permitting discovery due to disputed issues of fact).

Addressing this affirmative defense, the Court of Chancery found that "Defendants failed to plead that [Tygon]'s failure to provide services was material under either Section 1(A) or any request for services" and "[t]heir allegations are conclusory and therefore inadequate to preclude judgment in Plaintiffs' favor." Ex. C at 7-8. This is incorrect.

As to materiality, Mobile pled an affirmative defense that Tygon's claims were barred "because of Plaintiff's prior *material* breach of the [MSA]." A289 (emphasis added). Mobile also pled that "[Tygon] failed to provide services in accordance with the [MSA]." A230-31 ¶ 74. Tygon itself alleged that Mobile's July 1, 2019 letter was sent due to disputed "deficiencies with [Tygon]'s services." *Id.* The Court of Chancery's ruling on this issue thus does not fairly provide Mobile with the reasonable inference to which it is entitled: namely, that the pled "fail[ure] to provide services" in accordance with the MSA is a material aspect of performance under the MSA. *SphereCommerce, LLC v. Caulfield*, 2022 WL 325952, at *7 (Del.

Ch. Feb. 3, 2022) ("a breach is material if it goes to the root or essence of the agreement between the parties, or touches the fundamental purpose of the contract") (citation omitted). The Court of Chancery did not address how or why the "fail[ure] to provide services in accordance with the MSA" was insufficient to plead a material breach of the MSA when the essence of that agreement is the provision of services. Indeed, it is a services agreement.

Desert Equities is instructive. As this Court explained there when reversing judgment on the pleadings, whether or not prior material breach could ultimately be proven should have been an issue for the Court of Chancery to resolve on a more complete record:

> Whether [Appellant] is able to prove that the [Appellee] exercised its discretion in an unreasonable manner or in the exercise of bad faith is for another day. While ultimately on an enlarged record such a finding may be made, it was premature and speculative for the trial court to base its grant of judgment on the pleadings on the reasoning employed. We hold that the Court of Chancery erred as a matter of law in granting judgment on a complaint which contains facts which support a claim which may entitle [Appellant] to relief.

Desert Equities, 624 A.2d at 1206. Thus, the materiality of Tygon's alleged breach and the "deficiencies with [Tygon]'s services," A230-31 ¶ 74, were fact issues that should have awaited adjudication on an enlarged record. *See 2009 Caiola Fam. Tr. v. PWA, LLC*, 2014 WL 7232276, at *8 (Del. Ch. Dec. 18, 2014) (denying motion to dismiss that argued alleged breaches were immaterial and explaining "[t]he

materiality of an alleged breach of contract, however, is a question of fact generally not suitable for disposition in the context of a motion under Rule 12(b)(6)"); *Matthew v. Laudamiel*, 2012 WL 2580572, at *10 (Del. Ch. June 29, 2012) (denying summary judgment: the "materiality" of a breach of contract involves "predominately a question of fact").

As to the Court of Chancery's finding that the allegations were conclusory and therefore inadequate, this Court has held that even a purportedly "conclusory allegation" can be sufficient to plead a fact issue. In *Desert Equities*, (which the Court of Chancery relied upon), the trial court granted judgment on the pleadings and in so doing "disregarded the complaint's well-pleaded, *albeit conclusory*, allegations that 'the General Partner has *willfully, wrongfully* and *in bad faith* excluded plaintiff from participating in three or more Fund II investments *in retaliation* for plaintiff's lawsuit." *Desert Equities*, 624 A.2d at 1205 (first emphasis added). The Court explained that "[t]he complaint alleges that the General Partner acted in bad faith and in a retaliatory manner," and therefore, "[f]or purposes of determining defendants' Rule 12(c) motion, the trial court was required to accept as true the allegations that the General Partner had acted in bad faith and in a retaliatory manner or, at the very least, was required to infer such from the allegations in the complaint." *Id.* at 1206. Accordingly, even if Mobile's allegations that "[Tygon] failed to provide services in accordance with the [MSA]," A230-31 ¶ 74, and

"Plaintiff's claims are barred, in whole or in part, because of Plaintiff's prior material breach of the [MSA]," A289, could be deemed "conclusory," *Desert Equities*, 624 A.2d at 1205, the Court of Chancery's decision to disregard these allegations constituted error. Mobile alleged prior material breach through the failure to provide services, an issue that goes to the heart of the MSA. Accordingly, this affirmative defense should not have been dismissed on the pleadings.

