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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 REPLY BRIEF

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PRELIMINARY STATEMENT

Tygon's Answering Brief concedes that an unreasonable interpretation of the MSA is one that would "produce[] an absurd result or a result that no reasonable person would have accepted when entering the contract."[1] *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1208 (Del. 2021). Yet Tygon asks this Court to accept an interpretation of the MSA providing it $300,000 annually regardless of whether (1) Mobile *requests any services* from Tygon and (2) Tygon *performs any work* for Mobile. For the kicker, this fee is owed *in perpetuity* and Mobile cannot terminate the MSA unilaterally. No reasonable person would contract for this result. On this basis alone, the Court of Chancery's judgment must be reversed.

But even were this Court to adopt that absurd interpretation of the MSA, Mobile asserted viable affirmative defenses that should have precluded judgment. Mobile's answer included factual averments supporting Tygon's prior material breach (through failure to provide service as alleged by Mobile and admitted by Tygon), and waiver, estoppel, and acquiescence (through Tygon's statements and conduct). Rather than affording Mobile the reasonable inferences to which it was entitled, the court weighed incomplete evidence excerpted in Mobile's answer, and

[1] Capitalized terms have the meanings ascribed in Appellant's Opening Brief ("Opening Brief" or "OB"). Tygon's Answering Brief is referred to as the "Answering Brief" or "AB."

relied on an incomplete record to adjudicate fact-intensive defenses in Tygon's favor. These affirmative defenses provide another ground for reversal.

Further, the judgment below must be reversed even if this Court rules against Mobile on the arguments above, because the contractual interpretation advanced by Tygon and endorsed by the Court of Chancery renders the MSA voidable under Section 29(b) of the Exchange Act and Delaware law. Tygon's complaint alleges: "*As part of the consideration for serving as the independent sponsor on the Voice Comm Acquisition, Tygon Peak was promised certain management fees*." A104. Tygon's own pleading thus supports the necessary nexus between its illegal unregistered brokerage activity and the MSA, and offers another independent ground for reversal.

ARGUMENT

Tygon's Answering Brief reveals that the parties agree on the key issues before this Court. Indeed, Tygon either agrees with or concedes the following critical points:

- The court's interpretation of the MSA provides for Tygon to receive $300,000 annually, even though Mobile no longer requests any services from it. AB at 10, 15 (noting—but not refuting—Mobile's argument that the court's interpretation provides that Tygon is entitled "to annual management fees in perpetuity, regardless of whether Mobile needs any work performed *and regardless of whether Tygon performs any work*").

- The court's interpretation of the MSA provides for Tygon to receive $300,000 *in perpetuity*. AB at 12 ("no language in the MSA even suggests that Mobile has the right to terminate the contract" absent material breach).

- When evaluating Mobile's waiver defense on the pleadings, the court adjudicated Tygon's intent. AB at 20-21.

- When considering Mobile's defenses of estoppel and acquiescence, the court evaluated the "reasonableness" of Mobile's reliance on Tygon's correspondence, which even Tygon does not attempt to defend as proper at the pleadings stage. OB at 32-34; AB at 25.

- Tygon considers the $300,000 annual management fee to be "essential consideration" for its work on the Acquisition. OB at 38; AB at 27.

For these reasons, and as further explained below, the court's judgment should be reversed.

I. Tygon's Arguments Do Not Defeat Mobile's Reasonable Interpretation

Tygon argues that Mobile "has not offered an alternative, reasonable interpretation of the contract." AB at 10. Not true. As Tygon admits, Mobile's position is that Mobile "must pay only if it requests [and Tygon provides] management services." *Id.* This is consistent with the plain language of the MSA which states that the annual management fee is paid "[i]n exchange for the services provided to the Company." A296 § 2.B. This is also consistent with the text of Section 1.A which provides that Tygon "will, at the request of the Company's board of managers," provide certain services. A294 § 1.A. Accordingly, Mobile's interpretation of the MSA adheres to its terms and establishes that Mobile need not pay in the absence of Mobile requesting and Tygon providing service.

