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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	:	

APPELLANT S. CHRISTOPHER NEY'S REPLY BRIEF

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INTRODUCTION

This case is about a $20 million broken promise—a promise 3i[1] has never denied making and that is documented in records to which Ney no longer has access—for which 3i has managed to evade liability thanks to procedural technicalities. Despite 3i's imperious characterization of a dismissal without prejudice on *forum non conveniens* grounds as a "resounding defeat," the fact is that Ney has never been afforded a meaningful opportunity to pursue his claims against 3i for the breach of the Post-Closing Agreement, nor has he had an opportunity to pursue his alternative claims for promissory estoppel and unjust enrichment/quantum meruit, much less with the benefit of discovery.

Ney originally sued 3i in Texas, where he lives and where his company, Magnitude, was located. Ney did not sue in Texas to avoid the grasp of a forum selection clause because he has consistently, and in good faith, alleged that it does not apply to his claims. Indeed, he has never brought any claims whatsoever under the documents governing the sale of Magnitude. During the time that Ney pursued his claims in Texas, he was granted permission to amend his claims, and he exhausted his right to appeal his case to a full resolution before suing in Delaware.

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[1] All capitalized terms shall have the same meaning ascribed to them in Ney's Opening Brief. Appellee's Answering Brief is cited herein as "AB." Ney's Opening Brief is cited herein as "OB."

When Ney brought his claims in Delaware, they were timely under the Savings Statute. Ney was not required to bring a "placeholder" suit in Delaware while his lawsuit in Texas was pending, and such finding by the Superior Court is not supported by Delaware law. Similarly, the Superior Court's finding that the Transaction Agreements substantively barred Ney's claims, including his quasi-contract claims, was premature.

No court, whether in Delaware or in Texas, has given Ney an opportunity to pursue any substantive discovery on his claims, discovery that Ney has alleged repeatedly, based on his personal knowledge, is in the sole possession of 3i and will support his adequately pled claims. Given Delaware's strong preference for deciding cases on the merits, Ney should be permitted to develop the factual record more fully to support his claims.

For the reasons set forth below and in Ney's Opening Brief, the ruling of the Superior Court should be reversed.

ARGUMENT

I. NEY'S CLAIMS WERE TIMELY UNDER THE SAVINGS STATUTE

The Savings Statute was "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***." *Reid v. Spazio*, 970 A.2d 176, 181 (Del. 2009) (quoting *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964)) (emphasis added). Delaware's General Assembly "has provided a reasonable extension of one year for certain claims that are preserved by the Savings Statutes so they may be decided on their merits." *Reid*, 970 A.2d at 184. There is a strong policy for doing so. *Id*. at 180.

Ney's claims were not decided on their merits prior to the filing of the Delaware action. *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). The Superior Court erred in finding that the Savings Statute applied, focusing largely on Ney's intent. 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. But *Huffington* is inapposite, and 3i's continued (and heavy) reliance on it is misguided.

In *Huffington*, which was decided on a summary judgment standard (not a motion to dismiss), the plaintiff brought claims specifically related to a Subscription

Agreement, including claims for negligent misrepresentation relating to the agreement. *Huffington*, 2012 WL 1415930, at *2. 3i agreed with the assessment of these facts and the nature of the plaintiff's claims in *Huffington* below, but 3i overgeneralizes the nature of the claims on appeal to bury a key distinction. Compare A0538 ("The plaintiff initially brought a common law negligent misrepresentation claim") with AB at 18 ("The plaintiff brought various claims").

Indeed, the claims brought in *Huffington* and the claims Ney has consistently asserted are different in a dispositive way: there is no factual record that Ney "purposely disregard[ed] a forum selection clause" (*Huffington*, 2012 WL 1415930, at *10) because (a) no factual record has been developed, and (b) he did not bring claims for negligent misrepresentation, or fraudulent inducement, or any other claims arising out of any written agreement. He is suing under a separate agreement, with separate promises and obligations.