2. Waiver

Mobile also pled that Tygon's claims were barred due to waiver. A289. "Waiver is the voluntary and intentional relinquishment of a known right" and requires three elements: "(1) that there is a requirement or condition to be waived, (2) that the waiving party must know of the requirement or condition, and (3) that the waiving party must intend to waive that requirement or condition." *CPC Mikawaya Hldgs., LLC v. MyMo Intermediate, Inc.*, 2022 WL 2348080, at *6 (Del. Ch. June 29, 2022) (citation omitted). The only element in dispute on this affirmative defense is the third element: Tygon's intent. Ex. C at 8.

Mobile argued that "[a]s to the third element, even the limited facts available to the Court at this stage of the proceedings demonstrate that [Tygon] intended to waive the purported fee requirement." A336. The Court of Chancery then decided this disputed factual issue on the pleadings. Ex. C at 8-11. This was error.

"Because of waiver's fact-intensive nature, Delaware courts have been reluctant to evaluate it at the pleading stage." *CPC Mikawaya Hldgs.*, 2022 WL 2348080, at *6 & n.47 (collecting authority); 2 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 15.03 (2d ed. 2022) ("Whether a party has voluntarily abandoned a right or privilege usually involves a question of fact. Thus, summary judgment on the issue generally is inappropriate."); *see also George v. Frank A. Robino, Inc.*, 334 A.2d 223, 224 (Del. 1975) (reversing grant of summary judgment). Nevertheless, the Court decided the disputed factual issue of intent on the pleadings by construing the limited and incomplete evidence before the court prior to discovery.

First, the Court of Chancery held that "[t]he July 4 Letter does not demonstrate intent to waive: rather, it is a conditional suggestion." Ex. C at 9. This weighing of the evidence was error. As the Court of Chancery itself explained in denying defendants' motion to dismiss Count IV, "[t]he pleading standard for a [party's] state of mind is rightfully lax, since alleging specific facts may be 'virtually impossible' at the pleading stage." Ex. A at 56-57 (quoting *Desert Equities*, 624 A.2d at 1208). Here, Mobile pled that Tygon had intended to waive its rights under the MSA and supported that by reference to Tygon's own statements. *E.g.*, A230-31.

Further, even if this Court were to weigh the evidence at this stage (which it should not), and even if the statements in the July 4, 2019 letter were "conditional,"

the conditions were met. Ex. C at 9. Tygon responded to Mobile's July 1 notice that it would not be requesting services by stating "we are willing to waive our right to receive payment *in exchange for not being required to provide any services under the MSA until such time and upon such terms and conditions as are mutually agreed to by the Company and Tygon*." A370 (emphasis added). It is undisputed that Tygon was thereafter not asked to provide services. Taken together with Mobile's July 1, 2019 letter which had already stated that "[t]he Board of Managers of the Company…has determined and resolved that the Board is not requesting services from [Tygon] pursuant to Section 1(A) of the MSA from the date of this notice until otherwise indicated by the Board," A368, there were no further conditions that needed to be met. Mobile need not have signed the July 4 Letter for there to have been a waiver. *Components, Inc. v. W. Elec. Co.*, 267 A.2d 579, 582 (Del. 1970) ("[W]hether or not a waiver is effective does not require the consent of the party who benefits from the waiver.").

The Court of Chancery also ruled that Tygon "affirmatively reserved its rights," and that "[s]tanding alone, this reservation of rights defeats any waiver claim as a matter of law." Ex. C at 9. This conclusion is flawed in numerous respects.

First, this conclusion disregards Tygon's subsequent August 22 correspondence (discussed below) in which Tygon stated that "instead of declaring you and the Board to be in default of that agreement, we have honored your request

to stand down for the time being and not receive payment in exchange for not providing any services under that agreement." *Id.* at 3 (quoting A373).

Second, it disregards Tygon's August 26, 2019 correspondence, where it "reiterated that '[a]lthough [it] did not agree with the rationale or contractual basis for your request for us to stand down on the [MSA], we have complied (to date) with your request.'" A230-31 ¶ 74 (first alteration in original).

Third, the statement the Court of Chancery relied upon in the July 4 letter actually states "neither [Mobile] nor Tygon is waiving *any other rights* under the MSA." A371 (emphasis added). Accordingly, the reservation of rights, to the extent meaningful, referenced other rights separate from a right to payment.

