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Case Number 463,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RIJU RAVINDRAN, BYJU'S ALPHA, INC. and TANGIBLE PLAY, INC.,	)	
Defendants Below, Appellants,	)	No. 463,2023
v.	)	Court Below: Court of Chancery
GLAS TRUST COMPANY LLC, in its capacity as Administrative Agent and Collateral Agent, and TIMOTHY R. POHL,	)	C.A. No. 2023-0488-MTZ
Plaintiffs Below, Appellees.	)	

APPELLANTS' OPENING BRIEF

Dated: January 30, 2024

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NATURE OF PROCEEDINGS

This is an appeal from an action brought by Plaintiffs below, Appellees GLAS Trust Company LLC ("GLAS") and Timothy R. Pohl ("Pohl," collectively, "Plaintiffs") pursuant to 8 *Del. C.* § 225 against Defendants below, Appellants Riju Ravindran ("Ravindran"), Byju's Alpha, Inc. ("Byju's Alpha") and Tangible Play, Inc. ("Tangible," collectively, "Defendants"). After a one-day trial on a paper record, the Court of Chancery entered judgment in favor of Plaintiffs declaring that Ravindran was validly removed as sole director and officer of Byju's Alpha and that Pohl was properly appointed to those posts in his stead.[1] The judgment was a result of the Court of Chancery's November 2, 2023 bench ruling (the "Bench Ruling"),[2] which was the product of several legal errors involving, *inter alia*, contract interpretation and the doctrine of legal impossibility under governing New York law.

Byju's Alpha is the borrower under a Credit and Guaranty Agreement (the "Credit Agreement") governing a term loan facility with an aggregate principal amount of $1.2 billion (the "Term Loans"). The Credit Agreement is governed by New York law and designates the federal and state courts of New York as the "exclusive jurisdiction" for any action or proceeding arising out of or under the Credit Agreement.

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[1] A copy of the Final Order and Judgment is attached hereto as Exhibit A.

[2] A copy of the Bench Ruling is attached hereto as Exhibit B.

Byju's Alpha's obligations under the Credit Agreement are guaranteed by various of its affiliates, including Tangible, and by its parent, non-party Think and Learn Private Limited ("T&L"). As of May 3, 2023, when Plaintiffs commenced the underlying action (in blatant disregard of the exclusive New York forum clause), Byju's Alpha had made all requisite payments under the Credit Agreement, on time and in full.

Nevertheless, as part of an ongoing effort to extract better and unbargained-for terms, on March 3, 2023 certain of the lenders—acting through GLAS, the administrative and collateral agent under the Credit Agreement—sent a flurry of notices purporting to accelerate the Term Loans and to seize control of Byju's Alpha by replacing Ravindran with Pohl on the basis of concocted "events of default," including the inability of one Indian affiliate, non-party Whitehat Education Technology Pvt. Ltd. ("Whitehat"), to accede to the Credit Agreement as an additional guarantor.

The parties to the Credit Agreement knew at the time they executed it that Whitehat's ability to provide an additional guarantee was contingent upon receipt of approval from the Reserve Bank of India ("RBI Approval"). Moreover, while the parties anticipated that RBI Approval would be granted on or before April 1, 2022, they understood that this was not a certainty, and thus the Credit Agreement did not impose an obligation on Byju's Alpha and its affiliates to achieve Whitehat's

accession as an additional guarantor. Instead, the Credit Agreement required them to use "reasonable commercial efforts" to obtain RBI Approval by that date, and provided explicitly that failure to obtain such approval by the deadline would not constitute a breach or event of default.

Despite reasonable commercial efforts (which are undisputed and which GLAS itself acknowledged on several occasions), the RBI did not grant its approval by April 1, 2022. In the following months, Byju's Alpha and its affiliates continued to exert reasonable commercial efforts to obtain RBI Approval. Those efforts were cut short, however, when on August 22, 2022, the Government of India promulgated with immediate effect certain amendments to the financial regulations which made it a legal impossibility, going forward, for Whitehat to provide an additional guarantee.

By exerting reasonable commercial efforts to procure RBI Approval for Whitehat's guarantee, Byju's Alpha and its affiliates did all that was required of them under the Credit Agreement, and their failure to obtain such approval did not constitute a breach or event of default thereunder. But even if the Credit Agreement had imposed an affirmative obligation to achieve that result (and it did not), such obligation would be excused on grounds of impossibility by the unforeseen change to Indian regulations, and in any event is not a material breach that could serve as the basis to accelerate a $1.2 billion loan which was not in payment default. The

Trial Court thus committed reversible error when it held that Whitehat's failure to accede as an additional guarantor to the Credit Agreement by April 1, 2022, constituted an event of default justifying the actions taken by GLAS to install Pohl as Byju's Alpha's sole director and officer.

SUMMARY OF ARGUMENT

1. The Trial Court erred by failing to address Defendants' arguments that the action below should be dismissed in favor of a plenary action pending in New York, the appropriate forum designated by the exclusive forum selection clause of the Credit Agreement, because it wrongly found that Defendants waived an argument that Pohl was subject to that clause.

2. The Trial Court erred in holding that the inability of T&L to procure RBI Approval for Whitehat's additional guarantee notwithstanding its undisputed reasonable commercial efforts to procure such approval constituted a breach of the Credit Agreement. The Trial Court also did not address Defendants' arguments that, even if failure to procure the Whitehat additional guarantee was a breach of the Credit Agreement (which it is not), the lenders were not entitled to accelerate the loan based on that immaterial breach.

3. The Trial Court erred in holding that the inability of T&L to procure RBI Approval for Whitehat's additional guarantee was not excused on the grounds of legal impossibility.

STATEMENT OF FACTS

A. The Parties

GLAS is a New Hampshire limited liability company with its principal place of business in New Jersey. (A592, ¶ 36.)

Pohl is the owner of non-party TRP Advisors, LLC, a company purporting to provide strategic advice to companies, financial institutions, and private equity firms with respect to distressed situations, troubled portfolio companies, and acquisition opportunities. (A593, ¶ 37)

Byju's Alpha is a Delaware corporation with its principal place of business in Illinois as of March 3, 2023, prior to which its principal place of business was in India. (A593, ¶ 38; A1538, ¶ 32.)

Ravindran was appointed on September 27, 2021 as the sole director, Chief Executive Officer, President, Chief Financial Officer, and Secretary of Byju's Alpha. (A672, ¶ 4.) Ravindran is also an officer of Tangible. (*Id.* at ¶ 3.)

