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Case Number 219,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BITGO HOLDINGS, INC.,	)	
	)	
Plaintiff Below, Appellant,	)	
	)	
v.	)	No. 219, 2023
	)	
GALAXY DIGITAL HOLDINGS LTD., GALAXY DIGITAL HOLDINGS LP, and GALAXY DIGITAL INC.,	)	Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0808-JTL
	)	
Defendants Below, Appellees.	)	

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Galaxy's answering brief makes no meaningful attempt to defend the Court of Chancery's erroneous reasoning that a "signal" from the Amended Agreement's "Applicable Law" provision bolsters Galaxy's interpretation of "Company 2021 Audited Financial Statements," that BitGo was required to specifically allege that its auditor would remove the restriction on use when it consented to use, or that Galaxy had a "clean" right to terminate regardless of its breach. Instead, Galaxy presents a series of arguments that contradict the plain language of the Amended Agreement and the well-pleaded allegations in the Complaint.

First, Galaxy's contention that the April 2022 financial statements needed to apply SAB 121 contradicts the plain terms of the Amended Agreement. The Amended Agreement required the Company 2021 Audited Financial Statements to be "in a form that complies with the requirements of Regulation S-X" and "interpretations promulgated thereunder." A100 §1.01; A129 §1.02. Galaxy attempts to rewrite that definition to require compliance with newly announced non-binding accounting guidance published by SEC staff. But SAB 121's guidance does not interpret and was not "promulgated under" Regulation S-X. A separate contractual provision and timetable governed BitGo's implementation of non-binding guidance from the SEC, including SAB 121.

Retreating from the text of the Amended Agreement, Galaxy argues that the April 2022 financial statements needed to apply SAB 121 because Regulation S-X governs the format of financial statements filed in a registration statement with the SEC. AB at 19. But nothing in Regulation S-X supports that view, and the Amended Agreement expressly refutes it. The Amended Agreement has a different, much broader provision concerning compliance with "Applicable Law"—covering all laws and even non-binding applications of law—that does not apply here.

Even if SAB 121 *were* promulgated under Regulation S-X, it *still* would not have required BitGo to apply its guidance to the April 2022 audited financial statements because SAB 121, by its own terms, only required "retrospective application," an accounting term of art meaning that BitGo's financial statements would need to be retrospectively adjusted *in the future*. OB at 31-32. Galaxy insists that SAB 121 required immediate application as of April 29, 2022, but Galaxy ignores the authorities cited in BitGo's Opening Brief and cites none of its own.

Second, Galaxy's argument that the July 2022 financial statements did not meet the definition of "Company 2021 Audited Financial Statements" because they included a "Restriction on Use" legend likewise contradicts the plain terms of the Amended Agreement. The Amended Agreement provides that BitGo's auditor may provide "consents . . . to use such financial statements and reports" "as soon as practicable" "prior to any filing of an amended S-4 Registration Statement." A218

§9.07(c). Galaxy attempts to rewrite the Amended Agreement to require that the auditor consents be delivered without any "Restriction on Use" legend by July 31, 2022, long before the next filing. Galaxy's argument that the auditor could not *restrict* use even though it did not at that time have to *consent* to use defies the Amended Agreement and basic logic.

Third, Galaxy asks this Court to disregard BitGo's well-pleaded allegations that Galaxy's failure to seek pre-clearance from the SEC was commercially unreasonable and materially contributed to the uncertainty that prompted Crowe to include the "Restriction on Use" legend. But there is no basis to accept Galaxy's unsupported version of events at the pleading stage.

Seemingly recognizing the textual problems inherent in its interpretation, Galaxy falls back on the supposed "purpose" of the April and July 2022 delivery deadlines. According to Galaxy, those deadlines required BitGo to deliver financial statements that were ready for "as-is" inclusion in the final S-4 filing—immune from any further regulatory guidance or commentary from the SEC staff. But the Amended Agreement makes clear that those were internal, *interim* deadlines and that those financial statements would be included in *future* draft S-4 amendments that would be subject to further review and comment by SEC staff and subject to potential financial reporting changes (as they had before). A217-18 §9.07(a)–(c). As of July 2022, the parties were still months away from completing this process.

