To be Argued by:
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Court of Appeals

of the

State of New York

ALBERT BEHLER,

Plaintiff-Appellant,

– against –

KAI-SHING TAO,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Section 5601(a) of the New York Civil Practice Law & Rules ("CPLR"). As required by CPLR 5601(a), this appeal is from the March 14, 2024, Order of the Supreme Court, Appellate Division, First Department, duly entered on March 14, 2024, which contains a two-justice dissent on questions of law that are in Appellant's favor and would have resulted in the reversal of the underlying IAS Court's decision.

Plaintiff-Appellant Albert P. Behler ("Behler") respectfully submits this brief in support of his appeal from the March 14, 2024 Order of the Supreme Court, Appellate Division, First Department, entered on March 14, 2024 (the "AD Order") (R. 152-76), and from each and every part thereof. The Appellate Division majority opinion (the "Majority") affirmed the June 8, 2022 Order of the Supreme Court, New York County, Part 53 (Borrok, J.) (the "IAS Court"), entered on June 8, 2022, which: (i) granted the motion of Defendant-Respondent Kai-Shing Tao ("Tao") pursuant to CPLR 3211(a)(1) and (7); and (ii) dismissed the Appellant's complaint ("Complaint") in this action. R. 5-6.

PRELIMINARY STATEMENT

The dissent, authored by Justice Gesmer and joined by Justice Kennedy (the "Dissent"), framed the Majority's decision in a scathing preliminary passage:

> The fundamental issue in this case is whether a manager of an LLC may persuade a friend to invest in his LLC by orally promising the friend a guaranteed exit opportunity at a specific time and price, and then, with total impunity, amend the LLC's operating agreement unilaterally, by, among other things, including a merger provision which he now contends nullifies their oral agreement, relieves him of all obligations under it, and deprives his friend of all legal remedies, even though nothing in the operating agreement is inconsistent with Tao's obligations to perform under the oral agreement. As stated, it is clear the answer must be no. Yet that is just the conduct that the motion court approved, and what the majority would have this Court do, in violation of basic principles of contract law and fundamental fairness.

R. 163.

The dispute arises out of a simple oral agreement between Behler and his longtime friend Tao. Tao wanted Behler to invest in a publicly-traded media company Tao controlled called Remark Holdings, Inc. ("Remark"). Instead of a direct investment, however, Tao wanted Behler to make an indirect investment through a closely-held Delaware limited liability company he also controlled called Digipac LLC ("Digipac"). Digipac was set up by Tao to acquire and hold shares of Remark. Behler's primary concern with Tao's proposed investment mechanism was the illiquid nature of Digipac. Unlike Remark, Digipac was not publicly traded and there is no market for its shares.

Tao and Behler reached an agreement in 2012 to solve the impasse. The pair agreed that Behler would make the desired indirect investment in Remark through Digipac, but in return, Tao would guarantee Behler an exit from the Digipac investment at a price directly derived from the share price of Remark. The deal was designed to simulate the direct investment Behler desired. Specifically, Tao promised to cash Behler out of the Digipac/Remark investment if the publicly traded share price of Remark hit $50/share or within five years of Behler's initial investment, whichever occurred first.

The Majority declined to enforce the promise, holding that Tao released himself from his obligation to make the buy-out offer to Behler when he

unilaterally amended Digipac's operating agreement in 2014 (the "LLC Amendment"). Behler did not participate in the amendment to Digipac's operating agreement. The LLC Amendment was drafted and executed unilaterally by Tao. The agreement did not reference Tao's promise to Behler but did contain a boilerplate merger clause providing that it:

> together with the Certificate of Formation, each Subscription Agreement and all related Exhibits and Schedules, constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter, including the Original Agreement.

R. 51 § 13.2.

The Majority held that the clause terminated Tao's 2012 promise to Behler. To reach its holding, however, the Majority discarded a foundational principle of contract law—that a contractual obligation may only be modified, terminated, released, settled or waived, upon mutual assent or pursuant to a voluntary and knowing waiver. The Majority also improperly recast the Complaint's allegation of a bilateral oral agreement between Behler and Tao as an oral agreement between Behler and Digipac, inexplicably and impermissibly drawing a series of material factual inferences against the plaintiff on a motion to dismiss.

The dispute predominately turns on two legal issues. The first is an issue of statutory interpretation. Typically, a contractual obligation may only be waived, modified or released upon mutual assent or pursuant to a voluntary or knowing waiver. In the definitions section of Delaware's limited liability act (Del. Code tit. 6, § 18-101(9)), however, the definition of "limited liability company agreement" suspends those rules for agreements that govern "the affairs of a limited liability company and the conduct of its business." For such agreements, the statute provides that a "member or manager of a limited liability company or an assignee of a limited liability company interest is bound by the limited liability company agreement whether or not the member or manager or assignee executes the limited liability company agreement." Del. Code tit. 6, § 18-101(9).

The central question, and one that appears to be an issue of first impression, is whether this statutory exception to the rules of contract empowers a manager (or controlling member) of a limited liability company to unilaterally modify, create, or terminate contractual obligations that do not fall within the narrow statutory definition of a "limited liability company agreement," if that modification is made in an agreement that also functions as a limited liability company agreement.

The Majority answered the question in the affirmative, holding that because the termination of the Exit Guarantee Agreement was accomplished through a merger clause in an agreement that also functioned as a limited liability company

agreement, Behler's lack of assent to the termination of his extremely valuable and bargained for contract right was immaterial. In effect, the Majority held that Delaware's statutory scheme superseded the basic rules of contract even though the Exit Guarantee Agreement was not a "limited liability company agreement." Under the Majority's interpretation of the statute, Tao could have put any obligation in his unilateral amendment to Digipac's operating agreement and Behler would have been bound by virtue of his membership in Digipac, with no say in the matter.

The Majority's holding is unprecedented and deviates from the statutory text. The text does not authorize the unilateral modification of obligations that do not narrowly concern the internal affairs of a limited liability company. The Dissent would have applied the traditional rules of contract, explaining that because "Behler had no role in the authorship, negotiation, or preparation of the 2014 amended agreement, [the Dissent] would not read the 2014 amended agreement as having caused Behler to relinquish his valuable contract rights under the exit opportunity agreement without his knowledge and without compensation." R. 172-73.

The second question assumes that Tao had the authority to unilaterally terminate his obligation to Behler under the Exit Guarantee Agreement and turns on whether he did (*i.e.*, whether the boilerplate merger clause in the 2014 LLC

Amendment unambiguously terminated Tao's $10,500,000 personal obligation to Behler pursuant to the 2012 Exit Guarantee Agreement). The Majority answered the question in the affirmative, mischaracterizing the alleged Exit Guarantee Agreement between Behler and Tao as a distribution agreement between Digipac and Behler that was superseded by the LLC Amendment and its provisions concerning distributions. The Dissent noted the Majority's mischaracterization, explaining that:

> The exit opportunity agreement, *as described in the complaint*, is an agreement made solely between two friends to induce Behler to invest by providing that Tao would make it possible for him to cash out his investment under certain circumstances and by a date certain

R. 168 (emphasis added); *See also* R. 164 n.1. The Majority could only reach its holding that the LLC Amendment unambiguously superseded the Exit Guarantee Agreement by jettisoning the most basic of procedural rules—that the allegations of a complaint must be accepted as true on a motion to dismiss. The phony conflicts between the LLC Amendment and the Exit Guarantee Agreement that were central to the Majority's holding disappear when the Exit Guarantee Agreement is construed as a private agreement between Behler and Tao (the agreement alleged in the Complaint) rather than a liquidation and distribution agreement between Digipac and a member.

The Majority declined to rule on whether the Exit Guarantee Agreement was definite (one of the trial court's grounds for dismissal). But the key terms of the oral agreement were all stated in the Complaint or based on "easily ascertainable benchmarks" such as the publicly-traded share price of Remark. That is why the Dissent, citing this Court's decision in *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475 (1989), would have reversed the trial court's dismissal. The Majority's dismissal of Behler's promissory estoppel was predicated on its improper application of the merger clause to the Exit Opportunity Agreement.

As we show below, this Court should reverse the decision of the First Department, deny Tao's motion to dismiss in its entirety, and remand the case to the IAS court for further proceedings.

QUESTIONS PRESENTED

1. Whether a bilateral New York contract that is not a "limited liability company agreement," as defined in Delaware's Limited Liability Company law (Del. Code tit. 6, § 18-101(9)), may be unilaterally terminated in violation of the New York (and Delaware) rule that a modification, termination, release or waiver of a contract right must be voluntary, knowing, or upon mutual assent, pursuant to

the Delaware statutory exception to the rules of contract found in the definition of "limited liability company agreement."

