



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRASCENT MANAGEMENT :
CONSULTING, LLC, :
 :
 :
 Plaintiff-Below, : No. 126,2016
 Appellant, :
 :
 : Court Below:
 v. : Court of Chancery
 : Case No. 10915-VCMR
 :
 :
 GEORGE BOURI, :
 :
 :
 Defendant-Below, :
 Appellee. :

APPELLANT'S OPENING BRIEF

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I.

NATURE OF PROCEEDINGS

This is an appeal by Plaintiff-Below, Trascent Management Consulting, LLC (“Trascent”), from the order of the Court of Chancery granting partial summary judgment to Defendant-Below, George Bouri (“Bouri”), on Bouri’s counterclaim for breach of a contractual advancement provision.

This action between Trascent, a real estate consulting business, and Bouri, its former employee and minority owner, arises from Bouri’s alleged misconduct and Trascent’s resulting termination of Bouri’s employment with, and ownership interest in, the company. Trascent commenced this action on or about April 15, 2015, and asserts claims against Bouri for, among other things, declaratory relief, breach of contract, and breach of fiduciary duty. Bouri has asserted counterclaims against Trascent, including a counterclaim for breach of contract arising from the advancement provisions of his Executive Employment Agreement (the “Employment Agreement”) and the Trascent Amended and Restated Limited Liability Company Agreement (the “LLC Agreement”) (together, the “Agreements”). In defense of Bouri’s breach of contract claim, Trascent alleges that the Agreements – including any contractual advancement rights granted therein – were procured by Bouri’s fraud.

On July 14, 2015, Bouri filed a Motion for Partial Summary Judgment as to his Claim for Advancement (the “Motion”), pursuant to which he sought partial summary judgment on his counterclaim for breach of the advancement provisions of the Agreements. (D.I. 20). On September 16, 2015, Trascent filed its Answering Brief, contending the Motion should be denied because the Employment Agreement and LLC Agreement upon which Bouri’s contractual advancement claim is based were procured by fraud and, therefore, are void and unenforceable. (D.I. 30). In support thereof, Trascent submitted extensive evidence of Bouri’s fraudulent inducement of the Agreements – which Bouri did not attempt to rebut in his Reply Brief, filed October 7, 2015. (D.I. 39).

By Order dated February 12, 2016 (the “Order”), (D.I. 59), which incorporated a telephonic ruling given on January 29, 2016, the Court of Chancery granted the Motion, ruling that Bouri is entitled, pursuant to the Agreements, to advancement and reimbursement of his attorneys’ fees and other expenses incurred in this action. In so ruling, the Court of Chancery deemed Trascent’s defense that the Employment Agreement and LLC Agreement are invalid and unenforceable because they were procured by fraud to be a “peripheral issue” that is “not pertinent” in determining whether Bouri is entitled to summary judgment on his contractual advancement claims. On March 11, 2016, the Court of Chancery

entered its Order as a partial final judgment under Court of Chancery Rule 54(b).
(D.I. 74).

Trascent timely filed its notice of appeal of the Order on March 14, 2016.
This is Trascent's Opening Brief in support of its appeal.¹

¹ Exhibits relied upon by Trascent are contained in the Appendix and will be identified by "A-" and a corresponding page number or paragraph number. For example, "A-2" represents page 2 of the Appendix to Appellant's Opening Brief. References to the transcript of the Court's telephonic ruling on January 29, 2016, are identified as "Tr. at [PAGE]."

II.

SUMMARY OF ARGUMENT

1. To prevail on a motion for summary judgment on a breach of contract claim, a movant must establish each of the elements of his claim, including the existence of a valid and enforceable agreement.

2. Agreements procured by fraud are voidable by, and not enforceable against, the defrauded party. Therefore, a claimant is not entitled to summary judgment on a contract claim where genuine issues of material fact exist as to whether the contract at issue was procured by fraud.

3. There is no irrebuttable presumption that contracts containing advancement provisions are deemed to be valid and enforceable on a motion for summary judgment seeking to enforce an alleged contractual right to advancement. To the contrary, fraudulent inducement is a viable defense to a contractual claim for advancement based on the contract alleged to have been procured by fraud. Whether a contract was fraudulently induced is not a “peripheral issue” in an advancement proceeding where the claimed right of advancement arises from, and is dependent upon, the contract allegedly procured by fraud.