The auditor's consent to use the financial statements in the final S-4 filing was not immediately required. A218 §9.07(c).

In short, the text, structure and purpose of the Amended Agreement did not allow Galaxy to abandon the merger without consequence based on any future need to provide auditors' consents or to respond to future SEC accounting guidance. That is especially true because Galaxy's professed obstacle to the merger stemmed from its own refusal to seek preclearance from the SEC in breach of its duty to use commercially reasonable efforts.

The Court of Chancery's judgment should be reversed and the case remanded for further proceedings.

ARGUMENT

I. BITGO'S APRIL 29, 2022 AUDITED FINANCIAL STATEMENTS MET THE DEFINITION OF "COMPANY 2021 AUDITED FINANCIAL STATEMENTS"

A. The Definition Of "Company 2021 Audited Financial Statements" Did Not Require The Application Of SAB 121

Galaxy concedes that BitGo's April 2022 financial statements satisfied the definition of "Company 2021 Audited Financial Statements" unless SAB 121 is a "requirement[] of Regulation S-X" or an "interpretation[] promulgated thereunder." If Regulation S-X "require[d]" compliance with SAB 121, then there would be some language in Regulation S-X saying so. There is none.

If SAB 121 were an interpretation promulgated under Regulation S-X, then there would be some language in SAB 121 citing the source of its supposed promulgation, or SAB 121 would at least interpret some language in Regulation S-X. Again, there is none. That is why Galaxy tries to distort the test by arguing that SEC staff had "authority to *issue* interpretive guidance *relating to* Regulation S-X." AB 24 (emphasis added). But the standard is not issuance of guidance relating to Regulation S-X. It is "interpretations *promulgated []under*" Regulation S-X. A129 §1.02 (emphasis added).

The *only* language Galaxy cites from Regulation S-X is generic language that requires the filing of audited financial statements for entities being acquired. AB 18-19 (citing Rule 3-01 and 3-05 of Regulation S-X). Galaxy does not argue that

BitGo violated these rules. Nor does Galaxy argue that SAB 121 was promulgated under these rules, or that the SEC uses SAB 121 to interpret them.

Galaxy argues that SAB 121 "necessarily appl[ies] to" Regulation S-X because "Regulation S-X governs the form, content, and requirements of financial statements filed with registration statements." AB 22 (citing 17 C.F.R. Part 210). This is a non sequitur: Regulation S-X has provisions governing financial statements, but that does not mean all provisions governing financial statements (let alone all informal guidance about financial statements) are part of Regulation S-X. As BitGo explained and Galaxy ignores, when the SEC staff issues Staff Accounting Bulletins interpreting Regulation S-X, they do so expressly. OB 27-28.[1]

Nothing in SAB 121 interprets Regulation S-X, and Regulation S-X lacks any language requiring compliance with SAB 121 or authorizing the promulgation of SAB 121. Regulation S-X's plain language belies any suggestion that SAB 121 is an "interpretation[] promulgated thereunder." Regulation S-X expressly refers to

[1] Galaxy falls back on two accountants who opine that "SAB 121 appl[ies] to financial statements furnished under Rule 3-05 and Rule 3-09 of Regulation S-X." AB 22-23 n.4. But, under the Amended Agreement, SAB 121 must not merely "apply to" financial statements furnished under Regulation S-X; it must be an interpretation promulgated under Regulation S-X. Regardless, the accountants acknowledge that "SAB 121 *is silent* on whether SAB 121 should be applied to financial statements that are furnished under . . . Regulation S-X." Sean C. Prince & Nicholas G. Topoll, *SAB 121 frequently asked questions*, Crowe (June 24, 2022), https://www.crowe.com/insights/sab-121-frequently-asked-questions (emphasis added).

Financial Reporting Releases, *not* Staff Accounting Bulletins. OB 28 (citing 17 C.F.R. §210.1-01). This is not an accident, as Staff Accounting Bulletins are listed in the very next subpart of the C.F.R. after Financial Reporting Releases, but do not appear in Regulation S-X. *See* 17 C.F.R. Part 211.

