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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' REPLY BRIEF

Dated: April 16, 2024

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Page(s)

SUMMARY OF ARGUMENTS

The Trial Court erred by failing to give effect to a plain and unambiguous provision of the Credit Agreement[1] requiring that the dispute below be litigated exclusively in New York. Contrary to Plaintiffs' contention, Defendants did not "waive" that argument as it applied to Pohl, nor was GLAS authorized to sue in Delaware.

The Trial Court also erred by finding that Defendants materially breached the Credit Agreement by failing to procure the additional Whitehat guarantee. The Trial Court misconstrued the Credit Agreement as imposing an absolute obligation to procure the guarantee, rather than requiring "reasonable commercial efforts" to obtain the required governmental approval. The Trial Court further misapplied New York equitable principles that would intervene to avoid a forfeiture where, as here, any breach was non-material.

The Trial Court further erred by finding that Defendants' inability to procure the Whitehat guarantee was not excused due to intervening changes to Indian banking regulations, which made it objectively impossible for Defendants to obtain the requisite governmental approval. The Trial Court's ruling both misapplied New York law and ignored record evidence that these changes were unforeseen by the parties when they executed the Credit Agreement.

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[1] Capitalized terms not otherwise defined have the meaning ascribed in Defendants' Opening Brief ("OB"). "AB" refers to Plaintiffs' Answering Brief.

ARGUMENT

I. DEFENDANTS DID NOT WAIVE THEIR FORUM SELECTION ARGUMENT, AND THE TRIAL COURT'S FAILURE TO ADDRESS IT CONSTITUTED PLAIN ERROR

A. Defendants Did Not Waive This Argument

The purpose of the waiver doctrine is to ensure that an adverse party has sufficient notice of claims or defenses asserted against it. *See*, *e.g.*, *ParmAthene v. SIGA Techs.*, 2011 WL 6392906, at *2 (Del. Ch. Dec. 16, 2011). Here, it is undisputed that Plaintiffs had fair notice of Defendant's position that the forum selection clause was enforceable against Pohl in his putative capacity as the sole officer and director of the Borrower even though he was not a signatory to the Credit Agreement. Plaintiffs concede that they were aware of this issue and addressed it themselves multiple times below. (AB.15-16.) Unable to deny that they had fair notice of Defendants' position, Plaintiffs are left to cavil about how Defendants raised it. These objections are without merit.

For example, Plaintiffs claim that the issue was not adequately raised below because it was asserted in a footnote in Defendants' pre-trial brief (AB.16), yet the authority Plaintiffs cite is silent about how arguments need to be presented in briefing before the Court of Chancery. Rather, these cases apply Supreme Court Rule 14(b)(vi)(A)(3), which provides that substantive arguments in briefs

submitted to the Supreme Court must be raised in the body of the brief.[2] Tellingly, Plaintiffs cite no equivalent Court of Chancery rule (because there is none), nor do they claim that Defendants' Opening Brief fails to comport with Rule 14.

Plaintiffs also suggest that Defendants "strategically dodged" the question of the applicability of the forum selection clause to Pohl and instead focused "exclusive[ly] on GLAS." (AB.18.) This characterization cannot withstand scrutiny. Defendants' counsel explicitly addressed the applicability of the clause to Pohl. (A1676-78.) Furthermore, the fact that Defendants' counsel also argued that Pohl was not a necessary party to the underlying action was not a "dodge." Plaintiffs' counsel conceded as much when he argued that "none of this matters" because "GLAS would be able to bring this action in this Court" by itself. (A1658.)