4. A party asserting a contractual claim for advancement is not entitled to summary judgment where the opposing party submits unrebutted evidence in

support of its affirmative defense that the contracts from which the purported advancement right arises were procured by fraud.

III.

STATEMENT OF FACTS

A. Bouri Fraudulently Induces Trascent And Its Founder, Rakesh Kishan, To Enter Into The Employment Agreement And LLC Agreement.

Rakesh Kishan (“Kishan”), founder and then sole owner of Trascent’s affiliate, UMS Advisory, Inc. (“UMS”), first met Bouri at a business meeting in which Bouri made a presentation to UMS on behalf of Time Warner, Inc., Bouri’s employer at the time. (D.I. 30 at 3). In 2013, upon learning that Bouri had left Time Warner, Kishan contacted Bouri to explore his interest in joining UMS. (*Id.*). Bouri expressed a strong interest in becoming an employee of UMS (or a related entity) and in acquiring an equity interest in the company. (*Id.*).

Kishan subsequently had multiple conversations with Bouri over a period of several months to determine whether Bouri would be a good fit as an employee and a co-owner of Kishan’s company. (*Id.*). During this extended job interview, Kishan inquired about Bouri’s background and employment history, including specifically the circumstances surrounding Bouri’s departure from his prior employer, Time Warner. (*Id.* at 3-4). Bouri told Kishan that he had resigned voluntarily from Time Warner because of cultural issues, including claiming that he had been “micromanaged.” (*Id.* at 4, 16). During these multiple conversations, Bouri also attempted to convince Kishan to allow Bouri to join UMS (or some related entity) as an equity owner by making specific representations regarding

himself and what he would bring to the company. (*Id.* at 4). Bouri sold Kishan on various things, including that he was a wealthy man with sufficient resources to fund his acquisition of a sizable stake in the company (which he obtained solely by promissory notes with no capital investment), that he was fiscally responsible and prudent, and a person of integrity who would serve shareholder interests. (*Id.*).

Convinced from those communications that Bouri had the resume, work experience, resources, character, and integrity to be an employee and leader of Kishan's company, Kishan decided to hire Bouri and ultimately give him responsibility over Trascient's human resources, information technology, and finance functions. (*Id.* at 4-5). As was contemplated by Kishan and Bouri during the above-referenced communications, Trascient was formed and Bouri became an employee and owner in the new company. Specifically, effective January 1, 2014: (a) Bouri became a minority owner of Trascient pursuant to the LLC Agreement executed by Kishan, Bouri, and Itay Fastovsky;² and (b) Bouri became a Managing Principal of Trascient pursuant to the Employment Agreement executed by Kishan, on behalf of Trascient, and Bouri. (*Id.* at 5; A-190-202; A-204-248).

Bouri's representations to Kishan – in particular, that he: (a) voluntarily resigned from Time Warner due to cultural issues; and (b) was a wealthy man with

² The LLC Agreement was originally executed in or around December 2013. (D.I. 30 at 5). The LLC Agreement was later amended to reflect changes to the parties' ownership interests in Trascient. (*Id.*).

the ability and intention to satisfy his obligations under the promissory notes by which he obtained his interest in Trascient – were material to and induced Kishan’s and Trascient’s decision to enter into the Agreements. (D.I. 30 at 5-6, 9, 11, 16-17). Absent such assurances by Bouri, Kishan and Trascient would not have entered into the Employment Agreement or LLC Agreement with Bouri. (*Id.*).