Tangible is a Delaware corporation with its principal place of business in California. (A1222, ¶ 40.)

Byju's Alpha and Tangible are wholly-owned subsidiaries of T&L, a private limited company under the laws of India with its registered office in that country, and are part of a group of related business entities, collectively called BYJU's, that comprises the world's largest education technology business, providing personalized

learning programs to more than 150 million students around the world. (A673, ¶¶ 5, 9; A1539, ¶ 38.)

B. The Credit Agreement

On November 24, 2021, the Credit Agreement was entered into by and among Byju's Alpha (as Borrower), non-party T&L (as Parent Guarantor), Tangible, two non-party subsidiaries of T&L (as Initial Guarantors), GLAS (as Administrative Agent and Collateral Agent), and non-party Morgan Stanley Senior Funding Inc. ("MSSF") (as initial lender). (A1539, ¶ 41.) Subsequently, MSSF syndicated portions of the Term Loans to other lenders (the "Lenders"). (A1223, ¶ 41.)

The Credit Agreement is governed by New York law (A207, § 10.9(a)) and contains a forum selection clause which provides, in relevant part, that "[e]ach of the parties hereto … irrevocably and unconditionally submits … to the exclusive jurisdiction of the [federal and state courts] of New York sitting in the Borough of Manhattan ... in any action or proceeding arising out of or relating to this Agreement or any other applicable Loan Document or the transactions relating hereto or thereto…." (A207, § 10.9(c).)

1. The Additional Guarantors Covenant

The Credit Agreement required various affiliates of Byju's Alpha to guarantee its obligations under the Term Loans. Three such affiliates (Tangible and two other

non-party subsidiaries of T&L) entered the Credit Agreement as guarantors at the time of its execution on November 24, 2021. (A52; A216-20.)

The Credit Agreement also sets out the mechanisms and time-frames by which other affiliates could accede to the Credit Agreement, after its effective date, as Additional Guarantors. Section 5.9(a), for example, provided that two of Byju's Alpha's domestic affiliates would join the Credit Agreement as Additional Guarantors "substantially concurrently upon the consummation" of certain contemplated corporate acquisition, merger, or consolidation transactions. (A152-53, § 5.9(a).)[3]

The Credit Agreement provided a different mechanism and an extended time-frame for Byju's Alpha's India-based affiliates—T&L and its subsidiary Whitehat—to provide their guarantees. This is so because, at the time they entered into the Credit Agreement, the parties were aware that the then-applicable Indian financial regulations (the "Former ODI Regulations") required Indian parties to obtain prior approval from the RBI before undertaking overseas financial commitments, including guarantees, exceeding certain specified thresholds. (A158, § 3.3.; A1319-22, ¶ 4.)

[3] Upon the consummation of these transactions, on July 19, 2022, the two affiliates (both non-parties) provided their guarantees as required under Section 5.9(a) of the Credit Agreement. (A674-75, ¶ 14.)

Specifically, the Former ODI Regulations required RBI Approval before any Indian party could provide an overseas commitment in which the amount exceeded either (1) $1,000,000,000 in any financial year (the "Amount Test"), or (2) 400% of the net worth of the guarantor entity (the "Net Worth Test"). (A1322-23, ¶¶ 5-6.) Under the Former ODI Regulations, an Indian party could satisfy the Net Worth Test by taking into account, or "borrowing," the net worth of a subsidiary or holding company. (A1320, ¶ 4; A1323, ¶ 8.)[4]

Because the amount of the Term Loans ($1.2 billion) exceeds the Amount Test, the parties to the Credit Agreement understood that RBI Approval would be required with respect to the guarantees to be provided by T&L and Whitehat. (A100, § 1.1 (definition of "RBI Approval").) At the time the Credit Agreement was negotiated and executed, Whitehat's individual net worth was negative. (A675, ¶ 15; A328.) But because the Former ODI Regulations would allow Whitehat to "borrow" net worth from T&L, the parties to the Credit Agreement anticipated that it would be able to satisfy the Net Worth Test under the Former ODI Regulations. (A158, § 5.19(a)(ii).)

Section 5.9(c) of the Credit Agreement provides that Whitehat would accede to the Credit Agreement and provide its guarantee on or before the earlier of April

[4] This is undisputed. (A1375-76, ¶ 28.)

1, 2022, or within five business days of the receipt of RBI Approval. (A153, § 5.9(c).)

While the parties to the Credit Agreement anticipated that T&L would be able to procure RBI Approval for both itself and Whitehat under the Former ODI Regulations, they understood it was not a certainty. Accordingly, pursuant to Section 5.17(d) of the Credit Agreement, T&L committed to using its "*reasonable commercial efforts* to procure the RBI Approval on or prior to April 1, 2022 in order that it and Whitehat may guarantee [Byju's Alpha's obligations]," and that "if [RBI Approval is] obtained, [T&L] shall ensure that it and Whitehat guarantee [the obligations] up to the maximum amount permitted by the RBI approval." (A157, § 5.17(d) (emphasis added).)

The parties to the Credit Agreement further unambiguously indicated that the inability of T&L to obtain RBI Approval for its or Whitehat's guarantees would not constitute a breach warranting acceleration of the Byju's Alpha's debt. Specifically, Section 5.17(d) provides:

> For the avoidance of doubt, (i) any failure to obtain the RBI approval prior to April 1, 2022 (whether in whole or in part) *shall not cause a breach … or require any mandatory prepayment of the Term Loans* and (ii) in the event the RBI Approval is subject to any conditionality that … renders it impractically burdensome for it or Whitehat India to guarantee the Covered Obligations, [Byju's Alpha] *shall discuss such conditionality with [GLAS] in good faith with a view to facilitating any*

> *amendments to the Loan Documents* required in order for such RBI Approval to be effective.

(*Id.* (emphasis added).)

C. Byju's Alpha And T&L Materially Performed Their Obligations Under The Credit Agreement

As of May 3, 2023, when Plaintiffs commenced the action below, Byju's Alpha and T&L had fully performed their respective contractual obligations as Borrower and Parent Guarantor under the Credit Agreement. Significantly, Byju's Alpha had made all requisite payments under the Credit Agreement, on time and in full. (A305-06; A337-38; A361-62; A364; A378-79; A380-82; A394; A395-96; A397; A568; A674, ¶ 10.)