Finally, insofar as Plaintiffs imply that the basis for Defendants' position that Pohl was bound by the clause was not adequately presented, the transcript tells a different story. During an extensive colloquy with Plaintiffs' counsel on the matter, the Trial Court repeatedly observed that Pohl—by suing in his capacity as the Borrower's putative sole officer and director—was "closely related" both to a signatory to the Credit Agreement (the Borrower) and to the

[2] *See Bradley v. State*, 193 A.3d 734, 741 n.36 (Del. 2018); *Lum v. State*, 101 A.3d 970, 972 (Del. 2014); *Tumlinson v. Advanced Micro Devices*, 106 A.3d 983, 988 n.28 (Del. 2013).

instant dispute. (A1650-57.) Defendant's counsel agreed that the Trial Court's reasoning on this topic was "exactly right" and then answered the Trial Court's follow-up questions. (A1677.) Against this backdrop, Defendants were not required to belabor the matter further. (AB.18 (quoting *Ferguson v. State*, 642 A.2d 772, 780 (Del. 1994)).[3]

B. The Trial Court's Failure To Apply The Forum Selection Clause In This Case Constituted Plain Error

Plaintiffs next argue that, even if the Trial Court's waiver ruling was erroneous, it did not constitute "plain error" warranting reversal, either because (i) Pohl did not sign the Credit Agreement and was not bound by its forum selection clause (as the Trial Court held), or (ii) because the clause permitted GLAS to bring suit in Delaware (which issue the Trial Court did not reach). (AB.19-22.) Neither argument has merit.

New York law recognizes "three sets of circumstances where a nonsignatory can enforce [or be bound by] a forum selection clause." *Tate & Lyle Ingredients Ams. v. Whitefox Techs.*, 949 N.Y.S.2d 375, 376 (1st Dep't 2012). The third situation, of relevance here, is where the nonsignatory is "so 'closely related' to either the parties to the contract or the contract dispute itself

[3] Indeed, the circumstances of *Ferguson* bear no resemblance to the present case. There, this Court held that a criminal defendant could not establish that allegedly erroneous jury instructions below amounted to plain error where defendant's own trial counsel made a tactical decision to affirmatively "request[] the [very] instruction [his] appellate attorney now argues was erroneous." *Ferguson*, 642 A.2d at 780.

that enforcement of the clause against the non-party is foreseeable." *Recurrent Cap. Bridge Fund I v. ISR Sys. & Sensors*, 875 F. Supp. 2d 297, 307 (S.D.N.Y. 2012); *see also Tate & Lyle*, 949 N.Y.S.2d at 376-77. Plaintiffs argue that because Pohl did not execute the Credit Agreement and "his involvement did not begin until well over a year into the Agreement," the "closely related" exception does not apply to him. (AB.21-22.) They are wrong.

A nonsignatory is "closely related" when its interests are "completely derivative of and directly related to, if not predicated upon, the signatory party's interests or conduct." *Cuno, Inc. v. Hayward Indust. Prods.*, 2005 WL 1123877, at *6 (S.D.N.Y. May 10, 2005) (internal quotation marks omitted). Pohl meets this standard. He is "closely related" to the signatory parties to the Credit Agreement, since he was designated by GLAS (a signatory) to serve as the sole officer and director of the Borrower (also a signatory). Pohl is likewise "closely related" to the instant dispute, because his interests in this litigation derive completely from—and are entirely predicated on—his putative status as the Borrower's sole officer and director. Indeed, Pohl's relation to the dispute itself is indisputable given that he is a named plaintiff in the action below, brought suit in his purported capacity as the Borrower's sole officer and director, and held himself out as such in the conduct at issue in the litigation.[4] *See Tate & Lyle*, 949

[4] (*See* A615-18, ¶¶ 105-109 (alleging that Pohl, in his putative capacity as sole officer of the Borrower, issued a written consent to appoint himself chief executive officer and secretary).)

N.Y.S.2d at 377-78 (close relationship found as to non-signatory parent company whose chief executive officer "made the decision to institute the present litigation"); *Universal Inv. Advisory v. Bakrie Telecom*, 62 N.Y.S.3d 1, 8 (1st Dep't 2017) (forum selection clause may be enforced against nonsignatories who "consulted with each other regarding decisions and were intimately involved in the decision-making process").