Galaxy responds that SEC staff have issued Staff Accounting Bulletins for "nearly a half-century," AB 24, but Regulation S-X has never been amended to reference them. Moreover, Part 211 of the C.F.R., which includes Staff Accounting Bulletins, includes the Securities Act as "Authority" for their enactment, but does not include Regulation S-X. *See* 17 C.F.R. Part 211.

As an unofficial statement by the SEC staff, SAB 121 was not "promulgated" at all, let alone under Regulation S-X. *See* OB 28-30. BitGo cited numerous cases holding that a Staff Accounting Bulletin is not a "rule promulgated by the SEC," is not an "interpretation[] of the SEC," and does not have "the force of law." OB 28-29. Galaxy ignores them.

SAB 121 itself states that it provides only "interpretive guidance for entities to consider," and those considerations "*are not rules or interpretations of the Commission*." A746-47; A804-05 (emphasis added). Galaxy suggests that courts "accept" Staff Accounting Bulletins, *see* AB 23, but the case Galaxy cites holds that a Staff Accounting Bulletin "does not carry with it the force of law," and simply

should be used for guidance to the extent it is "persuasive." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000).

Galaxy's argument that an agency "promulgates" unofficial, non-binding bulletins published by its staff fails under the plain meaning of "promulgate" and the way it applies in this context. Galaxy cites Black's Law Dictionary for the proposition that "promulgate" means "[t]o declare or announce publicly; to proclaim" (AB 25 n.5 (citing Black's Law Dictionary (11th ed. 2019)), but the very same dictionary specifies that, in the administrative law context, "promulgate" means "(Of an administrative agency) to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal." Black's Law Dictionary (9th ed. 2009).

Courts have held the same, *see* OB 29-30, and Galaxy has not cited any cases to the contrary.[2] The administrative law definition aligns with how the SEC uses the term "promulgate" in its own regulations. *See* 17 C.F.R. §202.1(b).[3] There is no

[2] Galaxy suggests that the cases BitGo cited interpret "promulgate" broadly, AB 25 n.5, but they expressly hold that only "binding" agency action constitutes "promulgation." *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 862-63 (8th Cir. 2013); *Cement Kiln Recycling Coal. V. E.P.A.*, 493 F.3d 207, 226-28 (D.C. Cir. 2007); *see also, e.g.*, *Mahn v. Att'y Gen. of U.S.*, 767 F.3d 170, 173 (3d Cir. 2014) ("Unpublished, single-member BIA decisions are not 'promulgated' under the BIA's authority to 'make rules carrying the force of law.'").

[3] Galaxy cites one SEC release using the word "promulgate," *see* AB 24-25, but that release refers only to "written interpretations promulgated by the Division of Corporation Finance in the Manual of Publicly Available Telephone

reason to believe that the parties intended "promulgate" to mean something different than courts and the SEC mean when they use the word promulgate in the context of agency action. Regardless, even if SAB 121 were "promulgated," it certainly was not promulgated under Regulation S-X because, as discussed above, there is nothing in Regulation S-X authorizing the promulgation of Staff Accounting Bulletins in general or SAB 121 in particular.

If there were any doubt on these issues, the Amended Agreement resolves them by demonstrating that when the parties wanted to use the more expansive definition Galaxy advances here, they did so by using the defined term "Applicable Law." When the parties wanted compliance with *all* financial statement rules, they said so expressly by covering all "any transnational, domestic or foreign federal, state, provincial or local law," *not* just Regulation S-X. A96 §1.01 (defining "Applicable Law"). When the parties wanted to cover interpretations that are not just "promulgated," but "binding upon *or applicable*" to the parties and "promulgated *or applied*," they also said so in the definition of "Applicable Law." But everyone agrees that the definition of "Company 2021 Audited Financial Statements" does *not* require the application of "Applicable Law." OB 26.

Interpretations," and expressly distinguishes "Commission guidance" and "Commission interpretive guidance." *See* SEC Release Nos. 33-8957; 34-58597, at 47 n.146 (Sept. 19, 2008), *available at* https://www.sec.gov/files/rules/final/2008/33-8957.pdf.

