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Case Number 247,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

S. CHRISTOPHER NEY,	:	
	:	
Plaintiff-Below/Appellant	:	C.A. No. 247, 2025
	:	
v.	:	Appeal from the Superior Court
	:	of the State of Delaware
3i GROUP PLC and 3i CORPORATION, (CCLD)	:	C.A. No: N24C-08-357-PAW
	:	(Winston, J.)
Defendants-Below/ Appellee	:	

(CORRECTED)
APPELLANT S. CHRISTOPHER NEY'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Appellant S. Christopher Ney ("Appellant" or "Ney") brought claims for breach of contract, and alternative claims for promissory estoppel and unjust enrichment/quantum meruit, against Appellees 3i Group plc ("3i Group") and 3i Corporation ("3i Corp") (collectively, "Appellees" or "3i") to recover $20 million for the breach of an agreement between Ney and 3i. Ney was the founder, chairman, and CEO of Magnitude Software Inc. ("Magnitude"), a company he formed in 2014 for the purpose of acquiring struggling software companies and setting them on the right path. In 2018, Magnitude was engaged in discussions with private equity funds and investment companies for a potential sale of Magnitude. One such company was 3i Group.

3i, through CEO Simon Borrows ("Borrows") and agent Andrew Olinick ("Olinick"), duped Ney into selling Magnitude to 3i by agreeing to pay him a $20 million "kicker," as part of the Post-Closing Agreement (defined below). In relying on 3i's promises, Ney performed his part under this agreement, but 3i failed to live up to its end of the bargain. Instead, 3i used Ney, terminated him without cause, and sold Magnitude for far more than 3i paid for it – a sale that would not have been possible without Ney's efforts. Notwithstanding its refusal to pay, 3i has never denied that a promise to pay Ney $20 million was made.

Ney originally sued for, *inter alia*, 3i's breach of the Post-Closing Agreement in Texas, where Magnitude was headquartered and where Ney lives. Ney never brought any of his claims under any formal, written agreements between Magnitude and 3i, only the Post-Closing Agreement, because the obligations and promises made as part of the Post-Closing Agreement were separate and apart from those of the Transaction Agreements.[1] However, the Fifth Circuit found that the forum selection clause in the Transaction Agreements required Ney to sue in Delaware, rather than in Texas. *Ney v. 3i Group PLC*, 2021 WL 8082324, at *2 (W.D. Tex. Apr. 30, 2021), *aff'd*, 2023 WL 6121774 (5th Cir. Sept. 19, 2023) (granting motion to dismiss on *forum non conveniens* grounds). Neither the Texas court nor the Fifth Circuit ever reached the substance of Ney's claims.

Thereafter, Ney sued in Delaware, and 3i moved to dismiss, arguing that (1) Ney's claims are time barred; (2) the Post-Closing Agreement is precluded by the Transaction Agreements; (3) Ney failed to plead breach of contract; and (4) Ney's alternative counts fail as a matter of law. On May 21, 2025, the Superior Court granted 3i's motion, finding that (1) Ney's claims were barred by the statute of limitations; (2) certain of the Transaction Agreements preclude Ney's Post-Closing

[1] 3i attached seven agreements to their Motion to Dismiss and referred to those agreements collectively as the "Transaction Agreements." A0083-A0368. Ney utilizes this definition for convenience, only, and expressly denies that the Post-Closing Agreement is related to the Transaction Agreements.

Agreement claims; and (3) because the Transaction Agreements govern the promises made in the Post-Closing Agreement, Ney's quasi-contract claims fail (the "Opinion" or "Op."). A copy of the Opinion is attached here to as Exhibit A. These pre-discovery findings were, respectfully, made in error.

Ney's claims were not time-barred and should have survived because the Delaware Savings Statute applies to his claims. Relying on non-binding precedent, the decision below found that the Savings Statute was inapplicable to Ney's claims. For the reasons explained more fully herein, this conclusion was reached in error.

Furthermore, the decision below found that certain of the Transaction Agreements barred the Post-Closing Agreement. This decision was reached in error for two reasons: (1) these documents were improperly considered on the motion to dismiss, and doing so led to a premature decision that significantly prejudiced Ney's ability to investigate and ultimately demonstrate his claims, and (2) Ney was not collaterally estopped from arguing the Transaction Agreements did not apply to his claims because the substance of Ney's claims were never litigated in the Texas action.