The Majority incorrectly answered the question in the affirmative.

2. Whether a boilerplate merger clause included in an amendment to a limited liability company's operating agreement releases an obligation under a separate and distinct agreement between just two of the many parties to the operating agreement, entered years earlier, where the earlier agreement had a different focus and purpose than the operating agreement.

The Majority incorrectly answered the question in the affirmative.

3. Should the allegations of an oral agreement in the Complaint be set aside using the "last resort" of indefiniteness where the contract has been partially performed and the Complaint either alleges all material terms or references an ascertainable and objective methodology to supply the missing term?

The IAS Court incorrectly answered the question in the affirmative. The Majority declined to reach the issue. The Dissent would have answered the question in the negative.

4. Whether the Complaint's allegations of promissory estoppel, which arose out of plaintiff's reliance on defendant's 2012 personal promise to induce plaintiff's investment in a limited liability company were sufficiently stated and

survived defendant's inclusion of a boilerplate merger clause in the amendment to the company's operating agreement in 2014, and whether the claim could be alleged alongside the breach of contract claim arising out of the same 2012 promise.

The Majority incorrectly answered the question in the negative.

NATURE OF THE CASE AND STATEMENT OF THE FACTS

A. The Complaint: Formation of the 2012 Exit Guarantee Agreement Between Behler and Tao, Behler's Performance, and Tao's Breach

The Complaint alleges a simple breach of an oral agreement between Plaintiff-Appellant Behler and Defendant-Appellee Tao. Tao and Behler were longtime friends. R. 10 ¶ 15. Tao ran and controlled a publicly-traded media company called Remark. R. 11 ¶ 17. Tao also controlled a private Delaware limited liability company called Digipac. *Id.* ¶ 20. Tao formed Digipac to acquire and hold shares of Remark. *Id*. Tao pressed his friend to make an indirect investment in Remark through Digipac. *Id*. Behler did not want to make the proposed indirect investment because Digipac was not publicly traded and it would be impossible to liquidate its shares. *Id*. ¶ 21.

To induce Behler's indirect investment, Tao and Behler entered a side-agreement whereby Tao personally agreed to give Behler an option to cash out of

his Digipac investment, as if he had purchased shares of Remark directly, if the price of Remark hit $50/share or at the five-year anniversary of the initial investment, whichever occurred first (the "Exit Guarantee Agreement"). R. 12 ¶ 23. In line with the purpose of the agreement, the two agreed that the option price for Behler's Digipac holding would be directly derived from the easily ascertained publicly-traded price of Remark. *Id*. The pricing mechanism appears in several places of the Complaint. *Id*.; R. 14 ¶¶ 39-40.

Behler assented to the oral arrangement. R. 12 ¶ 24. With the side agreement between friends in place and a Tao-guaranteed exit secured, Behler transferred, in total, $3,000,000 to Digipac in 2012 and 2013. *Id*. ¶ 25. Remark was trading at approximately $1/share at the time of Behler's initial investment. R. 13 ¶ 28. In total, Digipac acquired 5,256,315 shares of Remark. *Id*. ¶ 29. After the two transfers to Digipac, Behler held a 24.14% ownership stake in Digipac. R. 12 ¶ 25. The arrangement was informal. The money was transferred to Digipac without documentation. There was just the oral agreement. *Id*. ¶ 26.

While the arrangement might seem odd, Behler and Tao were friends and longtime business partners; this is how they did business. *Id*. The two friends discussed the investment and oral agreement on numerous occasions between 2012 and 2017. R. 13 ¶¶ 31-32. Several months before the five-year trigger date, at a wine bar in New York in June 2017, the pair discussed the upcoming deadline and

Tao again explicitly acknowledged his personal obligation under the Exit Guarantee Agreement to make the promised cash-out offer to Behler. Between 2012 through the date of promised performance, Tao thus repeatedly acknowledged his outstanding obligation to Behler. *Id.*

On the five-year anniversary of the initial investment, in November 2017, Tao failed to make the exit offer he personally promised. *Id.* ¶ 33. At the time, shares of Remark were trading at $9.15/share. R. 14 ¶ 39. The derivative value of Behler's 24% stake in Digipac was $11,610.201.10. *Id.* ¶ 40. Tao subsequently admitted that he breached the Exit Guarantee Agreement during a dinner at Masa restaurant in New York on or around January 23, 2018. R. 10 ¶ 9. The parties could not resolve the dispute and Behler sued Tao in 2020.

B. The Merger Clause: Tao's Unilateral Amendment to Digipac's Operating Agreement in 2014

The Majority, adopting arguments advanced by Tao, held that the 2012 oral agreement was voided when Tao unilaterally amended Digipac's operating agreement on or about June 4, 2014 (the "LLC Amendment"). The LLC Amendment was drafted by Tao in his capacity as the manager of Digipac and signed by only Tao in his capacity as manager of Digipac. R. 165.

There is no evidence in the record that Behler executed the LLC Amendment (he did not). *Id.* There is no evidence in the record that Behler had

any input on the 28-page document (he had none). *Id*. There is no evidence that Behler reviewed or was even aware of the amendment before Tao caused it to go into effect (he was not). The only documentary evidence in the record that may be considered is that Behler was sent a copy of the LLC Amendment (along with a proposed subscription agreement that was backdated to 2012) by email from a person named Shannon Follansbee at a company called Pacific Star Partners two days before it was to go into effect. R. 56. Ms. Follansbee requested that Behler execute and return the two documents. Tao could not produce copies executed by Behler (because he never did). R. 20 ¶ 5.

The LLC Amendment (R. 27-55) contains a generic merger clause. The merger clause provides that it:

> constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter, including the Original Agreement. R. 51 § 13.2.

The clause does not reference the 2012 Exit Guarantee Agreement between Behler and Tao that induced Behler's investment in Digipac.

Moreover, there is no evidence in the record that either Tao or Behler understood the 2014 LLC Amendment to cancel the private 2012 Exit Guarantee

Agreement between the pair. To the contrary, there is ample evidence in the record that neither understood the LLC Amendment to have voided the oral agreement. As already noted, Tao repeatedly acknowledged his personal obligation to Behler between 2012 and 2018. R. 10 ¶ 9; R. 13 ¶¶ 31, 32.

C. The Decisions Below

i. The Majority Opinion

The Majority held that when Tao included a boilerplate merger clause in his unilateral amendment of Digipac's operating agreement in 2014 (defined above as the LLC Amendment), Tao successfully, if accidently, terminated his multi-million-dollar obligation to his friend Behler under the separate Exit Guarantee Agreement he entered with Behler two years before. The Majority was persuaded that under a narrow Delaware statutory exception to the traditional rules of contract, Tao had authority, in his capacity as Digipac's manager, to unilaterally terminate his obligation to Behler. According to the Majority, Behler had no say in the matter.

The exception is found in the definition of "limited liability company agreement" in Delaware's limited liability company law (Del. Code tit. 6, § 18-101(9)). The rule provides that a member of a limited liability company is bound by the terms of the company's operating agreement, regardless of whether the member assents to those terms or not. R. 158 (*citing* Del. Code tit. 6, § 18-101(9)

and *Seaport Vil. Ltd. v. Seaport Vil. Operating Co., LLC*, 2014 WL 4782817, at *2 (Del. Ch. Sept. 24, 2014)).

In light of the statutory exception, the Majority ignored a central tenet of New York (and Delaware) contract law—that the termination, modification, release, or waiver of a valuable contract right must be upon mutual assent or pursuant to a voluntary and knowing waiver. In so doing, the Majority failed to consider the scope of the statutory text. The statutory exception only applies to operating agreements—that is, agreements governing "the affairs of a limited liability company and the conduct of its business." Del. Code tit. 6, § 18-101(9). The Majority could not cite a single case to support its expansive application of the rule—where a unilateral amendment to an operating agreement terminated a separate private agreement that was not an operating agreement, had been entered years earlier, and contained an extremely valuable contract right. Though unable to cite a case to support its unprecedented expansion of the Delaware statute, the Majority offers that Delaware law sometimes leads to "harsh results." R. 158.

