To be Argued by:
JESSE T. CONAN
(Time Requested: 30 Minutes)

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Appellate Division–First Department Appellate Case No. 2022-03237

Court of Appeals

of the

State of New York

ALBERT BEHLER,

Plaintiff-Appellant,

– against –

KAI-SHING TAO,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

BECKER, GLYNN, MUFFLY,
CHASSIN & HOSINSKI LLP
Attorneys for Plaintiff-Appellant
299 Park Avenue
New York, New York 10171
Tel.: (212) 888-3033
Fax: (212) 888-0255
jconan@beckerglynn.com

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INTRODUCTION[1]

Defendant Tao's Opposition obfuscates and dodges the central arguments presented in Behler's Opening Brief and raised by the Dissent. Ultimately, Tao asks the Court to hold that: (a) the "Manager" of Digipac had the authority to unilaterally terminate Tao's $11,000,000 personal obligation to Behler arising out of a personal agreement between the two friends; (b) in contravention of Tao's contemporaneous expectation and understanding, Tao, in his role as "Manager," accidently exercised that authority by including a boilerplate merger clause in an amendment to Digipac's operating agreement; and (c) despite black-letter contract law to the contrary, Behler had absolutely no say in the matter.

Tao's further contention that the Exit Guarantee Agreement is indefinite demands that the Court ignore the actual allegations in the Complaint and dispense with the factual inferences to which the plaintiff Behler is entitled under the law. And Tao's argument that the Court should dismiss the promissory estoppel claim ignores the longstanding rule that promissory estoppel may be alleged alongside a breach where the bona fides of the agreement are challenged, as they are here.

As Behler explained in his Opening Brief and expands upon below, the adoption of Tao's arguments would require the Court to jettison decades of well-

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[1] Undefined capital terms have the same meaning as ascribed in the "Brief for Plaintiff-Appellant," dated June 21, 2024 ("Opening Brief"). References to the "Opposition" refers to Tao's "Brief for Defendant-Respondent," dated August 5, 2024.

established rules to reward a defendant that acted with "total impunity" to affirm a result that the Dissent scathingly notes violated "basic principles of contract law and fundamental fairness." R. 163.

The Majority decision should be reversed in its entirety and the case remanded for further proceedings.

I. TAO'S OPPOSITION ENGAGES WITH A COMPLAINT AND SET OF FACTS THAT DO NOT EXIST

There is a disconnect between the Complaint and the fact pattern constructed in Tao's Opposition. As a consequence, the two briefs (the Opening Brief and Opposition) largely talk past each other. Tao's error lies in his disregard for the well-pled allegations in the Complaint and the standard of review on a motion to dismiss. On such a motion, the plaintiff (not the defendant) is afforded "the benefit of all favorable inferences which may be drawn from their pleading." *Campaign for Fiscal Equity, Inc. v. State,* 86 N.Y.2d 307, 318 (1995) (citation omitted). A complaint is legally sufficient if "[the Court] determine[s] that plaintiffs are entitled to relief *on any reasonable view of the facts stated*." *Id.* (emphasis added). Defendant Tao's Opposition demands the opposite.

Here are just a few of the more glaring examples:

A. The Terms of the Exit Guarantee Agreement

Tao insists in his briefing (*See, e.g.,* Opposition at 42-43) that the Court should infer that the entire oral understanding between Behler and Tao is

essentially limited to the following allegation—"Tao would provide Behler the opportunity to cash out within five years of the initial investment . . . derived from the value of the Remark shares."

According to Tao, the Court should infer that the other allegations concerning the Exit Guarantee Agreement, collected on pages 29-31 of the Opening Brief, were not part of the negotiation and mutual understanding but simply Behler's interpretation of a brief exchange. Opposition at 42. Yet this is plainly not what Behler alleges. When the various allegations concerning the Exit Guarantee Agreement are viewed collectively, and afforded the benefit of the inferences to which Behler is entitled, Behler alleges at least the following: in exchange for Behler's decision to make an indirect investment in Remark through Digipac, as opposed to investing directly in the publicly-traded Remark, Tao agreed, among other things, to guarantee an exit opportunity from Digipac by personally making or arranging for an offer to purchase Behler's Digipac interest on the five-year anniversary of Behler's initial investment, at a price-point directly derived from the publicly traded share price of Remark and Digipac's Remark Holdings. *See, e.g.* R. 9-14 ¶¶ 5, 8, 23, 32, 33, 39, 40, 41.

B. The Complaint Alleges an Agreement Between Tao and Behler as Individuals

Tao's Opposition depends on the Court accepting its framing of the Exit Guarantee Agreement as an agreement between Behler and Digipac's manager.

But the Complaint does not allege such an agreement. The Complaint alleges an agreement between two friends who routinely did business with each other through handshake deals. *See, e.g.* R. 8,12 ¶¶ 4-5, 26. The Complaint alleges and describes a negotiation between the pair as individuals. R. 11-12.

