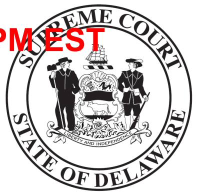
EFiled: Dec 14 2023 04:26PM EST
Filing ID 71628659
Case Number 363,2023



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Mobile Investors, LLC,	:	
	:	Number 363, 2023
defendant-below,	:	
appellant,	:	Case below: Court of Chancery
	:	of the State of Delaware,
— *against* —	:	civil action number 2019-0847-MTZ
	:	
Tygon Peak Capital Management,	:	
LLC,	:	
	:	
plaintiff-below,	:	
appellee.	:	

Appellee's Answering Brief

Robert K. Beste (3931)
Smith, Katzenstein & Jenkins LLP
1000 North West Street, Suite 1501
Wilmington, Delaware 19801
(302) 652-8400
rkb@skjlaw.com

December 14, 2023

Attorneys for appellee

Table of Contents

Page

Table of Authorities iii

Nature of the Proceedings 1

Summary of Argument 3

Counterstatement of Facts 4

A. The Parties 4

B. The MSA 4

C. Procedural History 5

1. Mobile's Motion to Dismiss the Claim for Breach of the MSA is Denied and Plaintiff's Motion for Judgment on the Pleadings is Granted 5

2. Mobile Files this Appeal 8

Argument 9

I. The Court of Chancery Correctly Interpreted the MSA 9

A. Question Presented 9

B. Scope of review 9

C. Merits of Argument 9

1. The MSA is Unambiguous and Mobile's Competing Interpretation Should be Rejected 9

2. The Court of Chancery's Interpretation Does Not Produce Absurd Results 15

II. The Court of Chancery Properly Found the Affirmative Defenses of Prior Material Breach, Waiver, Estoppel, and Acquiescence Failed to Preclude Judgment on the Pleadings 17

A. Question Presented 17

B. Scope of Review 17

C. Merits of Argument 17

1. Prior Material Breach 17

2. Waiver 20

3. Acquiescence and Estoppel 24

III. The Court of Chancery Properly Found the Exchange Act Defenses Fail 26

A. Question Presented 26

B. Scope of Review 26

C. Merits of Argument 26

1. Tygon Peak's alleged securities violations are not inseparable from the MSA 26

2. The Court of Chancery did not require Mobile to prove its claims, but only required it to plead its claims 30

Conclusion 33

Table of Authorities

Cases **_Page_**

Berckeley Investment Group, Inc. v. Colkitt,
455 F.3d 195 (3d Cir. 2006) 26, 27, 29, 30

Chicago Bridge & Iron Co. v. Westinghouse Elec. Co.,
166 A.3d 912 (Del. 2017) 10, 17, 26

ConAgra Foods, Inc. v. Lexington Insurance Co.,
21 A.3d 62 (Del. 2011) 14

Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, LP,
624 A.2d 1199 (Del. 1993) 19

Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.,
702 A.2d 1228 (Del. 1997) 14, 15

EdgePoint Capital Holdings, LLC v. Apothecare Pharmacy, LLC,
6 F.4th 50 (6th Cir. 2021) 28, 29, 30

Glaxo Group Ltd. v. DRIT LP,
248 A.3d 911 (Del. 2021) 15

Heron Bay Property Owners Association, Inc. v. CooterSunrise, LLC,
2013 WL 3871432 (Del. Ch. June 27, 2013) 24

Holifield v. XRI Investment Holdings LLC,
2023 WL 5761367 (Del. September 7, 2023) 31

Javice v. JPMorgan Chase Bank, NA,
2023 WL 4561017 (Del. Ch. July 13, 2023) 20

New Enterprise Associates 14, LP v. Rich,
295 A.3d 520 (Del. Ch. 2023) 16

Orman v. Cullman,
794 A.2d 5 (Del. Ch. 2002) 23

Pacific Insurance Co. v. Higgins,
1994 WL 114898 (Del. Ch. Mar. 23, 1994) 21

Paul v. Deloitte & Touche, LLP,
974 A.2d 140 (Del. 2009) 9

Regional Properties, Inc. v. Financial & Real Estate Consulting Co.,
678 F.2d 552 (5th Cir. 1982) 27

Reith v. Lichtenstein,
2019 WL 2714065 (Del. Ch. June 28, 2019) 14

REM OA Holdings, LLC v. Northern Gold Holdings, LLC,
2023 WL 6143042 (Del. Ch. Sept. 20, 2023) 16

Salamone v. Gorman,
106 A.3d 354 (Del. 2014) 10

Sanders v. Wang,
1999 WL 1044880 (Del. Ch. Nov. 8, 1999) 12

Sarraf 2018 Family Trust v. RP Holdco, LLC,
2022 WL 10093538 (Del. Super. Oct. 17, 2022) 22

Standard General LP v. Charney,
2017 WL 6498063 (Del. Ch. Dec. 19, 2017) 18

State v. Sweetwater Point, LLC,
2022 WL 2349659 (Del. Ch. June 30, 2022) 24

Woodwerx, Inc. v. Delaware Department of Transportation,
2007 WL 927943 (Del. March 29, 2007) 18

Nature of the Proceedings

Plaintiff-below, appellee, Tygon Peak Capital Management, LLC ("Tygon Peak"), brought this action against its co-investors in connection with the acquisition of a supply chain management company, Voice Comm. Tygon Peak, along with its co-investors, created several entities to manage Voice Comm and formed an investment vehicle, Mobile Investments Investco, LLC ("Investco"), that owned an interest in an intermediate investment vehicle, defendant-below, appellant Mobile Investors, LLC ("Mobile"), that, in turn, owned Voice Comm.