The Superior Court's conclusion that the Transaction Agreements applied and barred Ney's claims was reached in reliance ***only*** upon certain of the Transaction Agreements, and without reviewing the precise terms of the Post-Closing Agreement. As Ney alleged in his Complaint, the precise terms of the Post-Closing

Agreement could only be revealed through discovery, as Ney no longer has access to the various emails, documents, and text messages that reflect the precise terms of the Post-Closing Agreement. Accordingly, the finding that certain of the Transaction Agreements bar the terms of the Post-Closing Agreement was premature.

Finally, because the Superior Court should not have considered the Transaction Agreements on the motion to dismiss, Ney's quasi-contract claims should have survived the motion.

SUMMARY OF ARGUMENT

1. Plaintiff's claims are timely under Delaware's Savings Statute, 10 *Del. C.* § 8118, because Ney's Texas suit was dismissed for improper venue, and Ney was not required to initiate a separate, placeholder lawsuit in Delaware to preserve his ability to sue here. Ney was similarly not required to abandon his appeal in Texas before reaching a full resolution on those claims to preserve his ability to sue in Delaware.

2. The Transaction Agreements do not apply to Ney's claims. First, Ney is not estopped from arguing that the Transaction Agreements do not apply because the Fifth Circuit never decided that the Transaction Agreements, and the integration clause contained in certain of those documents, bar Ney's claims substantively. Second, without a discovery record, the Superior Court could not fully analyze whether the precise terms of the Post-Closing Agreement fall within the contours of the integration clause contained within certain of the Transaction Agreements, and therefore, those Transaction Agreements were improperly considered on the motion to dismiss because they were not incorporated by reference into the Complaint.

3. Because the Transaction Agreements do not bar Ney's claims under the Post-Closing Agreement, his quasi-contractual claims were improperly, and prematurely, dismissed.

STATEMENT OF FACTS

A. The Facts Underlying the Delaware Litigation

Ney was the founder, chairman, and CEO of Magnitude, a company formed for the purpose of acquiring struggling software companies and setting them on the right path. A0015. In 2018, Magnitude was engaged in discussions with 3i for a potential sale of Magnitude. A0015. Throughout the negotiation process, Plaintiff was in contact primarily with Olinick (who held himself out as Partner of 3i) and Borrows, the CEO of 3i. A0016.

During the negotiations, 3i, through Borrows and Olinick, (1) pressed Ney to put 3i at the "front of the line" during the sales process; (2) insisted Ney provide exclusivity to 3i and release other bidders; and (3) insisted that Ney agree to pay $750,000 to $1 million in final due diligence costs if Magnitude selected another bidder prior to the sale. A0016. Despite submitting a written offer for $360 million, 3i reduced its offer to $340 million at the eleventh hour, causing Magnitude to walk away from the deal. A0016. Desperate to close the deal, Borrows and Olinick came up with a plan: they promised Ney a personal $20 million "kicker" post-closing in exchange for Ney staying on as Magnitude's CEO to overhaul the company, in addition to the above (the "Post-Closing Agreement"). A0016.

Specifically, under the Post-Closing Agreement, Borrows and Olinick agreed that in exchange for Ney staying on as CEO of Magnitude to steer the new equity

group through the post-acquisition period, 3i would pay Ney $20 million post-close. A0022. Ney placed his trust in Borrows and Olinick. A0022. Ney had a direct, one-on-one, in person conversation with Olinick during the first board meeting post-closing, wherein Olinick confirmed that Borrows' and Olinick's promise to pay Ney $20 million was in place as long as he performed his side of the Post-Closing Agreement. A0022-23.

Ney performed his part of the Post-Closing Agreement by overhauling the company's c-suite and middle management, with a completely new go-to-market plan. A0023. He revamped the company's products and marketing strategy and recruited a high-quality executive team. A0023. He delivered as promised in all respects. A0023.