The cases cited by Plaintiffs (AB.21) to support their position that Pohl is not "closely related" are factually distinguishable. In *Sherrod v. Mount Sinai St. Luke's*, the court declined to hold plaintiff, the temporary administrator for non-party principal, bound by a forum selection clause in a contract where it was "undisputed that neither the [principal] nor the plaintiff signed the … agreement." 168 N.Y.S.3d 95, 100 (2d Dep't 2022). In *Freeford Ltd. v. Pendleton*, the court determined that nonsignatory plaintiff could invoke a forum selection clause in a contract to which it was not a party where that contract was part of a "global transaction" involving a second contract including an identical forum selection clause to which plaintiff was a signatory. 857 N.Y.S.2d 62, 68 (1st Dep't 2008). In *L-3 Commc'ns v. Channel Techs.*, the court ruled that a forum selection clause could not be enforced against a defendant who was a party to the contract but "deliberately excluded" from its forum selection clause. 737 N.Y.S.2d 366, 367 (1st Dep't 2002).

Plaintiffs' alternative argument, not addressed by the Trial Court, is that whether or not Pohl was bound by the exclusive jurisdiction clause, GLAS was

authorized to sue in Delaware. (AB.19.) But this argument requires a reading of the clause that is irreconcilable with New York rules of contract interpretation, which require that courts seek a construction that gives effect to all relevant terms and avoids rendering terms superfluous or meaningless. *See*, *e.g.*, *Platek v. Town of Hamburg*, 24 N.Y.3d 688, 693-94 (N.Y. 2015) (contracts are to be construed to "in a way that affords a fair meaning to *all* of the language employed by the parties … and leaves no provision without force and effect"); *Columbus Park Corp. v. Dep't of Housing Preservation & Dev.*, 80 N.Y.2d 19, 31 (N.Y. 1992) ("a construction which makes a contract provision meaningless is contrary to basic principles of contract construction").

Plaintiffs' contention that GLAS is free to sue in any jurisdiction without restriction (AB.20), would render meaningless the first sentence of Section 10.9(c), in which "[e]ach of the parties [to the Credit Agreement] irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction" of the state and federal courts of New York. (A207-08, §10.9(c).) Plaintiffs characterize this clause as merely pertaining to "personal jurisdiction" (AB.19), but that gloss ignores the plain language of the clause, in which each party submitted both "for itself and its property" (*i.e.*, *in personam* and *in rem*) to jurisdiction in New York. The first sentence of the clause thus squarely embraces the present lawsuit. *See Lynch v. Gonzalez*, 2020 WL 3422399, at *4 (Del. Ch. June 22, 2020) (in analogous Section 18-110 action, the "property at issue [is] the disputed corporate office….") Moreover, Plaintiffs' proffered construction

would ignore the parties' clearly stated intent that "each" of them, without exception, submitted to the "exclusive" jurisdiction of the New York courts, and would replace it with an agreement (nowhere expressed) that GLAS only submitted to their "non-exclusive" jurisdiction. Such an interpretation is disallowed under New York law. *See Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (N.Y. 2007) (courts "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract … under the guise of interpreting the writing").[5]

Plaintiffs' interpretation must also be rejected because it impermissibly elides the distinction between the broad scope of the clause's first sentence (designating New York as the exclusive jurisdiction for actions "arising out of or relating to this Agreement or any other Loan Documents or the transactions relating thereto") and the much narrower scope of its final sentence (recognizing the right the Lenders or their designated agent "may otherwise have" to bring actions "relating to this Agreement against any Loan Party or its properties in the courts of any jurisdiction"). (AB.20-21.) This violates the well-settled principle under New York law that "the use of different terms in the same agreement …

[5] *Cf. Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) ("[T]he description of our jurisdiction [under 28 U.S.C. § 1251(a)] as 'exclusive' necessarily denies jurisdiction to any other federal court. This follows from the plain meaning of 'exclusive'[:] 'debar from possession[.]'"); *Tower IPCO Co. v. EcoInteriors*, 2021 WL 1207813, at *4 (Del. Super. Ct. Mar. 29, 2021) (applying Delaware law) ("As the term 'exclusive' is not ambiguous, 'exclusive' is assigned its plain meaning….").

implies that they are to be afforded different meanings." *Platek*, 24 N.Y.3d at 696. Plaintiffs' assertion to the contrary notwithstanding, the action below does not solely "relat[e] to [the Credit] Agreement," but rather arises out of the Credit Agreement and "other applicable Loan Document," and the "transactions relating thereto,"[6] and thus falls within the broader scope of the clause's first sentence providing for exclusive New York jurisdiction, and not the narrower last sentence.