Fourth, the Court of Chancery erroneously relied on two cases in support of its holding that the reservation of rights defeats any claim of waiver. Ex. C at 9 n.50 (citing *Pac. Ins. Co. v. Higgins*, 1994 WL 114898, at *8 (Del. Ch. Mar. 23, 1994) and *Sarraf 2018 Fam. Tr. v. RP Holdco, LLC*, 2022 WL 10093538, at *8 n.105 (Del. Super. Ct. Oct. 17, 2022)). The former decision was a post-trial decision after discovery was provided and the decision weighed factual issues to reach its determination, *Pac. Ins. Co.*, 1994 WL 114898, at *1, *8; the latter decision was issued on cross-motions for summary judgment, again after discovery had been made available and had "closed," *Sarraf*, 2022 WL 10093538, at *4. Thus, the reservation of rights does not negate Tygon's intent to waive.

As to the August 22 email, the Court of Chancery found that "[a]s with the July 4 Letter, Plaintiff conditionally agreed that [Mobile] could pause payment in exchange for Plaintiff not providing any services, while retaining its position that unilaterally withholding the Fee was improper." Ex. C at 10. The Court of Chancery made this finding despite Tygon's statement that it had "honored [Mobile's] request to stand down for the time being and not receive payment in exchange for not providing any services under [the MSA]." *Id.* at 3 (quoting A373). There is nothing conditional in the past-tense use of the word "honored." Here too, the Court of Chancery should not have resolved disputed fact issues concerning Tygon's intent in connection with its communications.

Next, the Court of Chancery declined to permit discovery on the waiver argument based on its incorrect assertion that the prospect of undiscovered waiver communications represented a "new argument" first raised at hearing. *Id.* at 10. This was incorrect, as Mobile expressly argued in its answering brief that further discovery would support its affirmative defenses:

> At this stage of the proceedings, before discovery is complete…, the Court cannot find as a matter of law that there is no conceivable set of circumstances in which [Tygon] was in prior material breach, waived it rights, is estopped, or acquiesced. The facts alleged in the Amended Answer support each of these affirmative defenses which should be permitted to be developed further through discovery.

A346. Accordingly, the Court of Chancery's assertion that Mobile did not argue for additional discovery until the hearing on the motion is incorrect.

3. Acquiescence and Estoppel

As to acquiescence and estoppel, the Court of Chancery found that "[t]hese affirmative defenses fail as a matter of law because Defendants failed to plead reliance." Ex. C at 12. But the Court of Chancery ruled "in any event, as explained, the July 4 Letter and August 22 Email are not fairly read to wholly release [Mobile] from its obligation to pay the Fee under the MSA," so "[r]eliance on those statements would not have been reasonable." *Id.* Thus, the Court of Chancery made factual determinations as to whether or not Mobile's reliance was reasonable. The Court was not permitted at the pleading stage to find that Mobile's reliance on these communications unreasonable, without permitting documentary and testimonial evidence to support reasonable reliance. As this Court explained in *Desert Equities*, whether a decision or conduct was "'reasonable' is a mixed question of fact and law which cannot be resolved on a motion for judgment on the pleadings." 624 A.2d at 1206; *id.* ("Reasonableness is a question of fact to be determined by the finder of fact."). Accordingly, the Court of Chancery's determination on the pleadings regarding the reasonableness of Mobile's reliance was error.

The Court of Chancery also incorrectly rejected Mobile's arguments that it "relied on [Tygon]'s statements, and [Tygon]'s decision to cease sending invoices,

to its detriment by believing that it was not required to remit any fees," and that "[a]lthough the record is not fully developed, evidence will show that [Mobile] relied on these statements by, for example, not accruing [] management fees.'" Ex. C at 12 (citations omitted). The Court of Chancery found these arguments insufficient because "[n]either of those sentences has any citations, let alone cites to the Amended Answer" and "[t]he Amended Answer simply does not allege Defendants relied on [Tygon]'s conduct or silence." *Id.* But it is unclear how a defendant on a motion for judgment on the pleadings is to provide a citation to its own reliance. "Generally, the Court of Chancery rules of procedure, which adopt the philosophy of 'notice pleading,' do not require a [party] to plead a claim with particularity." *Desert Equities*, 624 A.2d at 1207. Nor must a defendant plead in an answer all the facts supporting its defense, in advance of obtaining discovery. *See id.* ("Since there has been no discovery in this case, there are no facts of record from which the Court of Chancery may discern the reasonableness of the [defendant's] actions"); *cf. Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 584 (Del. Ch. 1998) ("[A]cquiescence/waiver arguments go to the merits and are factually intensive. They cannot be finally resolved at this [preliminary injunction] stage in the proceedings, on the limited record before me.").

