



IN THE
Supreme Court of the State of Delaware

KNIGHTEK, LLC, an Arizona limited liability company,
Plaintiff Below, Appellant,

v.

JIVE COMMUNICATIONS, INC., a Delaware Corporation,
Defendant Below, Appellee.

NO. 570, 2018
On Appeal from the Superior Court of the State of Delaware
C.A. No.: N18C-04-260 JRJ

**APPELLANT KNIGHTEK, LLC'S
[CORRECTED] OPENING BRIEF**

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March 12, 2019

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NATURE OF PROCEEDINGS

On April 25, 2018, Appellant/Plaintiff below, KnighTek, LLC (“KnighTek”) filed a two-count complaint (“Complaint”)¹ in the Superior Court alleging that Appellee/Defendant below, Jive Communications, Inc. (“Jive”), through its corporate officers and directors, had engaged in fraudulent misrepresentation and concealment relative to the imminent acquisition of Jive by LogMeIn USA, Inc. (“LogMeIn”), thereby defrauding KnighTek of \$998,442.89. Jive sought dismissal of KnighTek’s Complaint by filing its Motion to Dismiss Plaintiff’s Complaint (“Jive’s Motion”)² and its Opening Brief in Support of its Motion to Dismiss Plaintiff’s Complaint³ on June 14, 2018. KnighTek filed its Brief in Opposition to Defendant Jive Communications, Inc.’s Motion to Dismiss Plaintiff’s Complaint.⁴ On July 31, 2018, Jive filed its Reply Brief in Support of Motion to Dismiss Plaintiff’s Complaint.⁵

On October 23, 2018, the Superior Court issued an opinion granting Jive’s Motion. KnighTek filed a Motion for Clarification on October 31, 2018,⁶ seeking guidance on whether the Superior Court’s dismissal of KnighTek’s Complaint was

¹ A9.
² A63.
³ A65.
⁴ A100.
⁵ A128.
⁶ A218.

with or without prejudice. On November 5, 2018, the Superior Court issued a letter order stating the dismissal of KnighTek's complaint was with prejudice, thus foreclosing KnighTek's opportunity to amend its Complaint.⁷ This appeal followed.

⁷ The Superior Court's letter order, cited herein as "Letter Order," is attached hereto as Exhibit B.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that KnighTek’s Complaint failed to meet the Rule 9(b) pleading requirements for fraudulent misrepresentation, holding that:

- A. The allegations lacked specificity to satisfy the elements of fraudulent misrepresentation under Utah law;⁸
- B. Even assuming the specificity requirement was met, the allegations concerning Jive’s misrepresentations did not reference “presently existing material facts,” and thereby are not actionable under Utah law;⁹
- C. Even assuming the specificity requirement was met, the allegations failed to establish that KnighTek fulfilled its affirmative duty under Utah law to inquire whether a Change of Control was imminent;¹⁰ and
- D. Even assuming the specificity requirement was met, Jive did not have a duty to disclose or to otherwise be forthright with KnighTek regarding its imminent sale to LogMeIn and the true state of the availability of funds for buyout acquisitions.¹¹

KnighTek’s Complaint addresses each element required under Utah law to

⁸ Op. at 15-16.

⁹ Op. at 16-17.

¹⁰ Op. at 17-19.

¹¹ Op. at 19-21.

adequately state a claim for fraudulent misrepresentation, including allegations specifying the time, place, and contents of Jive's representations, the facts misrepresented, the identity of the person making the misrepresentations, and what Jive gained as a result of its malfeasance, as required under Rule 9(b).

The allegations of the Complaint and the reasonable inferences to be drawn therefrom, which the Superior Court was required to accept as true, clearly show that Jive's senior management made numerous false statements concerning then presently existing material facts, including that:

- A. On January 25, 2018, Jive had already locked up its sale to LogMeIn for \$342 million when it contacted KnighTek and sold a discounted buy-out of its obligations to KnighTek;¹²
- B. Between January 25, 2018 and February 6, 2018, when Jive repeatedly misrepresented its financial condition to cajole KnighTek to accept its discounted offer, Jive knew that it was only days away from its February 7, 2018 announcement of its \$342 million sale to LogMeIn which would trigger its obligation to pay KnighTek in full;¹³ and
- C. Between January 25, 2018 and February 6, 2018, Jive repeatedly warned KnighTek's owner Erik Knight that he would not see full payment for at

¹² A10 at ¶ 2.

¹³ A14 at ¶¶ 21-23, A17 at ¶¶ 35-36, 38.

least another five years, when in fact Jive knew that its negotiation of its sale to LogMeIn had already triggered Jive's obligation to pay KnighTek in full.¹⁴

If Jive had been forthright and truthful as to the presently existing facts that a sale was not only pending but its public announcement imminent, or that Jive would be flush with cash to pay all of its obligations, Mr. Knight would not have been seduced into accepting a \$1 million discount.¹⁵ At the time Jive falsely averred that Mr. Knight would not receive full payment for another five years.¹⁶ The truth of the matter, known to Jive at the time of its false statements, was that Jive was days away from its public announcement of its sale to LogMeIn, which would have revealed to Mr. Knight that all amounts under the Agency Agreement had become immediately due.¹⁷

As a corollary to the above, the Superior Court held that KnighTek's claim was legally insufficient because it lacked allegations that Mr. Knight had inquired with Jive as to whether a Change of Control was imminent.¹⁸ Utah law, however, does not impose as a condition precedent to an action for fraudulent misrepresentation that the victim must ask the fraudster whether they are speaking

¹⁴ A10 at ¶ 2, A17 at ¶ 40.