The better construction of the clause is the one Defendants advanced below: New York is the "exclusive jurisdiction" for actions arising out of or relating to the Credit Agreement, Loan Documents, or the transactions relating thereto, which scope necessarily includes any action—like this one—to determine the proper interpretation of the Credit Agreement, whether its terms have been breached, and the attendant consequences. By contrast, the final sentence (together with the clause's second sentence) simply preserves the right of the Lenders and their agents, including GLAS, to pursue enforcement against "against [a] Loan Party or its properties" in any jurisdiction where its assets may be found. (A207-08, §10.9(c)); *see also* OB.26; A1668-69.)

[6] (*See* A611-20, ¶¶ 93-114) (concerning disputed actions taken by Plaintiffs under the Pledge Agreement and the Security Agreement).) The Credit Agreement defines "Loan Documents" to include "Collateral Documents," which term encompasses both the Security Agreement and the Pledge Agreement. (A70, A91, A103, A107, §1.1.)

Finally, Plaintiffs contend that the Trial Court's waiver determination "does not rise to 'plain error' … because the ultimate outcome of this case would not change in a New York court," given that there were "numerous" other "conceded … Events of Default entitling GLAS to exercise remedies." (AB.22-23.)[7] But the Trial Court did not reach—much less determine—whether T&L's alleged failure to timely furnish required reporting deliverables constituted a material breach of the Credit Agreement. (OB Ex. B at 17.) Moreover, Defendants have not "repeatedly conceded" the existence of any Events of Default (*see infra,* Section II.C.)—they have consistently maintained that they materially performed their obligations under the Credit Agreement.

[7] Plaintiffs cite *Indasu Int'l v. Citibank*, 861 F.2d 375 (2d Cir. 1988) for the proposition that a party seeking reversal of an erroneous forum determination must prove substantial prejudice. (AB.22.) That case is inapposite, however, since there the party seeking to reverse the lower court's *forum non conveniens* ruling prevailed on the merits of its case on appeal and thus obviously had suffered no prejudice. *Id.* at 380 ("A successful party … obviously cannot claim [substantial] prejudice.").

II. DEFENDANTS' INABILITY TO OBTAIN THE WHITEHAT GUARANTEE DID NOT GIVE RISE TO AN EVENT OF DEFAULT

A. The Trial Court Misconstrued The Credit Agreement

Plaintiffs assert that the Trial Court's interpretation of Section 5.9(c), as creating an absolute "promise" by the Loan Parties to "ensure that Whitehat acceded as a guarantor" by April 1, 2022, was correct because that construction works "in tandem" with other provisions of the Credit Agreement, including Sections 3.3 and 5.17. (AB.29.) Not so.

The first sentence of Section 5.9, which governs the accession of "Additional Guarantors" (including Whitehat), expressly provides that it is subject to the "limitations and exceptions of the Collateral and Guarantee Requirement" (A152, §5.9), which is defined to include the "Guarantee Maintenance Requirement" set forth in Section 5.17. (A69; A85, §1.1.)

In Section 5.17(a), T&L agreed, among other things, to "ensure that [it is] eligible to issue [its own] guarantee and to procure the [Whitehat] guarantee … subject to … receipt of the RBI Approval." (A156-57, §5.17(a) (emphasis added).) By its plain terms, this provision makes clear that T&L's undertaking to procure the Whitehat guarantee was not absolute, but was instead contingent on receipt of regulatory approval.

Likewise, in Section 5.17(d), "[w]ithout prejudice to the Guarantee Maintenance Requirement," T&L undertook to "use its reasonable commercial efforts to procure the RBI Approval [by] April 1, 2022," and that "if so obtained

[T&L] shall ensure that … Whitehat India guarantee[s] the Covered Obligations up to the maximum amount permitted by the RBI Approval." (A157, §5.17(d) (emphasis added).) Here again, the parties expressly provided that T&L's obligation was contingent, not absolute. Moreover, the parties unambiguously expressed their intent that the failure to obtain such approval (and thus procure the Whitehat guarantee) by April 1 would "not cause a breach of the Guarantee Maintenance Requirement" (*id.* (emphasis added)) nor, by extension, an "Event of Default" (*see* A157, §8.1(d)).