Once the purchase of Voice Comm was complete, Tygon entered into a Management Services Agreement ("MSA") with Mobile. The MSA provided that Tygon Peak would render services, upon request, to Mobile. In exchange, Mobile would pay Tygon Peak a $300,000 annual management fee in advance, quarterly installments.

The relationship between Mobile and Tygon Peak deteriorated, and Mobile stopped paying Tygon Peak the management fee. Thus, Tygon Peak's Second Amended Complaint alleges that Mobile breached the terms of the MSA by failing to pay Tygon Peak the management fee, and the Court of Chancery's disposition of that claim is the only issue before this Court.

Mobile moved to dismiss the claim alleging that it breached the MSA. The Court of Chancery denied Mobile's motion and held that the management fee is a

flat, annual fee that is not conditioned on, and does not vary with, the amount of services requested by Mobile.

Tygon Peak then filed a motion for judgment on the pleadings with respect to its claim that Mobile breached the MSA, based on the court's interpretation of the contract on Mobile's motion to dismiss. Mobile responded by amending its answer to assert affirmative defenses in an attempt to prevent judgment on the pleadings. But when Tygon Peak renewed its motion for judgment on the pleadings, the Court of Chancery held that Mobile's amended answer did not plead sufficient facts to sustain its affirmative defenses, and the court granted judgment in Tygon Peak's favor, finding that Tygon Peak was entitled to the missed management fee payments under the MSA.

As explained below, the Court should reject Mobile's claims of error because the MSA is an unambiguous contract which the Court of Chancery read, understood, and applied according to the contract's plain language. That language required that Mobile pay the management fee regardless of whether it requested services, and the language does not give Mobile the right to withdraw or terminate by not requesting services from Tygon Peak.

The Court should affirm.

Summary of Argument

1. Denied. The Court of Chancery did not err when it interpreted the MSA as not conditioning Tygon Peak's entitlement to the management fee on any specific requests for services. Additionally, the Court of Chancery correctly found that the MSA was unambiguous and construed it consistent with the contract's plain language.

2. Denied. The Court of Chancery did not err in concluding that Mobile's affirmative defenses of prior material breach, waiver, acquiescence, and estoppel each failed and were therefore insufficient to preclude judgment as a matter of law. Furthermore, in reaching this conclusion, the Court of Chancery correctly found that these affirmative defenses suffered from pleading deficiencies or were otherwise unsupportable. Thus, the Court of Chancery's decision did not impermissibly weigh evidence or improperly resolve disputed factual issues.

3. Denied. The Court of Chancery did not err in concluding Mobile's affirmative defenses based on the securities laws (the "Exchange Act Defenses") did not make the MSA potentially voidable. The Court of Chancery's conclusion that any purported securities violations committed by Tygon Peak lacked the requisite nexus to the MSA rested on the application of a logical and deductive reasoning process and was consistent with existing authority.

Counterstatement of Facts[1]

A. The Parties

Tygon Peak is a private equity firm that raises capital and leads investments on a per-deal basis. LO at 1; A58.

Mobile owns Voice Comm. LO at 2; A58.

Voice Comm is not a party to this appeal but is a market leader of supply chain management services for the mobile device accessories industry. A56.

B. The MSA

On August 31, 2018, Tygon Peak and Mobile entered into the MSA. A294-304. The MSA contemplated that Tygon Peak would receive an annual management fee in exchange for providing certain services needed by Mobile, on request. A296. The management fee is a flat annual fee that is not conditioned upon, and does not vary with, the amount or type of services requested by Mobile. MO at 41, 43; LO at 5. Mobile is required to pay the fee in advance, quarterly installments on the last day of March, June, September, and December of each year. A296. The MSA further provides that it will continue in full force and effect unless and until it is properly terminated in accordance with its terms. A297. To date, the MSA remains in full

---

[1] "A__" references pages in Mobile's appendix. "MO" refers to the Court of Chancery's January 4, 2022 Memorandum Opinion attached to the Opening Brief as Exhibit A. "LO" refers to the Court of Chancery's July 31, 2023 Letter Opinion attached to the Opening Brief as Exhibit C. "OB" refers to Mobile's opening brief. ID 71388762.

force and effect and none of the conditions that allow the MSA's termination have occurred.

The MSA expressly provides that Tygon Peak "will, at the request of [Mobile]'s board of managers (the "Board") and/or the boards of managers or boards of directors (or similar governing bodies) of [Mobile]'s subsidiaries and/or Affiliates" render certain services. A294. Those services are then detailed in twelve subparagraphs. A294-96.

Section 2(B) of the MSA, titled "Payment of Fees," sets forth Mobile's obligation to pay the annual management fee:

> [i]n exchange for the services provided to [Mobile] hereunder, as more fully described in Section 1 of this Agreement, during the Term, [Mobile] will pay or cause to be paid to [Tygon Peak] an annual management fee equal to Three Hundred Thousand Dollars ($300,000) (the "Annual Management Fee") in advance in quarterly installments upon the last day of each March, June, September and December.

A296.

C. Procedural History

1. Mobile's Motion to Dismiss the Claim for Breach of the MSA is Denied and Plaintiff's Motion for Judgment on the Pleadings is Granted

Tygon Peak filed this action on October 24, 2019. However, the operative complaint is Tygon Peak's Second Amended Complaint filed on February 19, 2021. A53-120. The only claim at issue is Count III, which asserts that Mobile breached the terms of the MSA by failing to pay Tygon Peak the management fee.