¹⁵ A11 at ¶ 3, A18 at ¶¶ 43-44.

¹⁶ A10 at ¶2, A 17 at ¶40.

¹⁷ A10 at ¶ 2, A14-17 at ¶¶ 21-24, 35-38.

¹⁸ Op. at 18-19.

the truth.

KnighTek maintains that Jive had a duty to disclose the impending sale to Mr. Knight even in the event such a disclosure would have likely violated a nondisclosure agreement with LogMeIn typically utilized during the due diligence phase of large corporate acquisitions. Even if a duty to disclose did not exist, Jive chose not to be silent on the issue, but instead reached out to Mr. Knight and made numerous statements intended to mislead him to believing that a sale was neither pending nor even remotely being contemplated.¹⁹

2. The Superior Court further erred in holding that KnighTek released its Change of Control rights in the Acceleration Agreement.²⁰ Utah law prohibits a defendant from benefitting from a release contained in an agreement procured by fraud, and therefore, such a release cannot be used by the fraudster as a bar to an action arising from the same fraudulent scheme that procured the release.

¹⁹ A10 at ¶ 2.

²⁰ *See Op.* at 21-22.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

Erik Knight (“Mr. Knight”) was the founder and sole owner of ComVoice, Inc. (“Comvoice”) and Wentcrz Holdings, LLC, which are communication equipment and services businesses.²¹ On March 18, 2014, Mr. Knight sold those businesses to Jive pursuant to an Asset Purchase Agreement²² and in return for the following consideration:

A. One Hundred Thousand Dollars (\$100,000), paid at closing;

B. The payment of the “Cap Amount” of \$4,616,063.10 (determined by a formula that applied the multiple of 2.7 times ComVoice’s 2013 revenues). The Cap Amount was to be paid over time, with monthly payments equal to Seventy Percent (70%) of the revenues Jive received from the customers it acquired to be paid to KnighTek, LLC, a limited liability company wholly owned and managed by Mr. Knight. A separate agreement governing the payment of the Cap Amount was signed at closing between Jive and KnighTek titled the “Jive Communications Inc. Authorized Agent Agreement” dated April 1, 2014 (the “Agency Agreement”).²³ Under the Agency Agreement,

²¹ A12.

²² A22.

²³ A45.

Jive was obligated to pay the unpaid balance of the Cap Amount within 30 days of a “Change of Control.”²⁴ The Agency Agreement defined a Change of Control as the sale of substantially all of Jive’s assets or a change of more than 50% of Jive’s ownership;²⁵ and,

C. Warrants to purchase 15,000 shares of Jive common stock if Jive attained certain revenue goals from the customers it acquired (the customer revenue goals were attained, and the Warrants were issued to EKnight Holdings, LLC, an Arizona limited liability company solely owned and managed by Mr. Knight).²⁶

In September 2017, nearly Three Million Dollars (\$3,000,000) of the Cap Amount remained unpaid, and Mr. Knight contacted Jive’s Chief Operating Officer, Mike Sharp, and Jive’s President of Finance, Samuel Simmons, to inquire whether Jive would be open to paying an accelerated lump-sum amount in return for a discount on the remaining Cap Amount.²⁷ Jive promptly and summarily rejected Mr. Knight’s proposal and he considered the negotiation closed.²⁸

On January 25, 2018, Mr. Knight was surprised to receive an email from Mr. Simmons in which Jive offered to accelerate the unpaid balance of the Cap Amount

²⁴ A12-13.

²⁵ A13.

²⁶ *Id.*

²⁷ *Id.*

²⁸ A14.

of \$2,748,442.89 for a lump-sum payment of \$964,928.00, a discount of \$1,783,514.89.²⁹ As part of a comprehensive scheme to defraud Mr. Knight, Mr. Simmons created a false sense of urgency by stating that Jive’s proposal was “based on availability of funds across multiple acquisitions and with a goal to complete by the end of January 2018.”³⁰ At the time Mr. Simmons communicated this representation, Jive had undoubtedly finished its negotiations to sell all of its assets (including the assets it had purchased from KnighTek) to LogMeIn for \$342,000,000.³¹

From January 25, 2018 through February 5, 2018, Mr. Simmons repeatedly misrepresented to Mr. Knight that Jive’s funds were limited and that if Mr. Knight did not act, Jive would allocate its limited funds to another party, and that consequently, Mr. Knight would have to wait an additional five years before he would receive the full payment of the monies due him.³² For example, in an email sent to Mr. Knight on January 25, 2018, Mr. Simmons stated that “[a]s a reminder, we are targeting by the end of January, and I’m juggling a number of other offers (some of which have already been accepted), so the sooner the better as availability of funds depends on who moves quickest and how beneficial the economics are.”³³

²⁹ *Id.*

³⁰ A14-A15.

³¹ *See* A16, A10 at ¶ 2

³² A14-15.