Rather than explain why a contract that requires payment without a request for services or the provision of services is reasonable, Tygon argues that Mobile's position that "services are only due when a 'request' is made by the 'Company's board of managers'" is "made up." AB at 12. Again, Tygon is incorrect. Section 1(A) of the MSA expressly states that Tygon "will, *at the request of the Company's board of managers*" provide certain services. A294 § 1.A. (emphasis added). There is nothing "made up" about Mobile's position.

To be sure, Tygon attempts to explain why payment in the absence of services does not render the operative language in the MSA as surplusage. Tygon argues that

because "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,'" this means that "the fee must be paid even prior to Mobile's decision on which services will be needed for any upcoming quarter." AB at 12. According to Tygon, "[t]his 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." *Id.*

But Tygon's position illustrates why *Mobile's* interpretation is reasonable and harmonizes the text of the MSA: Once Mobile told Tygon that it is not requesting any services (as it did on July 1, 2019, A368), there are no services for Tygon to provide. And once there are no services to provide, payment cannot be made "[i]n exchange for the services." A296 § 2.B. Otherwise (under Tygon's proffered reading) the relevant language of the MSA is surplusage. Services are provided not "at the request of" Mobile; they are provided despite Mobile's request for *no service*. A296 § 1.A. And payment is not required "*[i]n exchange for the services*"; it is required despite no services at all. A296 § 2.B.

Based on the text of the MSA, it is at least equally as likely (and certainly not unreasonable) that the parties agreed that payment of the management fee was predicated *on the actual provision of management services* (Mobile's interpretation)

rather than a perpetual and interminable obligation (Tygon's interpretation). Mobile's reasonable interpretation is grounds for reversal. OB at 13-18.

Tygon next argues that the court did not err by holding that "[p]art of Tygon Peak's service is its constant obligation and readiness to respond to the Mobile Board's requests," Ex. A at 42, because, according to Tygon, "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." AB at 13. But nowhere does the MSA state that Tygon must constantly be ready to respond to a request from Mobile. OB at 15-16. Nor does the MSA provide that payment is in exchange for supposed constant readiness. Indeed, Tygon never alleges that it was "constantly ready" to provide services should Mobile request. A104-05. The court's decision to supply a term not found in the agreement was error.

Tygon also fails to address Mobile's argument that there is no reason why Tygon would have a "constant obligation and readiness to respond" once Mobile informed it on July 1, 2019, that it was not requesting services. OB at 20-21. Put simply, no reasonable person would understand Tygon to have an obligation to be constantly ready to respond to requests that Mobile has told Tygon it is not going to make. *Id.* at 21. Tygon's contrary position is unreasonable.

Regarding the "practical and common structure" referenced by the Court of Chancery, Mobile illustrated in its Opening Brief how the court mistakenly relied on dissimilar circumstances. Ex. A at 43; OB at 16-17. Mobile explained that the MSA was not entered into in the typical private equity setting, and cited the court's own finding that Tygon was not in control of the investment vehicle as support. OB at 16. Rather than address the merit of Mobile's argument, Tygon runs from it claiming that "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." AB at 14. Tygon is wrong, as it directly put this at issue, alleging in its complaint that the MSA "is a customary economic construct of private equity sponsor-led transactions," allegations that Mobile *denied*. A228 ¶ 68. Mobile also refutes the Court of Chancery's adoption of that allegation. Ex. A at 43. And it is appropriate for this Court to consider the real-world relationship between the parties when construing the MSA. *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017).

On the merits, Tygon claims 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 "[t]he two contracts are similar, they were interpreted by the same judicial officer, and the Court simply noted the similarity." AB at 14. But Tygon omits that the court's citation to *Reith* for the terms of the management

services agreement references an exhibit from a motion to dismiss in that case (Ex. 11 at 6) which is merely a summary of the agreement in a Form 8-K. AR1-9, AR6. A short description of the agreement is not a sufficient basis to construe the MSA *sub judice*.