On March 4, 2021, Mobile moved to dismiss the Second Amended Complaint, including Count III. A25. Through the Memorandum Opinion issued on January 4, 2022, the Court of Chancery denied Mobile's motion to dismiss Count III. In denying Mobile's motion, the court noted that it "agree[d] with Tygon Peak" in terms of the parties' differing interpretations of the MSA. MO at 41. The different interpretations presented to the Court of Chancery are the same that are presented to this Court on appeal, namely, whether the MSA contemplates a management fee that is a flat, annual fee not subject to variation, or whether the fee is conditioned on Mobile requesting services from Tygon Peak, with no fee due if Mobile does not request services. MO at 40-41.

In reaching its conclusion that the interpretation proffered by Tygon Peak is the correct construction of the MSA, the Court of Chancery observed that "Section 1(A) defines Tygon Peak's obligations, and Section 2(B) defines Mobile's obligations." MO at 41-42. The court expressly observed that neither of those provisions in the MSA set forth any requirement that Mobile must first request Tygon Peak's services for Tygon Peak to be entitled to the management fee. MO at 42. The court noted that, in general, Delaware courts are hesitant to find conditions precedent while interpreting contracts, as doing so tends to result in a forfeiture. *Id.*

In addition, the court stressed that Mobile was contractually obliged to pay the management fee "in advance" and that the advance payment condition was not

subject to any limitation suggesting that those payments were cabined to services performed at the request of Mobile. *Id.* Indeed, the Court of Chancery concluded that at least "[p]art of Tygon Peak's service is its constant obligation and readiness to respond to [Mobile's] requests" and that the "flat fee consideration, paid in advance, rightfully reflects that commitment." *Id.* To further bolster its conclusion and show the soundness of its construction, the Court of Chancery observed that it was entirely unclear how a fee that is paid in advance could then be conditioned on subsequent requests for services. *Id.* at 43.

On April 21, 2022, Tygon Peak moved for partial judgment on the pleadings with respect to its entitlement to the annual management fee. A35. After Tygon Peak did so, Mobile filed an amended answer on July 21, 2022. A37-38. Mobile added numerous affirmative defenses, which it claimed "render[ed] the MSA voidable or unenforceable." LO at 13. On October 4, 2022, Tygon Peak renewed its motion for partial judgment on the pleadings. A39.

On July 31, 2023, notwithstanding Mobile's affirmative defenses, the Court of Chancery issued its Letter Opinion concluding that Tygon Peak was entitled to judgment on the pleadings with respect to Count III regarding the management fee. LO at 1. For reasons detailed below, the court found that Mobile's various affirmative defenses were unavailing and insufficient to preclude judgment. *Id.* at 6-18. The Court found that Tygon Peak was entitled to the management fee under the

terms of the MSA, and instructed the parties to confer and submit an implementing order under Court of Chancery Rule 54(b). LO at 18.

2. Mobile Files this Appeal

On August 31, 2023, the Court of Chancery entered a Partial Final Judgment and Order Pursuant to Rule 54(b) (the "Order") with respect to Count III in Tygon Peak's Second Amended Complaint. OB, Ex. D. The Order entered judgment in favor of Tygon Peak and against Mobile and awarded past due management fees, plus interest. *Id.*

On September 28, 2023, Mobile filed its notice of appeal in this Court. ID 70978448. Mobile filed its opening brief on November 14, 2023.

Argument

I. The Court of Chancery Correctly Interpreted the MSA

A. Question Presented

Did the Court of Chancery correctly determine that the MSA provides that the annual management fee is a fixed payment that is not contingent on Mobile's request for services? MO at 42-43; LO at 5, 7; OB at 13.

B. Scope of review

Mobile's appeal is from the Court of Chancery's legal interpretation of a contract, the MSA. The standard of review for the interpretation of a contract is *de novo*. *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009) ("Questions concerning the interpretation of contracts are questions of law, which we review *de novo*.") (citation omitted).

C. Merits of Argument

1. The MSA is Unambiguous and Mobile's Competing Interpretation Should be Rejected

As explained here, consistent with the Court of Chancery's interpretation of the MSA, Tygon Peak's interpretation of the contract is the only reasonable interpretation, so the court below reached the correct result.

When Delaware's courts interpret contracts, they '"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 of its provisions." *Salamone v. Gorman*,

106 A.3d 354, 368 (Del. 2014) (citation omitted). A contract's provisions are unambiguous, and can be interpreted and enforced as a matter of law, where they have only one meaning and are not '"reasonably or fairly susceptible of different interpretations."' *Chicago Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 927, n.60 (Del. 2017) (citation omitted).

As an initial matter, Mobile asserts that "a court cannot choose between two differing reasonable interpretations of a contract" and, because Mobile "proffered a reasonable interpretation of the MSA," judgment on the pleadings in favor of Tygon Peak was not appropriate. OB at 13-14. But the Court should reject all of Mobile's claims with respect to contract interpretation for a simple, dispositive reason: it has not offered an alternative, reasonable interpretation of the contract. To frame the issue, the Court of Chancery found that Mobile is required to pay the annual management fee in advance quarterly installments irrespective of whether Mobile requests any management services from Tygon Peak, with Mobile claiming that it must pay only ***if*** it requests management services. MO at 40-42; OB at 14-19.

To advance its interpretation, Mobile argues that the Court of Chancery's interpretation of the MSA renders two parts of the contract as surplusage. OB at 14. Mobile specifically argues that, if it is required to pay the fee regardless of whether it requests management services, then the phrase in Section 2(B) indicating the fee is paid "[i]n exchange for the services provided to the Company . . ." is surplusage.