³³ *Id.*

After informing Mr. Knight that the Jive Board of Directors agreed to a buyout of KnighTek's Future Commissions for \$1,750,000, and knowing that a Change of Control was imminent, Mr. Simmons again falsely misrepresented a sense of urgency by stating "I was able to get your buyout approved conditional on speedy completion, or they want me to move forward with someone else at this time given our goal date of the 31st that we're a little behind on."³⁴

On February 5, 2018, Jive's General Counsel, Benjamin King, sent Mr. Knight a draft of Jive's agreement to accelerate the Cap Amount due in return for a \$998,442.89 discount (the "Draft Acceleration Agreement").³⁵ The Draft Acceleration Agreement also included a provision to obtain the surrender of Mr. Knight's Warrants for 15,000 shares of Jive common stock, even though the warrants were never mentioned in their negotiations.³⁶ After Mr. Knight sent an email to attorney King on February 5, 2018 requesting that the Draft Acceleration Agreement be revised to exclude the surrender of his Jive Warrants, Jive agreed to exclude the surrender of the Warrants and a final Acceleration Agreement was sent to Mr. Knight on February 6, 2018.³⁷ Believing Jive's misrepresentations as to the need to act fast, Mr. Knight signed the Acceleration Agreement on February 6, 2018

³⁴ A15.

³⁵ *Id.*

³⁶ *Id.*

³⁷ A15-A16.

and sent the agreement back to Jive that same day.³⁸ Jive wired a lump sum payment of \$1,750,000 to KnighTek on February 7, 2018.³⁹

On the morning of February 8, 2018, only one day after Jive wired the lump sum discounted payment to KnighTek, a joint press release was issued by Jive and LogMeIn announcing that they had entered into a definitive agreement for Jive's sale for \$342,000,000.⁴⁰ On April 3, 2018, LogMeIn announced that Jive's acquisition had been completed.⁴¹ The sale by Jive to LogMeIn constituted a "Change of Control" as defined under the Agency Agreement which would have obligated Jive to pay KnighTek an additional \$998,442.89 more than it paid KnighTek less than sixty days before.⁴²

II. SUPERIOR COURT'S JUDGMENT

The Superior Court heard oral argument on Jive's Motion on August 21, 2018.⁴³ On October 23, 2018, the Superior Court issued an opinion granting Jive's Motion.⁴⁴ The Superior Court held that KnighTek failed to state a claim for fraudulent misrepresentation due to a failure to meet the particularity requirement of

³⁸ A16.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ A10, A16.

⁴² A11 at ¶ 3, A16 at ¶ 35.

⁴³ *See* A151-217.

⁴⁴ *Op.* at 2.

Rule 9(b)⁴⁵ and that even if KnighTek satisfied Rule 9(b), KnighTek was still affirmatively prohibited from bringing its claims because it had contractually released any claims against Jive when it executed the Acceleration Agreement.⁴⁶

KnighTek filed a Motion for Clarification on October 31, 2018, seeking guidance on whether the Superior Court had dismissed KnighTek's Complaint with prejudice.⁴⁷ In a letter order dated November 5, 2018, the Superior Court held that its dismissal of KnighTek's complaint was with prejudice.⁴⁸ In dismissing KnighTek's Complaint with prejudice, the Superior Court foreclosed the opportunity for KnighTek to file an amended complaint to address any of the perceived deficiencies raised by the Superior Court. Presumably, the dismissal with prejudice was due to the Superior Court's finding that the release of claims included in the Acceleration Agreement barred KnighTek's claims in any event. This timely appeal followed.

⁴⁵ *Id.* at 15-16.

⁴⁶ *Id.* at 21-22.

⁴⁷ A151.

⁴⁸ Letter Order at 1.

ARGUMENT

I. KNIGHTEK PLED FRAUDULENT MISREPRESENTATION AND CONCEALMENT WITH PARTICULARITY.

A. QUESTION PRESENTED

Did the Superior Court err in holding that the allegations in the Complaint were insufficient to meet the Rule 9(b) pleading requirements for fraudulent misrepresentation and concealment?⁴⁹

B. SCOPE OF REVIEW

The decision to grant a motion to dismiss under Rule 12(b)(6) is reviewed *de novo* to “determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.”⁵⁰ “Dismissal is appropriate only if it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief.”⁵¹ When reviewing the Superior Court’s decision, the complaint is viewed “in the light most favorable to the non-moving party,” and all well-pled allegations and the reasonable inferences flowing from those allegations are accepted as true. *Clinton*, 977 A.2d at 895.

⁴⁹ This question was preserved below in Knightek, LLC’s Brief in Opposition to Defendant Jive Communications, Inc.’s Motion to Dismiss Plaintiff’s Complaint (A110-24.).

⁵⁰ *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

⁵¹ *Id.* (citing *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008)) (internal quotations omitted).

C. MERITS OF ARGUMENT

The Superior Court impermissibly drew inferences in favor of the moving party, Jive, rather than the non-moving party, KnighTek, when it held that KnighTek failed to plead fraudulent misrepresentation under Utah law.⁵² The Complaint sets forth specific allegations for each of the nine elements required to adequately plead fraudulent misrepresentation under Utah law, namely:

(1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.⁵³

Taking the allegations in the Complaint as true and drawing all reasonable inferences in the KnighTek's favor, the Complaint addresses each of the nine required elements of fraudulent misrepresentation and paints a clear picture of Jive's premeditated scheme to defraud KnighTek.

In addition, the Superior Court held KnighTek to a super-heightened pleading standard in holding that the Complaint failed to identify the speaker of every statement "by name."⁵⁴ The Complaint meets Delaware's pleading requirements

⁵² Ex. A at 16-17.