1. T&L Used Its Reasonable Commercial Efforts To Obtain RBI Approval For Itself And Whitehat By April 1, 2022

On February 11, 2022, T&L submitted, through its authorized dealer bank, its finalized application to the RBI to obtain approval of T&L's and Whitehat's respective guarantees of Byju's Alpha's obligations under the Credit Agreement. (A285-304; A676, ¶ 21.) Over the rest of the month through the end of March 2022, the RBI raised several series of inquiries regarding the application, to which T&L responded via e-mail. (A307-24; A676, ¶ 21.)

On March 29, 2022, the RBI granted its approval for T&L to provide its guarantee under the Credit Agreement. Despite extensive efforts, however, the RBI's approval for the Whitehat guarantee could not be procured within the

stipulated timeline. (A325-29.) That same day, T&L sought from the Lenders a waiver with respect to providing Whitehat's guarantee. (A327-36.) In a memorandum to the Lenders conveying T&L's request, GLAS acknowledged that T&L had made "significant efforts (including but not limited to commercially reasonable efforts) … to obtain RBI's approval on or prior to April 1, 2022." (A327-29.)

Nevertheless, the Lenders unreasonably refused to consent to the requested waiver, and instead offered—in exchange for a "consent fee" of 0.125% of each Lender's outstanding Term Loans—to defer the deadline for obtaining RBI Approval for Whitehat's guarantee until October 8, 2022 (the "Extended RBI Approval Deadline"). (A339-55.)

T&L agreed in good faith to this arrangement, which was memorialized on April 5, 2022 in the First Limited Waiver of the Credit Agreement (the "First Waiver and Consent"). (A356-60.)

Significantly, the parties to the First Waiver and Consent—including GLAS and the Lenders—expressly acknowledged that T&L had "used commercially reasonable efforts to obtain [the] RBI Approval on or prior to April 1, 2022" but that "despite [its] significant efforts (including but not limited to commercially

reasonable efforts)" the RBI had not granted its approval by that date. (A356) GLAS made a similarly-worded acknowledgement in a memo to Lenders.[5]

The parties to the First Waiver and Consent further agreed that if T&L, going forward, was not able to obtain RBI Approval for Whitehat's guarantee by the Extended RBI Approval Deadline on commercially reasonable terms, they would "negotiate in good faith with a view to facilitating any amendments to the Loan Documents required in order for the guarantee of Whitehat India to be effected...." (A357-58, § 2.)

Consistent with its contractual obligations under the First Waiver and Consent and Section 5.17(d) of the Credit Agreement, T&L continued to exert reasonable commercial efforts to procure RBI Approval for Whitehat's guarantee. (A307-24; A363; A365-77.)

[5] "Guarantor is proceeding with the necessary regulatory filing in respect of this guarantee which will be completed within the deadline specified in the Credit Agreement. Despite significant efforts (including but not limited to commercially reasonable efforts) on the Parent Guarantor's part to obtain the RBI's approval on or prior to April 1, 2022, no such approval has been forthcoming to date to permit Whitehat India to guarantee the Covered Obligations." (A327-29.)

2. Intervening Changes To Indian Law Made It Impossible To Procure RBI Approval For Whitehat's Guarantee By The Extended RBI Approval Deadline

On August 22, 2022, the government of India and the RBI promulgated various amendments to the Former ODI Regulations with immediate effect (the "New ODI Regulations"). (A1324, ¶ 11; A1325, ¶ 14.)

Of relevance here, the New ODI Regulations expressly discontinued the mechanism that had been authorized under the Former ODI Regulations pursuant to which an Indian party could satisfy the Net Worth Test by "borrowing" net worth from a holding or subsidiary company. (A1327, ¶ 15(vi); A1328, ¶ 16.) Moreover, whereas the Former ODI Regulations allowed an Indian party to seek RBI permission for an overseas financial commitment in an amount exceeding the Net Worth Test, the New ODI Regulations do not permit a party to seek or obtain RBI approval for commitments exceeding 400% of the guarantor entity's net worth. (A1327, ¶ 15(v); A1328, ¶ 16.)

Taken together, these changes rendered it impossible for T&L to obtain RBI Approval for Whitehat's guarantee (at any time, let alone by the Extended RBI Approval Deadline) because, under the New ODI Regulations, Whitehat cannot "borrow" net worth from T&L to satisfy the Net Worth Test, nor can Whitehat seek (or the RBI grant) approval for financial commitments that exceed the Net Worth Test limit. (A1329, ¶ 19; A1330, ¶ 23.)

Moreover, because they were not disclosed or apparent in drafts of the proposed amendments published prior to their adoption, these changes in the New ODI Regulations were not foreseen or foreseeable by the parties at the time they executed the Credit Agreement on November 24, 2021, or the First Waiver and Consent on April 5, 2022. (A1328-29, ¶ 17.)

D. BYJU's Offered Substitute Guarantees In Place of Whitehat

Between early October 2022 through February 2023, the parties negotiated or attempted to negotiate a series of amendments to the Credit Agreement concerning the Lenders' purported concerns over putative "deficiencies" in the performance of certain of T&L's contractual obligations. Ultimately, the parties entered into eight amendments to the Credit Agreement. In none of them did Byju's Alpha or T&L acknowledge, concede, or otherwise admit that any default had occurred under the Credit Agreement. The use of the defined term "Specified Default" in certain of the amendments never constituted, nor was meant to constitute, an admission that there had been a default under the Credit Agreement. (A1350-51; A1354.)

In a good faith effort to avoid the impact of the New ODI Regulations, on or about October 6, 2022, BYJU's proposed a solution to the practical impossibility brought about by the changed regulations that would provide the Lenders with financial guarantees equivalent to the Whitehat Guarantee. Byju's offered to move all assets out of Whitehat into subsidiaries of Think & Learn that are already

guarantors (or the subsidiaries of guarantors) under the Credit Agreement. Lenders rejected BYJU's proposal without justification. (A641; A383-93; A673, ¶ 27)

E. The Notice Of Acceleration And Notice Of Enforcement

On March 3, 2023, GLAS issued a series of "notices" and "written consents" by which it purported to seize control of Byju's Alpha and its collateral, to amend its bylaws, and to replace its existing board and management with GLAS's own designee. (A420-26.)