On or about July 7, 2020, Ney was terminated as CEO of Magnitude. A0023. He was terminated after he had completed all aspects of his end of the Post-Closing Agreement – right when 3i would anticipate Ney's demand for the $20 million 3i promised him. A0023-24. At no point prior to Ney's termination – including during the meeting in which Ney was terminated – did 3i ever dispute or disclaim the Post-Closing Agreement, specifically 3i's obligation to pay Ney the $20 million he was owed. A0024. 3i used Ney and failed to deliver on the promise to pay him $20 million, thus breaching the Post-Closing Agreement and 3i's equitable obligations to Ney. A0024.

B. Procedural History

1. The Texas Action

Ney originally sued for, *inter alia*, 3i's breach of the Post-Closing Agreement in Texas, where he lives and where Magnitude was headquartered. Ney never brought any of his claims under any formal, written agreements between Magnitude and 3i, only the Post-Closing Agreement. However, the Fifth Circuit nonetheless found that the forum selection clause in the Transaction Agreements dictated that Ney sue in Delaware, rather than in Texas. *Ney v. 3i Group PLC*, 2021 WL 8082324, at *2 (W.D. Tex. Apr. 30, 2021), *aff'd*, 2023 WL 6121774 (5th Cir. Sept. 19, 2023) (granting motion to dismiss on *forum non conveniens* grounds). More specifically, Ney filed suit in Texas under the same set of facts here: that 3i promised to personally pay Ney $20 million for a revamp of the company post-close, among other things.

3i sought dismissal of the Texas action for (1) failure to state a claim; (2) improper venue; and (3) lack of personal jurisdiction over 3i Group. Thereafter, the United States Magistrate Court granted 3i leave to file a supplemental motion to raise the forum selection clause issue in a *forum non conveniens* context rather than under Rule 12(b)(3), enabling the court to review the Transaction Agreements, which would have been precluded on a Rule 12(b)(3) motion. The magistrate court issued a report and recommendation that Ney's complaint be dismissed without

prejudice for *forum non conveniens*. *Ney v. 3i Group PLC*, 2021 WL 8082411, at *14 (W.D. Tex. Apr. 13, 2021). The magistrate further recommended that 3i's motion to dismiss be "dismissed as moot" if the case is dismissed under *forum non conveniens*. *Id.* The district court adopted the magistrate's report, and the Fifth Circuit affirmed dismissal of Ney's action in Texas for "*forum non conveniens* pursuant to a valid forum-selection clause." *Ney v. 3i Group PLC*, 2023 WL 6121774, at *1 (5th Cir. Sept. 19, 2023). The Texas courts never made any findings as to the viability of Ney's claims, nor did they conclude that his claims were substantively barred by the Transaction Agreements in any way.

Ney then sued in Delaware under the facts set forth above, and 3i moved to dismiss.

2. The Superior Court's Opinion on 3i's Motion to Dismiss

On May 21, 2025, the Superior Court issued the Opinion, granting 3i's motion to dismiss. The Superior Court focused its analysis on the following issues.

i. Statute of Limitations

The Superior Court found that Ney's claims were untimely and that the Delaware Savings Statute did not apply to his claims. Op. at 12. The Superior Court found that "Ney was on notice that his claims against [3i] were subject to the forum selection clauses within the Stock Purchase Agreement and the Rollover Agreement as early as April 30, 2021," and that Ney could have "hedged his bet by filing in

Delaware immediately after the District Court dismissed his suit," rather than appealing the District Court's decision. Op. at 16. The Superior Court held that the Delaware Savings Statute did not apply to Ney's claims because he should have immediately sued in Delaware, rather than exercising his right to appeal the District Court's decision. Op. at 16-17.

ii. The Transaction Agreements

First, the Superior Court found that it could consider the Transaction Agreements on a motion to dismiss because of certain "references" to certain of the documents, and that, because of these references, Ney's claims "rely" on certain of those documents. Op. at 18. Specifically, the Superior Court found that it could consider (1) the Stock Purchase Agreement (A0085-173); (2) the Incentive Grant Agreements (A0186-225); and (3) the Rollover Agreement (A0227-246), without converting the motion to dismiss into a motion for summary judgment. Op. at 18, 22. The Superior Court noted that it did not need to consider the remaining Transaction Agreements. Op. at 22 n.96.