⁵³ *State v. Apotex Corp.*, 282 P.3d 66, 80 (Utah 2012).

⁵⁴ Ex. A. at 15-16.

under Rule 9(b) for cases involving fraud as the allegations state with particularity the time, place, and contents of the false representations, the identity of the person(s) making the misrepresentations, and what Jive intended to gain from its false statements.⁵⁵

1. KnighTek Adequately Pled Each of the Nine Elements of Fraudulent Misrepresentation as Required by Utah Law.

In regard to the first three elements, KnighTek alleged that Jive, through its Chief Financial Officer, Mr. Samuel Simmons, and through its Secretary and General Counsel, Mr. Benjamin King (collectively “Jive’s Officers”), made numerous false statements which were wholly antithetical to presently existing material facts. For example, in a series of emails initiated on January 25, 2018, Mr. Simmons falsely represented to KnighTek’s owner Erik Knight that Jive would take more than five years to fulfill its payment obligations under the Agency Agreement when in fact Jive was only days away from publicly announcing its definitive agreement to be acquired by LogMeIn for \$342,000,000.⁵⁶ Jive’s Officers knew at the time they made their misrepresentation that Jive’s sale to LogMeIn would trigger an acceleration of all amounts due KnighTek under the Agency Agreement and intended to cheat Mr. Knight of the amounts due him from the sale of his business

⁵⁵ *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 145 (Del. Ch. 2003).

⁵⁶ A14-15, A17.

to Jive.⁵⁷ The nine-figure purchase price LogMeIn agreed to pay to Jive was based in part on the value of the same business assets that Jive had acquired from Mr. Knight less than four years before.

Knowing that they had only a short window before the world and Mr. Knight would learn of the LogMeIn acquisition, Jive's Officers initiated their scheme on January 25, 2018 and, citing false pretenses, created a sense of urgency by stating that Jive was actively considering the discounted acceleration of debts due several other companies it acquired and warned Mr. Knight that due to limited funds, Jive was "juggling a number of other offers" and that the "availability of funds depends on who moves quickest..."⁵⁸ As explained by Mr. Simmons, unless Mr. Knight immediately accepted Jive's steeply discounted lump-sum offer, he would have to wait more than five years before he would receive full payment of the sums due him under the Agency Agreement.⁵⁹ Mr. Simmons, in furtherance of the deception stated: "[a]s a reminder, we are targeting by the end of January, and I'm juggling a number of other offers (some of which have already been accepted) . . ."⁶⁰ After Mr. Knight rejected Jive's first offer, Mr. Simmons continued the charade by stating to Mr. Knight that he "was able to get your buyout approved conditional on speedy

⁵⁷ A10 at ¶ 2.

⁵⁸ A14-15.

⁵⁹ A17.

⁶⁰ A14-15.

completion, or they want me to move forward with someone else”⁶¹

The reasonable inference that the Superior Court should have drawn from the pleadings is that Jive’s Officers knew that Jive had finalized the terms of its sale to LogMeIn when it initiated its ‘urgent’ negotiations with Mr. Knight on January 25, 2018. Throughout their negotiations with Mr. Knight, Jive’s Officers knew that if they truthfully disclosed that a Change of Control was imminent, Mr. Knight would rightfully demand full payment of the sums due him under the Agency Agreement.⁶² KnighTek therefore satisfied the element that Jive knew that its representations were false and made those representations for the sole purpose of inducing Mr. Knight to act to his detriment.⁶³

There can be little question that the above allegations and the reasonable inferences that can be drawn from them establish: (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representors knew to be false.⁶⁴

As to the fifth element, the allegations make clear that Jive’s misrepresentations were designed not only to induce KnighTek to act, but to act quickly. KnighTek averred that “Jive’s fraudulent conduct was intended to and did

⁶¹ A15.

⁶² See A16-17.

⁶³ *State v. Apotex Corp.*, 282 P.3d 66, 80 (Utah 2012).

⁶⁴ See *id.*

in fact induce Erik . . .” into entering the buyout agreement.⁶⁵ The Superior Court reasoned that the Complaint failed to adequately allege inducement since Mr. Knight continued to negotiate with Jive’s Officers after Jive’s original fabricated negotiation deadline had passed.⁶⁶ According to the Superior Court, KnighTek was required to allege that it asked for or needed additional time to negotiate the Acceleration Agreement in order to properly allege a “false urgency.”⁶⁷

The Superior Court erred by finding that inducement had not been shown based on its inference that Mr. Knight’s willingness to continue to negotiate beyond Jive’s original deadline was an indication that Jive’s deceptions were not central to Mr. Knight’s ultimate decision to accept a discount.⁶⁸ This finding is in error, however, as it is improper to infer that Mr. Knight is at fault simply because he entertained the repeated efforts by Jive’s Officers. Regarding the “false urgency,” Mr. Simmons doubled-down after the expiration of the original negotiation deadline by representing to Mr. Knight that the Jive Board had increased its offer and approved the discounted buyout conditional upon a speedy completion of the deal “given our goal date of the 31st that we’re a little behind on.”⁶⁹ KnighTek’s allegations demonstrate that after the original deadline had passed, Jive’s Officers

⁶⁵ A17 at ¶40.