The Majority found that the merger clause in the LLC Amendment was unambiguous in its intent to release Tao from his personal obligation to Behler under the Exit Guarantee Agreement. The clause provides that it "supersedes all prior and contemporaneous understandings, agreements, representations and warranties . . . with respect to such matter . . . including the Original LLC

Agreement." R. 51 § 13.2. Discarding the basic procedural rule that a plaintiff is entitled to all reasonable inferences on a motion to dismiss, the Majority recasts the allegations of the oral agreement between Behler and Tao as an agreement between Behler and Digipac that "scheduled Digipac's liquidation of plaintiff's membership interest and distribution to plaintiff of the proceeds." R. 159. It further found, in direct conflict with the actual allegations in the Complaint, that the Exit Guarantee Agreement's "operative function [was to] provid[e] a liquidation and distribution schedule for plaintiff's membership interest in Digipac." *Id.* n.5. The Majority then held that the LLC Amendment's merger clause and its strawman oral agreement between Behler and Digipac concerned the same subject matter:

> Here, the merger clause explicitly states that the amended LLC agreement supersedes all prior written and oral agreements concerning the subject matter of the amended LLC agreement, which includes the transfer of membership interests, distributions among Digipac's members and the rights, obligations, and interests of the members to each other and to Digipac. The amended LLC agreement clearly concerns the same subject matter as the exit opportunity agreement, which scheduled Digipac's liquidation of plaintiff's membership interest and distribution to the plaintiff of the proceeds thereof.

R. 159.

The Majority also dismissed the promissory estoppel claim, which was pled in the alternative to the claim of breach. The Majority held that because "distributions to Digipac's members are governed exclusively by the amended

LLC Agreement," Tao's promise of a distribution to Behler would be superseded by the LLC Amendment. That promise, however, appears nowhere in the Complaint. The Majority's holding again relies on its impermissible reformation of the allegations of the Complaint. The Majority further held that if the LLC Amendment did not supersede the Exit Guarantee Agreement, the promissory estoppel claim would still be subject to dismissal as the claim would then be duplicative of the claim for breach of that agreement. *Id.* & n.8. The Majority ignores the rule that a promissory estoppel claim may be pled as an alternative to breach where the enforceability of the contract is challenged, as it is here.

ii. The Dissent

In a lengthy dissent authored by Justice Gesmer (joined by Justice Kennedy), Justice Gesmer explains why she would have reversed the IAS Court's dismissal of the Complaint (the "Dissent").

The Dissent would have rejected Tao's effort to escape his promise on the grounds that it was too indefinite to enforce.[1] Citing this Court's decision in

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[1] The IAS Court had held that the 2012 Exit Guarantee Agreement was too indefinite to enforce because "no agreement or formula is alleged as to the terms of any such exit option and after the five years the defendant purportedly promised to provide him with an exit strategy." R. 5. The Majority attempted to avoid the issue by stating in a footnote that it need not reach the question because it dismissed on other grounds. R. 156 n.1. The Majority did, implicitly, find that the Exit Guarantee Agreement was adequately pled because one of its grounds for dismissing the promissory estoppel claim was its finding that either the LLC Amendment or the Exit Guarantee Agreement would be enforceable and thus preclude the promissory estoppel claim. R. 162 n.8 ("the ultimate adjudication of the case would find that either the exit opportunity agreement or

Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 74 N.Y.2d 475, 482 (1989), the Dissent explained that the alleged oral agreement has "no fatal flaw or missing material term" as the material terms were all stated or based on "easily ascertainable benchmarks." The Dissent detailed the essential allegations in the Complaint:

- "Tao would give Behler the opportunity to exit from the investment within five years";
- the "cash-out would be based on Digipac's holdings in Remark"; and
- "the buy out would be based on easily ascertainable benchmarks such as the closing price of Remark, a publicly traded company, on the date of the buy out; the number of Remark shares held by Digipac and the worth of those shares; and Behler's percentage of ownership in Digipac".

R. 167-68. The Dissent concludes that "Behler has sufficiently alleged the definiteness of the exit opportunity agreement to survive defendant's motion to dismiss." R. 168.

The Dissent also would have held that the boilerplate merger clause in the 2014 LLC Amendment had no effect on the 2012 Exit Guarantee Agreement.

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the amended LLC Agreement governs [Tao's] alleged promise to liquidate and distribute [Behler's] Digipac interest at the deadline, thus rendering the promissory estoppel claim improper").

Unlike the Majority, the Dissent recognized the procedural posture of the case—a motion to dismiss—and considered the application of the merger clause to the oral agreement actually alleged in the Complaint, appropriately affording the plaintiff, rather than the defendant, all reasonable factual inferences:

> the exit opportunity agreement, as described in the complaint, is an agreement made solely between two friends to induce Behler to invest by providing that Tao would make it possible for him to cash out his investment under certain circumstances and by a date certain. The 2014 amended agreement involved different parties (Digipac, as well as Digipac members who were not parties to the exit opportunity agreement) and governs in general terms the rights, obligations, and interests of Digipac's members to each other and to Digipac. Behler adequately pleads that it does not govern the separate, standalone agreement made between Behler and Tao which induced Behler to invest in Digipac.

Id. In distinguishing the cases relied upon by the Majority, the Dissent explains that the Majority could not cite a single "case in which an oral agreement between two individuals that did not impose any obligations on any other persons or entities was superseded by a subsequent unilateral modification of an LLC operating agreement." R. 169. The Dissent further explained why each of the purported conflicts between the LLC Amendment and the actual Exit Guarantee Agreement alleged in the Complaint were not conflicts at all, concluding that "Tao's compliance with his obligations under the exit opportunity agreement, as stated in

the complaint, would not be inconsistent with or displace any provision of the 2014 [LLC Amendment].” R. 172.

The Dissent would have at least found the merger clause ambiguous as to whether it terminated Tao’s personal obligation to Behler. The Dissent explains “that the terms of each agreement and their relation to each other are, at the very least, subject to more than one reasonable interpretation.” *Id.* That the panel split 3-2 on the appropriate interpretation of the clause hints at an ambiguity. The Dissent also pointed to Tao’s contemporaneous conduct and understanding of the clause—which conflicts with the Majority’s interpretation—as casting further doubt on the Majority’s finding that the only reasonable interpretation of the merger clause is that its intent was to terminate the Exit Guarantee Agreement.

Finally, the Dissent would have held that the common law rules concerning the modification or waiver of a valuable contract right—that the waiver must have been knowing and voluntary—preclude Tao’s unilateral termination of his obligation to Behler under the Exit Guarantee Agreement. Citing this court’s decision in *Jefpaul Garage Corp. v. Presbyterian Hosp. in City of N.Y.*, 61 N.Y.2d 442, 446 (1984), the Dissent explains that the “waiver of valuable contract rights must be made knowingly and voluntarily.” *Id.* Applying the rule, the Dissent explains that because “Behler had no role in the authorship, negotiation, or preparation of the 2014 amended agreement, [the Dissent] would not read the 2014

amended agreement as having caused Behler to relinquish his valuable contract rights under the exit opportunity agreement without his knowledge and without compensation." R. 173. In other words, the Dissent would not have held that Delaware's statutory exception to the rules of contract, relied on by the Majority, applied and thus superseded New York's (and Delaware's) requirement that the modification or waiver of the Exit Guarantee Agreement be knowing and voluntarily.

The Dissent would have also reversed the IAS Court's dismissal of the promissory estoppel claim.[2] The Dissent explains that, for the same reasons why the merger clause in the LLC Amendment did not terminate the Exit Guarantee Agreement, it would not preclude a promissory estoppel claim predicated on the same promise. R. 174. The Dissent, applying New York law, would have held that the factual allegations in the Complaint sufficiently stated a promissory estoppel claim. The Dissent further explained that pleading in the alternative is permissible at this stage of the proceeding. R. 175.

D. Competing Factual Scenarios

There are two competing scenarios at play:

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[2] The IAS Court had held that "the promissory estoppel claim fails because Mr. Behler's reliance on Mr. Tao's alleged promise was unreasonable based on the lack of definite terms as to any purported guaranteed exit strategy." R. 5-6.

Scenario one -- *A case of accidental termination*. Tao never intended and did not understand the LLC Amendment to void his personal obligation to his friend. As noted above, between 2012 and 2018, Tao repeatedly acknowledged his obligations to Behler under the Exit Guarantee Agreement. Under this scenario, the Majority's expansive interpretation of the merger clause in the LLC Amendment defied the expectations and understanding of both Tao and Behler. Put another way, the Majority, adopting the arguments of Tao's counsel, held that Tao unwittingly, unilaterally, and accidentally canceled an $11-million-dollar personal obligation to Behler and Behler had no say in the matter.