In a document entitled "Notice of Events of Default under Credit Agreement; Notice of Acceleration; Reservation of Rights" (the "Notice of Acceleration"), GLAS asserted that T&L's inability to procure RBI Approval for Whitehat's guarantee, and its purported failure to furnish required "Reporting Deliverables" as required under Sections 5.1(a) and (b) of the Credit Agreement, constituted events of default under Section 8.1(e) of the Credit Agreement, and declared the entire principal amount of the Term Loans outstanding, plus accrued and unpaid interest, together with other premiums and fees, to be "due and payable immediately." (A424.)

In a document entitled "Notice of Enforcement of Rights and Remedies under Pledge Agreements and Security Agreements" (the "Notice of Enforcement"), GLAS invoked the Notice of Acceleration as grounds for triggering certain Security and Pledge Agreements, enabling it to effectively seize control of all the equity

shares controlling Byju's Alpha. (A427-540.) The Lenders understood that serving the Notice of Enforcement would negatively impact Byju's Alpha. (A1344-45.)

Then, in its putative capacity as Byju's Alpha's sole stockholder, GLAS issued certain "stockholder written consents" by which, *inter alia*, it purported to amend Byju's Alpha's bylaws and to replace the Company's sole director (Ravindran) with its own designee (Pohl). (A614-16, ¶¶ 102-04, 108; A398-407.) Pohl, in turn, in his putative capacity as Byju's Alpha's sole director, executed a so-called "director written consent" which purported to replace the Company's existing management (Ravindran) with himself. (A615-16, ¶ 105; A408-19.)

The foregoing and other contemporaneous actions taken by GLAS and Pohl were improper and unauthorized under the Credit Agreement.

On March 16, 2023, T&L provided to GLAS a Compliance Certificate pursuant to Section 5.1(c) of the Credit Agreement denying that either the inability to procure RBI Approval for Whitehat's guarantee or the putative deficiencies and *de minimis* and disclosed delays in the provision of Reporting Deliverables constituted events of default under the Credit Agreement. (A541-67.) Accordingly, Ravindran continued to serve as Byju's Alpha's sole director, Chief Executive Officer, Chief Financial Officer, and Secretary, and maintained access to and control over Byju's Alpha's property and accounts until May 22, 2023, on which date the Court of Chancery entered a *Status Quo* Order ("SQO"). (A672-73, ¶ 4.)

Neither GLAS nor Pohl took actual actions that indicated that they were, respectively, shareholder and sole director and officer of Byju's Alpha. On the contrary, on April 6 and April 18, 2023, more than a month after the purported enforcement actions, GLAS itself sent "Borrower's consent requests" under the Credit Agreement to Ravindran and other BYJU's personnel, seemingly acknowledging that Ravindran was still (and, in any event, ought to have been) the actual director of Byju's Alpha. (A569-70.) Indeed, GLAS sent Ravindran and other BYJU's employees another such Borrower's consent request as recently as June 27, 2023.

F. The New York Action

On June 5, 2023, Tangible and other BYJU's affiliates commenced the New York Action, seeking, *inter alia*, declaratory judgment that there had been no default under the Credit Agreement, and damages for GLAS's breaches of the Credit Agreement and tortious conduct towards BYJU's under New York common law. (A1558, ¶ 110; A1271-1310.)

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT ADDRESSING DEFENDANTS' FORUM SELECTION CLAUSE ARGUMENTS

A. Question Presented

Whether the Trial Court reversibly erred by not addressing Defendants' forum selection clause arguments because it incorrectly found that Defendants waived an argument that Pohl was bound by the forum selection clause of the Credit Agreement. (Ex. B at 16; A1676-78; *see also infra* at Section I. C. 1.)

B. Scope of Review

The Court reviews a trial court's finding of waiver under the standard of plain error. *N. Am. Leasing, Inc. v. NASDI Hldgs., LLC*, 276 A.3d 463, 470 (Del. 2022) (citing *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995). Such a finding will be reversed where the trial court's error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.*

C. Merits of Argument

The Trial Court erred by ruling that "Defendants have made no argument that Pohl is bound by the forum selection clause" and had thus waived the argument. (*See* Ex. B at 16.) As a result, the Trial Court erred by not addressing Defendants' forum selection clause arguments and not dismissing the action below in favor of the New York Action.

1. Defendants Did Not Waive Their Jurisdictional Arguments

Defendants' forum selection clause arguments were fairly presented throughout the action below and *at trial*. "The doctrine of waiver operates to ensure fairness by requiring that notice be given to the adverse party." *Zhou v. Deng*, 2022 WL 1024809, at *6 (Del. Ch. Apr. 6, 2022) (quoting *Lavin v. W. Corp.*, 2017 WL 6728702, at *12 n.91 (Del. Ch. Dec. 29, 2017)). "The general rule ... that a party waives any argument it fails properly to raise shows deference to fundamental fairness and the commonsense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance." *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *2 (Del. Ch. Dec. 16, 2011). Here, Plaintiffs were plainly given notice of Defendants' forum selection clause arguments since they affirmatively addressed those arguments both in their briefs and at trial. (*See* A1620; A1643-45; A1654-59.)

Defendants ***first*** raised the exclusive New York forum selection clause argument twelve days after the commencement of the action below in their briefing in opposition to Plaintiffs' motion for *status quo* order. (*See* A658-59.) Plaintiffs responded to that argument in their reply brief. (*See* A1130.) That argument was ***again*** discussed by the parties during the hearing on Plaintiffs' motions to expedite and for a *status quo* order. (A1159-60; A1175-76; A1187.)

Defendants ***also*** raised their jurisdictional defense in their Second Affirmative Defense. (A1261) ("The Complaint should be dismissed for lack of jurisdiction pursuant to the exclusive New York forum selection clause contained in the Credit Agreement"). Plaintiffs understood and addressed this argument throughout the action below.

Moreover, in the parties' Joint Pretrial Order, the issue of New York's exclusive jurisdiction was ***again*** highlighted:

> 10. Plaintiffs commenced this action on May 3, 2023 *even though the Credit Agreement contains an exclusive New York forum selection clause. New York is the only jurisdiction in which the totality of the parties' dispute concerning these events, as well as their full legal consequences, can be determined***.** Importantly, neither Pohl nor GLAS have independent knowledge of any alleged event of default. Despite verifying the complaint filed in this action, neither Plaintiff has knowledge of the facts that are the underpinning for the purported events of default.

(A1532, ¶ 10 (emphasis added).)