The Complaint neither names Digipac as a defendant nor alleges a negotiation with the manager of Digipac. There is no allegation that Tao represented that he was negotiating as the "Manager" of Digipac. There is no allegation in the Complaint that the Exit Guarantee Agreement is between the "Manager" of Digipac and Behler. Tao concedes as much when he states that "Behler failed to plead . . . whether Tao promised to provide the 'exit opportunity' in his individual capacity or in his capacity as Manager of Digipac." Opposition at 4.

But Behler did allege capacity. He pled an agreement between him and Tao, two individuals, two friends, without qualification or title. R. 9, 12. Indeed, the agreement was entered before Behler was even a member of Digipac. R. 9 ¶ 6. At minimum, a plausible factual inference from the allegations is that the Exit Guarantee Agreement is between Behler and Tao as individuals.

Yet Tao's arguments demand the opposite inference, which the Dissent disposed of properly: "the exit opportunity agreement, *as described in the*

complaint, is an agreement made solely between two friends to induce Behler to invest . . ." R. 168.

* * *

The Opposition thus fails to engage with the Complaint and arguments made in the Opening Brief on their merits.

II. TAO DID NOT HAVE AUTHORITY TO UNILATERALLY TERMINATE THE EXIT GUARANTEE AGREEMENT

Under New York (and Delaware) law, valuable, bargained for contract rights may only be modified, voided, waived, or released, upon mutual assent or pursuant to a voluntary and knowing waiver (Opening Br. at 34-37).[2] These basic rules require that Behler affirmatively and knowingly consent to the termination or modification of his valuable contract rights in the Exit Guarantee Agreement (Opening Brief at 33-37). Tao, however, asks the Court to cast aside those foundational rules in favor of an expansive and unprecedented interpretation of a limited statutory exception to those rules of contract found in Del. Code tit. 6, § 18-101(9). Opposition at 15-19.

[2] Tao appears to suggest that claims under the Exit Guarantee Agreement are governed by Delaware law. Tao relies on the choice of law clause in the LLC Amendment. Opposition at 15-16. But the choice of law clause in the LLC Amendment is narrow: "This agreement shall be governed by, and construed in accordance with the laws of the State of Delaware." Thus, while Delaware law would govern the interpretation of the LLC Amendment, it does not govern the claim for breach of the separate Exit Guarantee Agreement or its interpretation.

Under the exception, members of a limited liability company are bound by agreements that govern the "affairs of a limited liability company and the conduct of its business" whether they execute those agreements or not. 6 Del. C. § 18-101(9). The rule's purpose 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).

Behler's Opening Brief explains that the plain text of the statute is explicit in its application to only operating agreements and would not reach other agreements—*i.e.*, agreements that are not "of the member or members as to the affairs of a limited liability company and the conduct of its business." 6 Del. C. § 18-101(9) (Opening Br. at 37-39). Thus, the exception cannot be employed to amend, modify, or terminate the Exit Guarantee Agreement because it is not a limited liability company agreement, as defined by the statute (Opening Br. at 39).

In response, Tao suggests that since Digipac's manager had the authority to unilaterally amend Digipac's operating agreement, Behler (as a member) would be bound to whatever obligation Tao (in his role as manager) included in such an amendment.[3] Opposition at 20. Tao's evident position is that, while a standalone

[3] Tao attaches significance to a provision in Digipac's original operating agreement conferring on Tao, as the "Manager," a unilateral right to amend the original operating agreement. While Tao does not explain what that significance might be, there is no evidence in the record before the Court on this motion to dismiss that Behler ever saw or executed Digipac's original operating agreement (he did not). To the extent Behler was bound, it would only be through the statutory exception.

release or modification of the Exit Guarantee Agreement would require Behler's consent, if the release is backdoored into an amendment of a "limited liability company agreement," Behler is bound without any say.

Such an absurd rule, if affirmed, would be rife for abuse and lead to unreasonable results. For instance, Tao's interpretation of the statute would allow Tao, in his role as manager, to unilaterally modify the private Exit Guarantee Agreement to allow him to personally acquire Behler's Digipac interest for $1, so long as it was done as an amendment to Digipac's operating agreement.

Tao's suggested interpretation deviates from the plain statutory text and purpose—to promote order and accountability in the governance and internal affairs of a limited liability company—and would lead to impermissibly absurd and unreasonable results. The interpretation thus violates two basic rules of statutory construction in Delaware (and New York):

1. A statute must be construed according to its plain meaning. *Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 375 (Del. 2022) ("The most important consideration for a court in interpreting a statute is . . . the plain meaning of the statutory language*."*); *Wang v. James*, 40 N.Y.3d 497, 502-03 (2023) (substantially the same).