Unfortunately, it turns out that those representations were blatantly false. Discovery in this action has revealed that, contrary to his representation that he voluntarily resigned from Time Warner due to cultural differences and micromanagement, Bouri was actually terminated by Time Warner after an internal investigation conducted by counsel for Time Warner as a result of allegations of, among other things, sexual harassment lodged against Bouri by one of his former colleagues, poor job performance, and a loss of confidence in Bouri’s “judgment.” (*Id.* at 8-9; A-118; A-148-178; A-180 at ¶ 3; A-183-184 at ¶ 4). Bouri’s misrepresentations extend beyond his employment history. Trascient has also come to know that Bouri’s representations about his ability and intention to pay off the promissory notes he exchanged as consideration for his sizeable interest in Trascient were false. (D.I. 30 at 10-11). In truth, Bouri admittedly cannot meet his obligations as they come due – prompting his efforts to convert Trascient’s assets for his personal benefit and delay repayment of his promissory notes while working for the company. (*Id.*; A-107; A-128-132; A-187-188). Importantly, had

Bouri told Kishan the truth about his departure from Time Warner and his actual financial condition, Trascent and Kishan would not have entered into the Agreements with Bouri. (D.I. 30 at 6, 9, 11).

B. Trascent Terminates Bouri's Employment With, And Ownership Interest In, The Company And Commences This Action To Obtain Relief From Bouri's Misconduct.

Trascent's hopes for a successful and long-term relationship with Bouri proved short-lived. Despite his promises and obligation to act in Trascent's best interests, throughout his employment, Bouri repeatedly violated his duties to the company and its members, by, among other things: (1) misappropriating Trascent's funds for his own personal use; (2) launching a bogus human resources investigation aimed at concealing his misappropriation of funds and undermining Kishan's authority; (3) concealing material information from Trascent's Board of Managers; and (4) disclosing Trascent's confidential information. (D.I. 12 at ¶¶ 27, 32-37, 39). Based on these and other wrongful acts, on April 8, 2015, Kishan removed Bouri from the Board of Managers, and Trascent terminated Bouri for cause in accordance with the Employment Agreement. (D.I. 30 at 7). As a result of his termination, Bouri's interest in Trascent was automatically deemed sold back to Trascent. (*Id.*).

Bouri's wrongful conduct did not end with his termination. In violation of his covenants in the Employment Agreement, Bouri told Trascent employees that

his removal from the Board and his termination were “illegal.” (D.I. 12 at ¶ 49). He also encouraged employees to leave Trascient because there was not enough money to cover expenses or payroll and because he was going to open a competing business venture, taking Trascient’s pipeline of business with him. (*Id.*). Bouri even told Trascient’s employees that they would be wise to quit because he intended to “take the company down.” (*Id.*). To that end, Bouri falsely told clients, potential clients, and seemingly anybody who would listen to him that Trascient was in economic distress, that the company was insolvent and could not make payroll, and that many key employees were going to resign. (*Id.* at ¶ 47).

In an attempt to stop Bouri’s unlawful behavior and to redress the harm caused by Bouri’s wrongful conduct, Trascient filed the instant action on April 15, 2015, asserting claims for declaratory judgment, breach of contract, and breach of fiduciary duty, among others. (*Id.* at ¶¶ 50-74).

C. Bouri Seeks Advancement Of His Legal Fees And Expenses In This Action Based On The Agreements That He Procured By Fraud.

On June 29, 2015, Bouri filed an Answer to First Amended Complaint and First Amended Verified Counterclaims, in which he asserted counterclaims for breach of contract against Trascient based on Trascient’s refusal to advance Bouri’s attorneys’ fees and costs in this action, as purportedly required under the Employment Agreement and LLC Agreement. (D.I. 16 at 64-67). Shortly

thereafter, Bouri filed the Motion, seeking summary judgment on that contract claim. (D.I. 20).

Pursuant to his Motion, Bouri sought a court order requiring Trascent to advance his legal fees and costs based on advancement provisions contained in the Agreements. In particular, the Employment Agreement provides, in relevant part:

Advancement of Expenses. Unless a determination has been made by final nonappealable order of a court of competent jurisdiction that indemnification is not required, the Company shall, upon the request of Executive, advance or promptly reimburse Executive's reasonable costs of investigation, litigation or appeal, including reasonable attorneys' fees; provided, however, that Executive shall, as a condition of Executive's right to receive such advances or reimbursements, undertake in writing to repay promptly the Company for all such advancements and reimbursements if a court of competent jurisdiction determines that Executive is not then entitled to indemnification under this Section 6.1. (A-198 at § 6.1(b)).