Scenario two -- *Tao's decade of illicit conduct*. Tao tricked Behler into transferring money to Digipac with the promise of an exit opportunity. R. 8-9 ¶¶ 2-6. Then, with Behler's money, and the money of numerous other investors safely in the Tao-controlled Digipac accounts, Tao unilaterally amended Digipac's operating agreement in a way that obliquely voided his personal promise of an exit to Behler (and perhaps others).

At the time the 2014 LLC Amendment went into effect, shares of Remark were trading at approximately $8.90/share. Based on Behler's 24.14% interest in Digipac (whose assets were comprised of 5.2 million shares of remark)), Tao's obligation to Behler under the Exit Guarantee Agreement stood at approximately

$10.5 million when Tao unilaterally terminated that obligation for no consideration as part of his illicit scheme.[3]

Subsequent to the amendment, over the next five years, Tao then repeatedly lied to Behler by acknowledging his obligations to Behler in connection with their oral promise. Tao even admitted that he breached the agreement when confronted about it at a wine bar in 2018. Then, as part the ultimate gotcha, Tao argued in connection with the motion to dismiss that the generic merger clause buried on page 25 of the 28-page single-spaced unilaterally drafted and imposed LLC Amendment voided the Exit Option Agreement. The interpretation was presented long after the statute of limitations for misconduct relating to Tao's 2014 modification would have expired. Under this scenario, the Majority's decision to enforce the merger clause against the Exit Guarantee Agreement endorses and rewards Tao's decade of deceit.

* * *

Under either factual scenario, the result below defies basic notions of fundamental fairness and bedrock principles of contract law. Tao got what he wanted—Behler's substantial investment in Digipac. But according to the

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[3] The Remark share price is found at https://finance.yahoo.com/quote/MARK?p=MARK&.tsrc=fin-srch. On or around December 22, 2022, Remark implemented a reverse stock split. The listed share price must be adjusted to account for the split: https://www.prnewswire.com/news-releases/remark-holdings-announces-reverse-stock-split-301708457.html.

Majority, and over Behler's objection, Tao either accidently or illicitly escaped his promise to Behler. The Majority's decision should be overturned and the case remanded to the IAS court for further proceedings.

STANDARD OF REVIEW ON A MOTION TO DISMISS

An order on a motion to dismiss is subject to de novo review on appeal. *See Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 81 (1st Dept 2022), *aff'd*, 41 N.Y.3d 415 (2024). The Court's task on such an appeal is to "determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.'" *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995) (citation omitted). Plaintiff is afforded "the benefit of all favorable inferences which may be drawn from their pleading." *Id.* The complaint is legally sufficient if "[the Court] determine[s] that plaintiffs are entitled to relief on any reasonable view of the facts stated." *Id.*

ARGUMENT

I. THE COMPLAINT SUFFICIENTLY STATES AN ENFORCEABLE ORAL AGREEMENT

The terms of the alleged Exit Guarantee Agreement are sufficiently stated. The charge of indefiniteness is particularly repugnant here as the contract is half performed; Behler transferred $3,000,000 to Digipac in reliance on Tao's promise that Tao now contends is too indefinite to enforce. As the Dissent would have

held, the Exit Guarantee Agreement is not indefinite because the key terms of the oral agreement, including a pricing formula, are alleged.

A. A Contract Should Only Be Set Aside as Indefinite as a "Last Resort"

This Court has long mandated a lenient approach to the question of whether a contract is indefinite, warning that "[t]he conclusion that a party's promise should be ignored as meaningless 'is at best a last resort.'" *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989); *see also 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 (1991) ("Striking down a contract as indefinite and in essence meaningless 'is at best a last resort.'").[4] The doctrine serves two functions. First, at a basic level, the doctrine requires a court to "determine what the agreement is," otherwise, a court "cannot know whether the contract has been breached." *Cobble Hill Nursing*, 74 N.Y.2d at 482. Second, "the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not." *Id.*

The Court cautions that "at some point virtually every agreement can be said to have a degree of indefiniteness, and if the doctrine is applied with a heavy hand it may defeat the reasonable expectations of the parties in entering into the

[4] New York law applies to the question of whether the Exit Guarantee Agreement is definite. R. 166 n.2 (Dissent). Tao did not contend otherwise below.

contract." *Id*. at 483. The Court further instructs that "courts should not be 'pedantic or meticulous' in interpreting contract expressions." *Id.* Imprecision is not a sufficient basis to strike an agreement because "[c]ontracting parties are often imprecise in their use of language" and "[a] strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting parties." *166 Mamaroneck Ave. Corp.*, 78 N.Y.2d at 91. Even when a material term is not explicitly stated, a court should satisfy its absence where the agreement (1) contains "a methodology for determining the [missing term]" or (2) "invite[s] recourse to an objective extrinsic event, condition or standard on which the amount was made to depend." *Id.* at 91-92.

In *Cobble Hill Nursing*, the defendant argued that the absence of a specific price term or methodology in an option agreement relating to the purchase of a nursing home rendered the option unenforceable. The agreement in *Cobble Hill Nursing* provided only that the price for the property be determined by the Department of Health "in accordance with the Public Health Law and all applicable rules and regulations of the Department." 74 N.Y.2d at 480. A split appellate division had found that the specified rules and regulations did not provide a mechanism for determining the purchase price and that therefore the agreement was missing an essential term, rendering the option unenforceable. *Id.* at 482.

This Court overruled the appellate division, explaining that a price term is sufficiently "definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage." *Id.* at 483. The Court held that the agreement to have the Department of Health fix the price in accordance with its rules and regulations provided the required objective standard. *Cobble Hill Nursing* also considered the context and purpose of the challenged agreement. There, the defendant had entered the agreement as part of an effort to avoid incarceration for "unwarranted health and medical care reimbursements." The challenged option agreement had allowed the defendant to make the key representation that he had divested himself from the nursing home business. *Id.* at 484-85. Informing the Court's decision in *Cobble Hill Nursing* was its observation that it would be particularly unjust to strike down a contract as indefinite *after* the party seeking to strike the agreement has already enjoyed the central benefit of the bargain and is simply seeking to avoid their own performance obligation:

> Far from being a necessary "last resort," to declare this defendant's promise legally meaningless--thus allowing it to walk away with its property after enjoying the benefits of the bargain--defeats the reasonable expectations of the parties in entering into the contract and is a misuse of the definiteness doctrine.

Id. at 485.

In *166 Mamaroneck Avenue Corp.*, this Court considered whether a lease renewal provision was fatally indefinite because it did not explicitly state the rent. Instead, the provision stated that if the parties could not agree on the rent, the amount "shall be fixed by arbitration." The landlord sought to set-aside the lease renewal provision on the grounds that it was too indefinite. This Court said no, explaining that "where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain." This Court held that the referral to arbitration was a sufficient method to supply the missing term. 78 N.Y.2d at 91.

The central question for the Court, as framed by *Cobble Hill Nursing* and *166 Mamaroneck Avenue Corp.,* is clear. Does the Complaint contain an agreed upon objective methodology to supply the missing price term? The answer is Yes.

B. The Exit Guarantee Agreement Is Enforceable as the Option Price is Easily Ascertained From an Objective Benchmark—the Publicly-Traded Share Price of Remark.

As noted above, Tao wanted Behler to invest in Remark through Digipac. Behler was reluctant to invest in Digipac (rather than directly in Remark) because the shares of Digipac were illiquid. To remedy that problem, Tao and Behler agreed that Tao would guarantee Behler the opportunity to cash out of the Digipac

investment if (a) the price of Remark ever hit $50/share or (b) within five years of the initial investment if the price never hit that $50/share threshold. The two agreed that the price point for Behler's exit was to be directly derived from the publicly-traded price of Remark and Digipac's Remark holdings. As the Dissent found, these are "easily ascertainable benchmarks," and no more specificity is required. R. 167; *see Cobble Hill Nursing,* 74 N.Y.2d at 483 ("a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties."); *see also Tonkery v. Martina*, 78 N.Y.2d 893, 895 (1991) (tying option price to extrinsic event sufficiently definite).

The essential terms of the Exit Guarantee Agreement are all pled. There is an offer and consideration (Behler agreed to invest $3,000,000 in Remark, through Digipac, in exchange for Tao's promise to provide Behler the option to cash out of the investment if certain metrics were met). There is an ascertainable and objective price mechanism (directly derived from the publicly traded share price of Remark). There is even partial performance (*i.e.*, Behler invested $3,000,000 dollars in Digipac).

The Complaint also alleges in detail the trigger date, how the shares are valued, and the party obligated to guarantee the purchase:

- The "Exit Opportunity Agreement required [Tao] to provide Behler the opportunity to cash-out at the five year anniversary of Behler's investment." R. 13 ¶ 33.