Section 5.17(b) further reinforces the conclusion that the failure of Whitehat to accede as guarantor by April 1 "for whatever reason" would not, as Plaintiffs incorrectly assert, result in an automatic default. (AB.29.) That section, which applies "from (and following) the date falling five Business Days after April 1, 2022 [*viz.*, April 8]," provides that Whitehat would provide GLAS with a signed Onshore Guarantee Accession Deed. (A157, §5.17(b).) But once again, the parties clearly expressed their intention that this obligation was not absolute because it depended on receipt of RBI Approval. Accordingly, they explicitly provided that "no Default will arise" from Whitehat's failure to accede provided, among other conditions, that Whitehat continue to "use[] its reasonable commercial efforts to procure [the RBI Approval] as soon as reasonably practical." (*Id.* (emphasis added).)

Plaintiffs argue against this construction of Section 5.17(b) on the grounds that the provision "would not be necessary if Whitehat's failure to accede never

created a default in the first instance." (AB.31.) But this is circular reasoning, based on the incorrect premise that Whitehat's non-accession as guarantor by April 1 "for whatever reason," irrespective of the Loan Parties' reasonable commercial efforts to obtain RBI Approval, was an automatic default (which, as shown, is not what the parties agreed). Moreover, Plaintiffs' construction would not only render Section 5.17(d) superfluous (since T&L's reasonable commercial efforts would count for nothing), but it would lead to an absurd result when applied in conjunction with Section 5.17(b). Under Plaintiffs' tortured interpretation, in a scenario where T&L and Whitehat continuously but unsuccessfully exerted reasonable commercial efforts to obtain RBI Approval both before and after April 1, 2022 (as they in fact did[8]), then an event of default would (i) not exist prior to April 1 (per §5.17(d)), (ii) "pop" into existence on April 1 (per §5.9(c)), and then (iii) disappear five business days later on April 8 (per §5.17(b)). Contractual constructions, like this one, that lead to absurdities are not permitted under New York law. *See Lanmark Grp. v. N.Y.C. Sch. Constr. Auth.*, 50 N.Y.S.3d 349, 351 (1st Dep't 2017) (A "contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.").

[8] *See* OB.11-16. GLAS itself acknowledged T&L's "significant efforts (including but not limited to commercially reasonable efforts) … to obtain RBI's approval on or prior to April 1, 2022." (A327-29.)

Plaintiffs' reliance on Section 3.3 to corroborate their flawed interpretation of Sections 5.9 and 5.17 is misplaced. That section does not show that a "condition to satisfying [the Loan Parties'] obligations was the receipt of RBI Approval" by April 1, 2022. (AB.31-32.) Rather, that section—which is a representation and warranty (not a condition) regarding the absence of existing conflicts and governmental approvals—provides in relevant part:

> The valid execution, delivery and performance of each Loan Document … and the consummation … of the transactions contemplated thereby … (a) do not require any … consents from … any Governmental Authority … except … receipt of the RBI Approval[,] and (b) will not result in any violation of … or require any consent under … any applicable law, rule or regulation … other than the requirement of the RBI Approval if … Whitehat India issues a guarantee … prior to April 1 2022.

(A138, §3.3 (emphasis added).)

Reading the foregoing clauses together to give effect to their unambiguous meaning, it is plain that the parties did not impose an absolute obligation for Whitehat to accede as guarantor by April 1, 2022 because they understood that this was contingent upon receipt of RBI Approval. Instead, they allocated to the Loan Parties the obligation to use reasonable commercial efforts to procure such approval by April 1, 2022 or as soon as reasonably practical thereafter.

B. At Most, Whitehat's Non-Accession Was A Non-Material Breach That Did Not Warrant Forfeiture Under New York Law

Assuming *arguendo* Whitehat's inability to accede as guarantor to the Credit Agreement could be construed as a breach, it was not sufficiently material

or consequential to justify Plaintiffs' enforcement actions resulting in a forfeiture of Defendants' interests in a $1.2 billion lending arrangement.