Consistent with the need for a complete record to adjudicate these defenses, the authorities the Court of Chancery relied upon when dismissing these affirmative

defenses were issued after summary judgment or trial. Ex. C at 13 n.67 (citing *Pilot Point Owners Ass'n v. Bonk*, 2008 WL 401127, at *2 (Del. Ch. Feb. 13, 2008) (summary judgment) and *Mennen v. Wilmington Tr. Co.*, 2015 WL 1914599, at *35 (Del. Ch. Apr. 24, 2015) (post-trial)). The Court should have permitted discovery so that Mobile could establish the reasonableness of its reliance.

III. The Court of Chancery Erred in Rejecting the Exchange Act Defenses

A. Question Presented

Whether the Court of Chancery incorrectly rejected the Exchange Act Defenses, finding Section 29(b) inapplicable because the connection between Appellee's securities violations and the MSA were "too attenuated" and "not 'inseparable'" from the "central purpose" of the MSA. Ex. C at 13-18.

B. Scope of Review

"[R]eview of the trial court's grant of a motion for judgment on the pleadings presents a question of law, which we review *de novo*." *Desert Equities*, 624 A.2d at 1204.

C. Merits of Argument

As noted, the standard to grant a motion for judgment on the pleadings is "stringent." *Artisans' Bank*, 2010 WL 2501471, at *2; *Warner Commc'ns*, 583 A.2d at 965 (Rule 12(c) motions should be denied "unless it appears to a reasonable certainty that under no set of facts that could be proven under the allegations of the Answer would plaintiffs' claim be defeated"). Delaware law requires denial of Rule 12(c) motions unless movant establishes no material issues of fact and entitlement to judgment as a matter of law. *Desert Equities*, 624 A.2d at 1205. The Court must view the facts pled—and all reasonable inferences—in a light most favorable to the non-moving party, and accord the non-moving party "the same benefits as a plaintiff

defending a motion under Rule 12(b)(6)." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499–500 (Del. Ch. 2000).

The facts and inferences in the pleadings here establish a close nexus between Tygon's securities law violations and the MSA that requires denial of Tygon's motion. The Court of Chancery committed reversible error by ignoring these facts and inferences, and instead finding that Tygon's alleged securities violations were "not 'inseparable' from the 'central purpose'" of the MSA. Ex. C at 16. These findings intrude into the fact-finding process and ignore record evidence—and reasonable inferences to be drawn therefrom—that establish the required nexus. The Court of Chancery reversed the burden on this Rule 12(c) motion by explicitly requiring Mobile to meet its ultimate ***trial*** burden based on bare pleadings. *Id.* at 13-14 ("Defendants bear the burden of proof"). Placing the relevant burden on Tygon, where it belongs, this Court should reverse the letter opinion because Tygon cannot show with requisite "certainty" that no "set of facts [can] be proven" to sustain the Exchange Act Defenses. *See Desert Equities*, 624 A.2d at 1204 n.7; *Warner Commc'ns*, 583 A.2d at 965.

1. The Pleadings Provide the Required Nexus Between the MSA and Illegal Conduct.

Section 29 provides in pertinent part that "[e]very contract ***made*** in violation of any provision of this chapter or of any rule or regulation thereunder,…***[or] the performance*** of which involves the violation of…any provision of this chapter or

any rule or regulation thereunder, shall be void." *See* 15 U.S.C. § 78cc(b) (emphases added).