For their part, Plaintiffs included an entire subsection of their pretrial brief arguing that Pohl is not bound by the forum selection clause. (A1461-62.) Plaintiffs argued that "the forum provision does not require GLAS to sue in New York and *additionally is inapplicable to Pohl, who is not a party to the Credit Agreement*." (A1458 (emphasis added).) Plaintiffs further argued specifically that Pohl is not bound by the Credit Agreement's forum provision because Pohl (a) "is neither a

party to the Credit Agreement nor 'closely related' to the parties thereto," and (b) "was not involved in the negotiation of the Credit Agreement." (A1461-62.)

Contrary to the Trial Court's finding that "defendants' pretrial brief did not address whether Pohl is bound by the credit agreement's forum selection clause," (Ex. B at 16), Defendants expressly noted in their pretrial brief that Pohl had brought the action as a director of Byju's Alpha, and not as an Agent or Lender (*see* A1510), and thus was not excluded from the applicability of the forum selection clause, which provides that *only* Agents or Lenders could bring certain limited actions outside of New York. (*Id.*)

Critically, at trial both Defendants and Plaintiffs addressed the issue of whether Pohl is bound by the forum selection clause of the Credit Agreement. The Court and Plaintiffs' counsel engaged in the following colloquy:

> THE COURT: But [Pohl's] rights to speak as a director of BYJU's Alpha arise out of the credit agreement.
>
> ATTORNEY CZESCHIN: That's true. But if you're going to bind someone to a forum clause, the law is pretty clear that they have to be related to the contract. Just the fact that that contract may give him some rights, but he wasn't related to it at the time, it wasn't foreseeable -- I think one of the standards is whether or not it was foreseeable.

(A1654.) Defendants presented a counterargument that Pohl is bound by the forum selection clause at trial:

> ATTORNEY KORPUS: Mr. Pohl is only here because he claims to be a sole director and officer of BYJU's Alpha. He says so in paragraph 1 of the verified complaint. His sole basis for acting is based on the validity of the enforcement action, and that's an issue to be determined in New York. He is here as an agent of a party to the credit agreement, a party that's bound by the exclusive jurisdiction clause.
>
> THE COURT: Can you address the argument that a 225 and the ability to bring a 225 is bestowed on stockholders and directors, it's not bestowed on the company.
>
> ATTORNEY KORPUS: Well, it's bestowed on stockholders and directors, but he's only a director of the company by virtue of him exercising the pledge; otherwise, he's just a private citizen. Either way, he's there through the mechanics of the credit agreement and the forum selection clause, which said all of the parties, each of the parties, agree to the exclusive jurisdiction.

(A1677-78.)

Put simply, Defendants did not waive the argument that Pohl is bound by the forum selection clause because it was made at trial in an action where the parties each submitted one, simultaneous pretrial brief and no post-trial briefs. *See Braga Invest. & Advisory, LLC v. Yenni Income Opp. Fund I, L.P.*, 2020 WL 5416516, at *2 (Del. Ch. Sept. 8, 2020) (finding litigant waived right to seek attorneys' fees and expenses where it did not brief the issue in its pre-trial or post-trial briefs); *Biolase, Inc. v. Oracle Partners, L.P.*, 97 A.3d 1029, 1036 (Del. 2014) (finding court did not abuse its discretion when denying claim for attorneys' fees where "[t]he parties filed pre-trial briefs and the Court of Chancery held both *a trial* and post-trial argument"

and litigant did not "present an argument in support of its request for an award of attorneys' fees" (emphasis added); *Kosachuk v. Harper*, 2002 WL 1767542, at *8 n. 51 (Del. Ch. July 25, 2002) (observing that where a party had sought an award of attorney's fees in the pretrial order but "did not pursue the award *during the trial* or in their post-trial brief," the claim for an award had been waived) (emphasis added); *Oxbow Carbon & Mineral Hldgs., Inc. v. Crestview-Oxbow Acquisition., LLC*, 202 A.3d 482, 502 n.77 (Del. 2019) ("The practice in the Court of Chancery is to find that an issue not raised in *post-trial* briefing has been waived, even if it was properly raised pre-trial.") (emphasis added) (citing *SinoMab Bioscience Ltd v. Immunomedics, Inc.*, 2009 WL 1707891, at *12 n.71 (Del. Ch. June 16, 2009) ("[Defendant] did not address those claims in *post-trial* briefing, and they are waived") (emphasis added).

The Trial Court's finding of waiver prejudiced a substantial right of Defendants—the right to enforce the exclusive forum selection clause in the Credit Agreement—which was an important part of Defendants' defense of the action. This jeopardized the fairness of the trial. The prejudice was heightened by the Trial Court not permitting post-trial briefing. (*See* A1270) ("There will be no post-trial briefing and/or argument, unless requested by the Court after trial has concluded"). As a result, the parties only submitted one round of pretrial briefs that were simultaneously filed. As a result, there was no opportunity for Defendants to further

respond to Plaintiffs' arguments in a brief. Rather, both parties' responses were presented at trial, including Defendants' response to Plaintiffs' argument that Pohl was not bound by the forum selection clause. And, to make matters worse, at the conclusion of trial, though the Trial Court indicated that it would consider whether post-trial briefing was necessary and would so inform counsel, it never did. (A1732-33.) The Court simply issued the Bench Ruling ninety days later.

Because the parties did not have the opportunity to submit post-trial briefs, the arguments made at the oral argument-style, paper record trial are akin to arguments being advanced in post-trial briefing. The Court therefore should have ruled on the substance of the forum selection clause arguments rather than making a finding of waiver and ignoring them. The fact that Plaintiffs made counterarguments about Pohl not being bound by the forum selection clause in their pretrial brief highlights that the underlying rationale to bar an argument on the grounds of waiver—fairness to the opposing litigant as to whether an issue was fairly presented—is absent. At bottom, the forum selection clause arguments were presented at trial through oral argument, including on rebuttal by Plaintiffs. Accordingly, the Trial Court reversibly erred by not addressing the merits of Defendants' forum selection clause defense.