Second, the Superior Court found that collateral estoppel prevents Ney from arguing that the Stock Purchase Agreement and the Rollover Agreement do not apply, because the "District Court determined that the Stock Purchase Agreement and the Rollover Agreement applied to [the] Post-Closing Agreement," stating that the District Court "expressly held that Ney's Texas complaint 'sufficiently

implicate[d] the underlying written agreements' and that 'Ney's claims unequivocally f[e]ll within the scope of the Rollover Agreement.'" Op. at 23-24; Op. at 24 n.101. The Superior Court followed this ruling, and held that because the Stock Purchase Agreement, the Incentive Grant Agreements, and the Rollover Agreement have integration clauses that state that the respective contracts "contain the complete agreement by, between and among the parties and supersede any prior understandings, agreements or representations by, between or among the parties, written or oral, which may have related to the subject matter hereof in any way," Ney's claims had to be dismissed. Op. at 24-25.

iii. Ney's Quasi-Contract Claims

The Superior Court dismissed Ney's quasi-contract claims because "[u]njust enrichment and promissory estoppel do not apply 'where a fully integrated enforceable contract governs the promise at issue.'" Op. at 25.

ARGUMENT

I. NEY'S CLAIMS ARE TIMELY

A. Question Presented

Whether Delaware's Savings Statute applies to Ney's claims rendering them timely when the action in Texas was dismissed on *forum non conveniens* grounds, and whether Ney was required to abandon his appeal in Texas, or, alternatively, initiate a placeholder action in Delaware in order to preserve his ability to sue in Delaware. Preserved at A0511.

B. Scope of Review

The "interpretation of a statute of limitations is a question of law, which we review *de novo*." *Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009).

C. Merits of Argument

Ney's claims are timely under Delaware's Savings Statute, 10 *Del. C.* § 8118. The Savings Statute provides that

> If any action duly commenced within the time limited therefor in this chapter…if the writ is abated, or the action otherwise avoided or defeated…for any matter of form…a new action may be commenced, for the same cause of action, **at any time within one year** after the abatement or other determination of the original action, or after the reversal of the judgment therein.

10 *Del. C.* § 8118(a) (emphasis added). "Delaware's Savings Statute provides exceptions to the applicable statute of limitations in certain instances where the plaintiff has filed a timely lawsuit, but is procedurally barred from obtaining a

resolution on the merits." *Reid v. Spazio*, 970, A.2d 176, 180 (Del. 2009) (citing *Vari v. Food Fair Stores, New Castle, Inc.*, 205 A.2d 529, 530 (Del. 1964); *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964)). "The Savings Statute reflects a public policy preference for deciding cases on their merits." *Reid*, 970 A.2d at 180 (citations omitted).

"Under this statute, an action is 'abated…avoided or defeated' for a 'matter of form' when the action is 'dismissed by reason of technical flaw, lack of jurisdiction, or improper venue, as the statute requires.'" *Laguelle v. Bell Helicopter Textron, Inc.*, 2014 WL 2699880, at *7 (Del. Super. June 11, 2014) (cleaned up). Therefore, "[u]nder Delaware's Savings Statute, a plaintiff may commence a new action within one year of dismissal of a prior action that was avoided or defeated on matters of form." *Wind Point Partners VII-A, L.P. v. Insight Equity A.P. X Co., LLC*, 2020 WL 5054791, at *11 (Del. Super. Aug. 17, 2020); *Rogers v. iTy Labs Corp.*, 2022 WL 985536, at *6 (Del. Ch. Mar. 31, 2022) ("Section 8118(a) is designed to allow a plaintiff one year to file a second cause of action following a final judgment adverse to his position if such judgment was not upon the merits of the cause of action.").

The Fifth Circuit affirmed the dismissal of Ney's Texas action on September 19, 2023. *Ney*, 2023 WL 6121774, at *1. The dismissal was on *forum non conveniens grounds*, and, because of that dismissal, Ney was "procedurally barred

from obtaining a resolution on the merits." *See Reid*, 970 A.2d at 180. Ney timely filed the instant action within one year after that dismissal, on August 28, 2024.