Courts have interpreted Section 29 to require some nexus between the securities violation and the subject contract. *See, e.g.*, *EdgePoint Cap. Hldgs., LLC v. Apothecare Pharmacy, LLC*, 6 F.4th 50, 58-59 (1st Cir. 2021) (summary judgment granted upholding Section 29 defense where there was a "direct relationship" between violation and contract); *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 205 (3d Cir. 2006) (summary judgment granted in part and denied in part where contract "involved a prohibited transaction"); *Reg'l Props., Inc. v. Fin. & Real Est. Consulting Co.*, 678 F.2d 552, 559 (5th Cir. 1982) (same) (affirming investors' rescission claims under Section 29, and remanding for consideration of defenses). *EdgePoint*, *Berckeley* and *Regional Properties* did not define the ***minimal*** required nexus between an Exchange Act violation and a relevant contract, but the cases collectively suggest that the First, Third and Fifth Circuits all agree that Section 29(b) may void contracts that "involved" prohibited conduct. *EdgePoint*, 6 F.4th at 59; *Reg'l Props.*, 678 F.2d at 559; *Berckeley*, 455 F.3d at 205.[4]

[4] *See also GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 202 (3d Cir. 2001) (dismissing Section 29 defense where alleged illegal short sales were "collateral or tangential" to subject contract).

Here, the pleadings and exhibits already show a close nexus between the MSA and Tygon's alleged securities law violations that is not merely "tangential or collateral," and Mobile is entitled to discovery to explore the full extent of the relationship between Tygon's unregistered brokerage activities and the MSA. Among other things, the record available at this preliminary stage shows that the Acquisition (in which Tygon engaged in the unregistered brokerage and solicitation activity giving rise to the Exchange Act Defenses) closed on August 31, 2018, ***the same day*** the parties executed the MSA. A62 ¶ 22; A294. The pleadings further evidence the close relationship between illegal conduct and the MSA through Tygon's assertion that its "entitlement to an ongoing management fee…constituted essential consideration" for its agreement to facilitate the Acquisition. *See* A62-63 ¶ 26; *see also* A65 ¶ 40 (describing Tygon's entitlement to promote as "key element [of] the overall economic bargain" with other investors); A73 ¶¶ 68–69 (alleging Tygon was promised management fee "[i]n consideration for [its] undertaking as the private equity independent sponsor on the deal").[5]

[5] Tygon repeated these allegations in its brief to the Court of Chancery. *See* A144 ("***In consideration for Plaintiff's undertaking as the private equity independent sponsor of the Acquisition and in exchange for its commitment to provide certain services as and when needed by Mobile***…[Tygon] was promised certain management fees[.]") (citing A73 ¶ 68).

In the face of the extensive record evidence already available—indicating that the parties closed the Acquisition on the same day they entered the MSA and that Tygon views the MSA's management fee as "essential consideration" for its securities-related work—and reasonable inferences that can be drawn therefrom, Tygon plainly cannot show "with reasonable certainty" that its illegal securities activities and the MSA are separable.

The letter opinion failed to consider the temporal and remunerative relationship between Tygon's solicitation activities and the MSA in finding that the connection was "too attenuated" to support liability, *see* Ex. C at 16, and improperly foreclosed the possibility that discovery will further supplement this nexus. This Court should reverse and allow the development of the factual record regarding the Exchange Act Defenses under the "stringent" standards required for Rule 12(c) relief. *Artisans' Bank*, 2010 WL 2501471, at *2; *Warner Commc'ns*, 583 A.2d at 965.[6]

[6] Notably, *EdgePoint*, *Berckeley* and *Regional Properties* were each decided on a fuller evidentiary record. *See Berckeley*, 455 F.3d at 200 (summary judgment); *EdgePoint*, 6 F.4th 50 at 57 (same); *Reg'l Props.*, 678 F.2d at 557 (after two-day trial); *see also GFL*, 272 F.3d at 197-98 (summary judgment).

2. The Letter Opinion's "Central Purpose" Test Misstates Governing Law.

Section 29 applies to "***[e]very***" contract made (or performed) in violation of relevant law, *see* 15 U.S.C. § 78cc(b) (emphasis added), not merely those contracts whose "central purpose" bear the nexus suggested by interpretive case law. The Court of Chancery nonetheless purported to ascertain "the central purpose" of the MSA, and then assess the nexus between Tygon's illegal conduct and this "central purpose." Ex. C at 16. The letter opinion cites *EdgePoint* in support of its "central purpose" test, but a careful reading of that case shows that the First Circuit did not use such language to cabin Section 29's reach, but merely to support its conclusion that the proponent of Section 29 had met its summary judgment burden. *EdgePoint*, 6 F.4th at 61.