Because Ney's claims were decided on *forum non conveniens* grounds rather than the merits in Texas, and because he did not disregard any forum selection clause, the Superior Court's decision that Ney's claims were time-barred was erroneous.[2]

Moreover, notwithstanding the Superior Court's holding to the contrary, Delaware law did not require Ney to file a placeholder suit in Delaware while his

[2] 3i does not dispute that, if the Savings Statute applies, Ney's claims are timely.

appeal was pending in the Fifth Circuit. *See* Op. at 16. As explained in Ney's Opening Brief, bringing placeholder suits is against this Court's policy. *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."). And Ney did not waive any argument below on this point because the notion that Ney was required to file a placeholder lawsuit in Delaware was raised by the Superior Court *sua sponte*. But even if this Court does find that Ney should have raised this point below, the Supreme Court should consider his argument here in the interests of justice. "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Sup. Ct. R. 8.

"The text of Rule 8 provides a narrow exception that permits this Court to consider a question for the first time on appeal 'when the interests of justice so require.' The exception is extremely limited and invokes a plain error standard of review. Plain error requires the error to be 'so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.'" *Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012) (emphasis added); *see also Levey v. Brownstone Asset Management, LP*, 76 A.3d 764, 773-74 (Del. 2013) (finding that the plaintiff did not

waive equitable tolling argument where, had certain arguments been discussed, the Court of Chancery would have reached a different result).

Here, had Ney been forced to respond to an argument that he was required to file a placeholder lawsuit in Delaware while his appeal was pending in Texas, he would have easily rebutted that argument under *Reid*, which states expressly that placeholder lawsuits are disfavored in Delaware. No such argument was raised by 3i below, likely because 3i would have been advancing an argument contrary to Delaware law.

Accordingly, and for the reasons set forth in Ney's Opening Brief, the Superior Court's holding that Ney's claims were time-barred should be reversed.

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

A. The Superior Court Incorrectly Held that Ney Was Collaterally Estopped

The Superior Court erred in finding that Ney was collaterally estopped from arguing that the Transaction Agreements do not apply to his claims, and 3i overlooks that the Fifth Circuit and Superior Court were adjudicating the case utilizing different procedural standards. The only reason the Fifth Circuit could consider the Transaction Agreements is because the court was analyzing them on *forum non conveniens* grounds. *See Ney v. 3i Group, P.L.C.*, 2023 WL 6121774, at *3 (5th Cir. 2023) ("We find that when evaluating a motion to dismiss based on a forum-selection clause, a court may consider matters outside the pleadings"); *compare with* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6)…matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment"). Collateral estoppel applies if "(1) the identical issue was previously adjudicated; (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.* (emphasis added). The first prong is not satisfied here because the Fifth Circuit affirmed the dismissal

of Ney's claims on *forum non conveniens* grounds, and the Superior Court dismissed his claims on 12(b)(6) grounds. As such, the "identical issue" was not adjudicated.

3i's statement that "the Texas courts adjudicated the 'identical issue' using the same legal standard that is invoked here" (AB at 24) is false. 3i states in the Answering Brief that "Pursuant to the [12(b)(6)] standard, the Texas courts also considered the SPA and Rollover Agreement for the separate reason that they were integral to Ney's claims." AB at 27 (citing *Ney*, 2021 WL 8082411, at *8 n.13, *11; *Ney*, 2023 WL 6121774, at *3-4). 3i goes on to state that "regardless of any differences between these standards in other contexts, the Texas Courts and the Superior Court both considered these agreements by applying Rule 12(b)(6)'s standard." AB at 27. Not so.

The Fifth Circuit's analysis of whether the court could consider matters outside of the pleadings (i.e., the Transaction Agreements) was limited to whether they could be considered on a *forum non conveniens* standard. *See Ney*, 2023 WL 6121774, at *3 ("We find that when evaluating a motion to dismiss based on a forum-selection clause, a court may consider matters outside the pleadings"); *see id.* ("other courts resolving *forum non conveniens* motions based on forum-selection clauses have held that one may consider facts outside of the pleadings.") (collecting cases). The *forum non conveniens* standard is not the same as the 12(b)(6) standard.