Even so, *Reith* supports Mobile's interpretation. First, the summary of the management services agreement states "[d]uring the year ended July 31, 2017, pursuant to the Management Services Agreement, the Company paid a fixed monthly fee of $175,000 *in consideration for the services and incremental costs as incurred*." AR6 (emphasis added). It thus supports payment as consideration for actual services. Second, another summary of the agreement from a public filing submitted on that motion reflects the agreement had a limited duration. Trans. ID 62120440 (Ex. 15 at 54). Third, the court in *Reith* found that the company subject to the management services agreement was *controlled by the same entity getting paid under the management services agreement*. *Reith*, 2019 WL 2714065, at *8-9. That is Mobile's point. As explained in the Opening Brief, "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" because Tygon as an independent sponsor, in the words of the court, "does not control the investment vehicle." OB 16-17.

Last, the Court may review Tygon's conduct to help it interpret an at least ambiguous MSA, particularly where one interpretation leads to an absurd result that provides a windfall to one party. *GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 784 (Del. 2012) ("prior communications and course of dealing" appropriately considered to resolve ambiguity). As is clear from the limited record on the pleadings, after Mobile informed Tygon that it was not requesting services (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*." A370 (emphasis added). Later, 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]." *E.g.*, A230-32 ¶¶ 74-75. Tygon also ceased providing invoices for the management fee—reinforcing that it understood Mobile did not owe the fee going forward. OB at 7-8 (citing A375-86); *Id.* at 18. This conduct supports Mobile's interpretation.

A. The Court of Chancery's Interpretation Leads to Absurd Results

This Court must decide whether a reasonable person would have entered into the MSA as interpreted by the Court of Chancery, providing for Tygon to receive $300,000 per year, in perpetuity, even though Mobile no longer requests any services and even though Tygon does not allege it has provided any work since July 1, 2019. AB at 10, 12, 15. The simple answer is that "no reasonable person would have

accepted [this result] when entering the contract." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

Not only does Tygon's proffered interpretation "def[y] common sense," *Fillip v. Centerstone Linen Servs., LLC*, 2014 WL 793123, at *5 (Del. Ch. Feb. 27, 2014), Delaware courts regularly reject interpretations that would lead to a windfall to one party, as here. *First Cap. Sur. & Tr. Co. v. Elliott*, 2012 WL 4471244, at *6-7 (Del. Ch. Sept. 27, 2012) (rejecting statutory interpretation that would lead to windfall Medicaid recoupment); *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009) (affirming no damages for assumed technical breach of agreement and explaining "[c]ontract damages … should not act as a windfall."); *Council of Unit Owners of Windswept Condo. Ass'n v. Schumm*, 2014 WL 2528657, at *3 (Del. Super. Ct. May 19, 2014) (declining to award fees and costs that would act as a windfall and explaining that "[t]he Delaware Supreme Court has held that damages awarded in a breach of contract action should not act as a windfall.").

The same is true for interpretations that would lead to payment in return for no value or perpetual terms. *ITG Brands, LLC v. Reynolds Am., Inc.*, 2022 WL 4678868, at *19 (Del. Ch. Sept 30, 2022) ("[N]o reasonable [seller] would have agreed to expose itself to the prospect of making annual payments to a [State settlor] for…product revenues it no longer receives"); *Revolution Retail Sys., LLC v. Sentinel Techs., Inc.*, 2015 WL 6611601, at *17 (Del. Ch. Oct. 30, 2015) (finding

that analogous Texas law "disfavors perpetual agreements" and, if the term of the agreement is perpetual, "then the agreement is terminable at will by either of the parties").

Tygon devotes just one paragraph to the absurd results stemming from its interpretation, claiming that Delaware law recognizes that 'parties have a right to enter into good and bad contracts' and 'enforces both.'" AB at 16. Yet Tygon omits that even though parties "are free to make bad bargains," courts do not interpret agreements in ways that "would lead to absurd and unfounded results that, in [the Court's] opinion, 'no reasonable person would have accepted when entering the contract.'" *Miramar Police Officers' Ret. Plan v. Murdoch*, 2015 WL 1593745, at *9 (Del. Ch. Apr. 7, 2015). Mobile's interpretation is that payment is in exchange for service, and that after Mobile informed Tygon it was not requesting service, Tygon was not entitled to receive payment for no service. Not only is Mobile's interpretation consistent with common sense, it is supported by the language of the agreement. At a minimum, the Court of Chancery should not have rejected Mobile's interpretation at the pleadings stage.