OB at 14. But that is not the case—the contract before the Court is a management contract in which the parties ***agreed*** that Tygon Peak ***would*** provide the listed services upon request, in exchange for fees, until the contract is terminated under Section 3. A297. In other words, the parties ***explicitly agreed*** and contemplated that Tygon Peak ***would provide*** the services during the term of the contract, in exchange for the fees, and that is why the parties indicated that the fee is paid "in exchange" for those services. In simplest terms, Mobile hired Tygon Peak to provide the listed management services and agreed to pay for those services, in advance. That is why the contract states that the fee is paid "in exchange," because the parties contemplated an ongoing exchange during the term. A296.

But ***nothing*** in the contract permits Mobile to stop paying the fee, unless and until the contract is terminated, and nothing suggests that Mobile can terminate its obligation to pay by not requesting management services. Section 3 thus provides that the contract will "continue in full force and effect" until properly terminated. A297. It would have been a simple task to write a contract to say what Mobile claims the MSA says, and each of these examples would suffice:

> If Mobile does request any of these services, it shall pay a fee; but no fee is required if Mobile does not request services.
>
> Mobile need not pay the fee unless it requests services.
>
> The request for services is a condition precedent to the obligation to pay the fee.

No comparable language appears in the MSA, and no language in the MSA even suggests that Mobile has the right to terminate the contract, or its obligation to pay in advance, by refusing to request management services. Mobile even agrees with this conclusion: "The MSA's termination provision does not give Mobile unilateral ability to terminate the agreement absent material breach by Tygon." OB at 20.

Mobile next claims, citing Section 1(A), that "services are only due when a 'request' is made by the 'Company's board of managers.'" OB at 14. But this is made up—the contract says nothing of the sort. Instead, Section 1(A) provides that Tygon Peak "will" provide the ten categories of services when requested, and Section 2(B) indicates that Mobile "will pay" the fee "in advance quarterly installments," which means that the fee must be paid even prior to Mobile's decision on which services will be needed for any upcoming quarter. A296. This further explains the "at the request of" language—Mobile would decide which of the listed services were needed for its business operations in any particular quarter, then request specific services. With this basic understanding, the "at the request of" language is not surplusage.

All of the language at issue is straightforward and not surplusage, and the Court of Chancery got it right. Because the contract's language is straightforward, the Court's analysis should stop here. *See*, *e.g.*, *Sanders v. Wang*, 1999 WL 1044880, at *6 (Del. Ch. Nov. 8, 1999) (contractual interpretation "starts with the terms of the

contract. If the terms are plain on their face, then the analysis stops there.") (citation omitted).

Mobile argues next that the Court of Chancery erred by adding terms to the MSA when it found that "[p]art of Tygon [Peak]'s service is its constant obligation and readiness to respond to the Mobile Board's requests; its flat fee consideration, paid in advance, rightfully reflects that commitment." MO at 42 (citation omitted). But, again, Mobile is just wrong—here because the contract ***does require*** Tygon Peak's constant contractual obligation and readiness to provide services: Section 2(B) mandates that Mobile pay the fee in advance and Section 1(A) provides that Tygon Peak must provide the services "at the request of" the board. A295-96. Because the twelve enumerated parts of Section 1(A) list specific services, Tygon Peak must be prepared to provide those services once a request is made. And, by the time a request comes, Tygon Peak will have received its fee, in advance. The management services include, for example, "advice in connection with" operations and contract negotiations under 1(A)(i) and (ii), assistance with financial analysis, budgets, and tax work under (iii) through (v), and other specifically listed services, all of which are Tygon Peak's "constant obligation" to provide, and which require "readiness to respond" as the Vice Chancellor found below. A294-95; MO at 42-43. Again, the language is straightforward and should be applied as written.

Mobile's next argument is that the Court of Chancery erred in determining that Mobile's "reading ignores the 'practical and common structure' of the MSA." OB at 16. Here, the court was simply citing an example of a similar contract discussed in *Reith v. Lichtenstein*, 2019 WL 2714065, at *3 (Del. Ch. June 28, 2019), and Mobile never explains how the Court erred, and it did not. MO at 43. The two contracts are similar, they were interpreted by the same judicial officer, and the Court simply noted the similarity. That is not error. Mobile's views on the "typical private equity sponsored transaction" are also not part of the record and not supported by any citation to authority.

In Mobile's final attempt to prove its interpretation of the MSA, Mobile argues that "Tygon's conduct supports Mobile's interpretation." OB at 17-19. Those arguments, however, are irrelevant because the MSA is not ambiguous. *See*, *e.g.*, *ConAgra Foods, Inc. v. Lexington Insurance Co.*, 21 A.3d 62, 69 (Del. 2011) (noting that where the language of a contract is clear and unequivocal, "the parties are to be bound by its plain meaning") (citation omitted); *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("When the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.") (citation omitted). If the Court does find ambiguity in the MSA, a trial will likely be required

on the parties' intent, which would make that evidence potentially relevant. But that evidence is only potentially relevant to the trier of fact if, and when, a ***trial court*** must decide those issues. *Id.*