Despite meeting the above criteria, the Superior Court found that Ney's claims were not timely, and that the Savings Statute did not apply. Op. at 12-17. In reaching its conclusion, the Superior Court focused in part on Ney's "fault," that is, that the Savings Statute only applies where a plaintiff, "*through no fault of his own* finds his cause technically barred by the lapse of time." Op. at 13 (emphasis in original). The Superior Court went on to state that "Delaware courts, however, recognize that where a litigant disregards or strategically tried to avoid an applicable forum selection clause, the Savings Statute does not apply." Op at. 13-14. The Superior Court relied on *Huffington v. T.C. Grp., LLC*, 2012 WL 1415930 (Del. Super. Apr. 18, 2012) in reaching its conclusion. *Huffington* is inapposite and is not binding authority.

In *Huffington*, on a motion to dismiss converted to a motion for summary judgment, the court found that the plaintiff had "decided to pay no heed to the forum selection clause he agreed to in the Subscription Agreement." *Huffington*, 2012 WL 1415930, at *10. But the plaintiff in *Huffington* alleged that the defendants made negligent misrepresentations and convinced him to sign a Subscription Agreement, and he sued them for causes of action arising ***from that agreement***. *Id.* at *2 (emphasis added). Here, Ney expressly did *not* sue 3i under any of the Transaction

Agreements. Rather, he brought claims against them for an agreement that was separate from the sale of Magnitude (A0016-17), and therefore, Ney contended that any forum selection clause contained in the Transaction Agreements never applied to his claims. Ney did not "disregard[] or strategically tr[y] to avoid an ***applicable*** forum selection clause" (*see* Op. at 14) when he sued in Texas because he has always maintained that the Transaction Agreements, including the forum selection clause contained therein, were ***not applicable*** to his claims under the Post-Closing Agreement.

Further, the Superior Court held that it was "inappropriate to apply the Delaware Savings Statute to save [Ney] from the consequences of his strategic decisions" because Ney chose to appeal the dismissal of the Texas action, rather than pursue litigation in Delaware. Op. at 16-17. The Superior Court also stated that "Ney could have hedged his bet by filing in Delaware immediately after the District Court dismissed his suit." Op. at 16.

Not only was Ney not required to "hedge[] his bet" by filing a placeholder action in Delaware, but it is also not this Court's policy to encourage placeholder lawsuits. *See Reid*, 970 A.2d at 181-82 ("allowing a plaintiff to bring his case to a full resolution in one forum before starting the clock on his time to file in this State will discourage placeholder suits, thereby furthering judicial economy."). What is more, "the statute's grace period is tolled during the pendency of appeals." *Id.* The

Superior Court's finding that Ney gave up his right to sue in Delaware because he sought a "full resolution" of his claims in Texas is contrary to Delaware law.

Ney should not be punished for suing in a jurisdiction he believed was appropriate, and he should not be punished for not filing a placeholder action in Delaware, an approach that is disfavored by this Court. Ney timely filed suit in Delaware after his claims in Texas were fully resolved by the Fifth Circuit.

II. THE TRANSACTION AGREEMENTS DO NOT BAR NEY'S CLAIMS AS A MATTER OF LAW

A. Question Presented

Whether the Transaction Agreements—specifically the Stock Purchase Agreement, Incentive Grant Agreement, and Rollover Agreement—bar Ney's claims. Preserved at A0513-22.

B. Scope of Review

The Supreme Court reviews "questions of law and interpret[s] contracts *de novo*." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (citing *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 2010 WL 779992, *2 (Del. Mar. 8, 2010)).

C. Merits of Argument

1. Ney is Not Collaterally Estopped From Arguing the Transaction Agreements Do Not Apply

Ney is not collaterally estopped from bringing his claims in Delaware because the only issue that was actually adjudicated in the previous action is whether Texas was the proper forum for his suit. In the Fifth Circuit,[2] collateral estoppel applies if the following factors are present: "(1) the identical issue was previously adjudicated;

[2] Under Delaware law, federal law under the Fifth Circuit applies for collateral estoppel purposes because that is the jurisdiction in which Ney's initial suit was dismissed. *Pyott v. La. Mun. Police Emps.' Ret. Sys.*, 74 A.3d 612, 614, 616-17 (Del. 2013).