- "On or about November 27, [2017,] the closing price of Remark was $9.15/share. [Tao], however, did not, as promised, provide Behler the opportunity to exit the Digipac investment based on the $9.15/share price of Remark." *Id*.

- "On the five-year anniversary of Behler's investment (on or about November 27, 2017), the share price of Remark was $9.15/share. Thus, [Tao] should have provided Behler the [promised Exit Opportunity] based on a Remark share value of $9.15". R. 14 ¶ 39.

- "At the time, Digipac held 5,256,315 shares of Remark. At $9.15/share, the value of its Remark holdings was $48,095,282. Moreover, at the time, Behler held a 24.14% interest in Digipac. Thus, [Tao] should have provided Behler with the opportunity to cash out of his Digipac investment by arranging to buy out [Behler's] shares for $11,610,201.10." R. 14 ¶ 40.

- "Behler seeks an order of specific performance, directing [Tao] to purchase his Digipac shares for $11,610,201.10." R. 14 ¶ 42.

- "Behler was guaranteed [by Tao] an exit opportunity if the shares of Remark hit $50/share or five years from the date of his investment". R. 9 ¶ 5.
- "[A]t the five year anniversary of the Exit Opportunity Agreement, [Tao] failed to provide Behler the promised exit opportunity." R. 9-10 ¶ 8.

Accordingly, the pleading contains the key material terms of the contract. No more is required at the notice pleading stage. And under *Cobble Hill*, Tao is not permitted to abuse the doctrine of indefiniteness by retaining the substantial benefit his promise induced while being excused from having to perform himself.

II. THE 2012 EXIT GUARANTEE AGREEMENT BETWEEN BEHLER AND TAO WAS NOT TERMINATED BY TAO'S UNILATERAL AMENDMENT TO DIGIPAC'S OPERATING AGREEMENT IN 2014

The Majority held that when Tao unilaterally amended Digipac's operating agreement in 2014, Tao unilaterally terminated his multi-million-dollar obligation to Behler under the Exit Guarantee Agreement. R. 157. Tao drafted and negotiated the LLC Amendment himself. Tao is the only signatory. R. 165. There is no evidence that Behler executed the LLC Amendment. And Behler had no input in its drafting. The Majority nevertheless held that one party to a contract (Tao) could extinguish obligations to his counterparty (Behler) after his counterparty performed by unilaterally amending a different agreement. As we

show below, the law demands that Behler have some say. The Majority, in error, held that he did not.

A. The Merger Clause

The Complaint alleges that the Exit Guarantee Agreement is a 2012 contract between Behler and Tao. The agreement served as the predicate for Behler's investment in Digipac. In exchange for Tao's promise that he would cash Behler out of the Digipac investment if the price of Remark ever hit $50/share or in five years, Behler made a $3,000,000 investment in Digipac. The 2014 LLC Amendment, in contrast, is an agreement among the members of Digipac, Digipac's manager (Tao), and Digipac. Its explicit scope is to "restate and amend the Original Operating Agreement" of Digipac:

> the Company and the Members now wish to amend and restate the Original Agreement on the terms contained herein to provide for the management of the business and the affairs of the Company, the allocation of profits and losses among the Members, distributions among the Members, the rights, obligations and interests of the Members to each other and to the Company, and certain other matters.

R. 28. There is no evidence that any member of Digipac participated in drafting the LLC Amendment. The only party to execute the LLC Amendment is Tao, in his capacity as manager. Behler did not. The integration and merger clause is buried in Section 13.2 of the twenty-eight-page agreement:

> This Agreement, together with the Certificate of Formation, each Subscription Agreement and all related Exhibits and Schedules, constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter, including the Original Agreement.

R. 51 § 13.2. The clause lacks any reference to Tao's promise to Behler.

B. Tao Lacked the Authority, in his Capacity as the Manager of Digipac, to Unilaterally Terminate his Personal Obligation to Behler Under the Exit Guarantee Agreement

Basic tenets of New York and Delaware contract law concerning the release, relinquishment, modification, or waiver of a valuable contract right preclude enforcement of the boilerplate merger clause against the New York Exit Guarantee Agreement.[5] Once a contract is formed, to modify that contract, waive a right under that contract, or release a counterparty from a performance obligation, the parties to the contract and, in particular, the party releasing his counterparty from a performance obligation, must manifest her clear and knowing intent to do so. This did not happen here. As detailed above, Behler never agreed to terminate the Exit Guarantee Agreement. Nor did Behler execute or negotiate the LLC Amendment

[5] The Exit Guarantee Agreement is alleged to be a New York contract governed by New York law. *See Dissent* at R. 166 n.2 (explaining that the Exit Guarantee Agreement is governed by New York law and noting Tao's concession on this point).

that purportedly released Tao from his obligations to Behler under the Exit Guarantee Agreement.

Thus, none of the requirements for contract modification or waiver were met with respect to the termination of the Exit Guarantee Agreement. The Majority erred when it cast aside those rules and empowered Tao to unilaterally terminate his substantial personal obligation to Behler. The Dissent would have held that "consideration of the law regarding waiver weighs against finding that the [2014 LLC Amendment] extinguished the exit opportunity agreement" because "a waiver of valuable contract rights must be made knowingly and voluntarily." R. 172. Applying New York law, the Dissent would have held that "[a]s Behler had no role in the authorship, negotiation, or preparation of the 2014 [LLC Amendment], I would not read the 2014 [LLC Amendment] as having caused Behler to relinquish his valuable contract rights under the exit opportunity agreement without his knowledge and without compensation." R. 173.

The Majority ignores and thus fails to grapple with the substantial body of law in both Delaware and New York that requires the relinquishment of a valuable contract right to be voluntary and knowing.

i. The Modification, Waiver or Relinquishment of a Contract Right Must Be "Clear," "Unambiguous," "Knowing," and "Voluntary."

To make an enforceable agreement, there must be a meeting of the minds among the parties on all material terms as well as the manifestation of an intent to be bound.[6] *See Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016) ("To form a binding contract there must be a 'meeting of the minds,' such that there is 'a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.'"); *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1229 (Del. 2018) (substantially the same). Similarly, the modification of an existing contract requires "proof of each element requisite to the formulation of a contract, including mutual assent to its terms." *Lawrence M. Kamhi, M.D., P.C. v. E. Coast Pain Mgmt., P.C.,* 177 A.D.3d 726, 726 (2d Dept 2019); *Pinsley v. Pinsley*, 168 A.D.2d 863, 865 (3d Dept 1990) (same in substance); *see also Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1232 (Del. Ch. 2000) ("Any amendment to a contract, whether written or oral, relies on the presence of mutual assent and consideration.")

In a similar vein, a contract right can only be waived or relinquished if the waiver is "voluntary and intentional." *See Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York,* 61 N.Y.2d 442, 446 (1984) ("A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent

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[6] There does not appear to be a material conflict between the law of Delaware and New York in connection with these central tenets of contract law.

which must be proved."); *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 27 A.3d 522, 529-30 (Del. 2011) ("[T]hree elements must be demonstrated to invoke the waiver doctrine: (1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition."); *Peck v. Peck*, 232 A.D.2d 540, 540 (2d Dept 1996) ("[W]aiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence. Waiver requires proof of a voluntary and intentional relinquishment of a known and otherwise enforceable right.") (citations omitted).[7]

Finally, for a release to be enforceable, it must be "clear and unambiguous." *Booth v. 3669 Delaware, Inc.*, 92 N.Y.2d 934, 935 (1998). Further, the release must be "knowingly and voluntarily entered into." *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 189 (S.D.N.Y. 2008) (quoting *Skluth v. United Merchants & Mfrs., Inc.*, 163 A.D.2d 104, 106 (1st Dept 1990)). Delaware imposes a similar standard, and like New York, looks to the intent of the parties. *Adams v. Jankouskas,* 452 A.2d 148, 156 (Del. 1982) ("In construing a release, the intent of the parties as to its scope and effect are controlling."). Delaware further requires that vague or ambiguous releases be construed against the drafting party,

[7] There does not appear to be a conflict between the law of New York (the law governing the Exit Guarantee Agreement) and Delaware (the law selected in the LLC Amendment) and the parties below cited primarily to New York law on the issue.

here Tao. *See, e.g., Corp. Prop. Assocs. 6 v. Hallwood Grp. Inc.*, 817 A.2d 777, 779 (Del. 2003) (ambiguous release "must be construed most strongly against the party who drafted it") (quotation mark and citation omitted).