The Court of Chancery looked to the Amended Agreement's sweeping definition of "Applicable Law" as a "signal," reasoning that Galaxy largely abandons. *See* AB 21-22. But the definition of "Applicable Law" simply underscores that the parties easily could have defined Company 2021 Audited Financial Statements more broadly to require compliance with unofficial, non-binding statements from SEC staff, but chose not to do so.

Lastly, Galaxy asserts that the "very purpose" of the contract required financial statements in April that would be greenlit for inclusion in the final registration statement. AB 25. That makes no sense. *See infra* Part II. Galaxy's position would allow Galaxy to abandon the merger without consequence based on *any* supposed inconsistency with a position of *any* SEC staff member on *any* accounting issue. The parties agreed in Sections 9.07(a)–(c) to cooperate in an iterative fashion to provide additional information requested by the SEC. That is why the parties required the Company 2021 Audited Financial Statements only to be in a form that complies with the requirements of Regulation S-X and interpretations promulgated thereunder, *not* with all Applicable Law.

B. SAB 121, By Its Own Terms, Did Not Require Compliance By April 30, 2022

The Court of Chancery independently erred because SAB 121 itself did not require BitGo to apply SAB 121 to the financial statements BitGo delivered on April 29, 2022. OB 31-35. That requirement would have been unreasonable because the

SEC staff had only issued SAB 121 on March 31, 2022, months after the financial statement date, only a few weeks before the completion of BitGo's audit.

SAB 121 explained that compliance was not expected until the registrant's "next submission or filing of the next amendment of the registration statement, with retrospective application, at a minimum, as of the most recent annual period ending before June 15, 2022 . . . ." A808 (cleaned up). Galaxy concedes that, as of April 30, 2022, its "next submission" was not anticipated for several months, *see* AB 28-29—and, in fact, Galaxy filed its amended S-4 on February 9, 2023. Nevertheless, Galaxy asserts that SAB 121's reference to "retrospective application" meant that the April 2022 financial statements had to apply SAB 121. AB 27-30. That is wrong for several reasons.

First, "Retrospective Application" as used in SAB 121 is a term of art in the accounting profession that refers to "[t]he application of a different accounting principle to one or more *previously issued* financial statements."[4] Because SAB 121 was issued *after* the end of the fiscal year, BitGo's financial statements for the fiscal year needed to include only a disclosure designed "to (1) notify the reader . . . that a standard has been issued which the registrant will be required to adopt *in the future* and (2) assist the reader in assessing the significance of the impact that the standard

[4] A850, ASC Topic 250-20 (definition of "Retrospective Application") (emphasis added); *see, e.g.*, A851, FASB, Statement No. 154.

will have on the financial statements of the registrant *when adopted*." SEC Staff Accounting Bulletin Codification, Topic 11.M (emphasis added). Thus, BitGo's financial statements were appropriately "prepared on the basis of accounting principles that were acceptable *at the financial statement date*," *i.e.*, December 31, 2021, with an appropriate disclosure that they would be "retrospectively adjusted *in the future* as a result of the change." *Id.* (emphasis added). Galaxy has no response.

Galaxy cites *Golden Rule Financial Corporation v. Shareholder Representative Services LLC*, 2021 WL 305741 (Del. Ch. Jan. 29, 2021), *aff'd*, 267 A.3d 382 (Del. 2021), for the proposition that this issue was correctly decided on the pleadings, *see* AB 28, but that case recognizes that "accounting principles . . . do not always lend themselves to black-and-white conclusions about correct application," 2021 WL 305741, at *6. *Golden Rule* decided an accounting question because "[t]he Buyer concede[d] that its chosen approach is inconsistent with ASC 606." *Id.* Here, BitGo's auditor determined that the April financial statements included appropriate disclosures about SAB 121. A688.