2. Courts should avoid statutory constructions that yield unreasonable or absurd results. *See, e.g. State v. Demby*, 672 A.2d 59, 61 (Del. 1996) ("statutes

must be construed to achieve a common sense result, a result which is in harmony with constitutional principles, and to avoid a construction which would lead to unreasonable or absurd results"); *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995) ("Where ambiguity exists, a rule, like a statute, must be interpreted to avoid mischievous or absurd results."); *Lubonty v. U.S. Bank N.A.*, 34 N.Y.3d 250, 255 (2019) (a court must "interpret a statute so as to avoid an unreasonable or absurd application of the law").

Tao does not cite a single case or rule of statutory construction to support his interpretation of the statute. The standard rules of contracting thus apply. Behler's affirmative and unambiguous consent to the modification or termination of the Exit Guarantee Agreement was required. *See* Opening Brief at 35-40.

III. BEHLER NEVER RATIFIED THE LLC AMENDMENT

Tao argues that Behler, through his conduct, ratified the LLC Amendment. Opposition at 23-25. Tao's argument relies on Behler's written request, submitted by counsel in 2019, for information and records relating to Digipac. Id. But such materials are available to any member of a Delaware limited liability company under Section 18-305 of Delaware's Limited Liability Company Act. Moreover, at the time, Tao had repeatedly affirmed the continued existence of the Exit Guarantee Agreement and, just a year before, admitted to his breach when he failed to make the required offer in 2017. R. 10 ¶ 9.

Given the context, Behler's reference to the LLC Amendment by counsel in a statutory request for books and records cannot constitute a knowing and voluntary ratification of the entire agreement and, specifically, the merger clause. The 2019 request was made after the Exit Guarantee Agreement was admittedly breached by Tao. And any purported ratification occurred in the context of Tao's repeated representations that Tao's obligation to Behler under the Exit Guarantee Agreement remained intact.

Finally, though Behler may have attempted to invoke certain statutory rights, and reference certain provisions of the LLC Amendment, the one-sided correspondence offered by Tao simply indicates that Tao refused to honor Behler's request for documents. R. 135-145. As of August 13, 2019, more than four months after the initial request, no documents had been produced. R. 141-145. And though Attorney Klein testifies that, ultimately, certain unidentified materials were produced, that statement cannot be credited on a motion to dismiss. *See, e.g., GEM Holdco, LLC v. Changing World Tech., L.P.,* 127 A.D.3d 598, 599 (1st Dept 2015) (a defendant's affidavit is "not properly considered on a motion to dismiss pursuant to CPLR 3211(a)(7)").

Thus, there is no evidence in the record from which the Court may infer that Behler ratified the LLC Amendment. The cases Tao cites prove the point, providing that ratification requires the knowing and voluntary acceptance of

substantially all the benefits of an agreement. *See Friedman v. Garey*, 8 A.D.3d 129 (1st Dept 2004) (party ratified unexecuted settlement agreement when attorney orally stipulated to the agreement in Court and accepted payments pursuant to agreement); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, *U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (a party that knowingly accepted the benefit of the bargain—its use of the trade name Deloitte—could not later contend that it was not bound by agreement because it was not signed)*; God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc.*, *LLP*, 6 N.Y.3d 371, 374 (2006) (church that had operated pursuant to terms of agreement with architecture firm to expand and renovate church for years, and had even sued under the agreement, could not later disclaim agreement on grounds that it was not executed); *Cianci v. JEM Enter., Inc.*, 2000 WL 1234647, at *12 (Del. Ch. Aug. 22, 2000) (in context of argument that executed agreement was unenforceable on grounds of duress, a contracting party ratifies the agreement if he later "accept[s] all of the benefits of the bargain, and partially perform[s], without asserting that the contract was tainted" (cleaned up))

Tao cannot point to a course of Behler's performance, or any pecuniary or other benefit that the LLC Amendment conferred upon Behler that he accepted. The requirements of ratification are not met.

IV. THE LEGAL ARGUMENTS CONCERNING TAO'S ILLICIT SCHEME ARE NOT "NEW" AND ARE PROPERLY BEFORE THE COURT

Tao's contention that Behler may not raise Tao's possible illicit scheme on this appeal because he did not raise it in the IAS Court misconstrues the relevant rules. *See* Opposition at 20-21. The single case Tao cites, *Merrill v. Albany Medical Center Hospital*, 71 N.Y.2d 990 (1988), and the authorities *Merrill* relies on, concern untimely objections at trial. While the Appellate Division can overlook the failure to raise a timely trial objection in the "interest of justice," a dissent on whether to do so is not considered a dissent on a question of law. Since the jurisdictional predicate for an appeal under CPLR §5601(a) requires a dissent on "on a question of law," there would be no appeal as of right from such a decision under 5601(a). *See, e.g. Merrill*, 71 N.Y.2d at 991 (dismissing plaintiff's as of right appeal because the dissent at the Appellate Division concerned a decision, in the interests of justice, to overlook a litigant's failure to timely object to the admissibility of expert testimony at trial).[4]