II. Mobile's Affirmative Defenses of Prior Material Breach, Waiver, Estoppel, and Acquiescence Were Well-Pled

A. Material Breach

Tygon does not dispute Mobile's definition of material breach as a breach that "goes to the root or essence of the agreement…or touches the fundamental purpose of the contract." OB at 24-25. As to materiality, Mobile pled that Tygon's claims were barred "because of Plaintiff's prior material breach of the [MSA]," A289, and admitted that "[Tygon] failed to provide services in accordance with the [MSA]," A230-31 ¶ 74. Yet the court found that Mobile "failed to plead that Tygon Peak's failure to provide services was material under" the MSA. Ex. C at 7-8. The court did not address why the failure to provide services is insufficient to plead a material breach when the essence of the MSA is the provision of services. As Mobile argued in its Opening Brief: "Indeed, it is a services agreement." OB at 24. Tygon appears to agree, proclaiming: "The contract is a 'Management Services Agreement' after all." AB at 15. The pled failure to provide that which goes to the essence of the agreement is sufficient for this affirmative defense to proceed.

Tygon's reliance on *Standard General L.P. v. Charney* is of no help, as that case in pertinent part dealt with the timing of an investment. 2017 WL 6498063, at *21 (Del. Ch. Dec. 19, 2017). The Court of Chancery there found that defendant failed to allege facts about when an investment request was made, precluding a finding of untimeliness. *Id.* Here, there is no dispute that Mobile requested services

before July 1, 2019, and that, in the words of Tygon "on July 1, 2019—under the guise of purported deficiencies with Tygon Peak's services and without any legitimate basis—Mobile stopped paying Tygon Peak the management fees to which Tygon Peak is entitled under the MSA." A274 ¶ 186. Mobile denied that allegation. *Id.* Thus, the parties' dispute over the adequacy and deficiencies with Tygon's service creates triable issues of fact. OB at 25-26; A178 (Tygon arguing 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"). No further specificity was required. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011) ("even vague allegations in the Complaint [are] 'well-pleaded' if they provide the defendant notice of the claim").

B. Waiver

Tygon also claims "[t]his Court should affirm because, as found below, the communications that Mobile cites unequivocally show that Tygon Peak did not waive any rights." AB at 20. Tygon's intent was the only disputed element. Ex. C at 8. And Mobile supported its affirmative defenses with detailed denials of the allegations in the complaint. A230-31 ¶ 74 (referencing correspondence from Tygon dated July 4, August 22, and August 26, 2019). The court considered (and weighed) the July 4 and August 22 correspondence on the pleadings, but did not consider or even reference the August 26 correspondence, as Tygon did not put it before the

court. The court also disregarded its prior ruling that "[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, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993)), instead finding Tygon did not intend to waive its rights. The court impermissibly weighed incomplete evidence at the pleadings stage (including documents not even before the court) and refused to provide Mobile the reasonable inferences to which it was entitled. OB at 28; *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989), *aff'd*, 567 A.2d 419 (Del. 1989) (TABLE). Thus, this Court should reverse judgment on the pleadings so that the facts regarding Tygon's intent and conduct can be developed.

Tygon also does not address Mobile's argument that it need not have signed the July 4 Letter for there to have been a waiver and "even if the statements in the July 4, 2019 letter were 'conditional,' the conditions were met." OB 28-29. This is another ground for reversal.

As to Mobile's request for discovery, Tygon argues that "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.'" AB at 23 (citing OB at 31). But that is what the court held: "*At the hearing on the Motion*, Defendants offered a new argument: Tygon

Peak might have waived its rights to payment via as-yet undiscovered oral or other written communications." Ex. C at 10 (emphasis added). The court also cited the hearing transcript. *Id.* at n.55. Mobile pointed out in its Opening Brief that this finding was inaccurate. OB at 31-32. Mobile also stated in its answer that it was reserving its rights "to allege other defenses…as they become known during the course of discovery." A291. For these reasons too, the Court should reverse judgment on the pleadings so that a record regarding Tygon's intent can be developed.