⁶⁶ Op. at 17.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ A15.

falsely portrayed an even greater sense of urgency to induce Mr. Knight to forfeit nearly one million dollars due him under the Agency Agreement.

As to the sixth, seventh, eighth and ninth elements of a fraudulent misrepresentation claim, the Complaint makes clear that Mr. Knight acted reasonably and, in ignorance of the pending sale until the public announcement on February 8, 2019, relied and acted upon Jive's misrepresentations which induced him to execute the Acceleration Agreement, resulting in nearly a one million dollar haircut from the amount Jive agreed to pay when Mr. Knight sold his business in April, 2014.⁷⁰

2. Jive's False Statements Involved Presently Existing Material Facts.

The Superior Court held that the Complaint did not detail any misrepresentations of presently existing material facts, and therefore, KnightTek failed to adequately plead the second element of its fraudulent misrepresentation claim.⁷¹ The Superior Court erred by viewing Jive's Officers' emails to Mr. Knight as forward-looking predictions. Rather, they are clear misrepresentations of a very material and current fact—Jive had completed negotiations with LogMeIn and was about to announce a Change of Control event that would entitle KnightTek to the

⁷⁰ A17-18 at ¶¶ 39-44.

⁷¹ Op. at 16.

acceleration of all monies due it under the Agency Agreement.⁷²

The Superior Court's analysis of whether Mr. Simmons' statements were forward-looking predictions focused solely on the statement regarding KnighTek's historical payoff rate and not the totality of the false representations made in all of the emails from Jive's Officers referenced in the Complaint.⁷³ The cases relied on by the Superior Court dealt with estimations of value, "trader's talk," or statements of future events.⁷⁴ Mr. Simmons' emails to Mr. Knight, however, repeated Jive's representation that KnighTek would have to wait more than five years before it would receive full payment.⁷⁵ This representation was clearly false at the time it was made.⁷⁶ Mr. Simmons, as Jive's Vice President of Finance, was well aware that Jive and LogMeIn had completed its negotiations and were on the cusp of making a joint public announcement of the sale.⁷⁷

The urgency requiring a quick decision conveyed to Mr. Knight by Jive's Officers was not based on their false claim that Jive had limited funds and was considering several discounted buyouts. Rather it arose from Jive's Officers'

⁷² A16-17 at ¶¶35-38.

⁷³ Op. at 16-17 & n.59.

⁷⁴ *Id.*; *See Wright v. Westside Nursery*, 787 P.2d 508, 512-13 (Utah Ct. App. 1990); *Andalex Resources, Inc v. Myers*, 871 P.2d 1041, 1047 (Utah Ct. App. 1994); *Thornton v. Countrywide Mortg. Ventures, LLC*, 2011 WL 4964275, at *3, (D. Utah 2011).

⁷⁵ A 10 at ¶2, A17 at ¶ 40.

⁷⁶ *Id.*

⁷⁷ A14 at ¶17, A16-17 at ¶¶ 32, 35-38.

knowledge that they only had a few days to hoodwink Mr. Knight before the LogMeIn deal was made public. The proper inference to be drawn is that the LogMeIn transaction was a done deal when Mr. Simmons contacted Mr. Knight on January 25, 2018, and that the emails that followed from Jive’s Officers were sent in furtherance of Jive’s scheme to defraud Mr. Knight of nearly one million dollars that otherwise would have been due him under the Agency Agreement upon a Change of Control.

3. KnightTek Did Not Have a Duty to Independently Verify the Truthfulness of Jive’s False Statements.

The Superior Court also supported the dismissal of the Complaint by citing *SugarHouse Fin. Co. v. Anderson*, 610 P.2d 1369 (Utah 1980) for the proposition that KnightTek “was obligated to take reasonable steps to inform itself with respect to its preexisting contractual rights.”⁷⁸ The holding in *SugarHouse*, however, is distinguishable from the facts at bar as the representations in *SugarHouse* could have been determined to be untrue from the public records had the plaintiff engaged in rudimentary due diligence.⁷⁹ A duty to speak will not be found “where the underlying facts are reasonably within the knowledge of both parties.”⁸⁰ The plaintiff in *SugarHouse* was precluded from reasonably relying on the defendant’s

⁷⁸ Op. at 18.

⁷⁹ See *Sugarhouse*, 610 P.2d at 1373-74.

⁸⁰ *Id.* at 1373.

failure to inform where the information “was a matter of public record.”⁸¹

The Superior Court erred in requiring that KnighTek seek a representation from Jive regarding the immediacy of a Change of Control when information regarding a Change of Control was not publicly available.⁸² *SugarHouse* can be easily distinguished. First, the information on the pendency of Jive’s sale was unavailable to the public.⁸³ But second, and ironically, the fact that a public announcement was imminent was the impetus for Jive’s Officers’ urgings, based on false representations, that Mr. Knight must act quickly before he lost his opportunity for an accelerated, but deeply discounted, lump-sum payment. Here, LogMeIn’s acquisition of Jive was not a matter of public record until two days after Jive had induced Mr. Knight into a discount of nearly a million dollars under the Acceleration Agreement.⁸⁴ No amount of due diligence by Mr. Knight would have uncovered the imminent Change of Control. In any event, the Superior Court did not reference how Mr. Knight could have apprised himself of the truth that Jive had finalized its deal with LogMeIn, when it can be inferred that Jive and LogMeIn were subject to a strict non-disclosure agreement until the time of the public announcement.⁸⁵