[4] The cases *Merrill* relies on all concern "interests of justice" determinations over a failure to timely object at trial. *See Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp*., 62 N.Y.2d 941, 941 (1984) (dismissing appeal because the dissent at the Appellate Division, "pertain[ed] to a claimed error [at trial] to which no objection was made"); *Guaspari v. Gorsky*, 29 N.Y.2d 891, 891 (1972) (dismissing appeal because the dissent at the Appellate Division concerned "questions of fact or discretion not reviewable by this court" and a claimed error in the trial court's charge to the jury that was not a reviewable question of law because "no objection was taken thereto at the trial").

Contrary to Tao's assertion, this Court has long understood that pure legal arguments (such as Behler's argument concerning the illicit scheme) "may be raised for the first time in the Court of Appeals if it could not have been obviated or cured by factual showings or legal countersteps in the court of first instance." *Rivera v. Smith*, 63 N.Y.2d 501, 516 n.5 (1984) (*citing Amer. Sugar Refining Co. v. Waterfront Comm.*, 55 N.Y.2d 11, 25 (1982); *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969)). Here, however, the pure legal argument is not even "new" because it was appropriately raised before and considered by the First Department (the Dissent would have denied the motion to dismiss on the grounds that the allegations in the Complaint raised the possibility that the merger clause was potentially a key element of an illicit scheme). The argument is thus appropriately before the Court.[5]

On the merits, Tao contends that the rule should only apply where a party "sue[s] to collect the fruit of a crime or illegality." Opposition at 22-23. But Tao points to no authority or public policy reason why the doctrine would not prohibit the enforcement of a contract whose purpose was to deny a victim the ability to recover illicitly obtained funds. In both cases, the Court is being impermissibly

[5] Tao also contends (Opposition at 33) that Behler's argument (Opening Brief at 48-49)—that the Exit Guarantee Agreement, as construed by the Majority, is a subscription agreement—is "new" and may not be considered on appeal. But the argument arises out of a legal disagreement between the Majority and Dissent about the enforceability and reach of the LLC Amendment's merger clause. As the argument concerns a pure question of law, it may be considered.

asked to enforce an agreement that is part of an illicit scheme. *See* Opening Brief at 52-54.

V. THE GENERIC MERGER CLAUSE IN DIGIPAC'S 2014 LLC AMENDMENT DOES NOT REACH THE SEPARATE AND DISTINCT 2012 EXIT GUARANTEE AGREEMENT BETWEEN BEHLER AND TAO

Even were the Court inclined, at this stage, to hold that Behler was bound to the LLC Amendment (and its merger clause) among Digipac and its members, Tao cannot establish that the clause reaches the separate option agreement he personally entered with Behler years before. Critically, Tao cannot point to a single case where a court invalided such a private transaction on the grounds that it was subsumed and merged into a company's operating agreement (an agreement with numerous additional parties, acting in very different capacities, and a very different purpose) based on a boilerplate merger clause.

A. Tao's Suggested Interpretation of the Merger Clause in the LLC Amendment—that it Is Unambiguous in its Intent to Reach the Exit Guarantee Agreement—Is Unreasonable as a Matter of Law

Tao's opposition avoids the essence of the dispute over the scope and reach of the merger clause. The dispute is about whether the merger clause in the LLC Amendment is unambiguous in its intent to terminate a separate, standalone transaction between Tao and Behler. The dispute is not about whether a boilerplate merger clause is unambiguous in its intent to exclude parol evidence to vary the

terms of a fully or partially integrated agreement. A boilerplate merger clause may be unambiguous as to its intent to preclude parol evidence, but ambiguous as to its intent to terminate a separate transaction.

The Fifth Circuit decision of *Langhoff Properties, LLC v. BP Products N. America, Inc.*, 519 F.3d 256, 260-63 (5th Cir. 2008), illustrates the dichotomy. The court explains that the basic purpose and common understanding of a merger clause is to merge all "earlier negotiations and communications" into the final contract for purposes of excluding parol evidence that a party might otherwise use to explain or alter the meaning of the final contract. *Id.* at 262. In *Langhoff*, like here, the court considered a boilerplate merger clause, and held that such a clause unambiguously reflects the intent of the parties to preclude the introduction of parol evidence to vary the terms of the final writing. There, like here, a party attempted to argue that the boilerplate clause reached a separate agreement entered years before.

Without more, however, the Fifth Circuit explained that a boilerplate merger clause does not and cannot reflect the unambiguous intent to reach an agreement entered years earlier with a different scope or function. The termination (or in that case novation) of such an agreement would require the "clear and unequivocal" expression of intent. And given the commonly understood function of a boilerplate

merger clause, the clause cannot convey the unambiguous intent needed to reach separate agreements that are different in scope and function.