The letter opinion's reliance upon the MSA's recital provision (Ex. C at 16 n.83) introduced further error under Delaware law, as recitals are "not a necessary part of a contract" and should only be used to explain "apparent doubt" with respect to the intended meaning of the operative instrument. *Stabler v. Ramsay*, 62 A.2d 464, 470 (Del. Ch. 1948), *rev'd on other grounds*, 88 A.2d 546 (Del. 1952). Here, the Court of Chancery used the recital provision to determine the "purpose" of the MSA, even though the purpose (*i.e.*, intent) of any contract raises quintessential questions of fact that should not have been resolved adversely to Mobile on the pleadings, and even though Tygon itself contends that the MSA's fee provisions

"constituted essential consideration" for its Acquisition activities. *See* A62-63 ¶ 26. Mobile respectfully submits that ascertaining the MSA's "purpose" must await document discovery and testimony by the MSA's signatories and other percipient witnesses.

3. Section 29 Precludes Contracts "Made" In Violation Of Law.

The letter opinion also erred in its singular focus on whether the MSA could be "performed" without violating federal law. *See* Ex. C at 16 (holding that "[Appellee] can perform management services…under the MSA without violating securities laws."). Section 29 sweeps more broadly, however, providing disjunctively that "[e]very contract ***made*** in violation of any provision of this chapter or of any rule or regulation thereunder,…***[or]*** the performance of which involves the violation of…any provision of this chapter or any rule[,] shall be void." *See* 15 U.S.C. § 78cc(b) (emphases added). Mobile invokes both prongs of Section 29(b), alleging the MSA constituted an "illegal contract" under federal law because Tygon acted as an unregistered broker "[i]n making or performing" the subject agreement. *See* A290-91. *See EdgePoint*, 6 F.4th at 61 ("the mere fact that it is possible to legally perform a contract does not mean the contract was not made in violation of securities law"). As noted, the record amply supports the inference that Tygon "made" the MSA in violation of the Exchange Act because, among other things, Tygon entered the MSA at the same time that it closed the Acquisition and as part

of the "essential consideration" for its unregistered broker activities in facilitating the Acquisition. *See* A62-63 ¶ 26; A73 ¶¶ 68-69; A294.

Turning to Section 29(b)'s "performance" prong, the Court of Chancery's holding overlooks settled federal prohibitions on unregistered brokerage activities. *See* 15 U.S.C. § 78o(a)(1) ("It shall be unlawful for any broker or dealer…to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in…any security…unless such broker or dealer is registered"); *DeHuff v. Digital Ally, Inc.*, 2009 WL 4908581, at *2 (S.D. Miss. Dec. 11, 2009) ("Clearly, an agreement to compensate an unregistered broker for effecting securities transactions would involve a prohibited transaction.") (citing *Salamon v. Teleplus Enters., Inc.*, 2008 WL 2277094 (D.N.J. June 2, 2008) (consulting agreement involved prohibited transaction within scope of Section 29(b) where broker was not registered)).

In sum, the letter opinion effectively reads the word "made" out of Section 29(b) and errs by concluding that the MSA could be performed without violating the law.

4. Rule 12(c) Does Not Require Mobile To Prove State Law Illegality Defenses Now.

Finally, the Court of Chancery erred by concluding that Mobile has "not demonstrated the MSA is an illegal contract under the Exchange Act" for purposes of Delaware law. *See* Ex. C at 17. In so holding, the Court of Chancery again

reversed Rule 12(c)'s burden by requiring Mobile to meet its ultimate trial burden on the pleadings. *See Desert Equities*, 624 A.2d at 1205. Mobile alleges that Tygon acted as an unregistered broker and engaged in the business of effecting transactions in securities for the account of others in connection with its Acquisition-related actions, including the MSA. *See* A290-91; *see also* A350-54; A363-64. Faced with these allegations, Tygon cannot establish with "reasonable certainty that under no set of facts" could the MSA constitute an illegal contract or violate public policy. *See Warner Commc'ns*, 583 A.2d at 965; *see also Preferred Fin. Servs., Inc. v. A&R Bail Bonds LLC*, 2019 WL 315331, at *5 (Del. Super. Ct. Jan. 23, 2019) ("Contracts may be unenforceable if they are either illegal per se or violate public policy."), *aff'd*, 217 A.3d 60 (Del. 2019) (TABLE).