Plaintiffs cite case law supporting the unremarkable proposition that acceleration clauses are generally enforceable. (AB.32-33.) But that is not the issue here. Rather, the question is whether under these circumstances equitable principles operate to prevent a forfeiture under New York law. For the reasons stated in Defendants' Opening Brief, they do. (OB.31-35.) Plaintiffs raise two arguments as to why these principles should not apply here, neither of which has merit.

First, Plaintiffs suggest that for equity to bar a forfeiture, there must have been a "good faith mistake, promptly cured by an unsophisticated party." (AB.33.) But that is not an accurate statement of the law. Mistake is but one circumstance where equity will intervene. Another situation—the one presented here—arises when necessary to "prevent a substantial forfeiture occasioned by a trivial or technical breach," especially when driven by "exploitive overreaching or unconscionable conduct." *Fifty States Mgmt. v. Pioneer Auto Parks*, 46 N.Y.2d 573, 576-77 (N.Y. 1979).

Plaintiffs contend that the absence of Whitehat's additional guarantee was a "significant breach," because it "deprived the Lenders [of] recourse to Whitehat's assets in the event of default." (AB.34.) This argument ignores undisputed evidence that, as soon as it became apparent that the RBI would not grant its approval, the Loan Parties offered further financial guarantees equivalent

to the Whitehat guarantee, and to move all assets out of Whitehat into other affiliates that were already guarantors under the Credit Agreement. (OB.15-16.) Plaintiffs' refusal to even entertain this offer, which would have cost them nothing and inoculated them against the prejudice they invoke, is the very definition of exploitive, overreaching conduct that New York equitable principles condemn. *Cf. Fifty States*, 46 N.Y.2d at 579 (the failure of a party to accept a proffered cure without prejudice and then seek enforcement of an acceleration clause would "be at least exploitive and, perhaps, unconscionable").

C. Defendants Never Conceded That Whitehat's Non-Accession Constituted A "Material Breach"

Plaintiffs contend that certain amendments to the Credit Agreement establish that "Defendants conceded that Whitehat's failure to accede as guarantor was a material breach permitting GLAS to enforce remedies." (AB.25-26.) While the Trial Court agreed, it relied on a misunderstanding of the agreements and the uncontested facts of the case.

Defendants never acknowledged, conceded, or otherwise admitted that any default had occurred under the Credit Agreement. As Ravindran testified, the use of the defined term "Specified Default" in these amendments never constituted, nor was meant to constitute, an admission that there had been a default under the Credit Agreement. (A1350-51; A1354.) Plaintiffs present no authority or factual support to find that by using a defined term in a document, the parties agreed to all possible meanings and implications of that term.

Further, the parties never agreed that the language in the Third and Seventh Amendments regarding Whitehat's failure to accede as guarantor had not been cured and entitled the Lenders to serve a notice of default means it was a material breach. What the parties agreed to, and the only thing Defendants acknowledged, was that by executing those amendments the *Lenders* were not waiving any rights to have GLAS deliver a notice concerning the Specified Defaults. Nowhere in the amendments did Defendants acknowledge that the default notice would be substantively valid and effective or that the delivery of such a notice would impair their defenses or result in a waiver of their rights or ability to challenge the validity of any such notice.

The same logic applies to Plaintiffs' reliance on language in the Seventh Amendment regarding that Whitehat's failure to accede could not be cured unless the Lenders waived it. That language does not provide a basis to find that, by waiving a right to cure, Defendants also acknowledged that there had been a default material enough to justify acceleration of the loans and seizing control of the Borrower.