Similarly, the LLC Agreement contains the following advancement clause:

Advancement of Expenses. Unless a determination has been made by final, nonappealable order of a court of competent jurisdiction that indemnification is not required, the Company shall, upon the request of any Covered Person, advance or promptly reimburse such Covered Person's reasonable costs of investigation, litigation or appeal, including reasonable attorneys' fees; provided, however, that the affected Covered Person shall, as a condition of such Covered Person's right to receive such advances or reimbursements, undertake in writing to repay promptly the Company for all such advancements and reimbursements if a court of competent jurisdiction determines that such Covered Person is not then entitled to indemnification under this Section 6.2. (A-221 at § 6.2(c)).

According to Bouri, those contract provisions obligate Trascent to advance funds to cover all of the legal fees and costs Bouri incurs in this lawsuit.

On September 16, 2015, Trascent filed its Answering Brief, relying on its asserted affirmative defense and contending the Motion should be denied because the Agreements upon which Bouri's contract claim is based were procured by fraud and, therefore, are void and unenforceable. (D.I. 30 at 13-18). In support thereof, Trascent offered evidence demonstrating that Bouri made false, material representations to Trascent regarding his background and employment history, that Bouri knew those representations were false, that Bouri intended to induce Trascent to rely upon his misrepresentations, that Trascent and Kishan justifiably relied upon his misrepresentations in entering into the Employment Agreement and LLC Agreement, and that absent such false representations, Kishan and Trascent would not have entered into the Agreements. (*Id.* at 3-11, 13-18). Based on the evidence of Bouri's fraudulent inducement, Trascent urged the Court of Chancery to deny the Motion because Bouri did not and could not meet his burden to demonstrate, as a matter of law, that the Agreements are valid and enforceable. (*Id.* at 13-18).

On October 7, 2015, Bouri filed a Reply Brief in support of his Motion, in which he made no attempt to: (a) demonstrate that the Agreements are valid and enforceable contracts; or (b) rebut the evidence that Trascent had submitted in support of its defense of fraudulent inducement. (D.I. 39). Instead, Bouri took the

position that “whether the LLC Agreement and/or the Employment Agreement was procured by fraud is irrelevant” to the Motion. (*Id.* at 14 (emphasis added)).

D. Notwithstanding Trascent’s Unrebutted Evidence That The Agreements At Issue Were Fraudulently Induced, The Court Of Chancery Grants Partial Summary Judgment To Bouri On His Contractual Counterclaim.

Following oral argument, the Court of Chancery issued a ruling on the Motion by telephonic hearing on January 29, 2016. (Tr.). In explaining her decision to grant the Motion, the Vice Chancellor, construing the decision in *Tafeen v. Homestore, Inc.*, C.A. No. 023-N, 2004 Del. Ch. LEXIS 38 (Del. Ch. Mar. 22, 2004), ruled that Trascent’s fraudulent inducement defense was a “peripheral issue” and, therefore, was “not pertinent” to Bouri’s entitlement to summary judgment on his contractual claims for advancement. (*Id.* at 16:20-18:13). According to the Court of Chancery’s rationale, “[h]olding otherwise would turn advancement on its head, where any allegation challenging the right to advancement would collapse that right into one only for indemnification and cripple the summary nature of these proceedings.” (*Id.* at 18:9-13).

On February 12, 2016, the Court of Chancery entered the Order, which granted the Motion, incorporated the Court of Chancery’s telephonic ruling, and required that Trascent advance and reimburse all attorneys’ fees and other expenses that Bouri has reasonably incurred and will reasonably incur with respect to the “Covered Claims” and the “Fees on Fees Claim.” (D.I. 59). Trascent now

appeals from that Order, which was entered as a partial final judgment under Court of Chancery Rule 54(b) on March 11, 2016. (D.I. 74).

IV.

ARGUMENT

A. The Court Of Chancery Erroneously Granted Bouri Summary Judgment On His Contractual Counterclaim In The Face Of Unrebutted Evidence That The Contracts Giving Rise To Bouri's Purported Advancement Right Were Procured By Fraud.