Second, Galaxy's assertion that BitGo admitted it needed to apply SAB 121 and had adopted SAB 121 as an accounting policy effective as of January 1, 2021, *see* AB 28, is misleading at best. Nowhere in the April financial statements did BitGo or its auditor state that SAB 121 needed to be adopted at that time. Rather, the notes described what "SAB 121 *will* likely require" and stated that the guidance

would be adopted in the future "with *retrospective* application" to 2021. A688 (emphasis added). BitGo's auditor confirmed that BitGo was *not* required to apply SAB 121 in April by issuing an unqualified audit opinion for the April financial statements. A674. Galaxy's counsel conceded the point at argument below. Tr. 79:12-13 ("BitGo had to comply in its *next filing with the SEC*") (emphasis added).

Third, Galaxy's argument conflicts with the Amended Agreement, which, like FASB, distinguishes between *retrospective application* and *restatement*. Under Section 13.01(b), the parties agreed that BitGo would not meet the April 30, 2022 deadline "in the event either (i) the Company [*i.e.*, BitGo] does not deliver [the Company 2021 Financial Statements by April 30] . . . or (ii) the Company's independent auditors withdraw . . . any audit opinion . . . or the Company otherwise determines that it is required to restate any financial statements . . . in order for such financial statements to comply with GAAP . . . ." A241-42 §13.01(b). Thus, BitGo would fail to meet the April 30, 2022 deadline if the financial statements required a *restatement*, but not if those financial statements required *retrospective* application of new accounting guidance. The same distinction appears in the July 31, 2022 deadline memorialized in Section 13.01(h). A242 §13.01(h).

Galaxy concedes that this interpretation "is correct" but claims it misses the mark because "it addresses scenarios that arise *after* April 30, 2022 (or July 31, 2022, in the case of Section 13.01(h)) and *after* BitGo has already delivered *contractually*

compliant financial statements." AB 30. However, Section 13.01(b) and (h) contain no such limitation. They refer to lower-case "financial statements" and address scenarios where the financial statements necessarily are *not* compliant. If the financial statements need to be restated "in order for such financial statements to comply with GAAP" (A242 §13.01(b)), it follows that the financial statements were not "prepared in accordance with GAAP[,]" as required by the definition of Company 2021 Audited Financial Statements (A100 §1.01). *See* A851, FASB, Statement No. 154 (defining a "restatement" to mean "the revising of previously issued financial statements to reflect the correction of an error"). Thus, a need for future retrospective application of a new accounting standard does not invalidate BitGo's delivery of financial statements for that reporting period.

II. BITGO'S JULY 31, 2022 AUDITED FINANCIAL STATEMENTS MET THE DEFINITION OF "COMPANY 2021 AUDITED FINANCIAL STATEMENTS"

Galaxy also errs in arguing that BitGo's July 2022 financial statements did not meet the definition of Company 2021 Audited Financial Statements because Crowe's audit report included a "Restriction on Use" legend. *See* AB 32-40.

Galaxy's argument conflicts with the deadlines in the Amended Agreement. BitGo's auditor was entitled to restrict the use of its audit opinion until the due date for its consent. That deadline was *not* July 31, 2022, but *sometime in the future*, as "consents from the independent registered accounting firm to use such financial statements and reports" were to be furnished by BitGo to Galaxy as "promptly as practicable" "prior to any filing of an amended S-4 Registration Statement or S-1 Registration Statement that Parent has determined will include such Company 2021 Audited Financial Statements." A218 §9.07(c). Galaxy concedes that, as of July 2022, the parties were still months away from filing an amended S-4. Galaxy also concedes that Section 9.07(c) did not require BitGo to obtain its auditor's consent to use the financial statements in July 2022, and that BitGo's auditor could provide such consent at a later time.

Galaxy's entire argument thus boils down to the idea that even though the auditor did not have to provide *consent* for use in July 2022, it could not *restrict* use in July 2022. This argument is nonsensical. A restriction on use is, by definition, a

lack of consent to use. There is no difference between the two, and certainly no difference embodied in the text or structure of the Amended Agreement. Galaxy is simply mistaken in asserting that the "auditor's consent" is separate from the "auditor's report." AB 36. The provision of Section 9.07(c) that sets the deadline for the "auditor's consent" expressly governs the use of auditor's "report[s]." A218 §9.07(c).