Finally, Tygon's argument that Section 7 of the MSA "prevents Mobile's waiver argument" is a red herring. AB at 23. Mobile dispatched that argument below, and this Court can reject it for the same reasons—parties may amend, modify, or waive provisions of their agreements (even an agreement with a no waiver provision) through conduct. A344-46. Tygon provides no authority to the contrary.

C. Estoppel and Acquiescence

Despite Mobile's entitlement to all reasonable inferences, the court concluded that Mobile had not pled that it relied on Tygon's statements and conduct. That is incorrect. Mobile repeatedly denied that Tygon was entitled to the fee and asserted that Tygon's statements and conduct justified Mobile's decision not to pay. *E.g.*, A228-29 ¶ 69, A273-76 ¶¶ 182-83, 187 (denying obligation to pay and answering that "Plaintiff, *through its statements and conduct, has conceded that payment under*

the MSA was conditioned on the provision of services by Plaintiff") (emphasis added). And again, all that was required was notice pleading which "do[es] not require a [party] to plead a claim with particularity." *Desert Equities*, 624 A.2d at 1207; *Cent. Mortg. Co.*, 27 A.3d at 536.

As another example of pleading facts supporting reliance, when Tygon alleged that "Mobile has breached the MSA by failing to pay," Mobile answered by *denying the allegation* and explaining that:

> on July 4, 2019, [Tygon] stated in a letter to [Mobile] that it was willing to "waive [its] right to receive payment" under the MSA "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 …. [Tygon] further "acknowledge[d]" that "neither [Mobile] nor [Tygon] is or will be in breach of the MSA by not providing services in the case of [Tygon] or payment under the MSA in the case of the [Mobile] in accordance with the terms of this letter, until the terms and conditions of recommencing any services under the MSA are mutually agreed to by [Mobile] and [Tygon]." [Tygon] has not performed any services under the MSA and [Tygon] and [Mobile] have not mutually agreed upon the terms and conditions of any services under the MSA. Defendants further state that even though [Mobile] did not sign the July 4, 2019 letter from [Tygon], on August 22, 2019, [Tygon] admitted in an e-mail that it was "honor[ing]" [Mobile's] request that [Tygon] "stand down for the time being and not receive payment in exchange for not providing any services under [the management services] agreement."

A231-32 ¶ 75.

Based on this detailed response (coupled with the expressly pled affirmative defenses of estoppel and acquiescence and Mobile's averments that Tygon, "through its statements and conduct, has conceded that payment under the MSA was conditioned on the provision of services"), the argument that Mobile did not plead reliance or adequately put Tygon on notice of its intent to raise estoppel and acquiescence as a defense is wrong.

Just as important, Tygon concedes that the court ruled that reliance on Tygon's correspondence would not have been reasonable. AB at 25. In the face of Mobile's binding and dispositive authority (*see* OB at 32-34), Tygon does not even attempt to defend that ruling as proper on the pleadings. AB at 25. Thus, at a minimum, the Court of Chancery's decision must be reversed so that the reasonableness of Mobile's reliance on Tygon's statements and conduct can be considered on a developed record. *Desert Equities*, 624 A.2d at 1206. This is another independent ground for reversal.

III. The Court of Chancery Erred by Summarily Dismissing the Exchange Act Defenses

Mobile showed in its Opening Brief that the Exchange Act Defenses should not have been summarily dismissed under Rule 12(c)'s "stringent" standards because Tygon did not demonstrate a "reasonable certainty" that "no set of facts could be proven" after discovery and trial to support those defenses. OB at 35-46 (citing *Artisans' Bank v. Seaford IR, LLC*, 2010 WL 2501471, at *2 (Del. Super. Ct. June 21, 2010); *Warner Commc'ns*, 583 A.2d at 965).