1. Question presented

The question presented on appeal is whether the defense of fraudulent inducement, supported by competent and unrebutted summary judgment evidence, precludes entry of summary judgment enforcing a purported contractual right to advancement arising from the agreement(s) procured by fraud. This issue was presented to the Court of Chancery in Trascent's Answering Brief in Opposition to Defendant George Bouri's Motion for Partial Summary Judgment as to his Claim for Advancement (D.I. 30 at 13-18), during oral argument on the Motion (A-35-53), and in Trascent's Memorandum of Law in Support of its Application for Certification of Interlocutory Appeal to the Delaware Supreme Court and Motion to Stay Enforcement of the Order Pending Appeal (D.I. 61).

2. Scope of review

The Supreme Court reviews *de novo* a Court of Chancery decision granting summary judgment. *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 833 (Del. 1992). To the extent the issues on appeal are matters of law, as here, the

Supreme Court determines whether the Court of Chancery erred in formulating or applying legal precepts. *Id.*

3. Merits of argument

In granting summary judgment to Bouri on his contract claim, the Court of Chancery disregarded Trascant's un rebutted evidence showing that the Employment Agreement and LLC Agreement (*i.e.*, the sole sources of Bouri's claimed advancement right) were induced by Bouri's fraud. In reaching that decision, the Vice Chancellor deemed Trascant's well established defense – that the Agreements are invalid and unenforceable because they were procured by fraud – to be a “peripheral issue” that is “not pertinent to advancement.” (A-27, Jan. 29 Tr. at 18). As demonstrated below, the Court of Chancery's Implementing Order, which requires Trascant to promptly advance and reimburse attorneys' fees and other costs that Bouri has incurred and will incur in this action (D.I. 59), was erroneous as a matter of law.³

³ Notably, the Order imposes a significant, immediate, and ongoing economic burden on Trascant that Bouri may be unwilling or unable to repay. The evidence Trascant submitted in support of its opposition to Bouri's motion for partial summary judgment demonstrates that, by Bouri's own admission (and contrary to his prior representations), Bouri is perpetually “unable to meet [his] ongoing financial obligations . . . which causes him to be in a constant financial hole every month or two.” (A-187). As Bouri further stated, “I have had to come to [Trascant] each month asking for an advance to meet my obligations. [And] I now once again cannot meet my obligations and have nowhere to turn.” (A-188). Thus, it is likely that Bouri will not have the ability to repay what has been advanced. Moreover, even if Bouri had the resources, given the fact that Bouri has

a. **The standards governing the Court of Chancery's resolution of advancement disputes**

Under 8 Del.C. § 145(k), the Court of Chancery is “vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise.”⁴ Section 145(k) provides that the Court of Chancery “may summarily determine a corporation’s obligation to advance expenses (including attorneys’ fees).”⁵

Not surprisingly, summary judgment practice is often used as “an efficient and appropriate method to decide” an advancement dispute.⁶ However, summary judgment is proper only if the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.⁷ On a motion for summary judgment, the movant bears the burden of clearly

relocated recently to Beirut, Lebanon, Trascent’s ability to compel Bouri to reimburse it for the fees and expenses advanced is highly questionable.

⁴ See 8 Del.C. § 145(k).

⁵ *Id.*

⁶ See *Pontone v. Milso Indus. Corp.*, 100 A.3d 1023, 1048 (Del. Ch. 2014) (quoting *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 WL 21843254, at *2 (Del. Ch. Aug. 8, 2003)).

⁷ See DEL. CH. CT. R. 56(c); *Brown v. Ocean Drilling & Exploration Co.*, 403 A.2d 1114, 1115 (Del. 1979).

establishing that no genuine issue of material fact exists, and any doubt regarding the existence of such an issue must be resolved against the movant.⁸

b. Evidence of fraudulent inducement precludes the entry of summary judgment on a claim for breach of the fraudulently-procured contract.

It is a bedrock principle of law that, to prevail on a claim founded on contract, a party must, as a threshold matter, establish that the agreement at issue is valid and enforceable.⁹ It is also axiomatic that a contract procured by fraud is voidable and cannot be enforced against the defrauded party.¹⁰ Thus, fraudulent

⁸ See *Brown*, 403 A.2d at 1115; *Scureman v. Judge*, 626 A.2d 5, 10-11 (Del. Ch. 1992).