(2) the issue was actually litigated; ***and*** (3) the previous determination was necessary to the decision." *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (emphasis added). Issues of fact are not "identical" or "the same," and therefore not preclusive, if the legal standards governing their resolution are "significantly different." *Id.*

The Superior Court held that Ney was collaterally estopped from arguing the Transaction Agreements did not apply to his claims because "[t]he District Court determined that the Stock Purchase Agreement and the Rollover Agreement applied to Plaintiff's Post-Closing Agreement." Op. at 23-24 (citing *Ney v. 3i Group, P.L.C.*, 2021 WL 8082411 at *8, n.13, *11). But the District Court only held, and could only hold on a *forum non conveniens* motion, that the forum selection clauses in the Rollover Agreement and Stock Purchase Agreement applied for the purposes of the motion. A substantive determination of whether these agreements barred Ney's claims was never made.

It follows naturally, then, that the first prong of the test articulated in *Pace*—that "the identical issue was previously ***adjudicated***"—is not satisfied here because the Texas District Court and Fifth Circuit's analysis was limited to whether the suit should be brought in Delaware. The only thing the magistrate court, District Court, and Fifth Circuit concluded was that the action should be dismissed for *forum non conveniens*. *Ney v. 3i Group, P.L.C.*, 2023 WL 6121774, at *5 (5th Cir. Sept. 19,

2023); *see also* A0417 ("because the forum selection clause should apply to Mr. Ney, the case should just go away before we even get to the personal jurisdiction"); A0418 ("[T]he focus is really the defendant's argument that the forum selection clause carries the day."). Defendants' substantive motion to dismiss for failure to state a claim was ***denied as moot***. *Ney v. 3i Group PLC*, 2021 WL 8082411, at *14 (W.D. Tex. Apr. 13, 2021).

The legal standard used on a motion to dismiss on *forum non conveniens* grounds in the Western District of Texas is necessarily different from a decision on a Rule 12(b)(6) motion in Delaware. *See Noble Capital Fund Management, LLC v. US Capital Global Investment Management LLC*, 2023 WL 4118570, at *5 (W.D. Tex. June 22, 2023) (internal citations omitted) (The Fifth Circuit has ruled that "relitigation of an issue is not precluded ***unless the facts and the legal standard used to assess them are the same in both proceedings.***") (emphasis added). Among other things, documents outside the pleadings, including the Transaction Agreements, may be considered on a motion to dismiss on *forum non conveniens* grounds but not on a 12(b)(6) motion. Because the factors for collateral estoppel have not been satisfied, Ney was not estopped from arguing that the Transaction Agreements do not apply to his claims.

2. The Transaction Agreements are Outside of the Pleadings and Should Not Have Been Considered on the Motion to Dismiss

"Generally, matters outside the pleadings should not be considered in a ruling on a motion to dismiss." *Totta v. CCSB Financial Corp.*, 2021 WL 4892218, at *2 (Del. Ch. Oct. 20, 2021) (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 68 (Del. 1995)). "When [a] trial court considers matters outside of the complaint, a motion to dismiss is usually converted into a motion for summary judgment and the parties are permitted to expand the record." *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006). "The Complaint generally defines the universe of facts that the trial court may consider in ruling on a Rule 12(b)(6) motion to dismiss." *US Dominion, Inc. v. Newsmax Media, Inc.*, 2022 WL 2208580, at *28 (Del. Super. June 16, 2022) (citation omitted).