Specifically, the pleadings offer factual allegations which, if proven, will establish the required nexus between Tygon's illegal unregistered brokerage activity and the MSA.[2] These allegations are drawn largely from the SAC, and include, among others:

- Tygon's assertion that the MSA's management fee was *deal-related* compensation "[i]n consideration for [its] undertaking as the private equity independent sponsor on the [Acquisition]." A73 ¶¶ 68–69.

[2] The court's opinion limited its Exchange Act analysis to the *relationship* between Tygon's unregistered brokerage activity and the MSA and did not consider (or reject) Mobile's threshold assertion that such activity was indeed illegal under federal securities law and Delaware law. Accordingly, this Court can assume that Tygon violated Section 15(a)(1) of the Exchange Act when it acted as an unregistered broker in connection with the Acquisition, and similarly limit its review to the relationship between that illegal activity and the MSA. Tygon's curious suggestion that Mobile "waived" its illegality arguments (AB at 31) misconstrues the pleadings, which plainly assert such illegality. A290-91 (alleging Tygon's lack of registration violated Section 15(a)(1)).

- Tygon's assertion that its "entitlement to an ongoing management fee…constituted essential consideration" for facilitating the Acquisition. A62-63 ¶ 26.

- Tygon's assertion that the MSA included a "promote" payment as a "key element [of] the overall economic bargain" with other investors. A65-66 ¶¶ 40-44.

- Execution and closing of the Acquisition *on the same day* as the MSA. OB at 38; AR28.

Tygon disputes the obvious nexus between the MSA and its Acquisition-related misconduct, mischaracterizing the MSA as "a simple management services agreement in which one Delaware company agreed to provide management services to another Delaware company," and an agreement that the parties entered "[o]nce the purchase of Voice Comm was complete." AB at 1, 27. These assertions are untrue.

The MSA shows, on its face, that it is not a "simple" management services agreement but rather—to use Tygon's own words—an "essential" part of the Acquisition intended to compensate Tygon for its illegal *deal-related* activities. Section 2 of the MSA, entitled "**Payment of Fees**," provides for Tygon to receive both a management fee and "due diligence" fee for its unregistered brokerage work in connection with the Acquisition. A296. Discovery and trial will confirm that these fees were both "essential" compensation for Tygon's Acquisition-related activities, and that the MSA therefore "involved a prohibited transaction" which renders it voidable under Section 29(b) of the Exchange Act. *Berckeley Inv. Grp.,*

Ltd. v. Colkitt, 455 F.3d 195, 205 (3d Cir. 2006) (finding that party seeking to void a contract under Section 29(b) must establish that "the contract involved a prohibited transaction") (summary judgment granted in part and denied in part); *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).

Tygon likewise mischaracterizes the record by incorrectly stating that the MSA was entered "[o]nce the purchase of Voice Comm was complete." AB at 1. To the contrary, discovery and trial will establish that closing of the Acquisition and the MSA occurred on the same day (August 31, 2018), buttressing the nexus between Tygon's illegal securities activities and the MSA. And the MSA memorialized deal terms included in the Term Sheet for the Acquisition (Exhibit A to the SAC), which contained the management fee as an "essential" part of Tygon's deal-related compensation. A136; AR14. At very least, the pleadings offer sufficient basis to warrant a contrary inference, which is all that is required to defeat relief under Rule 12(c).

The court ignored these facts and reasonable inferences therefrom when it found that Tygon's unregistered brokerage activities were "not 'inseparable' from the 'central purpose'" of the MSA. Ex. C at 16. This Court should reverse. *Artisans' Bank*, 2010 WL 2501471, at *2; *Warner Commc'ns*, 583 A.2d at 965.

A. Authoritative Case Law Confirms that Mobile Pled the Required Nexus Between the MSA and Tygon's Securities Violations

Berckeley and *EdgePoint* were both decided at the summary judgment stage, not on the pleadings, and both cases ***upheld*** Section 29(b) defenses, either in whole or part. Accordingly, the First and Third Circuit's holdings in *Berckeley* and *EdgePoint* support Mobile's position, not Tygon's.