Galaxy's argument about the purpose of these provisions fares no better. As Galaxy recognizes: "The auditor's *report* includes the auditor's opinion as to whether the financial statements present fairly, in all material respects, the company's financial condition, results of operations, and cash flows in accordance with GAAP.'" AB 36 (citations omitted). That is precisely what BitGo's auditor did. The auditor's *report* confirmed that BitGo's financial statements had been prepared in accordance with GAAP, as required by the Amended Agreement. The parties agreed that the auditor's *consent* would be due later, following the auditor's review of Galaxy's draft registration statement.

Galaxy also errs in arguing that Company 2021 Audited Financial Statements had to be greenlit, ready for filing in a final S-4 as of July 2022. AB 39-40. As Galaxy recognizes, under SEC rules, the financial statements could not be filed without consent from the auditor. AB 37. Thus, contrary to Galaxy's assertion that the Company 2021 Audited Financial Statements had to be ready for filing as-is

upon delivery on July 31, 2022, the Amended Agreement unequivocally stated that consent to use—which is undisputedly necessary for filing—was not due until later.

More generally, the process outlined in Section 9.07 of the Amended Agreement refutes the idea that the Company 2021 Audited Financial Statements would be filed in a final S-4 "as is." Section 9.07(a) provides that a registration statement containing BitGo's financial statements might not be ready for filing until (i) after "one or more confidential submissions," (ii) further submissions of "any amendment or supplement thereto," and (iii) "any responses to comments from the SEC to any of such materials." A217. Section 9.07(b) provides that BitGo must provide information customarily included in registration statements, and that Galaxy must advise BitGo of any "written comments or other written correspondence from the SEC in respect of the S-4 Registration Statement." A217-18. And Section 9.07(c) states that BitGo "shall as promptly as practicable," provide "for inclusion . . . in the S-4 Registration Statement," the Company 2021 Audited Financial Statements and (before the filing) auditor consent. A218. In sum, Section 9.07 confirms that, following the April and July interim deadlines, the Company 2021 Audited Financial Statements would remain subject to further review and comment by the SEC staff, there would be successive iterations of amended S-4 filings, and the parties would adjust and respond accordingly up until the finalization of the of the S-4.

Indeed, the parties followed this very process for the Company 2020 Audited Financial Statements, which the Amended Agreement defines identically to Company 2021 Audited Financial Statements. Galaxy acknowledges that, although BitGo timely delivered compliant Company 2020 Audited Financial Statements in September 2021, Galaxy was *unable to file them for months* because the parties had to "respond[] to multiple rounds of SEC comments and revisions." AB 9. Even after Galaxy filed the registration statement on January 28, 2022, "[t]he SEC responded with additional comments, making clear that the transaction could not close by . . . March 31, 2022" and necessitating the parties' "enter[ing] into the Amended Agreement." *Id.* Galaxy's assertion that BitGo's April and July 2022 financial statements "had to be in a form that could actually be filed with—and accepted by—the SEC," AB 18, defies not only the plain terms of the Amended Agreement but also the parties' course of dealing.

Nothing in the definition of "Company 2021 Audited Financial Statements" required BitGo to deliver financial statements that were approved for inclusion in a final S-4 and immune from further regulatory review or comment. OB 39. The definition required the financial statements to be "in a form that complies with the requirements of Regulation S-X for an offering of equity securities." And nothing in Regulation S-X prohibits a restriction on use pending the auditor's future consent. OB 37. Galaxy's only citation for this supposed rule is a 2003 letter from the SEC's

then-Acting Chief Accountant and then-Director of Corporate Finance. That letter was not an interpretation promulgated under Regulation S-X, and Galaxy cites nothing in the letter or Regulation S-X to the contrary.[5] Instead, Galaxy argues that "a balance sheet or audit report that ignores SEC rules plainly cannot be filed with the SEC to satisfy the Regulation S-X requirement." AB 34. But a letter is not an "SEC rule[]," Galaxy cites no "Regulation S-X requirement" at issue, and this entire argument mistakenly assumes that the financial statements must be file-ready.