In *Johnson v. Student Funding Group, LLC*, the plaintiff filed an action alleging that defendants breached a Deferred Compensation Agreement ("DCA") and alleged violations of the Delaware Wage Payment & Collection Act ("WPCA"). *Johnson v. Student Funding Group, LLC*, 2015 WL 351979, at *1 (Del. Super. Jan. 26, 2015). Defendants moved to dismiss for failure to state a claim and attached an Executive Employment Agreement ("EEA") to their brief in support of their argument for dismissal. *Id.*

The Court noted two exceptions to when matters outside the pleadings may be considered: (1) when the document is integral to the plaintiff's claim and incorporated into the complaint, and (2) when the document is not being relied upon to prove the truth of its contents. *Id.* (citing *Vanderbilt Income & Growth Assoc., L.L.C.*, 691 A.2d 609, 613 (Del. 1996) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995))). The *Johnson* Court converted the motion to dismiss into a motion for summary judgment because no exception to the Court's consideration of the document applied. *Id.* The Court found that even though the plaintiff's complaint incorporated the EEA by reference, the Court held that it was not integral to plaintiff's claim because "[p]laintiff's claim alleges breach of the DCA," not the EEA. *Id.*

Similarly, in *Highland Capital Management, L.P. v. T.C. Group, LLC*, the Court converted a motion to dismiss into a motion for summary judgment where defendants attached documents outside the pleadings to "attempt to prove the truth of their contents," and finding that "[s]uch reliance is not appropriate on a motion to dismiss, the scope of which is limited to the pleadings." *Highland Capital Management, L.P. v. T.C. Group, LLC*, 2006 WL 2128677, at *3 (Del. Super. July 27, 2006). The Court noted the typical practice of converting a motion to dismiss when defendants attempt to include matters outside the pleadings inappropriately. *Id.* (citing *Deputy v. Roy*, 2003 WL 367827 (Del. Super. Feb. 20, 2003) (converting

motion to dismiss to motion for summary judgment based on the addition of affidavits and medical records)); *Price Auto. Group v. Danneman*, 2002 WL 31260007 (Del. Super. Sept. 25, 2002) (holding same with affidavit and deposition testimony); *Gutheim v. Viacom, Inc.*, 2000 WL 1211511 (Del. Super. June 30, 2000) (holding same with affidavit with attachments and defendant's Form 10-K Annual Report), *aff'd*, 2000 WL 1780778 (Del. Nov. 27, 2000); *Degnars v. Kimmel, Weiss & Carter*, 1996 WL 527311, at *1 (Del. Super. June 21, 1996) (converting motion to dismiss to motion for summary judgment and finding it "desirable to inquire more thoroughly into the facts to clarify the application of the law to the circumstances[,]" where evidence was submitted with the motion to dismiss); *Schultz v. Delaware Trust Co.*, 360 A.2d 576, 578 (Del. Super. 1976) ("In view of the fact that Delaware Trust has offered affidavits and depositions in addition to the pleadings, its motion to dismiss must be considered a motion for summary judgment.")). The *Highland Capital* Court noted that the "additional step of allowing a party to engage in discovery to create a more complete factual record has also been frequently endorsed and utilized by the Delaware Judiciary." *Highland Capital*, 2006 WL 2128677, at *3 (citations omitted).

The Superior Court should have followed *Johnson* and *Highland Capital* and allowed the parties to develop the record more fully so that it could fully analyze the terms of the Post-Closing Agreement, not just the terms of the Transaction

Agreements relied upon by 3i. Instead, the Superior Court found that the Stock Purchase Agreement, Incentive Grant Agreements, and the Rollover Agreement were incorporated into the Complaint because the "foundation of Ney's Post-Closing Agreement claims relates to the sale of Magnitude, including his post-closing employment and compensation, through the executed Stock Purchase Agreement, the Incentive Grant Agreements, and the Rollover Agreement." Op at 22. But that is not the correct test.

Whether a document "relates" to claims in a Complaint does not determine whether that document is incorporated into the Complaint. As the Superior Court noted, for a document to be incorporated into a complaint, the plaintiff must use the documents at issue to "form the factual foundation for its claim." Op. at 20 (citing *Fortis Advisors LLC v. Allergan, W.C.*, 2019 WL 5588876, at *3 (Del. Ch. Oct. 20, 2019)). The ***documents***, not something related to the documents, must be the source of the facts pled. *See e.g., Orman v. Cullman*, 794 A.2d 5, 16 (Del. Ch. 2002) (concluding a proxy statement was "integral to [a] complaint as it [was] the ***source*** for the merger-related facts as pled in the complaint.") (emphasis added).