Tygon miscites *Berckeley* to claim that "the Third Circuit applies Section 29(b) to make a contract voidable ***only*** where it 'cannot be performed without violating the securities laws….'" AB at 28 (emphasis added) (quoting *Berckeley*, 455 F.3d at 206). *Berckeley* said no such thing, as the Third Circuit's full sentence (only partially quoted by Tygon) actually states: "If an agreement cannot be performed without violating the securities laws, that agreement is subject to rescission under Section 29(b)." 455 F.3d at 206. While Tygon's inability to perform its agreement without violating securities laws offers ***one*** basis to void the MSA under Section 29(b), the Third Circuit did not suggest that it was the exclusive means to Section 29(b) relief. Nor could it, as the text of the law plainly states that Section 29(b) applies to void "[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." *See* 15 U.S.C. § 78cc(b) (emphases added); *see also EdgePoint*, 6 F.4th at 61 ("[T]he mere fact that it is possible to legally perform a contract does ***not*** mean the contract was not made

in violation of securities law.") (emphasis added). Mobile's Opening Brief properly explained that it has pled sufficient facts to warrant discovery under both of these disjunctive prongs of Section 29(b). *See* OB at 41-42.

Tygon also misstates the nature of the nexus required to maintain a defense under Section 29(b). In *Berckeley*, the Third Circuit partially reversed a lower court's summary judgment finding and reinstated a Section 29(b) defense as a matter of law, finding a genuine issue of material fact existed whether a misrepresentation in violation of Section 10(b) occurred when the parties entered into the agreement. *Berckeley*, 455 F.3d at 205. The Third Circuit explained: "The Section 10(b) claim alleges that [Appellant] made material misrepresentations that induced [Appellee] to enter into the Agreement. If [Appellee] is able to prove that claim, then the Agreement was 'made in violation of' Section 10(b). The misrepresentations that induced [Appellee] to enter into the Agreement would be 'inseparable from the underlying agreement between the parties.'" *Id.* at 207 n.11 (quoting *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 202 (3d Cir. 2001)). While this case differs slightly from *Berckeley* as it involves an underlying violation of Section 15(a) of the Exchange Act rather than Section 10(b), the same principle that warranted reinstatement of the Section 29(b) defense in *Berckeley* applies here, since the limited record available on the pleadings amply supports the possibility that a factfinder may conclude that the MSA was "***made in*** violation" of the Exchange Act.

See A62-63 ¶ 26; A73 ¶¶ 68-69; A294.

In *EdgePoint*, the First Circuit likewise upheld the applicability of Section 29(b) and granted summary judgment voiding an illegal agreement after finding a "direct relationship" between the agreement at issue and the underlying securities violation. 6 F.4th at 58-59. Contrary to the Court of Chancery's analysis, *EdgePoint* did not require that "the central purpose" of the voidable agreement relate to the underlying securities violation, but merely cited that factual conclusion (reached after discovery) in support of an affirmative award of relief under Section 29(b). OB at 40. Tygon confuses the ceiling with the floor by suggesting that a court must find that the "central purpose" of the MSA implicates an underlying securities violation, and such words are inconsistent with the statutory text, which applies to "***[e]very***" contract made (or performed) in violation of the federal securities laws. *See* 15 U.S.C. § 78cc(b) (emphasis added).

B. Mobile Sufficiently Pled Its State Law Illegality Defense

The court likewise erred by prematurely concluding that Mobile had not "demonstrated" that the MSA was illegal under Delaware law. Ex. C at 17-18. This holding effectively required Mobile to meet its ultimate trial burden on the pleadings. The Court of Chancery instead should have considered whether there exists even one single set of conceivable circumstances under which Mobile could prevail. *Warner Commc'ns*, 583 A.2d at 965. The Court of Chancery erred by its

failure to utilize the appropriate standards under Rule 12(c), and instead holding that Mobile was required to prove its case before discovery. OB at 42-46. This failure warrants reversal, especially in light of the remedial purposes underlying Section 29(b), a point that Tygon fails to address and thereby implicitly concedes. OB at 45-46.

CONCLUSION

For these reasons and those set forth in Mobile's Opening Brief, the Court of Chancery's ruling should be reversed.

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