⁹ See *Patterson-Woods & Assocs., LLC v. Realty Enters., LLC*, 2008 Del. Super. LEXIS 196, at *14 (Del. Super. May 21, 2008) (“To establish a claim for breach of contract a plaintiff must show . . . the existence of a valid contract . . .”).

¹⁰ See *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059, 1067 (Del. 2011) (holding that contracts induced by fraud are voidable by the innocent party); *Lincoln Nat’l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, 28 A.3d 436, 441 (Del. 2011) (same); *Martin v. Med-Dev Corp.*, C.A. No. 10525-VCP, 2015 Del. Ch. LEXIS 272, at *41 (Del. Ch. Oct. 27, 2015) (“Transactions entered into in reliance on material misrepresentations are voidable.”); *Berdel, Inc. v. Berman Real Estate Mgmt.*, C.A. No. 13579, 1997 Del. Ch. LEXIS 177, at *28-29 (Del. Ch. Dec. 15, 1997) (“Where a party’s manifestation of assent is induced by a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable.”); *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1054 n.46 (Del. Ch. 2006) (“The Restatement (Second) of Contracts § 164 offers that ‘If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.’”); *Tekstrom Inc. v. Savla*, C.A. No. 05-A-12-006 (JTV), 2006 Del. Super. LEXIS 323, at *13-14 (Del. Super. July 31, 2006) (“A contract may be voidable on the grounds of misrepresentation.”); *Penn. Truck Line, Inc. v.*

inducement is a valid defense to a suit on a contract.¹¹ Accordingly, a claimant is not entitled to summary judgment on a contract claim where the non-movant has raised a viable defense of fraud in the inducement supported by unrebutted, credible evidence.¹²

Hendricks, C.A. No. 82C-AU-63, 1986 Del. Super. LEXIS 1100, at *7 (Del. Super. Mar. 26, 1986) (contract induced by fraud was voidable by defendant and, thus, could not be enforced by plaintiff).

¹¹ See *Alabi v. DHL Airways*, 583 A.2d 1358, 1361 (Del. Super. 1990) (“A contract may be voidable on the basis of misrepresentation, be it a fraudulent or an innocent misrepresentation. As such, misrepresentation can be asserted as an affirmative defense to an action on the contract.”) (citing RESTATEMENT (SECOND) OF CONTRACTS § 164); *Griffin Corporate Servs., LLC v. Jacobs*, C.A. No. 396-N, 2005 Del. Ch. LEXIS 120, at *38 n.62 (Del. Ch. Aug. 11, 2005) (recognizing that “fraud in the inducement is a defense against an assignee attempting to enforce a contract between its assignor and an obligor”); *First Fed. Sav. Bank v. CPM Energy Sys. Corp.*, C.A. No. 88C-MY-249, 1988 Del. Super. LEXIS 400, at *2 (Del. Super. Oct. 25, 1988) (“[A]n affirmative defense of fraud in the inducement can be raised in a suit on a contract in this Court.”).

¹² See *First Fed. Sav. Bank*, 1988 Del. Super. LEXIS 400, at *2 (denying motion for summary judgment for breach of a note where defendant raised the defense of fraud in the inducement of the loan agreement); *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1543-1545 (2d Cir. 1997) (reversing order granting summary judgment on breach of contract claim where genuine issues of material fact existed as to defendant’s affirmative defenses of fraud in the inducement and failure of condition precedent); *Painter v. Atwood*, 2014 U.S. Dist. LEXIS 153342, at *17-18 (D. Nev. Oct. 23, 2014) (denying summary judgment on breach of contract claim where party asserted and offered evidence in support of fraudulent inducement defense to contract claim); *Okla. ex rel. Doak v. Staffing Concepts Int’l, Inc.*, 2014 U.S. Dist. LEXIS 8767, at *9-10 (W.D. Okla. Jan. 24, 2014) (same); *Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, 2015 U.S. Dist. LEXIS 148374, at *21-22 (N.D. Cal. Oct. 29, 2015) (same); *Contrada, Inc. v. Parsley*, 2012 U.S. Dist. LEXIS 21708, at *10-11 (D. Colo. Feb. 22, 2012) (same); *Suzlon Wind Energy Corp. v. Shipper Stevedoring Co.*, 662 F. Supp. 2d 623, 650-

c. **Fraudulent inducement is a viable defense to a claim seeking to enforce a contractual advancement right arising from the contract alleged to have been procured by fraud.**