2. The Trial Court Erred By Not Dismissing the Action Below in Favor of the New York Action

The Trial Court failed to address any of Defendants' forum selection clause arguments in the Bench Ruling despite such arguments being made throughout the action and at trial. Section 10.9(c) of the Credit Agreement provides that the parties "irrevocably and unconditionally submit[ted] ... to the exclusive jurisdiction of the [federal and state courts] of New York sitting in the Borough of Manhattan." (A207, § 10.9(c).) Though that section contains language allowing any Agent of Lender (*i.e.*, GLAS or the Lenders) to bring certain actions related to the Credit Agreement in the courts of other jurisdictions (so that enforcement actions can be brought in other jurisdictions where assets are held if necessary), it is clear that that the parties intended New York to be the proper venue for legal proceedings determining the *interpretation of the Credit Agreement and whether its terms had been breached*. As argued below, Pohl brought this action in his putative capacity as "sole director" and he is neither an Agent nor a Lender as defined by the Credit Agreement. (A1509-10.) Accordingly, Pohl, acting through powers purportedly emanating from the Credit Agreement, could only bring suit in New York. *See also* A207-08, §10.9(c) (providing that BYJU's Alpha and other related entities *must* bring any "claims, cross-claims or third-party claims" they have against GLAS or its related entities in New York).

II. THE TRIAL COURT INCORRECTLY HELD THAT THE INABILITY TO OBTAIN THE WHITEHAT GUARANTEE CONSTITUTED A MATERIAL BREACH

A. Question Presented

Whether the Trial Court reversibly erred when it held that the inability to obtain the Whitehat Guarantee constituted a material breach. (A1261; A1488; A1512; A1518; Ex. B at 27:8-18.)

B. Scope of Review

The Court reviews questions of contract interpretation *de novo*. *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits of Argument

1. BYJU's was not obligated to obtain the Whitehat Guarantee

The Trial Court's finding of breach was premised on a finding that Section 5.9(c) of the Credit Agreement, independently of the "reasonable commercial efforts" language of Section 5.17(d), obligated the Loan Parties to obtain the Whitehat Guarantee by April 1, 2022. In particular, the Trial Court found that the April 1 deadline "is a hard deadline [even] if RBI approval is not obtained beforehand." (Ex. B at 22.)

The Trial Court found that Section 5.9(c) was "not a performance obligation owed by a loan party," but was "[n]evertheless, [] still a covenant that each loan party made under Article V. The fact that breach of a covenant is the result of a

nonparty's action or inaction or events outside the loan parties' control does not affect its validity or the consequences of its breach." (*Id.* at 22-23.)

The Trial Court further found that Section 5.9(c) was consistent with Section 5.17(d), because the latter clause "governs prior to April 1 or the date RBI approval is granted, while Section 5.9(c) governs only on April 1, or after RBI approval is obtained…. This efforts clause [Section 5.9(c)] does not change, weaken, or nullify the fact that the loan parties covenanted that Whitehat would, in fact, accede and accept the consequences if it did not." (*Id.* at 25-26.)

The Trial Court's conclusion was erroneous for at least two reasons: (i) it is inconsistent with the fact that Section 5.9(c) by its own language does not obligate the Loan Parties to obtain the accession of Whitehat; and (ii) it misconstrued the relationship between Sections 5.9(c) and 5.17(d), rendering the latter meaningless.

First, the Trial Court's finding that the Loan Parties were obligated to obtain the Whitehat Guarantee is inconsistent with the plain wording of Section 5.9(c). That section states, in full, as follows:

> (c) On and from the earlier of April 1, 2022 and (ii) within five Business Days of the date RBI Approval is received, Whitehat India shall accede to this Agreement and the Onshore Guarantee Deed as a Guarantor and shall take all such actions and execute and deliver or cause to be executed and delivered, all such documents, instruments, agreements, and certificates reasonably requested by the Administrative Agent or the Collateral Agent or otherwise required by the Loan Documents.

(A153, §5.9(c).)

Crucially, the provision places *no obligation* onto any of the Loan Parties to obtain Whitehat's accession to the Credit Agreement and the Onshore Guarantee Deed. Rather, it states only that Whitehat "shall" accede—and Whitehat, as defined in the Credit Agreement, is not a Loan Party. (A91; A107.) The Trial Court's statement that "Loan Parties covenanted in Section 5.9(c) that Whitehat would accede as a guarantor by April 1, 2022" is therefore simply irreconcilable with the clear wording of the contract. (*See* Ex. B at 22.)

It is a basic premise of contract law that obligations must be stated clearly, and that a breach—especially one with such serious consequences—cannot be based on language that does not clearly obligate a party. *See Black Quarry Millwork, LLC v. Sandy Littman Realty Corp.*, 200 N.Y.S.3d 10, 11 (1st Dep't 2023) (holding that breach could not be determined where contractual language regarding the parties' obligations was ambiguous); *Romilly v. RMF Prods., LLC*, 106 A.D.3d 1465, 1466 (4th Dep't 2013) (holding that summary judgment on breach of contract claim was precluded where the parties' obligations under the contract were ambiguous).

The second reason the Trial Court erred in finding that the Loan Parties were obligated to obtain the Whitehat Guarantee is that it would render Section 5.17(d) meaningless.

It is a core rule of contractual interpretation that contracts should be read so as to not render their terms superfluous. *Helmsley-Spear, Inc. v. N.Y. Blood Ctr., Inc.*, 257 A.D.2d 64, 69 (1st Dep't 1999) ("Courts should construe a contract so as to give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract.") (citing *Two Guys from Harrison-N.Y. v. S.F.R. Realty Assocs.*, 63 N.Y.2d 396, 403 (N.Y. 1984)).

But if Section 5.9(c) requires the Loan Parties to obtain the Whitehat Guarantee regardless of the circumstances, then Section 5.17(d), which only requires T&L to employ "reasonable commercial efforts" to obtain RBI approval, would be rendered a nullity. Further, a plain reading of Section 5.17(d) makes it clear that the Trial Court's interpretation is contradictory to the parties' intent. Section 5.17(d) explicitly states that T&L will use reasonable commercial efforts to obtain RBI approval, and "*if so obtained*, shall ensure that it and Whitehat ..." provide their respective guarantees. Thus, the requirement to provide a guarantee would arise *only if* RBI Approval was obtained.

The Trial Court attempted to resolve the issue by adopting the interpretation stating that Section 5.17(d) "governs prior to April 1 or the date RBI approval is granted, while Section 5.9(c) governs only on April 1, or after RBI approval is obtained." (A1612-13.)

That explanation, however, does not succeed in preventing Section 5.17(d) from being effectively meaningless: if it were the case that the Loan Parties were expressly obligated to obtain the Whitehat Guarantee on April 1, 2022, then providing that they only need to utilize reasonable commercial efforts to obtain RBI approval *prior* to April 1, 2022, would be redundant, as there was at that time no obligation to obtain the Whitehat Guarantee.