The letter opinion correctly notes that "courts are averse to voiding agreements on public policy grounds unless their illegality is clear and certain," *Bennett v. Lally*, 2014 WL 4674623, at *4 (Del. Ch. Sept. 5, 2014), but plainly misapplies applicable review standards by finding the "clear and certain" test dispositive at the pleading stage. Ex. C at 17-18. When considering a Rule 12(c) motion, the Court of Chancery must determine if there exists even one single set of conceivable circumstances under which Mobile could prevail. *Warner Commc'ns*, 583 A.2d at 965. Such circumstances exist here, as Tygon concedes the MSA compensated it for alleged unregistered broker activity in violation of Section

15(a)(1). A62-63 ¶ 26; *see Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006) ("Transaction-based compensation…[is] one of the hallmarks of being a broker-dealer" and "[t]he underlying concern has been that transaction-based compensation represents a potential incentive for abusive sales practices that registration is intended to regulate and prevent."); *S.E.C. v. StratoComm Corp*., 2 F. Supp. 3d 240, 262–63 (N.D.N.Y. 2014), *aff'd*, 652 F. App'x 35 (2d Cir. 2016); *Brumberg, Mackey & Wall, P.L.C.*, SEC No-Action Letter, 2010 WL 1976174, at *1 (May 17, 2010) ("A person's receipt of transaction-based compensation in connection with these activities is a hallmark of broker-dealer activity.").

The case law cited in the letter opinion does not warrant summary dismissal of the Exchange Act Defenses. Indeed, five of the seven cited cases made findings after some form of evidentiary hearing. *See Balooshi v. GVP Glob. Corp.*, 2022 WL 576819, at *11 (Del. Super. Ct. Feb. 25, 2022), *aff'd*, 285 A.3d 839 (Del. 2022) (TABLE); *Preferred Fin. 1*, 2019 WL 315331; *Preferred Fin. Servs., Inc. v. A&R Bail Bonds LLC*, 2018 WL 587023 (Del. Super. Ct. Jan. 26, 2018); *Bunting v. Citizens Fin. Grp*., 2007 WL 2122137 (Del. Super. Ct. June 29, 2007); *Della Corp. v. Diamond*, 210 A.2d 847, 850 (Del. 1965). The other two cases cited merely denied affirmative illegality defenses where the reviewing courts could not summarily conclude that the movants were entitled to judgment as a matter of law. *See*

Lighthouse Behavioral Health Sols., LLC v. Milestone Addiction Counseling, LLC, 2023 WL 3486671, at *11 (Del. Ch. May 17, 2023); *Bennett*, 2014 WL 4674623, at *5. Here, Tygon, not Mobile, affirmatively moved for judgment on the pleadings, and thus maintains the requisite burden.[7]

Finally, the Court of Chancery's interpretation of Section 29(b) is at odds with the remedial purposes of the statute. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *GFL Advantage Fund*, 272 F.3d at 200 ("Section 29(b) is a remedial provision that is triggered only when another section of the Exchange Act has been violated."). Section 29(b) should be interpreted liberally to protect parties from doing business with unregistered brokers. *See Cogniplex, Inc. v. Ross*, 2001 WL 436210, at *9 (N.D. Ill. Apr. 27, 2001); *see also EdgePoint*, 6 F.4th at 62 (the Exchange Act's broker-dealer registration "requirements protect both the public and the markets"). Additionally, statutes must be construed as a whole, "and literal or perceived interpretations which yield mischievous or absurd results are to be avoided." *Zambrana v. State*, 118 A.3d 773, 776 (Del. 2015). The letter opinion's narrow interpretation and application of Section 29(b) violates this liberal rule of

[7] Notably, the letter opinion failed to address the legality of Tygon's conduct under Section 15(a)(1), but merely found the alleged illegality insufficiently proximate to warrant Section 29(b) relief. *See* Ex. C at 13-17. As such, Mobile's unrefuted and unaddressed allegations that the MSA constitutes an illegal contract under Section 15(a)(1) should have precluded the dismissal of Mobile's illegality defense.

construction and leads to an absurd result by allowing Tygon to avoid its registration obligations under Section 15(a)(1) while potentially reaping perpetual illegal annual payments. *See* A296 § 2. Neither federal nor Delaware law countenance such a result.

CONCLUSION

For these reasons, the Court of Chancery's ruling should be reversed.

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