Like the Fifth Circuit, the Second Circuit has noted the inherent ambiguity as to a boilerplate merger clause's intent to reach a separate prior agreement with a different scope, focus and purpose:

> The merger clause in the 2002 Contract covers all prior agreements between the two parties "with respect to its subject matter." The 1999 Contract provided in relevant part that FlightSafety would provide training on twenty-nine different aircraft models (later amended to include more), while the 2002 Contract dealt with training on four aircraft models, only two of which were also listed in the 1999 Contract. The two agreements also differed with regard to the frequency of training and the rates for the training services of FlightSafety. It is not clear that the two contracts were viewed by the parties as the same "subject matter."

FlightSafety Intern., Inc. v. Flight Options, LLC, 194 F. App'x 53, 55 (2d Cir. 2006). Similarly, in *Exhibitgroup/Giltspur, Inc. v. Spoon Exhibit Services*, 273 A.D.2d 874 (4th Dept 2000), the Fourth Department explained that a boilerplate clause bars only those agreements and understandings that were part of the negotiations directly leading to the final agreement. The Fourth Department explained that such language would not preclude a separate agreement with a different focus and purpose, entered years earlier. *Id.* at 874 (holding that boilerplate merger clause in settlement agreement relating to termination of defendant's employment would not terminate a separate non-solicitation obligation

found in separate agreement entered a year earlier). The court also highlighted the importance of intent in connection with the extinction of a live agreement, and observed that despite the merger clause, nothing evidenced an intent to relinquish an extremely valuable contract right. *Id.*

The two agreements here are different in kind and purpose and have a different set of parties. One, a private agreement between Behler and Tao, entered in 2012, concerns Behler's agreement to purchase interests in Digipac in exchange for a promise by Tao to acquire or arrange for the acquisition of Behler's interest in Digipac if certain triggers are met. The purpose was to secure Behler's investment in Digipac. The other, entered in 2014, is an agreement among Digipac's members (in that limited capacity), its Manager, and Digipac, and concerns the affairs and corporate governance of Digipac. The agreements are different in time, kind, purpose, and parties. Moreover, the LLC Amendment did not explicitly identify the Exit Guarantee Agreement, or any other private transaction agreement concerning the sale of a member's Digipac interests, as one of the agreements that would be superseded by the amended operating agreement. (Opening Brief at 37-39). To the contrary, the LLC Amendment contains numerous provisions that contemplate and permit such private transaction agreements. *See* R. 73-76, LLC Amendment § VIII.

These facts create, at minimum, ambiguity as to whether Tao, the "Manager," intended to terminate his private option agreement with Behler. Indeed, Behler argues in his Opening Brief (at 41-45) that these facts unambiguously show the opposite, that Tao did not intend to terminate his personal obligation to Behler through the unilateral amendment of the operating agreement.

Not surprisingly, Tao does not cite a case where a merger clause was deployed as Tao does here. The cases cited by Tao in support of his contention that the clause is unambiguous in its intent terminate the Exit Guarantee Agreement involve the classic use of a merger clause to preclude parol evidence; they do not concern the offensive use of a merger clause to terminate a separate transaction, in a different type of agreement, involving a different set of parties, entered years earlier.[6]

Finally, Tao's suggested interpretation of the boilerplate merger clause in the LLC Amendment—that it terminated the partially performed Exit Guarantee

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[6] *See, e.g., Schron v. Troutman Sanders LLP,* 20 N.Y.3d 430, 435-37 (2013) (merger clause precluded introduction of evidence that the consideration under the option agreement—which stated in detail the consideration thereunder and did not identify the loan agreement—was performance under the separate loan agreement); *Scott v. Land Lords, Inc*., 616 A.2d 1214 (Del. 1992) (parol evidence in form of oral statement in purchasing process that a condition precedent in the final negotiated contract would not be satisfied was inadmissible); *Hynansky v. Vietri*, 2003 WL 21976031, at *4 (Del. Ch. Aug. 7, 2003) (plaintiff could not introduce evidence of oral understanding reached as part of the negotiation that he was not a general partner because negotiated written partnership agreement provided that plaintiff was a general partner); *Phoenix Racing, Ltd. v. Lebanon Valley Auto Racing Corp*., 53 F. Supp. 2d 199, 213 (N.D.N.Y. 1999) (representations about the leased property made in connection with the negotiation of the lease could not be used to vary the written terms of the lease).

Agreement—is unreasonable as a matter of law because it would lead to absurd results. Consider the following hypothetical: Behler and Tao enter a purchase agreement providing that Behler would pay Tao $4,000,000 to acquire Digipac shares owned by Tao on June 2, 2014 (2 days before the LLC Amendment went into effect), but Tao did not have to deliver the shares until June 10, 2014. Under Tao's (and the Majority's) interpretation of the merger clause in the LLC Amendment, the merger clause would reach, supersede, and terminate Tao's performance obligation (*i.e.*, his obligation to deliver the shares) under that private purchase agreement, but Tao would get to keep Behler's $4,000,000.