Moreover, the Trial Court's interpretation does not address the fact that Section 5.17(d) expressly covers April 1, 2022, and not just the time leading up to it: "the Parent Guarantor will use its reasonable commercial efforts to procure the RBI Approval *on or prior to April 1, 2022*" (A157, §5.17(d)) (emphasis added). If, as the Trial Court stated, Section 5.17(d) governs prior to April 1, and Section 5.9(c) governs from April 1 onward, then the "on or" wording in Section 5.17(d) would be superfluous.

The only interpretation of the contract that gives effect to both provisions is that Section 5.9(c) requires that non-party Whitehat "shall accede" on April 1, 2022, and that the Parent Guarantor must only use reasonable commercial efforts to obtain regulatory approval.

2. Any Breach was Trivial and Could Not Justify the Enforcement Actions

In its decision, the Trial Court did not address Defendants' arguments as to materiality and conscionability, and thus committed error. These arguments have

been fairly presented during the action below. (A1261 ("under New York law, Plaintiffs' acceleration and enforcement actions are unconscionable and unwarranted because the purported bases for acceleration are trivial or inconsequential"); A1627-28; A1635-37; A1643; A1727 (Plaintiffs' counsel advancing arguments why the purported breaches were material); A1488 ("Byju's Alpha and T&L Materially Performed Their Obligations Under the Credit Agreement); A1512 ("Because there was no material breach of the Credit Agreement, Plaintiffs' Actions to Accelerate the Term Loans ... are all invalid"); A1518 (citing New York case law for the proposition that a breach asserted as a basis for acceleration must be material, *i.e.*, not trivial or inconsequential); A1680-81; A1684-86 (Defendants advancing arguments about when a breach is trivial such that it does not justify acceleration).

Under New York law, "where the breach asserted as the basis for the acceleration is trivial or inconsequential, the [resulting] forfeiture may be viewed as an unconscionable penalty [disallowed by] equitable principles…." *Tunnell Publ'g Co. v. Straus Commc'ns, Inc.*, 169 A.D.2d 1031, 1032 (3d Dep't 1991); *see also Hirsch v. Lindor Realty Corp.*, 63 N.Y.2d 878, 880 (N.Y. 1984) ("equity may properly intervene to prevent a forfeiture of a substantial interest despite a technical breach or omission by the holder of the interest") (internal quotation marks

omitted).[6] In particular, where the lenders "have sustained no damages, … the security bargained for by [lenders] has not been impaired, … the … obligor on the note is a viable, financially stable entity carrying on the business of the original obligor[,] and … the essential part of the bargain—timely payment of the installments due under the note—has been and is being satisfied," then acceleration for a non-monetary default is unconscionable and will not be enforced by a court. *Tunnell*, 169 A.D.2d at 1032.

This principle of New York law was recently reaffirmed in a decision by the bankruptcy court for the Southern District of New York:

> New York has long recognized broader equitable exceptions to enforcing the parties' contract with respect to acceleration and non-monetary defaults.... Generally, courts look to three factors: has the lender suffered actual damages as a result of the default; has the default impaired the lender's security ... ; and does the default make the future payment of principal and interest less likely?

In re 53 Stanhope LLC, 625 B.R. 573, 584 (S.D.N.Y. Bankr. 2021). In the action below, Plaintiffs were unable to make out how *any* of those three factors were applicable at the time of the purported enforcement actions.

[6] Delaware Court of Chancery precedent has held similarly. *See Jefferson Chem. Co. v. Mobay Chem. Co*., 267 A.2d 635, 637 (Del. Ch. 1970) ("Equity, of course abhors a forfeiture…. It will disregard a forfeiture occasioned by failure to comply with the very letter of an agreement when it has been substantially performed.").

First, there was no damage. Plaintiffs could not point to *any* loss that they, or the Lenders, suffered, due to the Loan Parties' inability to procure the Whitehat Guarantee. The Borrower continued to make all payments in full, and during the period between April 1, 2022, and the enforcement action, the debt was trading at non-distressed levels. (A674, ¶ 10.)

Nor were Plaintiffs able to claim any actual impairment to their security or to their chances of ultimate repayment. As Plaintiffs were always aware, at the time the parties entered into the Credit Agreement, Whitehat had negative net worth. (A675, ¶ 15.) Lenders had a robust security package in their favor, which was completely unaffected by Whitehat. Thus, whether Whitehat acceded as a guarantor therefore did not impact the overall security of the debt. Moreover, BYJU's offered to move all assets out of Whitehat into entities that were already guarantors (or the subsidiaries of guarantors) under the Credit Agreement, a move that would have ensured that Lenders suffered no loss of security as a result of the inability to have Whitehat accede to the Credit Agreement. (A678, ¶ 27.) Lenders rejected the proposal without any explanation. (*Id*.)

And for the same reasons set out above, the inability of the parties to procure the Whitehat Guarantee did not make the "future payment of principal and interest less likely." Borrower continued to make all payments and there was ample security for Lenders.

Thus, under the New York law standard set out in *Tunnell* and *Stanhope*, any breach on the part of the Loan Parties with respect to not obtaining the Whitehat Guarantee is trivial, and thus the enforcement actions taken by GLAS constituted an unconscionable penalty.

III. THE TRIAL COURT ERRED IN FINDING THAT THE FAILURE TO OBTAIN THE WHITEHAT GUARANTEE WAS NOT EXCUSED BY IMPOSSIBILITY

A. Question Presented

Whether the Trial Court reversibly erred when it held that the inability to obtain the Whitehat Guarantee was not excused as legally impossible. (A1491-92; A1513-15; Ex. B at 34-35.)

B. Scope of Review

The Court reviews the application of law to factual determinations *de novo*. *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 960 (Del. 2005). The Court will only accept factual findings "[i]f they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

C. Merits of Argument

After finding that the failure to obtain the Whitehat Guarantee was a breach of the Credit Agreement, the Trial Court further found that the failure to obtain the Whitehat Guarantee was not excusable by impossibility despite Plaintiffs' concession that obtaining RBI approval under the New ODI Regulations was objectively impossible. (A1617-22). In particular, the Trial Court stated that Defendants "have offered no evidence whatsoever that the retirement of the borrowing exception was unforeseeable and could not have been guarded against." (Ex. B at 35.) The Trial Court relied primarily on *Red Tree Invs., LLC v. Petróleos*

de Venezuela, S.A., 2021 WL 6092462 (S.D.N.Y. Dec. 22, 2021), *aff'd*, 82 F.4th 161 (2d Cir. 2023) in determining that the New ODI Regulations and changes to the borrowing exception which were not in effect at the time the parties entered the Credit Agreement were nonetheless foreseeable. (Ex. B at 33-34).