These basic rules of contract all arise out of the bedrock principle that a party may only be held to have entered, modified, released or relinquished a contract right if done in a clear and unmistakable manner.

ii. The Majority Erroneously Relied on Delaware's Narrow Exception to the Traditional Rules of Contract Found in its Limited Liability Company Law— title 6, § 18-101(9)—*to Terminate the Exit Guarantee Agreement*

The Majority ignored these foundational rules of contract and held that Tao's unilateral amendment of Digipac's operating agreement also modified or waived (*i.e.* extinguished) Tao's personal obligation to Behler under the Exit Guarantee Agreement. R. 157. The Majority was persuaded that under a narrow Delaware exception to the traditional rules of contract, Tao had the authority to unilaterally terminate his personal obligation to Behler.[8]

The Majority relied on the narrow Delaware statutory rule that a member of a limited liability company is bound by the terms of the company's operating agreement, regardless of whether the member assents to those terms or not. R. 158 (citing Del. Code tit. 6, § 18-101(9) and *Seaport Vil. Ltd. v. Seaport Vil. Operating*

[8] The LLC Amendment provides that it is governed by Delaware law. R. 52 §13.4.

Co., LLC, 2014 WL 4782817 (Del. Ch. Sept. 24, 2014)). The provision appears in the definitions section of Delaware's limited liability company law, and provides:

> (9) "Limited liability company agreement" means any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written, oral or implied, of the member or members *as to the affairs of a limited liability company and the conduct of its business*. A member or manager of a limited liability company or an assignee of a limited liability company interest is bound by the limited liability company agreement whether or not the member or manager or assignee executes the limited liability company agreement.

Del. Code tit. 6, § 18-101(9) (emphasis added). The purpose of the exception is "to promote order and accountability in the governance of LLCs." Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 Del. J. Corp. L. 391, 413 (2018).

The application of the statutory exception, however, is exceedingly narrow; it is explicitly limited to agreements that concern "the affairs of a limited liability company and the conduct of its business." Del. Code tit. 6, § 18-101(9). Any expansion of the rule beyond that narrow focus would substantially deviate from the plain text of the statute, conflict with basic principles of New York and Delaware contract law, and invite mischief and chicanery.

Tao's personal promise to Behler is not a promise that falls within the statutory definition of "limited liability company agreement." The Exit Guarantee

Agreement does not concern the internal affairs of Digipac or the conduct of its business. Tao and Behler also reached the agreement before Behler had become a member of Digipac. And the statutory exception applies only to an agreement "of the member or members as to the affairs of a limited liability company and the conduct of its business." Del. Code tit. 6 § 18-101. The Exit Guarantee Agreement is thus not a "limited liability company agreement" under the statute.

Because the Exit Guarantee Agreement is not a "limited liability company agreement," the Delaware statute does not empower Tao to unilaterally compel Behler to make the $3,000,000 investment in Digipac, with the promise of an exit on the five-year anniversary of that investment, unless Behler affirmatively assented to that agreement. By the same logic, Tao cannot unilaterally terminate or release himself from such an obligation pursuant to the narrow statutory exception to the rules of contract found in Delaware's limited liability company law.

Accordingly, the Exit Guarantee Agreement cannot be unilaterally modified or waived by Tao pursuant to § 18-101. The traditional rules of contract apply. The Exit Guarantee Agreement and obligations thereunder can only be modified, terminated, released, or waived, upon mutual assent or voluntary, knowing, and intentional waiver by Behler.

The Dissent highlighted that the Majority could not cite a single case to support its self-described "harsh" holding in which "an oral agreement between

two individuals that did not impose any obligations on any other persons or entities was superseded by a subsequent unilateral modification of an LLC operating agreement." R. 169. The reason why the Majority could not find a case to support its expansive reading of the limited exception to the rules of contract found in Delaware's limited liability company law is because there is none. The Majority's interpretation of the statute is unprecedented, deviates substantially from the statutory text, and enables and encourages mischief of all sorts.

Both Delaware and New York law require that Behler manifest his unequivocal assent to the relinquishment or modification of his valuable contract rights in the Exit Guarantee Agreement. As Behler did not, the Majority's decision is error and should be reversed.

C. The Merger Clause in the LLC Amendment, Which Concerned Digipac's Operations and the Relationship Between the Company and its Members, Does not Reach the Separate and Distinct Exit Guarantee Agreement Between Tao and Behler

Even if the Delaware statutory scheme conferred upon Tao the unilateral authority to terminate or excuse his performance obligation under the Exit Guarantee Agreement, Tao's insertion of a generic merger clause in the LLC Amendment did not unambiguously accomplish that termination.[9]

[9] The parties below relied predominantly on New York contract law in their discussion of the merger clause. Neither party identified a conflict between the law of New York and Delaware on the issue.

i. The Absence of an Express Reference to the Exit Guarantee Agreement Precludes its Application to the Exit Guarantee Agreement.

The purpose of a boilerplate merger clause "is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing." *Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 599 (1997); *see also Carrow v. Arnold*, 2006 WL 3289582, at *4 (Del. Ch. Oct. 31, 2006) ("When a written contract is intended to be the final expression of the parties' agreement, the parol evidence rule bars the introduction of evidence of prior or contemporaneous oral understandings that vary the written terms of the agreement"), *aff'd*, 933 A.2d 1249 (Del. 2007). When determining if "a merger clause extends to a prior agreement, the parties' intent controls." *Burke v. Community Brands Holdco, LLC*, 2023 WL 7098174, at *3 (Del. Super. Ct. Jan. 4, 2024). Under Delaware law, courts are instructed to consider the "facts and circumstances surrounding the execution of the clause [and] [d]ismissal may only occur when the defendant's interpretation is the only reasonable construction as a matter of law." *Id.* (internal quotations omitted).

The First Department's decision in *Weksler v. Weksler*, 140 A.D.3d 491, 492-93 (1st Dept 2016) is instructive. There, the court held that an earlier standalone oral promise to transfer stock was not precluded by a general merger clause in separate stock purchase agreements and an amended and restated

shareholder agreement. The court explained that the subject matter of the agreements were different; that a promise to purchase or transfer shares of stock in a company is different from an agreement governing the affairs of that company such that a merger clause in one would not preclude a claim under the other. *Id.; see also Urban Holding Corp. v. Haberman*, 162 A.D.2d 230, 231 (1st Dept 1990) (general merger clause in subscription agreement did not vitiate all agreements between the parties because "it is unclear whether the parties intended this one merger clause to encompass all the agreements in issue"); *3850 & 3860 Colonial Blvd., LLC v. Griffin*, 2015 WL 894928, at *5 (Del. Ch. Feb. 26, 2015) (in the absence of explicit language, court cast doubt on contention that a general merger clause in a corporate governance document, such as the operating agreement, would subsume separate agreements unrelated to corporate governance).

Here, the two agreements at issue are different in kind, purpose, and parties. One, a private agreement between just Behler and Tao, entered in 2012, concerns Tao's inducement of Behler's investment in Digipac in exchange for a personal promise by Tao to acquire or arrange for the acquisition of Behler's interest in Digipac if certain triggers are met. The purpose of the Exit Guarantee Agreement was to induce Behler's investment in Digipac.

The LLC Amendment was entered in 2014 among all Digipac members, its manager, and Digipac. The parties are not the same and Tao and Behler are acting

in different capacities. To the extent Tao is a party to the LLC Amendment, it is solely in his capacity as a manager (and perhaps member). And to the extent Behler is a party to the LLC Amendment, it is solely in his capacity as a member. Moreover, the LLC Amendment concerns the management and corporate governance of Digipac. It is not a purchase agreement between Behler and Tao concerning Behler's Digipac interest. And it is not an option or guarantee agreement between Behler and Tao concerning Behler's Digipac interest. The subject and purpose of the two agreements are not remotely similar.

Thus, absent specific language in the LLC Amendment referencing the private agreement between just Behler and Tao, the boilerplate merger clause in the LLC Amendment cannot evidence Tao's unambiguous intent to terminate his personal obligation to Behler under the Exit Guarantee Agreement.