It was reasonable for Mr. Knight to rely on Jive’s implicit representation that

81 *Id.*

82 Op. at 18.

83 A192-93.

84 A16.

85 Op. at 18-19.

it had not already negotiated a Change of Control transaction that would trigger the acceleration of all the monies due KnighTek under the Agency Agreement when Jive's Officers insisted that Mr. Knight had a very short window to make the binary choice of: (i) an immediate, but discounted, lump-sum payment; or, (ii) five more years of installment payments. In *Pace v. Parrish*, 247 P.2d 273, 276-77 (Utah 1952), Utah's Supreme Court made clear that a party cannot avoid liability for his fraudulent scheme simply because his victim failed to perform enough due diligence:

Defendants suggest that the plaintiffs had no right to rely on the representations made by defendant, but were bound to make more careful and complete inquiry concerning such matters. It is strange and inconsistent for defendants to urge the necessity for the plaintiffs to cross-examine Mr. Parrish and to doubt and verify his representations.

As to reliance in such situations, see 5 Williston on Contracts, Rev. Ed., Sec. 1512. The full measure of the plaintiffs' duty was to use reasonable care and observation in connection with these representations. Having done so, it does not lie in defendant's mouth to say that they were too gullible and shouldn't have believed him.

Contrary to the directive of *Pace*, the Superior Court placed an unwarranted burden on KnighTek, the victim of the fraud, to plead in the first instance that it sufficiently vetted the veracity of Jive's misrepresentations before it was victimized.⁸⁶

4. Jive Had a Duty to Act in Good Faith and Disclose Truthful Information.

The Superior Court's dismissal of the Complaint was based in part on

⁸⁶ Op. at 18-19.

misunderstanding as to whether KnighTek’s claim can be sustained without a finding that Jive had an affirmative duty to disclose its pending sale to LogMeIn.⁸⁷ It can. KnighTek contends that Jive had an affirmative duty as of January 25, 2018 at the latest to notify KnighTek that a Change of Control transaction was imminent. Even if Jive did not have an affirmative duty to disclose, Jive is not excused from liability for swindling KnighTek out of nearly one million dollars by falsely representing to Mr. Knight that no sale was even remotely being contemplated. When Jive’s officers chose to speak, they had a duty not to lie in furtherance of a fraud.

Jive’s actions are even more reprehensible in the context of its existing contractual relationship with KnighTek. Mr. Knight had sold his business to Jive in 2014 and they had an ongoing contractual relationship whereunder Jive promised to pay Mr. Knight the agreed upon purchase price as revenue was collected from the accounts Jive acquired—subject to full acceleration if Jive experienced a Change of Control.⁸⁸ Under Utah law, “[w]hen parties enter into contractual relations, each party impliedly owes the other contracting parties a duty to act in good faith.”⁸⁹ As explained in *Brown v. Moore*, “[u]nder the covenant of good faith and fair dealing, each party impliedly promises that it will not intentionally or purposely do anything

⁸⁷ See Op. at 19-21.

⁸⁸ A12-13 at ¶¶ 10-15.

⁸⁹ *CIG Exploration v. State*, 24 P.3d 966, 970 (Utah 2001).

[that] will destroy or injure the other party's right to receive the fruits of the contract."⁹⁰ Jive violated its duty to KnighTek and purposely misled Mr. Knight into believing that if he did not act fast and immediately accept a discount of one million dollars, he would be waiting more than five years before he would receive full payment from Jive.⁹¹

In holding that Jive did not have a duty disclose or to otherwise be forthright with KnighTek regarding the imminent Change of Control and the true state of the availability of funds for buyout acquisitions, the Superior Court improperly constrained Utah's totality of the circumstances analysis for determining whether a duty to disclose exists.⁹² The Superior Court limited its focus to whether KnighTek's warrants to purchase Jive stock gave rise to a fiduciary relationship or whether Jive's duty to act in good faith with respect to the Agency Agreement also gave rise to a special relationship. As discussed below, Utah law required the Superior Court to look at the totality of the circumstances, including the disparity of information between the parties.⁹³ KnighTek never argued that Jive's duty to act in good faith with respect to the Agency Agreement created a special relationship *per se*.⁹⁴ Rather,

⁹⁰ 973 P.2d 950, 954 (Utah 1998) (quoting *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199 (Utah 1991)).

⁹¹ A18-19 at ¶¶ 49-51.

⁹² Op. at 19-21.

⁹³ See *infra* notes 94-96 below and accompanying text.

⁹⁴ See A194-197.

Jive's duty to act in good faith is one piece of evidence in the totality of circumstances creating a duty of honesty and disclosure.⁹⁵ Other factors that the Superior Court ignored include Jive's superior knowledge, privity of contract, and exclusivity of knowledge.⁹⁶

In Utah, while the duty to speak analysis has evolved from the analysis outlined in the seminal case *Elder v. Clawson*, 384 P.2d 802 (Utah 1963), key tenets from that case remain. “[W]hether a duty exists is determinable by reference to all the circumstances of the case and by comparing the facts not disclosed with the object and end in view by the contracting parties.”⁹⁷ “If those circumstances include a relation of trust or confidence, or inequality of condition, a duty may exist.”⁹⁸

In *Yazd v. Woodside Homes Corp.*, 143 P.3d 283 (Utah 2006), the totality of the circumstances duty analysis delineated in *Elder* was reiterated:

Age, knowledge, influence, bargaining power, sophistication, and cognitive ability are but the more prominent among a multitude of life circumstances that a court may consider in analyzing whether a legal duty is owed by one party to another. Where a disparity in one or more of these circumstances distorts the balance between the parties in a relationship to the degree that one party is exposed to unreasonable risk, the law may intervene by creating a duty on the advantaged party to conduct itself in a manner that does not reward exploitation of its advantage.⁹⁹

⁹⁵ A196-197.