The Trial Court's conclusion was erroneous for at least three reasons: (i) Defendants did offer evidence that the changes to the Borrower exception were unforeseeable at contracting; (ii) the *Red Tree* decision is factually inapposite to the issues here; and (iii) the parties to the Credit Agreement did in fact allocate the risk of Whitehat not obtaining RBI approval, for both foreseeable and unforeseeable events, in the plain language of the Credit Agreement.

First, it is undisputed that the unforeseeable intervening change in Indian law that occurred on August 22, 2022—*i.e.*, the promulgation of the New ODI Regulations—rendered performance of any such obligation legally impossible. It is a fundamental tenet of New York law that where, as here, the performance of a contractual obligation is "rendered impossible by intervening [unforeseeable] governmental activities," performance of that obligation "will be excused." *Pleasant Hill Devs., Inc. v. Foxwood Enters., LLC*, 65 A.D.3d 1203, 1206 (2d Dep't 2009); *see also Kolodin v. Valenti*, 115 A.D.3d 197, 200 (1st Dep't 2014) ("Impossibility excuses a party's performance ... when the destruction of the ... means of performance makes [it] objectively impossible."). As Defendants

established on the record below, the Indian government's change to the prior provision that previously allowed for an Indian subsidiary to "borrow" net worth from its parent company to meet the standards to receive RBI approval, in effect from 2004 until August 22, 2022, was not foreseeable.

As Defendants' expert explained, the discontinuation of the "borrowing" exception was never stated prior to the New ODI Regulations coming into effect. (A1328-29, ¶ 17). This is evidenced by reading the draft regulations. Nowhere did the draft regulations or rules state, explicitly or otherwise, that the concept of a subsidiary utilizing the parent's net worth would be discontinued. On the contrary, this discontinuation was never explicitly stated prior to the Foreign Exchange Management (Overseas Investment) Directions, 2022, which were published in August 2022 and in respect of which no draft had ever been publicly circulated. (*Id.*) Moreover, even if the draft had indicated that the ability to use the parent company's net worth was to be discontinued (which it did not), the parties to the Credit Agreement had no indication as to when or even if they would be adopted as law. Indeed, there is no certainty that a draft will be made into law, whether in the form in which it is published, or at all. The RBI released the drafts in early August 2021 specifically seeking comments and feedback on the proposed amendments for all stakeholders meaning there likely could have been further changes to the drafts. (A1324, ¶ 13). When the New ODI Regulations came into effect in August 2022,

nearly six months after T&L applied for the Whitehat Guarantee, they were not to be applied retroactively. (A1325, ¶ 14). It was therefore not only unforeseeable that the New ODI Regulations would be adopted in the same manner as the publicly available drafts and changed to prohibit net worth borrowing, but it also was unforeseeable that any change to the regulations would be effectuated and applicable before the RBI approved the Whitehat guarantee.

Second, while the Trial Court took issue with Defendants' expert's use of the word "apparent" as opposed to "foreseeable" in opining as to whether the parties could have known at the time of contracting that the draft New ODI Regulations would discontinue the relevant borrower exception rendering it impossible for Whitehat to give its guarantee, (Ex. B at 33), the Trial Court's reliance on the *Red Tree* decision to conclude that a change in law does not need to be "apparent" or "explicit" to be foreseeable is misplaced. In *Red Tree*, unlike here, at the time of contracting, the President of the United States had already issued an executive order sanctioning certain "Venezuelan-related persons and entities." 2021 WL 6092462, at *6. That order was later expanded to include additional persons and entities. *Id.* at *7. The Southern District of New York Court found that it was foreseeable that the "pre-existing Venezuelan sanctions" at the time of contracting could be expanded. *Id.*

An effective executive order issued weeks before a contract is executed is not analogous to the situation at bar where at the time of entering into the Credit Agreement there were no laws or regulations in effect that prohibited Whitehat from borrowing from its parent company's net worth to meet the necessary RBI tests required for approval. Not only were there no laws or orders in effect, the draft amendments to the regulations at issue were silent as to any changes to the borrowing exception, with no indication as to if or when the changes would ever go into effect. Further, RBI never released a draft of the 2022 Directions which ultimately discontinued the concept of utilizing / borrowing the net worth of the holding/subsidiary company to meet the Net Worth Test.

Additionally, the Trial Court also relied on Section 77:54 of Williston on Contracts to imply that the change in law here was foreseeable because the treatise states "changes in law are generally foreseeable." (Ex. B at 31.) This blanket statement and the Trial Court's reliance thereon ignores New York case law finding that contracting parties' performance can be excused as a result of governmental activities. For example, in *Campo v. Bd. of Educ., Brookhaven-Comsewogue Union Free Sch. Dist.*, the New York Appellate Division, Second Department affirmed the lower court's decision to rescind a contract of sale because of a subsequent change in zoning situation stating: "When a municipality takes action, after the signing of

the contract, which makes the bargain impossible, it would be inequitable to require performance." 211 A.D.2d 658, 659 (2d Dep't 1995).

Third, in finding that Defendants' defense of impossibility fails, the Trial Court ignored that the contracting parties did allocate the risk of not obtaining the Whitehat Guarantee, whether by foreseen occurrences such as the RBI declining approval, or unforeseen occurrences such as the RBI modifying its regulations such that gaining its approval was rendered impossible. As discussed above, the Credit Agreement plainly did not require Parent Guarantor to obtain RBI Approval by April 1, 2022, but instead required it to use its "reasonable commercial efforts" to obtain the RBI Approval by April 1, 2022. The parties intentionally allocated the risk that the RBI would not grant its approval by that date by providing that it "shall not cause a breach … or require any mandatory prepayment of the Term Loans." (A157, § 5.17(d).)

Accordingly, to the extent the inability of Defendants to obtain RBI Approval for Whitehat's Guarantee could and did constitute a breach of the Credit Agreement, the breach is excusable by the defense of impossibility.

CONCLUSION

The judgment should be reversed.

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