Lastly, Galaxy does not even attempt to defend the Court of Chancery's basis for decision here, *i.e.*, that BitGo was required to specifically allege the auditor would later remove the use restriction. *See* OB 37-38. This was error because "[i]t is enough that the pleading 'allege complete performance generally.'" *In re Cadira Grp. Hldgs., LLC Litig.*, 2021 WL 2912479, at *14 (Del. Ch. July 12, 2021)

[5] BitGo's Opening Brief provided several examples of audit reports filed with the SEC on an interim basis with a use restriction, which Galaxy fails to distinguish. Galaxy notes that the financial statements submitted by First Trinity Financial Corporation "were removed from the registration statement before" the final filing, AB 35 n.9, but that was not because of a supposedly improper restriction on use. Rather, the issuer later provided the auditor's consent (just as the Amended Agreement requires here), and the financial statements were removed for other reasons not relevant here. *See* https://www.sec.gov/Archives/edgar/data/1395585/000143774919023954/filename1.htm. Galaxy asserts that the financial statements submitted by Amazon "were not required in the SEC filing," AB 35 n.9, but they were filed in any event. *See* https://www.sec.gov/Archives/edgar/data/1018724/000119312509199231/d424b3.htm.

(footnote omitted). The Complaint alleged that performance. *See* A70 ¶116, A74 ¶127. The Court of Chancery misallocated the pleading burden when it stated that "[t]here's nothing in the record" suggesting BitGo's auditor would provide its consent. Tr. 37:13–14, 86:10. It also overlooked that BitGo advised Galaxy that "BitGo will provide relevant auditors' consents as promptly as practicable after the SEC clarifies its views on accounting for digital asset lending." A732-34. It was at least reasonably conceivable that BitGo's auditor would have timely provided its consent and lifted the use restriction.

III. THE COURT OF CHANCERY ERRED IN DISMISSING BITGO'S CLAIMS BASED ON GALAXY'S BREACH OF THE AMENDED AGREEMENT

Galaxy concedes that if its own breach materially contributed to BitGo's supposed non-delivery of Company 2021 Audited Financial Statements, then that supposed lack of compliance is excused under the prevention doctrine. *See* OB 43-46. The allegations of the Complaint, and the documents incorporated therein, generate more than a reasonable inference that the "Restriction on Use" legend resulted from Galaxy's failure to seek pre-clearance from the SEC on how to account for digital asset lending. A31 ¶19; A62 ¶93; A70 ¶117. The Complaint alleges that BitGo "urged Galaxy to immediately request that the SEC provide 'pre-clearance' for the combined company's accounting treatment for digital asset lending," which "was the only commercially reasonable approach and was, indeed, the necessary course of action, given the End Date," "to clear the way for the Merger." A61 ¶90. Galaxy, which had the exclusive "right to control and direct all interactions" with the SEC (A209 §9.01(b)), refused to do so. A60-62 ¶¶89-93. "Galaxy's refusal to seek pre-clearance for the combined company's accounting treatment of digital assets on loan prevented . . . BitGo, from . . . seeking consents from [its] auditors" and "effectively put the Amended S-4 filing on hold." A62 ¶93.

Galaxy's assertion that the Court of Chancery "considered" and "rejected" the prevention doctrine and found Galaxy's alleged breach not material, *see* AB 45-46,

comes with no citation, because the Court never mentioned the prevention doctrine or materiality. Instead, the Court that held Galaxy had a "clean" termination right regardless of its alleged breach. That holding is erroneous under the prevention doctrine. OB 43-44.

Rather than defend the Court of Chancery's holding, Galaxy offers only bare assertions aimed at disputing well-pleaded allegations and minimizing the significance of Galaxy's breaches. Each of those arguments fails.

First, Galaxy asserts that it "pursued a path to obtain guidance from the SEC regarding the accounting treatment for digital asset lending transactions, as was its contractual right." AB 44. Galaxy cites nothing for this assertion, and it directly contradicts the Complaint's allegations that Galaxy did *not* actively pursue guidance from the SEC, and opted in bad faith to wait passively, hoping the issue would not be resolved in time to consummate the merger. Galaxy offered no basis for the Court of Chancery to conclude as a matter of law that its inaction was consistent with its duty to use commercially reasonable efforts.