No reasonable person would accept such an absurd and unreasonable outcome, undermining Tao's argument that the only reasonable interpretation of the opaque clause is an unambiguous intent to reach the Exit Guarantee Agreement. *See, e.g., Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract."); *Dermatology Assoc. of San Antonio v. Oliver St. Dermatology Mgmt. LLC*, 2020 WL 4581674, at *24 (Del. Ch. Aug. 10, 2020) ("principles of contract interpretation require courts to avoid [bizarre outcomes]"); *Pine Riv. Master Fund Ltd. v. Amur Fin. Co., Inc.*, 2017 WL 4548143, at *13 n.95 (Del. Ch. Oct. 12, 2017) ("it is a settled tenet of

contract construction that the court should not construe a contract in a manner that produces an 'absurd result'"), aff'd, 190 A.3d 996 (Del. 2018).

The merger clause does not and cannot unambiguously reflect Tao's intent to terminate the Exit Guarantee Agreement. That Tao repeatedly confirmed his obligations to Behler under the Exit Guarantee Agreement after he amended the operating agreement and admitted to their breach merely confirms that Tao had no such intent.

B. There Is No Conflict Between the LLC Amendment and the Exit Guarantee Agreement

Tao's argument that Tao, as "Manager," intended to terminate his personal obligation to Behler under the Exit Guarantee Agreement via the boilerplate merger clause collapses into his contention that there are irreconcilable material conflicts between the LLC Amendment and the Exit Guarantee Agreement. Opposition at 29-34. The contention is predicated on the improper inference that the Exit Guarantee Agreement is an agreement between Behler, in his capacity as a member, Tao, in his capacity as Manager, and Digipac. Any putative conflict disappears where the alleged Exit Guarantee Agreement, taking all factual inferences to which Behler is afforded, is properly understood as an agreement between Tao and Behler as individuals.

Tao points to five separate provisions of the LLC Amendment that are purportedly in conflict with the Exit Guarantee Agreement:

- Transfers require approval of the Manager which may be withheld for any reason (R. 43 § 8.1).

Tao argues that his obligation to make an offer to purchase Behler's shares conflicts with the obligations of Digipac's manager who has discretion to approve the transfer. Opposition at 30. But there is no conflict between Tao's personal obligation and any putative approval rights Digipac's "Manager" might have over the final transfer. That Tao might have to get the Manager's sign-off to complete the transaction is not a conflict between the two agreements. Critically, the Exit Guarantee Agreement does not prohibit or impose restrictions on Digipac's Manager from exercising his approval rights.

- No member is entitled to a distribution except as provided in the agreement which Digipac's Manager may approve in his "sole discretion" (R. 35, 37 §§ 3.3; 4.3)

Tao argues that his personal obligation to make an offer to purchase Behler's shares in year five conflicts with the right of Digipac's Manager to approve distributions. Opposition at 30. But Tao's personal obligation to make an offer is not a distribution under sections 3.3 and 4.3 of the LLC Amendment. There is no conflict.

- No member shall have rights or preferences that are different from other Members if not detailed in the LLC Amendment. (R. 40 § 6.1)

Tao argues that this provision conflicts with his personal obligation to make an offer to purchase Behler's shares. Opposition at 30. As the Dissent noted,

Section 6.1 concerns voting rights, not the sale of a Member's interests. Moreover, Section VIII of the LLC Amendment enables a member to enter private transactions to sell their Digipac interest. There is no conflict.

- Each member shall look to the assets of [Digipac] for the return of its investment (§ 9.4).

Tao argues that his obligation to make an offer to purchase Behler's shares conflicts with this provision. *See* Opposition at 30. Tao does not identify the conflict. But the referenced clause concerns the dissolution of Digipac which has no plausible connection to Tao's obligation to make an offer to Behler.

- No Member can seek to recoup damages or losses from Tao for performance of his duties as Manager of Digipac except in the case of willful misconduct (R. 30 § 5.1(c)).

Tao complains that Behler does not allege willful misconduct. Opposition at 31. But Behler has not asserted or brought a claim that Tao breached his obligations as Manager under the LLC Amendment.

- Restrictions relating to the transfer of membership interests in Digipac (§ VIII).

Tao suggests that there might be conflicts between the Exit Guarantee Agreement and the transfer provisions of the LLC Amendment. Opposition at 31. But the LLC Amendment explicitly contemplates transactions where a member sells his interests (Section VIII), confirming that there was no intent in the LLC Amendment to upset, terminate or preclude such private agreements.