In *Orman*, the court held that a proxy statement was the "basis for [plaintiff]'s disclosure claims." *Orman*, 794 A.2d at 16. This makes sense, because whether something was disclosed would be evident from the contents of a proxy statement. Indeed, Orman expressly utilized the proxy statement to support his disclosure

claims. *See id.* at 14 ("Orman also asserts that the Board breached its duty of disclosure. Specifically, he alleges that the Proxy Statement soliciting shareholder approval of the proposed merger omitted material facts necessary for the Public Shareholders to make a fully informed decision with regard to their vote for or against the merger."). But this is a very different scenario. The Post-Closing Agreement was formed before the Stock Purchase Agreement, Incentive Agreements, and Rollover Agreements were even executed. Indeed, if 3i had not induced Ney to enter the Post-Closing Agreement, the Transaction Agreements would never have come to pass. This begs the question: how could these Transaction Agreements be the "source" of Ney's claims if he is suing under an agreement that predates their execution?

Ney has never sued under any of the Transaction Agreements because his claims do not arise out of any of them. Ney should have been permitted discovery to develop a more complete record, particularly here where Ney is aware of, and specifically pled the existence of, certain documents and emails in the sole possession of 3i that could have provided evidentiary support for his claims.

III. DISMISSAL OF NEY'S QUASI-CONTRACT CLAIMS PRIOR TO DISCOVERY WAS PREMATURE

A. Question Presented

Whether Ney's quasi-contract claims should have been permitted as a matter of law. Preserved at A0522-23.

B. Scope of Review

The Supreme Court reviews "questions of law and interpret[s] contracts *de novo*." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (citing *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 2010 WL 779992, *2 (Del. Mar. 8, 2010)).

C. Merits of Argument

Ney's promissory estoppel claim should have proceeded because the outcome necessarily depends on factual determinations. A claim for promissory estoppel requires that: "(i) A promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise." *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003) (citing *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000)).

The Superior Court held that "[u]njust enrichment and promissory estoppel do not apply 'where a fully integrated, enforceable contract governs ***the promise at***

issue.'" Op. at 25 (citing *Neurvana Med., LLC v. Balt USA, LLC*, 2020 WL 949917, at *21 (Del. Ch. Feb. 27, 2020); *Black Horse Cap., LP v. Xstelos Hldgs., Inc.*, 2014 WL 5025926, at *26 (Del. Ch. Sept. 30, 2014)). However, Ney pled that the promises at issue in the Post-Closing Agreement were different from those in the Transaction Agreements and never had the opportunity to obtain discovery on that issue. A0016-17.

In *Cytotheryx, Inc. v. Castle Creek*, Cytotheryx initiated its suit for common law fraud and promissory estoppel, and Castle Creek moved to dismiss alleging that both the fraud and promissory estoppel were, among other things, barred by an integrated contract related to the sale. *Cytotheryx, Inc. v. Castle Creek Biosciences, Inc.*, 2024 WL 4503220, at *1 (Del. Ch. Oct. 16, 2024). The Court found that the fraud claims were not barred by the integration clause (*Id.* at *4), and the promissory estoppel claim was reasonably conceivable. *Id.* at *7. Specifically, the Court held that "whether reliance on the alleged promises was reasonable is a factual question that cannot be resolved on a motion to dismiss" (*Id.*) and "whether enforcement of the promise is necessary to prevent injustice is a factual inquiry not suitable for resolution at this stage." *Id.*

For the same reasons, the dismissal of Ney's unjust enrichment claims was also premature. Indeed, the subsequent sale of Magnitude by 3i—which, by definition, could not have been governed by the Stock Purchase Agreement—

formed part of the basis of Ney's unjust enrichment claim. A0026. But the Superior Court's decision did not discuss how Ney's unjust enrichment claim relating to the subsequent sale of Magnitude would be governed, and therefore barred, by any of the Transaction Agreements. Accordingly, the dismissal of Ney's unjust enrichment claim was error.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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CERTIFICATE OF SERVICE

Samuel T. Hirzel, II, Esquire, hereby certifies that on July 29, 2025, a true and correct copy of the foregoing *(Corrected) Opening Brief of Appellant S. Christopher Ney* was served electronically upon the following:

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