III. ANY OBLIGATION DEFENDANTS MAY HAVE HAD TO PROCURE THE WHITEHAT GUARANTEE WAS EXCUSED ON GROUNDS OF IMPOSSIBILITY

There is no dispute that, at the time the parties entered into the Credit Agreement on November 24, 2021, it was possible (though not guaranteed) under the then-existing Indian banking regulations for the Loan Parties to obtain RBI Approval for Whitehat's additional guarantee by the April 1, 2022 target date. Nor is it disputed that the RBI did not issue its approval by that target date despite the Loan Parties' reasonable commercial efforts. Nor is it disputed that on August 22, 2022 the banking regulations changed in a way that made it objectively impossible for the RBI to approve the Whitehat guarantee. As such, even assuming the Credit Agreement contained an obligation requiring Whitehat's accession as guarantor (which, as previously shown, it did not), performance of that obligation was excused under New York law because it was "rendered impossible by intervening governmental activities." *Pleasant Hill Devs. v. Foxwood Enters.*, 885 N.Y.S.2d 531, 533 (2d Dep't 2009).

Plaintiffs argue that the impossibility doctrine is inapplicable because the change to the Indian regulations was "readily foreseeable" when the Credit Agreement was executed, and because the parties "expressly allocated" to the Loan Parties "all the risk associated with RBI non-approval by April 1, 2022, regardless of why." (AB.37; *see also id.*, AB.39-42.) Neither argument withstands scrutiny.

First, as Defendants' Indian law expert explained, although certain draft proposals were published at the time the Credit Agreement was executed, the relevant language of the draft regulation that actually revoked the Borrowing Exception (which made RBI Approval possible under the then-existing regulations) was not published before the new regulation coming into effect. (OB.38-39.) In any event, these were drafts—with no indication as to when (or, indeed, whether at all) they would ever be made into law.

Second, Plaintiffs are right that the parties allocated the risk "associated with RBI non-approval," but they are wrong that it was allocated to constitute an automatic event of default. To the contrary, as shown above, the parties realized that Whitehat's guarantee was contingent on receipt of RBI Approval, and they assigned to the Loan Parties the obligation to exercise "reasonable commercial efforts" to procure such approval "on or prior to April 1, 2022 (per §5.17(d)) or, failing that, "as soon as reasonably practical" thereafter (per §5.17(b)).[9] The parties thus explicitly considered the possibility that RBI Approval could not be obtained through the Loan Parties' reasonable commercial efforts and allocated that risk as not constituting an event of default. (*Supra,* Section II.)

The cases Plaintiffs rely on to oppose application of the impossibility doctrine (AB.36) are distinguishable. For example, in *A&S Transp. v. Cnty. of*

[9] Notably, Plaintiffs did not even attempt to show—nor did the Trial Court find—that Defendants failed to perform those obligations or any other provision of the Guarantee Maintenance Requirement under Section 5.17.

Nassau, 546 N.Y.S.2d 109, 111-12 (2d Dep't 1989), at the time the parties executed their contract, the existing government regulations already rendered the stipulated performance impossible. In *Pleasant Hill*, 885 N.Y.S.2d at 533, the court held that plaintiff could not invoke the impossibility doctrine on the basis of change in zoning ordinances in June 2005 prohibiting six-lot subdivisions when plaintiff had previously elected, in December 2004, not to cancel the contract when defendant failed to obtain approval for a six-lot permit by the contractual December 31, 2004 cut-off. And in *Gen. Elec. v. Metals Res. Grp.*, 741 N.Y.S.2d 218, 220 (1st Dep't 2002), the court declined to apply the doctrine where the changed circumstances invoked by defendant did not render performance under a commodity swap contract impossible, but simply "financially disadvantageous."

Plaintiffs' attempt to rehabilitate *Red Tree Invs. v. Petróleos de Venezuela*, 2021 WL 6092462 (S.D.N.Y. Dec. 22, 2021), the case on which the Trial Court heavily relied, fares no better. The *Red Tree* court ruled that an expansion of existing sanctions did not support an impossibility defense for two reasons, neither of which pertains here. First, while the sanctions may have made it more difficult for defendants to make required payments, they did not render performance objectively impossible. *Id.* at *5 ("These payments were not impossible. In fact, they were made."). Second, the court determined that the expansion of sanctions was foreseeable by the parties because their contract expressly "contemplated that the activities of [defendant] could become the

subject of [future] sanctions…." *Id.* at *6 (internal quotation marks omitted). Here, by contrast, the Credit Agreement was entirely silent about the prospect of changes to the relevant regulations, and the new regulations rendered it objectively impossible to procure the Whitehat Guarantee.