Based on the foregoing principles, it follows that fraudulent inducement is a viable defense to a claim for advancement where the claimed advancement right arises out of a contract allegedly procured by fraud. As with other contract claims, a party moving for summary judgment on a claim for contractual advancement must establish the validity and enforceability of the contract at issue. Stated differently, there is no irrebuttable presumption that contracts containing advancement provisions are deemed to be valid and enforceable on a motion for summary judgment seeking to enforce the alleged contractual right to advancement. To hold otherwise would prioritize the summary disposition of advancement disputes over fundamental rules of law. The preference for prompt

51 (S.D. Tex. 2009) (same); *ConocoPhillips v. 261 E. Merrick Rd. Corp.*, 428 F. Supp. 2d 111, 121 (E.D.N.Y. 2006) (same); *Wang Labs, Inc. v. Ma Labs, Inc.*, 1995 U.S. Dist. LEXIS 18054, at *42-43 (N.D. Cal. Nov. 30, 1995) (same); *Potenza v. Mitchell Int'l*, 1997 U.S. Dist. LEXIS 6088, at *10-11 (D. Ill. May 1, 1997) (in suit by former employee against former employer for breach of contract, court denied employee's motion for summary judgment on his breach of contract claim where employer raised fact issues support its affirmative defense of fraudulent inducement, namely that the employee induced the company into making an offer of employment by lying about his education credentials); *Nichols v. YJ USA Corp.*, 2009 U.S. Dist. LEXIS 22450 at *52-61 (N.D. Tex. Mar. 18, 2009) (same). *See also Way Rd. Dev. Co. v. Snavely*, C.A. No. 89C-DE-48, 1992 Del. Super. LEXIS 42, at *15 (Del. Super. Jan. 31, 1992) (denying summary judgment on breach of contract claim where defendant raised factual issue regarding affirmative defense that contract was signed under duress and, thus, voidable).

resolution of advancement disputes does not override and invalidate legitimate defenses to claims for advancement.¹³

In reaching a contrary conclusion in connection with Bouri's motion for summary judgment on his contractual advancement claim, the Vice Chancellor relied upon *Tafeen v. Homestore, Inc.*, C.A. No. 023-N, 2004 Del. Ch. LEXIS 38 (Del. Ch. Mar. 22, 2004), for the proposition that Trascent's defense of fraudulent inducement of the Employment Agreement and LLC Agreement is a "peripheral issue" which is "not pertinent" to Bouri's contractual claims for advancement based on the fraudulently-procured Agreements. (Tr. at 16:20-18:13). The Vice Chancellor's reliance on the *Tafeen* decision was misplaced.

In *Tafeen*, a former officer of Homestore, Tafeen, sought advancement of expenses pursuant to 8 *Del. C.* § 145 and Section 6.2 of Homestore's bylaws (the "Advancement Bylaw").¹⁴ Tafeen moved for summary judgment on the issue of his entitlement to advancement, and Homestore filed a cross-motion for summary judgment on its various defenses to Tafeen's claim for advancement,¹⁵ including its defense that Tafeen's claim for advancement pursuant to the Advancement Bylaw

¹³ See *Tafeen v. Homestore, Inc.*, C.A. No. 023-N, 2004 Del. Ch. LEXIS 38, at *29, *45 (Del. Ch. Mar. 22, 2004) (denying summary judgment to former officer on advancement claim due to questions of fact regarding unclean hands defense).

¹⁴ *Id.* at *3.

¹⁵ *Id.* at *12.

was barred because Tafeen had fraudulently induced Homestore to enter into an employment agreement with him.¹⁶ The Court of Chancery found that Homestore’s fraud-in-the-inducement argument did not serve as a defense to Tafeen’s claim for advancement because the Advancement Bylaw (*i.e.*, the source of the claimed advancement right) was “not dependent upon” the employment contract.¹⁷

Unlike the instant action, the right to advancement in *Tafeen* was predicated on the corporation’s bylaws – not a provision in a fraudulently-procured employment contract – and, therefore, the alleged fraudulent inducement of the employment agreement was considered by the court to be a “peripheral” issue that was not a defense to the advancement claim.¹⁸ In other words, the advancement right at issue in *Tafeen* did not arise from the contract allegedly induced by fraud. In contrast, Bouri’s claim to advancement here is predicated solely on Agreements which are invalid and unenforceable because Bouri procured them by fraud. Thus,

¹⁶ *Id.* at *18.