2. The Court of Chancery's Interpretation Does Not Produce Absurd Results

Mobile attempts to undercut the Court of Chancery's ruling by contending it "provides an absurd windfall to Tygon" because Mobile must pay the fee "even if Tygon is not asked to perform a single minute of work." OB at 20. And, Mobile asserts, when that payment obligation is linked to the termination conditions set forth in Section 3 of the MSA, the absurdity of the Court of Chancery's interpretation becomes even more apparent because it shows Tygon Peak is entitled "to annual management fees *in perpetuity*, regardless of whether Mobile needs *any work performed* and regardless of whether Tygon *performs any work* . . . ." *Id.* Rhetoric aside, the parties very simply agreed that Mobile would ask Tygon Peak for the listed services during the contract and that Mobile would pay for those services, in advance, and the contract gave Mobile no right to refuse payment by not requesting services. The contract is a "Management Services Agreement" after all, and the Court should not rewrite the contract based on Mobile's regret over the deal it struck. *See*, *e.g.*, *Glaxo Group Ltd. v. DRIT LP*, 248 A.3d 911, 919 (Del. 2021) ("Even if the bargain they strike ends up a bad deal for one or both parties, the court's role is to enforce the agreement as written.") (citation omitted); *New Enterprise Associates*

14, LP v. Rich, 295 A.3d 520, 565 (Del. Ch. 2023) (observing that "[t]o say that Delaware prides itself on the contractarian nature of its law risks understatement. . ." and "Delaware courts are 'especially chary about relieving sophisticated business entities of the burden of freely negotiated contracts") (citation omitted); *REM OA Holdings, LLC v. Northern Gold Holdings, LLC*, 2023 WL 6143042, at *19 (Del. Ch. Sept. 20, 2023) ("Our law recognizes that 'parties have a right to enter into good and bad contracts' and 'enforces both."') (citation omitted).

For these reasons, as confirmed by the Court of Chancery, Tygon Peak's reading of the MSA is the only reasonable interpretation of the contract's language, and the Court should affirm the decision below.

II. The Court of Chancery Properly Found the Affirmative Defenses of Prior Material Breach, Waiver, Estoppel, and Acquiescence Failed to Preclude Judgment on the Pleadings

A. Question Presented

Did the Court of Chancery err in concluding that the affirmative defenses of prior material breach, waiver, estoppel, and acquiescence all failed? LO at 6-13; OB at 22.

B. Scope of Review

This Court reviews the Court of Chancery's grant of a motion for judgment on the pleadings *de novo*. *Chicago Bridge*, 166 A.3d at 925.

C. Merits of Argument

1. Prior Material Breach

Mobile's third affirmative defense asserts that Tygon Peak's claims are barred "because of Plaintiff's prior material breach of the [MSA]." A289. However, the Court of Chancery found that the affirmative defense of prior material breach was insufficiently pled and, therefore, that it did not preclude judgment on the pleadings. LO at 6-8. Again, the court below got it right.

First, the court noted that Mobile "failed to plead that Tygon Peak's failure to provide services was material under either Section 1(A) [of the MSA] or any request for services." *Id.* at 7-8 (citation omitted). That fact alone is dispositive as the court identified a basic pleading deficiency—Mobile failed to allege any facts to support its defense of material breach. Indeed, the Court of Chancery observed that Mobile's

"allegations are conclusory and therefore inadequate to preclude judgment in Plaintiffs' favor." *Id.* at 8. In its opening brief, Mobile argues that it pled prior material breach of the MSA just because it used the phrase "material breach" and alleged that Tygon Peak "failed to provide services." OB at 24-25. Yet, Mobile pled no facts showing that it requested any specific services from Tygon Peak or that Tygon Peak failed to provide any specific services that it was required to provide under Section 1(A) of the MSA. A294-96. This basic flaw in Mobile's pleading allowed judgment on the pleadings.

Standard General LP v. Charney is instructive. There, as here, the Court of Chancery rejected an affirmative defense because the party "failed to plead facts to demonstrate a prior material breach." 2017 WL 6498063, at *21 (Del. Ch. Dec. 19, 2017). In *Standard General*, the party asserting prior material breach contended that an investment was not made in a timely fashion. *Id.* However, the timeliness of the investment was contingent upon the board requesting funds from the investment firm. *Id.* Because the pleading omitted any allegation that the board had requested funds, the Court found the omission was "fatal as it precludes a finding that the investment was not timely." *Id.*

Similarly, Mobile failed to meet basic pleading requirements in this case. *Woodwerx, Inc. v. Delaware Department of Transportation*, 2007 WL 927943, at *1 (Del. March 29, 2007) ("The court is not required, however, 'to accept as true

conclusory allegations 'without specific supporting factual allegations.'"'). Mobile's pleading never alleges *what services* it requested, *when* it requested services, or how Tygon Peak failed to provide services required by the contract and requested by Mobile. While Mobile may be entitled to have every *reasonable* inference drawn in its favor, it is not entitled to simply cry "material breach" or "you failed," then force costly discovery. Mobile must instead explain specifically how Tygon Peak breached the contract and how the breach was material. *Id.* (noting that "[a] trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations . . . .'") (citation omitted).

Mobile relies on *Desert Equities*, but that case is inapposite. *Desert Equities* held 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 Desert Equities to relief." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, LP*, 624 A.2d 1199, 1206 (Del. 1993). To be specific, the plaintiff had brought a prior lawsuit against a fund, and the fund's general partner responded by relying on a discretionary contract provision to "excuse" the plaintiff "from further participation in at least three new Fund II investments." *Id.* at 1202. This Court simply held that the "reasonableness" of the general partner's exercise of its discretion is a question of fact. *Id.* at 1206. *Desert Equities* does not stand for the

position that a party can support an affirmative defense by claiming—without a single factual averment in support—"material breach" or "you failed" and move past the pleadings.

Delaware law requires that parties detail facts in their pleadings, and Mobile's answer failed to meet that standard.