Any other putative conflict between the two agreements disappears when the Exit Guarantee Agreement is properly understood as a personal agreement between Tao and Behler rather than an agreement between Tao and Digipac's "Manager." Tao would remain obligated to Behler, even if he were no longer the "Manager" of Digipac. Thus, there is no provision in the Exit Guarantee Agreement that conflicts with or prohibits the Manager's performance of his duties under the LLC Amendment. And once it is "established that an antecedent agreement has no effect to vary, contradict or supplement the terms of a later agreement containing the general merger clause, the prior agreement remains enforceable." *Matter of Primex Intern. Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 600 (1997).

Accordingly, there is no putative conflict.

* * *

The Opening Brief contends that the only reasonable interpretation of the merger clause is that it does not reach the Exit Guarantee Agreement. Opening Brief at 40-49. The Opening Brief further contends that if the clause is susceptible to more than one interpretation, under the principle of *contra proferentem*, the contract must be interpreted against Tao, as the drafter. *Id.* at 49-52.

Either way, the clause does not reach the Exit Guarantee Agreement.

VI. THE EXIT GUARANTEE AGREEMENT IS NOT FATALLY INDEFINITE

As noted above (Point I), Tao's argument that the Exit Guarantee Agreement is indefinite improperly demands for his benefit the factual inferences to which only Behler is entitled. Behler's Opening Brief establishes that the Complaint's allegations concerning the Exit Guarantee Agreement are sufficiently definite (25-30). Tao's opposition, with or without those improper inferences, boils down to the dubious contention that there is something unascertainable about the publicly traded share price of Remark and the Remark holdings of Digipac.[7] Opposition at 42-43. But the publicly-traded share price of Remark is easily ascertainable. And so too are Remark's Digipac holdings.

Tao also suggests, despite the numerous allegations that Tao is the party responsible for performance under the Exit Guarantee Agreement, that the contract is indefinite because it does not allege who would supply the funds (Digipac or Tao). Opposition at 43. But contracts rarely identify things like the specific pool of money from which the funds for performance come. Such an omission would not make a contract legally unenforceable. Here, Behler alleges that the obligation

[7] Tao also points to the allegation that Digipac's Remark shares were initially acquired through loans. Tao does not explain how that would make the alleged price term, based on Digipac's Remark shares, indefinite. Indeed, it would not. Behler alleges that the purpose of Digipac was to acquire shares of Remark. R. 11. Digipac did acquire those shares. R. 13. And the price point for Behler's Digipac interest was to be directly derived from the publicly traded price of Digipac's remark shares. R. 9. The loans are not a factor.

to make or arrange for the offer at the agreed-upon price point is Tao's. The breach is Tao's failure to make or arrange for the offer.

The pleading contains the key material terms of the contract and Tao understands precisely what Behler alleges the terms of the Exit Guarantee Agreement to be. No more is required at the notice pleading stage. *See* Opening Brief at 28-30.

VII. PROMISSORY ESTOPPEL MAY BE PLED IN THE ALTERNATIVE WHERE THE *BONA FIDES* OF THE AGREEMENT ARE CHALLENGED AND TAO'S PROMISE TO BEHLER WAS NOT IMPERMISSIBLY VAGUE

Tao argues that his promises to Behler—discussed ad nauseum in the Opening Brief and above—were insufficiently definite to enforce. Opposition at 46-51. The Opening Brief (at 54-57) explains that promissory estoppel claims are routinely permitted in connection with promises that have far more ambiguity than Tao's specific promise of an exit on the five-year anniversary of Behler's investment at an easily ascertainable price.

Tao persists with his contention that his promise was impermissibly vague, rendering Behler's reliance unreasonable. Tao, however, relies on caselaw that is noteworthy for the contrast between the vague promises and fact patterns that courts find insufficient, and the specific and detailed promises made by Tao.

For example, in *James v. Western N.Y. Computing Sys., Inc.*, 273 A.D.2d 853, 855 (4th Dept 2000), a*brogated by American Tower Asset Sub, LLC v.*

Buffalo-Lake Erie Wireless Sys. Co., LLC, 104 A.D.3d 1212 (4th Dept 2013), the employer cut the employee's commission structure by 25% but stated that his compensation package was competitive because, under the current stock option plan, the employer would be eligible to eventually own up to 5% of the company and the share price would go up. When the employer terminated the plan, the employee sued, seeking to enforce a promise for 5% of the company that was never actually made. The Court dismissed the claim explaining that in the absence of a promise of indefinite employment or a promise that the specific plan would be in place for a specific period of time, there was no enforceable promise.