⁹⁶ Op. at 20-21.

⁹⁷ *Elder*, 384 P.2d at 804.

⁹⁸ *DeBry v. Valley Mortg. Co.*, 835 P.2d 1000, 1007 (Utah 1992) (citing *Elder*, 384 P.2d at 804).

⁹⁹ *Yazd*, 143 P.3d at 286.

The disparity in knowledge between Jive and KnighTek distorted the balance between the parties to such a degree that KnighTek was exposed to an unreasonable risk. While Mr. Knight did not learn of LogMeIn’s transaction until it was publicly announced on February 8, 2018, Jive’s Officers knew that the deal had been completed when it solicited Mr. Knight for a deep discount, and there was no inkling that Jive was seeking buyers.¹⁰⁰ Mr. Knight had no reason to suspect that Jive would abuse its exclusive knowledge that a Change of Control was imminent to cheat him out of the funds Jive had previously agreed to pay. Jive was under a legal duty to speak truthfully.¹⁰¹

The Superior Court improperly limited the imposition of a duty to be forthright or disclose to only situations in which there is a *per se* fiduciary or special relationship.¹⁰² Both *Yazd* and *Elder* employ a totality of the circumstances analysis that allows for the expansion of a duty to speak beyond only those situations in which there is a *per se* fiduciary or special relationship.¹⁰³ Under *Yazd*, Jive had a clear duty to be honest with KnighTek regarding the pending Change of Control and the state of the availability of funds creating the “false urgency” during negotiations of the Acceleration Agreement. Several factors weigh heavily in favor of imposing a

¹⁰⁰ A10, A16.

¹⁰¹ *See Yazd*, 143 P.3d at 286; *Elder v. Clawson*, 384 P.2d at 804-05.

¹⁰² *See Op.* at 19-21.

¹⁰³ *See Yazd*, 143 P.3d at 286; *Elder v. Clawson*, 384 P.2d at 804-05.

duty to be honest on Jive, including the heightened relationship between Jive and KnighTek stemming from KnighTek’s warrants and Jive’s duty to act in good faith and not deprive KnighTek of the benefits of the Agency Agreement.¹⁰⁴

Jive’s duty to act in good faith necessarily meant that Jive had a duty to not interfere with KnighTek’s acceleration rights upon a Change of Control. While the aforesaid factors alone required Jive to be honest regarding the Change of Control, when factoring in the disparity of information to which only Jive was privy, Jive undoubtedly had a duty to be forthright with KnighTek.

5. The Allegations of the Complaint Meet Delaware’s Rule 9(b) Particularity Requirements.

In holding that KnighTek failed to state a claim for fraudulent misrepresentation, the Superior Court rejected the reasonable inferences flowing from KnighTek’s well-pled allegations, analyzed KnighTek’s allegations in isolation rather than as a whole, and failed to view the Complaint in the light most favorable to KnighTek. Delaware law requires the opposite.¹⁰⁵ The Superior Court improperly held that KnighTek’s fraudulent misrepresentation allegations lacked the specificity necessary to satisfy Rule 9(b).¹⁰⁶

In fraud cases “the circumstances that must be stated with particularity are the

¹⁰⁴ A18-19.

¹⁰⁵ *See supra* Section I(B).

¹⁰⁶ *Op.* at 15-16.

time, place, and contents of the false representation, the identity of the person(s) making the representation, and what he intended to obtain thereby.”¹⁰⁷ A plaintiff need only plead knowledge of falsity generally.¹⁰⁸ “[M]alice, intent, knowledge and other condition of mind of a person necessary to plead fraud may be averred generally.”¹⁰⁹ Regarding the time the false representations were made, the Complaint includes the dates on which Mr. Simmons sent the emails containing his false representations.¹¹⁰ The Complaint specified that the representations occurred via email, thus addressing the particularity requirement for place.¹¹¹ For the content of the misrepresentations, the Complaint contains Mr. Simmons’ direct quotes pertaining to the allegedly limited amount of funds available for Jive’s acquisitions (despite the reasonable inference that Mr. Simmons must have been known that Jive had completed its negotiations with LogMeIn over its \$342,000,000 sale).¹¹²

KnighTek’s Complaint identified Mr. Simmons, Jive’s Vice President of Finance, and Mr. King, Jive’s General Counsel, as the persons making the misrepresentations.¹¹³ The Superior Court, however, stated that “In paragraph 35, the allegation includes ‘individuals who negotiated the [Letter] Agreement but fails

¹⁰⁷ *H-M Wexford LLC*, 832 A.2d at 145.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ A14-15.