2. Waiver

Mobile's fourth affirmative defense asserted that Tygon Peak's claim for management fees under the MSA is precluded "due to the doctrine of waiver." A289. '"Under Delaware law, a waiver is 'the voluntary and intentional relinquishment of a known right."' *Javice v. JPMorgan Chase Bank, NA*, 2023 WL 4561017, at *4 (Del. Ch. July 13, 2023) (citation omitted). "A waiver may be express or implied, but either way, it must be unequivocal." *Id.*

The Court of Chancery found that Mobile's "waiver affirmative defense fails as a matter of law." LO at 8. This Court should affirm because, as found below, the communications that Mobile cites unequivocally show that Tygon Peak did not waive any rights. Mobile cites a July 4, 2019 letter (A370-71) and an August 22, 2019 email (A373-74).

The July 4 letter expressly stated: "*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

[Mobile] and Tygon [Peak].” A370 (emphasis added). As the Court of Chancery properly found, the July 4 letter constitutes “a conditional suggestion to pause both Tygon Peak’s right to payment and [Mobile’s] receipt of any requested services.” LO at 9. But, the letter was expressly conditional on Mobile’s agreement and signature, and the parties agree that Mobile “did not sign the July 4, 2019 letter . . . .” *Id.*, n.48. Thus, by the letter’s plain terms, Tygon Peak suggested a potential compromise that Mobile did not accept, and that is not a waiver.

In addition, Mobile ignores that Tygon Peak wrote in the same letter that “[w]e respectfully disagree that [Mobile] is permitted to stop paying Tygon the Annual Management Fee . . . without violating [Mobile’s] covenant to pay under the MSA.” A370. This too shows that Tygon Peak did not waive its rights—it instead specifically preserved the dispute.

Also, as found by the Court of Chancery (LO at 9), Tygon Peak expressly reserved its rights in the July 4 letter. A370. Tygon Peak indicated that it “disagree[d] that the Company is permitted to stop paying . . .” the fee, but that it was “willing to waive” its right as part of the proposed, but not concluded, settlement proposal, and also that it was not “waiving any other rights under the MSA . . . .” Delaware law provides that reservations such as these defeat waiver claims as a matter of law. *See, e.g.*, *Pacific Insurance Co. v. Higgins*, 1994 WL 114898, at *8 (Del. Ch. Mar. 23, 1994) (finding there was no intent to waive rescission rights where party also sent a

letter specifically reserving its rights to contest its obligations under the agreement); *Sarraf 2018 Family Trust v. RP Holdco, LLC*, 2022 WL 10093538, at *8, n.105 (Del. Super. Oct. 17, 2022) (finding no waiver where "the same letter that the Trusts allege constitutes waiver also states a reservation of rights, i.e., no intent to waive").

The August 22, 2019 email also fails to show that Tygon Peak waived anything. A373-74. Again, as the court below found, that email is not a waiver because Tygon Peak specifically stated that it would "stand down ***for the time being***," but also reiterated that "we disagree with the Board's (which you control) and your decision to stop paying management fees owed to us under the management services agreement, and do not agree with your assertion that payment of those fees can be turned on and off at your leisure." A373; LO at 9-10. The Court of Chancery thus found that Tygon Peak only agreed to "pause payment" during the discussion, and nothing in the August 22, 2019 email suggests that Tygon Peak was permanently waiving its right to the fee.

Quite simply, both communications cited by Mobile, by their explicit terms, demonstrate that Tygon Peak made conditional statements, never waived its right to the fee, and only indicated temporary things. A373 ("'we have honored your request to stand down *for the time being*") (emphasis added); A230-31 ("we have complied *(to date)* with your request'") (emphasis added). This is not waiver.

Although the Court of Chancery did not reach the issue (this Court's review is *de novo*), Section 7 of the MSA expressly prevents Mobile's waiver argument because it provides that "[n]o amendment or waiver of any term, provision or condition of this Agreement will be effective, unless in writing and executed by the Manager and the Company." A299. It is undisputed that Mobile never signed the July 4 letter and that no documents were "executed by the Manager and the Company," thus preventing waiver.

Finally, putting aside the two communications before the Court, Mobile challenges the determination that Mobile "did not plead that Plaintiff waived its right to the Fee in any oral or other unknown communications." LO at 10. Mobile recast the issue in its brief, claiming that the court erred due to "its incorrect assertion that the prospect of undiscovered waiver communications represented a 'new argument' first raised at the hearing." OB at 31. That is not what the court held. Instead, the court held only that Mobile failed to put facts in its pleading alleging that other communications existed, which is very different—and also accurate. LO at 10-11. The Court of Chancery did not err in that regard because, as with its other claims, Mobile failed to allege real facts supporting its claims, and Mobile may not amend its pleadings through counsel at argument. *See*, *e.g.*, *Orman v. Cullman*, 794 A.2d 5, 28, n.59 (Del. Ch. 2002).