Here, the specifics that were lacking in *James* are present. Tao actually promised Behler an exit from Digipac. Specifically, Tao promised to make or arrange for an offer to buy Tao's interest in Digipac at an agreed upon ascertainable price-point five years from Behler's initial investment. And of course, Tao relied on the promise by transferring $3,000,000 to Digipac.[8]

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[8] The other three cases relied on by Tao in support of his contention that Tao's promises to Behler are unenforceable are similarly inapposite. *See Bd. of Managers of Trump Tower at City Ctr. Condominium v. Palazzolo*, 346 F. Supp. 3d 432, 470 (S.D.N.Y. 2018) (promises that, taken together, amounted to a promise that promisee had authority to act in the best interest of the board was probably too vague to enforce but, any event promisee, was given the authority to act in the best interest of the board and suffered no injury); *James Cable, LLC v. Millennium Digit. Media Sys., L.L.C.*, 2009 WL 1638634, at *5 (Del. Ch. 2009) (applying Delaware law and denying the promissory estoppel claim because the alleged statements were not actually promises made to the plaintiff of future action); *Sanyo Elec., Inc. v. Pinros & Gar Corp.*, 174 A.D.2d 452, 453 (1st Dept 1991) (parties were in process of reducing offer of an exclusive distributorship to writing when promisor withdrew the offer before a final agreement was reached making reliance unreasonable).

Tao also contends that the promissory estoppel claim is duplicative of Behler's claim of breach and should be dismissed on that ground alone. Tao forgets that he has challenged the *bona fides* of the Exit Guarantee Agreement. And as the Dissent explains:

> "[Behler] is permitted to plead in the alternative to the extent that there is a dispute as to whether the exit opportunity agreement constituted a valid contract. This is true under both New York . . . and Delaware law.

R. 174; *see Tahari v. Narkis*, 216 A.D.3d 557, 559 (1st Dept 2023) ("[promissory estoppel claim] 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."); *Kasmin v. Josephs*, 228 A.D.3d 431, 432-33 (1st Dept 2024) (substantially the same); *CIP GP 2018, LLC v. Koplewicz*, 194 A.D.3d 639, 640 (1st Dept 2021) (substantially the same); *Kramer v. Greene*, 142 A.D.3d 438, 441-42 (1st Dept 2016) (substantially the same); *Soldiers', Sailors', Marines' and Airmen's Club Inc. v. Carlton Regency Corp.,* 95 A.D.3d 687, 690 (1st Dept 2012) (substantially the same); *see also Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 563 (1968) (*"*a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery"); *Goldberg v. Pace Univ.*, 88 F.4th 204, 214-15 (2d Cir. 2023) ("In New York . . . a plaintiff may plead unjust enrichment and promissory estoppel claims in the alternative if there is a dispute over the existence, scope, or enforceability of the putative contract.").

Tao cannot wish away the alternative pleading rule by citing cases where the well-established exception was not applicable because the bona fides of the underlying agreement were not challenged. *See, e.g., Kim v. Francis*, 184 A.D.3d 413, 414 (1st Dept 2020) (no challenge to bona fides of the underlying agreement); *Susman v. Commerzbank Capital Markets Corp*., 95 A.D.3d 589, 590 (1st Dept 2012) (same).[9]

[9] *See also Martin Greenfield Clothiers, Ltd. v. Brooks Bros. Group, Inc.*, 175 A.D.3d 636, 638 (2d Dept 2019) (no challenge to bona fides of underlying agreement but rather challenge to enforcement under the statute of frauds); *Brown v. Brown*, 12 A.D.3d 176 (1st Dept 2004) (same).

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: August 20, 2024
New York, New York

Respectfully submitted,

BECKER, GLYNN, MUFFLY, CHASSIN & HOSINSKI LLP

By: _____
Richard N. Chassin
Jesse T. Conan
Walter E. Swearingen
299 Park Avenue
New York, New York 10171
Tel: 212-888-3033
Fax: 212-888-0255
rchassin@beckerglynn.com
jconan@beckerglynn.com
wswearingen@beckerglynn.com

CERTIFICATE OF COMPLIANCE

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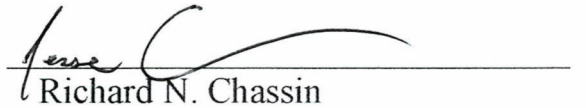
New York, New York

Respectfully submitted,

BECKER, GLYNN, MUFFLY, CHASSIN & HOSINSKI LLP

By: 
Richard N. Chassin
Jesse T. Conan
Walter E. Swearingen
299 Park Avenue
New York, New York 10171
Tel: 212-888-3033
Fax: 212-888-0255
rchassin@beckerglynn.com
jconan@beckerglynn.com
wswearingen@beckerglynn.com

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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.

On August 20, 2024

deponent served the within: **Reply Brief for Plaintiff-Appellant**

upon:

OLSHAN FROME WOLOSKY LLP
Attorneys for Defendant-Respondent
1325 Avenue of the Americas
New York, New York 10019
Tel.: (212) 451-2300
Fax: (212) 451-2222
tfleming@olshanlaw.com

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

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Mariana Braylovskiy

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Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

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