Second, Galaxy asserts that it "had no obligation to pursue" pre-clearance from the SEC, which Galaxy contends was merely the route "BitGo and its auditors may have preferred." AB 42. But Galaxy was obligated to use "commercially reasonable efforts" and take "necessary or desirable" actions to move things along, "to have the S-4 Registration Statement declared effective . . . as promptly as

practicable," and to "consider in good faith all comments of [BitGo] and its counsel in connection" with "the S-4 Registration Statement." A208 §9.01(a); A217 §9.07(a). And if seeking pre-clearance "'was both commercially reasonable and advisable to enhance the likelihood of consummation of the [transaction], the onus was on [Galaxy] to *take that act*.'" *Williams Cos. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 272 (Del. 2017) (footnote omitted).

The Complaint alleges that seeking pre-clearance was "the only commercially reasonable approach and was, indeed, the necessary course of action." A61 ¶90. Galaxy ignores this allegation, presents no record basis to show it was not commercially reasonable to seek pre-clearance, and provides no argument for resolving the factual dispute over commercial reasonableness on the pleadings.

Third, Galaxy asserts (again, without support) that "[n]o action by Galaxy prevented BitGo's auditors from exercising their professional judgment" in the absence of clarity from the SEC. AB 42–43. However, "[a] breach 'contributed materially' to the non-occurrence of a condition if the conduct made satisfaction of the condition 'less likely.'" *In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556, at *90 (Del. Ch. Aug. 31, 2020) (citation omitted), *aff'd sub nom. Cigna Corp. v. Anthem, Inc.*, 251 A.3d 1015 (Del. 2021). BitGo's auditors *did* exercise their professional judgment and concluded that *Galaxy* needed to resolve the digital asset lending issue before BitGo's auditors could lift the "Restriction on Use" legend.

BitGo criticized Galaxy's continued refusal to resolve the digital asset lending issue directly with the SEC, observing that "[t]he AICPA efforts to date ha[d] been cumbersome and slow-moving" and had yielded no guidance from the SEC. A734. That is why the Complaint alleges that Galaxy's refusal to seek pre-clearance from the SEC "hamstrung Galaxy's auditors and effectively put the Amended S-4 filing on hold" and prevented BitGo from seeking its auditors' consent to include its audited financial statements in the amended S-4. A62 ¶93.

Finally, Galaxy questions whether seeking pre-clearance "would have resulted in any guidance from the SEC by July 31, 2022." AB 43. This argument fails as a matter of law because "'[t]o establish that a party's breach contributed materially to the non-occurrence of a condition, it is not necessary to show that the condition would have occurred but for the [breach].'" *Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc.*, 2021 WL 1714202, at *52 (Del. Ch. Apr. 30, 2021) (quoting *Anthem-Cigna*, 2020 WL 5106556, at *90). Regardless, the complaint alleges that the SEC encourages companies—and BitGo actively encouraged Galaxy—to seek pre-clearance, which is more expeditious than waiting for an industry consensus to emerge. A61 ¶91. The SEC's website confirms that pre-clearance typically takes three weeks. *See* "Consulting with OCA: What to Expect" (last modified Apr. 6, 2023) https://www.sec.gov/page/oca-consulting-oca-what-expect.

The Complaint thus generates a reasonable inference that Galaxy's refusal to seek pre-clearance prevented BitGo's auditors from removing the "Restriction on Use" legend and therefore *did* "materially contribute to the failure of the transaction." *Williams Cos.*, 159 A.3d at 273. Galaxy cannot be permitted to profit from its own misconduct in stymying the work of BitGo's auditor. *See Murphy Marine Servs. of Del., Inc. v. GT USA Wilmington, LLC*, 2022 WL 4296495, at *13 (Del. Ch. Sept. 19, 2022).

CONCLUSION

The Court of Chancery's judgment should be reversed and the case remanded for further proceedings.

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