3. Acquiescence and Estoppel

Mobile's fifth and seventh affirmative defenses contend that Tygon Peak was not entitled to receive the management fee under the MSA based on the doctrines of acquiescence and estoppel. A289. Again, the Court of Chancery found that these affirmative defenses failed because they were not adequately pled. LO at 12. Specifically, the Court of Chancery observed that an element of both acquiescence and estoppel is "reliance," and that element was not pled by Mobile, "even in [the] Amended Answer" and, accordingly, "[t]hese affirmative defenses fail as a matter of law." *Id.*

Mobile's answering brief does not contend that it pled reliance, which is fatal on both acquiescence and estoppel. *See*, *e.g.*, *State v. Sweetwater Point, LLC*, 2022 WL 2349659, at *6 (Del. Ch. June 30, 2022) (rejecting an acquiescence defense because "there is no evidence from which I may infer reliance on the State's silence"); *Heron Bay Property Owners Association, Inc. v. CooterSunrise, LLC*, 2013 WL 3871432, at *9 (Del. Ch. June 27, 2013) (rejecting estoppel defense where reliance was not shown to be reasonable). Mobile strangely claims that "it is unclear how a defendant on a motion for judgment on the pleadings is to provide a citation to its own reliance." OB at 33. The answer is simple: ***put it in your pleading***. Because Mobile failed to plead facts supporting a required element of both defenses, the Court of Chancery properly granted judgment.

Mobile argues that "the Court of Chancery made factual determinations" because it found that reliance on Tygon Peak's July 4, 2019 letter and August 22, 2019 email "would not have been reasonable." OB at 32; LO at 12. But the court's comment on reasonableness came at the end of a paragraph starting with the basic, dispositive finding that Mobile's "affirmative defenses fail as a matter of law because Defendants failed to plead reliance, even in their Amended Answer." LO at 12. The court thus held that the affirmative defense failed due to pleading defect, not reasonableness, then simply and correctly pointed out that the correspondence cited by Mobile does not indicate that Tygon Peak was giving up its right to the fee—again, because the correspondence was conditional and not accepted by Mobile. *Id.* at 8-10. But, more to the point, the court's comment does not matter because Mobile ***never alleged in its pleading that it relied on Tygon Peak's behavior***. This means that, by Mobile's own pleading, no reasonable reliance took place, and the defense thus fails. If Mobile relied on anything, it should have alleged actual reliance in its answer.

III. The Court of Chancery Properly Found the Exchange Act Defenses Fail

A. Question Presented

Did the Court of Chancery err in concluding that the Exchange Act Defenses failed to render the MSA voidable or otherwise unenforceable so as to preclude Tygon Peak from receiving judgment on the pleadings? LO at 13-18; OB at 35.

B. Scope of Review

This Court reviews the Court of Chancery's grant of a motion for judgment on the pleadings *de novo*. *Chicago Bridge*, 166 A.3d at 925.

C. Merits of Argument

1. Tygon Peak's alleged securities violations are not inseparable from the MSA

Mobile raises three arguments on the Exchange Act: (1) that Tygon Peak's allegedly illegal conduct has a sufficient nexus to the MSA (OB at 36-39), (2) that the Court of Chancery misapplied federal law on the MSA's purpose (OB at 40-41), (3) that the MSA was "made" in violation of the Exchange Act (OB at 41-42), and (4) that the court improperly rejected Mobile's illegal contract claim under Delaware law (OB at 42-46). The Court should reject each argument.

Below, the Court of Chancery correctly concluded that, to invalidate the MSA, Mobile has the burden to allege facts showing that a securities violation is "inseparable ***from the underlying agreement*** between the parties." *Berckeley Investment Group, Inc. v. Colkitt*, 455 F.3d 195, 206 (3d Cir. 2006) (emphasis added)

(citation omitted); LO at 15. Consistent with the Court of Chancery's decision, the Third Circuit looks to whether "an agreement ***cannot be performed without violating the securities laws*** . . . ." *Id.* (emphasis added).

Here, the MSA is a simple management services agreement in which one Delaware company agreed to provide management services to another Delaware company, specifically basic advice and assistance in operations and finance. A294-96. This Court should reject Mobile's arguments because Third Circuit precedent shows that the third element of a claim under Section 29(b) of the Exchange Act, whether "***the contract*** involved a prohibited transaction," is only met where the "securities violations ***are inseparable from***" ***the contract***. LO at 15 (quoting *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 559 (5th Cir. 1982) and *Berckeley*, 455 F.3d at 206) (emphasis added). Here, Tygon Peak's agreement to provide management services in exchange for cash is separable from the purported securities violation, and neither the formation nor performance of the MSA "involved a prohibited transaction." *Berckeley*, 455 F.3d at 206.

The only tangible connection between the MSA and the purportedly wrongful conduct identified by Mobile is that the management fees were "consideration for Tygon Peak's role in attracting investors in TopCo." LO at 16. But that is not sufficient because the ***MSA*** was not "made in violation" of the Exchange Act and its performance did not "involve[] a violation of the Exchange Act," the two prongs of

Section 29(b). LO at 15. Thus, the Third Circuit applies Section 29(b) to make a contract voidable only where it "cannot be performed without violating the securities laws . . . ." *Berckeley*, 455 F.3d at 206. Here, the parties may fully perform ***the MSA***, again a basic management services contract, without violating any securities laws, and Mobile does not argue otherwise. That fact is fatal to Mobile's claims, as the Court of Chancery properly found. LO at 16 ("Tygon Peak's alleged securities violations in soliciting TopCo investors are not 'inseparable' from the 'central purpose' of MidCo's MSA.") (citations omitted).

Mobile argues that the court ignored the "made in violation" prong of Section 29(b), and points to a statement in *EdgePoint* that "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." OB at 41 (citing *EdgePoint Capital Holdings, LLC v. Apothecare Pharmacy, LLC*, 6 F.4th 50, 61 (6th Cir. 2021)). But, the Court of Chancery did not ignore that part of the statute, and the court applied *EdgePoint* directly. LO at 15-16. Specifically, in *EdgePoint*, the First Circuit looked at whether the purported securities violation was "inseparable from the contract's central purpose . . . ." *EdgePoint*, 6 F.4th at 61. The Court of Chancery, citing *EdgePoint*, thus looked at the MSA's "central purpose" of providing management services and found that the purported violation arising from "soliciting TopCo investors" was not "inseparable" from that central purpose, making Section 29(b) inapplicable. LO at 16.