Moreover, as discussed above at length, under the law of Delaware and New York, the release or waiver of a valuable contract right must be intentional, knowing and voluntary; a release or waiver cannot be accomplished obliquely, surreptitiously, or by accident. *See* above at 34-37. A boilerplate merger clause is not how a party represented by counsel, as Tao clearly was, would terminate a multi-million-dollar liability to a counterparty. He would do so explicitly, just as he did when expressly referencing Digipac's original operating agreement. *See, e.g., Matter of Wenzel*, 85 A.D.3d 563, 563 (1st Dept 2011) (declining to read

additional term into agreement where parties could have expressly included language addressing the issue but did not); *see also Clark v. Kelly*, 1999 WL 458625, at *3 n.6 (Del. Ch. Jun. 24, 1999) (substantially the same). Tao's post amendment conduct, explicitly acknowledging his obligation to Behler under the Exit Guarantee Agreement, merely confirms that to the extent the language of the clause unambiguously terminated the Exit Guarantee Agreement, it was an accident; running afoul of the requirement that the release or waiver of a contract right be knowing and voluntary.

The primary two cases relied upon by the Majority to support its expansive and erroneous reading of the merger clause (R. 159), *Levy Family Inv'rs, LLC v. Oars + Alps LLC*, 2022 WL 245543, at *10 (Del. Ch. Jan. 27, 2022) and *In re Coinmint*, 261 A.3d 867, 897 (Del. Ch. 2021), were ably distinguished by the Dissent. R. 168-69. In *Levy*, the Dissent explained that, unlike here, the written agreement (a promissory note) was between the same two parties as the alleged oral agreement "and the subject matter of the alleged oral agreement and the promissory note [unlike here] were identical." R. 169.

In *In re Coinmint,* the underlying issue was whether a standard integration or merger clause would preclude consideration of post-execution promises, communications, or modifications to the express agreement in connection with a claim of "waiver, estoppel, or acquiescence." *In re Coinmint*, 261 A.3d at 897. In

dicta, the Delaware Chancery Court explained that a standard integration clause would "proscribe the Court's consideration of all oral and written communications and agreements that occurred prior to the agreement when interpreting it." *Id.* As noted above, that is the textbook application of an integration or merger clause—to preclude parol evidence. *See above* at 41. Not the issue here. Here, the Majority (and Tao) did not employ the integration clause to preclude parol evidence in interpreting the 2014 LLC Amendment. The Majority employed the merger clause to release Tao from his obligations under the 2012 Exit Guarantee Agreement. *In re Coinmint* is inapposite.

ii. The Absence of a Material Conflict Between the Two Agreements Also Precludes the Termination of the Exit Guarantee Agreement

To support its holding that Tao accidently released himself from his multimillion-dollar personal obligation to Behler under the Exit Guarantee Agreement when he included a generic merger clause in the LLC Amendment, the Majority contrived to show a material conflict between the two agreements. Delaware law provides that, to the extent a subsequent contract between two parties conflicts with an earlier contract between the same parties on a specific issue, the subsequent agreement controls, to the extent of the conflict. *See, e.g.*, *REM OA Holdings, LLC v. N. Gold Holdings, LLC*, 2023 WL 6884845, at *3 (Del. Ch. Oct. 19, 2023) ("where a new, later contract between the parties covers the

same subject matter as an earlier contract, the new contract supersedes and controls that issue, if the two agreements conflict"); *Cabela's LLC v. Wellman,* 2018 WL 5309954, at *4 (Del. Ch. Oct. 26, 2018) (same).

To set up the supposed conflict, the Majority impermissibly recast the allegations of the Complaint. The Complaint alleges that the Exit Guarantee Agreement is an agreement between Tao and Behler; Digipac is not a party. R. 12 ¶¶ 23-25. The Complaint further alleges that Tao and Behler agreed that, in exchange for Behler's indirect investment in Remark through Digipac, Tao would guarantee an exit from Digipac within five years at a price derivatively derived from the share price of Remark. *Id.*

The Majority, however, breaking the cardinal rule on a motion to dismiss that the plaintiff (not the defendant) is entitled to all reasonable factual inferences, recasts the bilateral agreement between Tao and Behler as an agreement between Behler and Digipac that "scheduled Digipac's liquidation of plaintiff's membership interest and distribution to plaintiff of the proceeds thereof." R. 159. The Majority goes on to state that "because the amended LLC agreement and exit opportunity agreement both concern the liquidation and distribution of plaintiff's interest in Digipac, the amended LLC agreement, by virtue of the merger clause, supersedes the exit opportunity agreement." *Id.* The Dissent chides the Majority's sleight of hand, explaining that "the exit opportunity agreement, as described in the

complaint, is an agreement made solely between two friends to induce Behler to invest by providing that Tao would make it possible for him to cash out his investment under certain circumstances and by a date certain." R. 168. The Dissent goes on:

> the majority disputes my characterization of the exit opportunity agreement as having been made to induce Behler's investment. However, since that is how Beheler's complaint characterizes it, this Court is required to accept that fact as true on this motion to dismiss. Furthermore, contrary to the majority's characterization, the exit opportunity agreement, as described in the complaint, imposes the obligation to buy out Behler's investment on Tao, not on Digipac.

R. 164 n.1 (citation omitted).

The Majority identifies four purported conflicts between the LLC Amendment and its strawman oral agreement: (i) no member is entitled to receive distributions from Digipac; (ii) defendant has sole discretion to determine distributions to members; (iii) no members shall have any rights or preferences in addition to or different from those of any other member; and (iv) defendant must consent in writing to any transfer of membership interest. R. 155. As the dissent explains, each is a phony conflict.

Since the oral agreement alleged in the complaint is not a distribution agreement, there is no plausible conflict between the distribution provisions of the LLC Amendment and Tao's personal obligation to make or arrange for the

purchase of Behler's Digipac interest on the five-year anniversary of his investment under the Exit Guarantee Agreement. Moreover, because Exit Guarantee Agreement is a personal agreement between him and Tao, and not an agreement with Digipac's Manager, there is no plausible conflict between the Digipac manager's right to approve Digipac share transfers and Tao's personal obligation to make the exit offer to Behler. In any event, as the Dissent explains, nothing would prevent Tao, as manager, from approving the transfer to himself as a private individual. R. 170-72.

The Majority's attempt to recast the Exit Guarantee Agreement has a further flaw. The Exit Guarantee Agreement, as amended by the Majority, is a "Subscription Agreement" that would not be superseded by the 2014 LLC Amendment. The Majority framed the Exit Guarantee Agreement as an agreement between Digipac and Behler providing for the purchase of Behler's Digipac interest and providing a liquidation and distribution schedule for Behler's Digipac interest. *See, e.g.,* R. 159 & n.5. The merger clause, in turn, provides that "this agreement, together with the certificate of formation, each Subscription Agreement . . . , constitutes the sole and entire agreement of the parties . . ." R. 51 § 13.2. The LLC Amendment further provides that "Each Member has subscribed for Units pursuant to a separate subscription agreement entered into on or prior to the

Effective Date by and between such Member and the Company," which it defines as the "Subscription Agreement." R. 35 § 3.1(a).

The only agreement that plausibly fits the LLC Amendment's definition of "Subscription Agreement," actually entered by Behler and Digipac "on or before the Effective Date" is the Exit Guarantee Agreement (as reframed by the Majority). Behler and Digipac did not enter into any other agreement in connection with Behler's acquisition of his Digipac interest. Accordingly, as recast by the Majority, the LLC Amendment preserves, rather than terminates, the Exit Guarantee Agreement as it is the "Subscription Agreement" between Behler and Digipac.

iii. The Merger Clause Is at Least Ambiguous, Precluding dismissal.

The procedural posture of the case further supports reversal. This is an appeal from an order on a motion to dismiss. The plaintiff is entitled to all reasonable factual inferences. At the very least, there is an ambiguity as to the reach of the merger clause and Tao's intent, illustrated by his post-amendment conduct and representations to Behler. That ambiguity, precludes dismissal. *See Berkeley Rsch. Grp., LLC v. FTI Consulting, Inc.*, 157 A.D.3d 486, 489 (1st Dept 2018) (denying motion to dismiss; where "a contract's provisions are subject to more than one or conflicting reasonable interpretations, the agreement will be

considered ambiguous, requiring a trial on the parties' intent"); *Burke v. Community Brands Holdco, LLC,* 2023 WL 7098174, at *3 (Del. Super. Ct. Jan. 4, 2024) ("Dismissal may only occur when the defendant's interpretation is the *only* reasonable construction as a matter of law.") (citing *Vanderbilt Income & Growth Associates, LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996)) (emphasis in original).