IV. THE TRIAL COURT'S DECISION SHOULD NOT BE AFFIRMED ON THE ALTERNATIVE GROUNDS IDENTIFIED BY PLAINTIFFS

Finally, Plaintiffs argue that regardless of whether Whitehat's non-accession constituted a default, the Trial Court's decision should be affirmed because there were other "defaults" due to Defendants' "failure" to furnish certain financial reports under Section 5.1 of the Credit Agreement. (AB.43-44.) Plaintiffs are wrong. The Trial Court declined to address Plaintiffs' claims regarding the purported financial reporting defaults. (OB Ex. B at 17:8-11.)

At the time the parties executed the Credit Agreement, they neither understood nor intended that a delay in furnishing financial reports would constitute a material breach. Instead, they expressly provided that any putative event of default arising "solely as a result of a failure of any Loan Party to provide" the reports would "be deemed to be cured upon delivery of such [reports] … notwithstanding that the time for delivery … shall have expired or passed." (A111, §1.11.) Still, Plaintiffs claim that under the Second, Third, and Seventh Amendments, these were defined as "Specified Defaults" which "matured into Events of Default entitling GLAS to exercise remedies." (AB.43.) Those amendments do not change the fact that the parties did not intend for a delay in providing financial reports to constitute a material breach,[10] Plaintiffs'

[10] *See*, *e.g.*, *Singh v. Carrington*, 796 N.Y.S.2d 668, 669 (2d Dep't 2005) ("Delay in performance of a contract where time is not of the essence is not a material breach….").

argument fails for the same reasons it fails regarding the Whitehat guarantee (*supra,* Section II.) Further, T&L materially satisfied its reporting deliverables obligation by furnishing quarterly reports and providing additional extensive, detailed disclosures. (A1495.)

Lastly, Plaintiffs argue that Defendants' defenses fail because: there can be no duress where a plaintiff is threatening to exercise its contractual remedies; New York law treats breaches of reporting covenants as "material;" and the Lenders were too "patient" in agreeing to forbear their remedies for their hands to be unclean. (AB.44.) Not so.

With respect to duress, Plaintiffs' reliance on *ECI Fin. Corp. v. Resurrection Temple of Our Lord, Inc.*, 184 N.Y.S.3d 96 (2d Dep't 2023) is misplaced. There, the plaintiff threatened to exercise its legal right "to execute on the judgment of foreclosure … and sell the subject property…." *Id.* at 98. Here, Plaintiffs had no legal or contractual right to violate the NDA and disclose the Defendants' confidential information nor to have their advisors contact hundreds of potential investors to dissuade them from investing or transacting with Defendants. (A689-90.)

With respect to materiality, Plaintiffs' reliance on *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373 (N.Y. 2005), is likewise misplaced. In that case, the breaches were material because they adversely affected the ability of an "asset-backed lender … to track the movement and quality of its borrower's collateral…." *Id.* at 384. Here, by contrast, the Term Loans are guaranteed by

multiple guarantors, not backed by collateral, and Defendants *did* provide significant financial disclosures. Further, *JMD* does not overrule longstanding New York law that trivial breaches, not resulting in any damage to lenders, are at most technical breaches. (OB.32-35.)

Plaintiffs' "unclean hands" argument ignores the reality that their actions in connection with negotiating amendments to the Credit Agreement and ultimately serving notices of default and acceleration were taken at the behest and under the control of a group of distressed debt dealers. Not only were these dealers subject to designation as "Disqualified Lenders" under the Credit Agreement, they were increasing their positions in the Borrower's debt to be able to maximize the value they could extract while leaving Defendants no choice but to enter into amendment after amendment. (A1426-30.) In short, given that Plaintiffs' purported "patience" was in service of enriching this control group, their hands are sufficiently dirty to establish a defense to any purported breach related to the provision of financial reports.

CONCLUSION

For the foregoing reasons and those stated in Defendants' Opening Brief, the Trial Court's judgment should be reversed.

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4869-9847-0070, v. 8

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4884-7463-5415, v. 1