EdgePoint made clear that "[o]ur holding is consistent with *Berckeley* and *Regional Properties* . . ." and *EdgePoint* also did not involve a "made in violation" claim under Section 29(b). *EdgePoint*, 6 F.4th at 61 ("As a threshold matter, the argument is immaterial because we conclude the contract's performance involved a violation of the Exchange Act, not that the contract was 'made' in violation of the Exchange Act."). These facts show that *EdgePoint* does not create a separate thread of law for the "made in violation" part of Section 29(b), as Mobile claims (OB at 41-42), and instead that settled Third Circuit precedent governing ***both prongs*** of Section 29(b) continues to require a finding that the securities violation is "inseparable" from the contract and that the contract "cannot be performed" without a violation:

> Surveying the applicable case law on the subject, ***we took a narrow view of the phrases "made in violation of" and "the performance of which involves the violation of" contained in Section 29(b)***. The test, as we applied it in *GFL Advantage Fund*, ***is whether the securities violations are inseparable from the underlying agreement between the parties***. *Id.* at 201. ***If an agreement cannot be performed without violating the securities laws, that agreement is subject to rescission under Section 29(b)***.

Berckeley, 455 F.3d at 206 (emphasis added). *See also EdgePoint*, 6 F.4th at 61 (stating that *Berckeley* "holds that a contract is voidable if the contract 'involved a prohibited transaction' and there was 'a direct relationship between the violation at issue and the performance of the contract; i.e., the violation must be 'inseparable

from the performance of the contract' rather than 'collateral or tangential to the contract.'").

Here, the Court of Chancery applied settled Third Circuit precedent, again governing both aspects of Section 29(b), and found that the MSA is not voidable because "Tygon Peak can perform management services for [Mobile] under the MSA ***without violating securities laws***." LO at 16. That finding was both correct and entirely consistent with *Berckeley* and *EdgePoint*. *Berckeley*, 455 F.3d at 206 ("If an agreement cannot be performed without violating the securities laws, that agreement is subject to rescission under Section 29(b)."); *EdgePoint*, 6 F.4th at 60 ("Instead, a contract may be voidable under Section 29(b) if its performance in fact involved a violation of the Exchange Act.").

For these reasons, Mobile failed to identify any reason for this Court to reverse the Court of Chancery's decision in relation to the Exchange Act.

2. The Court of Chancery did not require Mobile to prove its claims, but only required it to plead its claims

Mobile claims that the Vice Chancellor erred by "requiring Mobile to meet its ultimate trial burden on the pleadings." OB at 43 (citing LO at 17). Nothing like that took place below.

After examining, in detail, whether the pleadings include facts which, if proven, show that the MSA is voidable because Tygon Peak violated the securities laws, the Court of Chancery turned to Mobile's fifteenth affirmative defense. LO at

17. That affirmative defense asserted only that "[b]ecause the MSA constitutes an illegal contract under §§ 15(a)(1) and 29(b) of the Exchange Act, it is unenforceable under Delaware law." A291. And while Delaware law will refuse to enforce an illegal contract, Mobile cited ***only*** the Exchange Act for the claimed illegality. Thus, the court found that, "[***a***]***s explained***," referring to its preceding discussion of the Exchange Act, Mobile had "not demonstrated that the MSA is an illegal contract under the Exchange Act." LO at 17 (emphasis added). If the MSA is not illegal under the Exchange Act, Mobile's sole basis for claiming illegality in its fifteenth affirmative defense fails. A291.

As with Mobile's other defenses, Mobile failed to plead facts which, if proven, demonstrate that the MSA is "illegal" in any way. It is a simple management contract and, as the court below properly found, "litigants must do more than state a contract is 'illegal' to render it unenforceable." LO at 17. This holding below is a far cry from the court "requiring Mobile to meet its ultimate trial burden on the pleadings," and the Court should reject the argument.

Finally, Mobile argues in a footnote that the Court of Chancery erred by not addressing "the legality of Tygon's conduct under Section 15(a)(1)" of the Exchange Act. Under Rule 14(b)(vi)(3), Mobile waived that argument by relegating it to a footnote. *See*, *e.g.*, *Holifield v. XRI Investment Holdings LLC*, 2023 WL 5761367, at *16, n.95 (Del. September 7, 2023). Substantively, Mobile's fifteenth affirmative

defense is that because "***the MSA*** constitutes an illegal contract under §§ 15(a)(1) and 29(b) of the Exchange Act, it is unenforceable under Delaware law." A291 (emphasis added). The Court of Chancery addressed, at length, why the MSA is not illegal under Section 29(b). LO at 13-17. Beyond that, Section 15(a)(1) makes it illegal to use the mail or interstate commerce "to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security . . . ." Again, the MSA is a management services contract relating to advice and assistance in the operation and finance of a Delaware company, but it has nothing to do with the sale of securities and Section 15(a)(1) finds no application here.

Conclusion

For the foregoing reasons, the Court should affirm the Court of Chancery's rulings below.

Smith, Katzenstein & Jenkins LLP

/s/ *Robert K. Beste*

Robert K. Beste (3931)
1000 West Street, Suite 1501
Wilmington, Delaware 19801
(302) 652-8400
rkb@skjlaw.com

December 14, 2023

Attorneys for appellee