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ A14-15 at ¶¶21-25, A16-17 at ¶¶ 35-38.

to identify any of those individuals by name.”¹¹⁴ The Superior Court failed to connect the fact that the allegations regarding Mr. Simmons’ statements were incorporated into Count 1,¹¹⁵ Mr. Simmons was identified as an officer of Jive,¹¹⁶ and that the allegations regarding Mr. Simmons’ statements were directly related to negotiation of the Acceleration Agreement.¹¹⁷ While the Superior Court concedes that the Complaint identified Mr. Simmons as a person who made misrepresentations,¹¹⁸ it did not accept the necessary corollary that any allegation that included wrongdoing alleged against Jive or Jive’s Officers necessarily included Mr. Simmons.

Moreover, Delaware courts have held that a plaintiff who identifies an entity as the source of the fraudulent statement adequately pleads fraud with particularity under Rule 9(b).¹¹⁹ With the Superior Court’s finding that the Complaint identified Mr. Simmons as an officer of Jive, any allegation regarding Jive or its officers satisfies the particularity requirement of Rule 9(b).

¹¹⁴ Op. at 16 (internal quotations omitted).

¹¹⁵ A16.

¹¹⁶ A13-14.

¹¹⁷ A14-15.

¹¹⁸ Op. at 16.

¹¹⁹ See, e.g., *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *12 & n.97 (Del. Ch. Dec. 22, 2010) (denying motion to dismiss under Del. Ch. Ct. R. 9(b) when the individual whom plaintiff identified as the perpetrator of the false representations was the defendant corporation). A copy of the court’s opinion and the complaint in *Narrowstep* is attached hereto as Exhibit C.

For the remaining particularity requirement that a complaint must allege what a representor intended to obtain through the false representations, KnighTek's Complaint is replete with factual allegations and inferences that Mr. Simmons and Jive intended to fraudulently obtain a substantially discounted buyout in lieu of full payment upon a Change of Control.¹²⁰ The reasonable inference to be drawn from the allegations regarding the false urgency that Mr. Simmons created mere days before Jive announced the \$342,000,000 acquisition by LogMeIn was that his clear intent was to exert as much pressure on Mr. Knight as possible to force him to quickly agree to a discount of nearly one million dollars.¹²¹ In addition to the reasonable inferences regarding Mr. Simmons' intent to induce Mr. Knight into agreeing to the discount, the plain language of the Complaint alleged that "Jive's fraudulent conduct was intended to and did in fact induce Mr. Knight into the false belief that, if he did not immediately accept a steep discount, he would have to wait at least another five years before he received full payment on the sale of his business."¹²²

KnighTek more than satisfied the Rule 9(b) specificity requirements for fraudulent misrepresentation.

¹²⁰ A 10 at ¶ 2, A1-15 ¶¶ 21-24.

¹²¹ See A14-15.

¹²² A17.

II. A RELEASE PROCURED BY JIVE UNDER FRAUDULENT PRETENSES CANNOT SHIELD JIVE FROM LIABILITY ARISING FROM ITS FRAUDULENT CONDUCT.

A. QUESTION PRESENTED

Did the Superior Court err by holding that the release contained in the Acceleration Agreement barred KnighTek's claim that the Acceleration Agreement was procured by fraudulent misrepresentation?¹²³

B. SCOPE OF REVIEW

The Superior Court's ruling regarding KnighTek's alleged release of its Change of Control rights is reviewed *de novo*.¹²⁴

C. MERITS OF ARGUMENT

The Superior Court erred by holding that KnighTek's claims were barred as a result of Mr. Knight's execution of the Acceleration Agreement, which included a provision that released all of KnighTek's known and unknown claims.¹²⁵

In reaching its decision, the Superior Court disregarded well-settled Utah law holding that a release or waiver obtained as part of a comprehensive scheme to defraud is voidable. Releases, similar to contracts, may be enforced or rescinded on

¹²³ This question was preserved below in Knightek, LLC's Brief in Opposition to Defendant Jive Communications, Inc.'s Motion to Dismiss Plaintiff's Complaint (A125-26).

¹²⁴ See *Clinton*, 977 A.2d at 895; See *supra* Section I(B).

¹²⁵ See Op. at 22.

the same grounds.¹²⁶ “[A] contract clause limiting liability will not be applied in a fraud action. The law does not permit a covenant of immunity which will protect a person against his own fraud on the ground of public policy.”¹²⁷ “[A] release will be voidable if it was an integral part of a scheme to defraud.”¹²⁸

KnighTek alleged that Jive fraudulently induced Mr. Knight into signing the Acceleration Agreement.¹²⁹ The release was an integral part of the Acceleration Agreement, which is the key document and culmination of Jive’s fraudulent plot.¹³⁰ As the Complaint has adequately pled a cause of action for fraudulent misrepresentation, Jive is precluded from utilizing a release as a shield against liability for the fraudulent conduct that procured it.¹³¹

¹²⁶ *Horgan v. Industrial Design Corp.*, 657 P.2d 751, 753 (Utah 1982).

¹²⁷ *Lamb v. Bangart*, 525 P.2d 602, 608 (Utah 1974).

¹²⁸ *Ong Intern. (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 453 (Utah 1993).
¹²⁹ A17.

¹³⁰ *Id.*, A60-61.

¹³¹ *See Ong Intern.*, 850 P.2d at 453.

CONCLUSION

For the reasons set forth above, KnighTek respectfully requests that this Court reverse the judgment of the Superior Court in its entirety; or, in the alternative, direct that the dismissal of KnighTek's Complaint be without prejudice, with leave granted to file an amended complaint.

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