¹⁷ *Id.* at *19.

¹⁸ *Id.* (“The Advancement Bylaw is not dependent upon Tafeen’s employment contract. This action is to determine Tafeen’s entitlement to advancement under Homestore’s *governing* rules. Whether or not Homestore was fraudulently induced to enter into to the *employment contract* with Tafeen is a peripheral issue.”) (emphasis in original).

Trascent's affirmative defense of fraud in the inducement is not "peripheral," but goes to the heart of the advancement issue that was decided on summary judgment.

In sum, *Tafeen* does not stand for the proposition that fraudulent inducement can never serve as a defense to an advancement claim. On the contrary, the *Tafeen* decision recognized that an affirmative defense may preclude the entry of summary judgment on a claim for advancement.¹⁹ In any event, Bouri's contractual claim for advancement in this case is wholly dependent upon the validity and enforceability of the very agreements that Bouri procured by fraud. Accordingly, Bouri's fraudulent inducement of the Agreements is not a "peripheral issue" that may be ignored in connection with Bouri's motion for summary judgment on his contractual counterclaim for advancement.

- d. **Bouri is not entitled to summary judgment on his counterclaim for contractual advancement because the unrebutted evidence shows that the Agreements on which his advancement claim is based were procured by fraud.**

As explained above and demonstrated by the summary judgment evidence presented to the Court of Chancery, Bouri procured the Employment Agreement and LLC Agreement by fraud. Specifically, prior to entering into those Agreements, Bouri made certain representations to Trascent's founder and

¹⁹ *Id.* at *24-29, *45 (recognizing unclean hands as a defense to an advancement claim and denying summary judgment to former officer on advancement claim based on questions of facts regarding that defense).

majority owner, Kishan, regarding Bouri's departure from his prior employer and his financial condition. (D.I. 30 at 4, 16). Those representations were material, false, known by Bouri to be false, designed to induce reliance, and justifiably relied upon by Kishan and Trascent in entering into the Agreements. (*Id.* at 4, 6, 8-11, 16-17). Indeed, the summary judgment evidence demonstrates that Kishan and Trascent would not have entered into the Agreements had they known of the falsity of Bouri's material misrepresentations. (*Id.* at 5-6, 9, 11). During the summary judgment motion practice, Bouri made no effort to rebut or dispute Trascent's substantial evidence that Bouri fraudulently induced Trascent to enter into the Employment Agreement and LLC Agreement, or to otherwise establish that the Agreements are valid and enforceable against Trascent.²⁰ (D.I. 20; D.I. 39).

At a minimum, Trascent's summary judgment evidence raises a genuine issue of material fact as to whether Bouri fraudulently induced Trascent to enter into the Agreements and, therefore, the validity and enforceability of the Agreements themselves. Because a genuine issue of material fact exists as to whether the Agreements are valid and enforceable due to Bouri's fraud, Bouri is

²⁰ See *Duffield Assocs. v. Meridian Architects & Eng'rs, LLC*, 2010 Del. Super. LEXIS 293, *12 (Del. Super. July 12, 2010) (stating the elements of the defense of fraudulent inducement). See also *Schiavello v. Delmarva Sys. Corp.*, 61 F. Supp. 2d 110, 113-15 (D. Del. 1999) (explaining that "resume fraud" is a complete defense to an employee's breach of contract claim where the employer can show that the employee's concealment undermined the very basis upon which the employee was hired).

not entitled to summary judgment as to his claim for contractual advancement.

Accordingly, the Court of Chancery's Order should be reversed.

V.

CONCLUSION

For the foregoing reasons, Trascent respectfully asks this Court to reverse the Court of Chancery's Order granting summary judgment to Bouri on his contractual claims for advancement.

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TRIAL COURT’S JUDGMENT AND RATIONALE

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