To assess whether a merger clause in a contract unambiguously extends to an earlier agreement, Delaware courts consider the "facts and circumstances surrounding the execution" drawing all reasonable inferences in favor of the non-moving party. *Burke,* at *3. In *Burke*, an employee entered an incentive award program with his employer in 2018. In 2021, the employee was promoted and entered into a new employment agreement that contained a boilerplate merger clause. The court found the boilerplate merger clause in the second agreement ambiguous as to whether it superseded the earlier agreement. Because the two agreements had a different focus and function, and both sides offered interpretations of the merger clause that were plausible, dismissal was inappropriate. *Id.*

Here, as in *Burke*, the facts and circumstances surrounding the amendment highlight what is at least an ambiguity. The agreements were different in nature and purpose. Moreover, Tao unilaterally drafted the LLC Amendment. And

unless Tao had been engaged in a long-fraud, he did not intend, nor did he understand the clause to void his personal obligation to Behler. Not only did the clause not reference his agreement with Behler, in both 2017 and 2018, Tao acknowledged his obligation to Behler and even admitted that he had breached his promise to Behler when he failed to provide the promised exit five years from the initial investment. R. 10 ¶ 9; R. 13 ¶ 32; *see Wattenberg v. Wattenberg*, 277 A.D.2d 69, 69 (1st Dept 2000) (general merger clause in post-nuptial agreement, explicitly entered to modify ante-nuptial agreement, did not void separate agreement concerning the payment of taxes that the parties continued to abide by). The Dissent explains the significance of Tao's post-amendment conduct: "these acknowledgements evidence Tao's understanding at the time that the exit opportunity agreement remained an enforceable contract that was made solely between the two friends and was different in subject matter from, and thus not affected by, the [2014 LLC Amendment]." R. 173.

The Majority held that the clause was unambiguous in its intent to reach the Exit Guarantee Agreement. The Dissent would have held that it was unambiguous in its intent not to reach the Exit Guarantee Agreement. And Tao, the drafter, did not intend nor did he understand the clause to terminate his obligation to Behler. The Majority's holding that its interpretation is the only plausible one is belied by the Dissent's opposite interpretation and Tao's contemporaneous understanding.

The clause is, at the very least, ambiguous as to its intent to reach the Exit Guarantee Agreement. Here, that ambiguity must be resolved against Tao as the drafter. *See, e.g., Aleynikov v. Goldman Sachs Group, Inc.*, 765 F.3d 350, 366 (3d Cir. 2014) ("When one side of a contract was unilaterally responsible for the drafting, [Delaware] courts apply contra proferentem and construe ambiguous terms against the drafter.") (citing *Norton v. K–Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013)).

iv. To the Extent the LLC Amendment and its Merger Clause Were Part of an Illicit Scheme, They May not Be Enforced.

The Dissent explained that the Majority erred in enforcing the merger clause at this stage because the merger clause was potentially a key element of an illicit scheme perpetrated by Tao. R. 174. New York courts are not in the business of enforcing such agreements:

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.

McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 469 (1960) (declining to enforce contract claim where contract claim directed related to underlying bribery scheme). R. 173-174.

To the extent Tao intended to terminate his personal obligation to Behler when he amended Digipac's operating agreement, that termination would potentially be part of an illicit scheme, precluding dismissal. Conferring upon the plaintiff the benefit the reasonable inferences to which he is entitled, the following scheme may be inferred from the facts before the court. Tao lured Behler into making a $3,000,000 investment into his limited liability company, Digipac, through the promise of an exit. R. 12 ¶¶ 23-25. Once the money was in hand and after a bit of time had passed, Tao discreetly amended the LLC Agreement to void his promise to Behler of an exit. R. 154-56, 158 n.4.. Then, over the next five years, Tao lied to Behler about the continued existence of the Exit Agreement to conceal his termination of the Exit Guarantee Agreement. R. 10 ¶ 9; R. 13 ¶¶ 31-32.

Those facts, which the Court must infer as true on this motion, paint a damning picture of Tao and his conduct. Since New York courts, as a matter of public policy, will not enforce a contract or contract claims related to such a scheme, the Majority's enforcement of the tainted merger clause here, in connection with Tao's motion to dismiss, was error. *See, e.g., Summit Rest. Repairs & Sales, Inc. v. New York City Dept. of Educ.*, 201 A.D.3d 612, 613 (1st Dept 2022) (submission of fabricated letters in connection with contract performance would preclude enforcement if central to the breach of contract

claim); *B.D. Estate Planning Corp. v. Trachtenberg*, 134 A.D.3d 650, 651 (1st Dept 2015) (promissory note unenforceable to the extent there was a direct connection between note and underlying fraudulent scheme); *Innovative Mun. Products (U.S.), Inc. v. Cent. Equip., LLC*, 54 Misc. 3d 1224(A), at *3 (Sup. Ct. 2017) ("if the proof at trial shows that the invoices upon which Central seeks to recover are the product of fraud or illegality, Central may be precluded from turning to the courts for recovery") (footnote omitted)).

III. THE COMPLAINT SUFFICIENTLY STATES A CLAIM OF PROMISSORY ESTOPPEL

The Majority held that the promise underlying the promissory estoppel claim was superseded by the LLC Amendment pursuant to its integration and merger clause. The Majority separately would have dismissed the claim as duplicative of the breach of contract claim under the Exit Guarantee Agreement. As we show below, and as the Dissent explained, the Majority's dismissal of the claim was error.

A. The Elements of Promissory Estoppel Were Pled and the Promise was Sufficiently Definite

To state a claim of promissory estoppel, a plaintiff must allege "(i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the

promise; and (iii) injury caused by the reliance." *Castellotti v. Free*, 138 A.D.3d 198, 204 (1st Dept 2016).[10]

As explained by the Dissent, the allegations of the Complaint stated the elements of promissory estoppel:

> As discussed earlier, the exit opportunity agreement was clear and unambiguous. The complaint alleges that Tao made the promise with the expectation that Behler would invest in Digipac. Behler's investment in Digipac shows that he relied on Tao's promise. The reasonableness of his reliance is demonstrated by their prior course of conduct of engaging in business transactions together based on oral agreements . . . [and] [t]here is certainly no question that Behler was injured by his reliance

R. 175.

New York courts routinely and as a matter of course find that promises with far more ambiguity are sufficiently clear to form the basis of a promissory estoppel claim. *See, e.g., Paramax Corp. v. VoIP Supply, LLC*, 175 A.D.3d 939, 941 (4th Dept 2019) (promise to pay "success fee" sufficient); *Univ. Veterinary Specialists, LLC v. Four Dimensional Digit. Imaging LLC*, 68 Misc. 3d 1204(A), at *3 (Sup. Ct. 2020) (vague promise to purchase the CT scanner sufficient); *Castellotti*, 138 A.D.3d at 204-05 (promise to provide half of income during divorce, transfer half

[10] Tao conceded below in its papers that New York law would apply to the claim, thus the Majority's analysis-free decision to apply Delaware law is puzzling. The Dissent applied New York law to the claim and neither party identified a material conflict between the law of New York and Delaware.

of the assets upon finality of divorce, and name plaintiff as sole beneficiary of life insurance policy of at least $5 million sufficiently clear); *Weksler*, 140 A.D.3d at 492 (vague promise to give plaintiff shares in company so that parties would all have an equal number of shares sufficiently clear).

The narrow and explicit promise made by Tao to induce his friend Behler's investment was sufficiently clear and unambiguous. As the Dissent explained, it would be an "injustice" to allow Tao to retain the benefits of Behler's induced reliance without enforcing Tao's promise.

Moreover, for the same reasons why the merger clause in the amendment to Digipac's operating agreement would not preclude the claim of breach, the merger clause would not preclude the related promissory estoppel claim. *See above* at 31-54.

B. A Promissory Estoppel Claim May be Alleged Alongside a Claim of Breach Where the Bonafides of the Contract are in Dispute

A plaintiff may plead promissory estoppel as an alternative to a breach of contract claim where there is a bonafide dispute concerning the existence of a contract. *See, e.g., Tahari v. Narkis*, 216 A.D.3d 557, 559 (1st Dept 2023) ("As to the causes of action for promissory estoppel and unjust enrichment, both of these claims were properly pleaded in the alternative to the breach of contract cause of action, as the matter presents a bona fide dispute as to the existence of a valid

contract."). Since Tao challenges the bonafides of the oral Exit Guarantee Agreement, Behler may plead his promissory estoppel claim in the alternative.

CONCLUSION

The First Department Decision and Order should be reversed, Tao's motion to dismiss should be denied, and the case should be remanded for further proceedings.

Dated: June 21, 2024
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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York that the foregoing brief was prepared on a computer using Microsoft Word.

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STATE OF NEW YORK)) COUNTY OF NEW YORK)	ss.:	**AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

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