Indeed, 3i's 12(b)(6) 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 courts in Texas did not address the substance of the claims under the 12(b)(6) standard. They could not do so before addressing the threshold, *forum non conveniens* issue. This distinction is meaningful here because the Transaction Agreements could be considered on a *forum non conveniens* analysis but not a 12(b)(6) analysis. *See Ney v. 3i Group, P.L.C.*, 2023 WL 6121774, at *3 (5th Cir. 2023) (citing *Color Switch LLC v. Fortafy Games DMCC*, 377 F. Supp. 3d 1075, 1082–83 (E.D. Cal. 2019), *aff'd*, 818 F. App'x 694 (9th Cir. 2020); *Jiangsu Hongyuan Pharm. Co. v. DI Glob. Logistics Inc.*, 159 F. Supp. 3d 1316, 1322 (S.D. Fla. 2016); *Turner v. Costa Crociere S.P.A.*, 488 F. Supp. 3d 1240, 1245–46 (S.D. Fla. 2020) ("When ruling on a motion to dismiss for *forum non conveniens*, a court may consider matters outside the pleadings if presented in proper form by the parties."). Accordingly, the cases were clearly not decided using the same standards, and thus, Ney was not collaterally estopped from arguing that the Transaction Agreements do not apply to his claims. The Superior Court erred in holding otherwise.

B. The Superior Court Improperly Considered the Transaction Agreement on a Motion to Dismiss

"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).

3i argues that Ney "misapprehends the Superior Court's ruling" by arguing that the Superior Court applied the wrong test when it found that, because the Transaction Agreements were "relate[d]" to Ney's claims, the Superior Court could consider them. AB at 30. But that is precisely what the Superior Court did.

Although the Superior Court cited the correct test articulated in *Fortis Advisors LLC v. Allergan W.C.*, 2019 WL 5588876, at *3 (Del. Ch. Oct. 20, 2019), it misapplied that test and improperly stretched the test to include documents that "relate" to claims. Op. at 21-22 ("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" and the Transaction Agreements "are the source of the facts pled."). But as Ney argued in his Opening Brief, whether a document "relates" to claims in a Complaint does not determine whether that document is deemed incorporated by reference into the Complaint. The documents at issue must "form the factual foundation for its claim." OB at 23. The Transaction

Agreements could not be "the ***source*** of the facts pled," as the Superior Court held, because ***they did not even exist when the Post-Closing Agreement was made***. *Compare with 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" where plaintiff relied on the proxy statement in bringing his disclosure claims) (emphasis added).

But even if the Superior Court found that the Transaction Agreements were incorporated by reference into Ney's Complaint, it still should not have dismissed his claims at this stage because they were not integral to his claims. In *Johnson v. Student Funding Group, LLC*, the plaintiff filed an action alleging, among other claims, that defendants breached a Deferred Compensation Agreement ("DCA"). *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.* Even though the Court found that the EEA was incorporated by reference into Plaintiff's Complaint, it converted the motion to dismiss into one for summary judgment and denied it, finding that the EEA was not integral to the plaintiff's claims because plaintiff's claims did not involve the breach of the EEA. *Id.* The same is true here. Ney's claims relate to the breach of the Post-Closing Agreement, not to any of the Transaction Agreements. The Superior Court

should have followed the *Johnson* Court's analysis here and denied 3i's motion to dismiss or converted it into a motion for summary judgment and permitted discovery.

Further, 3i's argument that "discovery would put the cart before the horse" makes little sense given the governing body of case law on this issue. *See* AB at 30**.** In *Highland Capital*, the Superior 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 Management, L.P. v. T.C. Group, LLC*, 2006 WL 2128677, at *3 (Del. Super. July 27, 2006) (citing *Marvel v. Prison Industries*, 884 A.2d 1065, 1070-71 (Del. Super. 2005) (denying motion to dismiss for failure to state a claim because plaintiff was not "afforded a reasonable opportunity" to engage in discovery)); *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 291 (Del. Ch. 2003) (denying motion to dismiss for failure to state a claim but allowing "extensive discovery" to take place in order to create a more complete factual record). The Superior Court should have done so here.

C. Ney Adequately Alleged a Breach of Contract Claim

Finally, although the Superior Court never addressed whether Ney adequately pled a breach of contract claim, Ney's breach of contract theory is viable under Delaware law. Under Delaware law, "the formation of a contract requires a bargain

in which there is a manifestation of mutual assent to the exchange and a consideration." *Sarissa Capital Domestic Fund LP v. Innoviva, Inc.*, 2017 WL 6209597, at *21 (Del. Ch. Dec. 8, 2017) (quoting *Wood v. State*, 2003 WL 168455, at *2 (Del. Jan. 23, 2003)). "A valid contract exists when (1) the parties have made a bargain with 'sufficiently definite' terms; and (2) the parties have manifested mutual assent to be bound by that bargain." *Id.* (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)). Whether there was mutual assent "is to be determined objectively based upon the [] [parties'] expressed words and deeds as manifested at the time rather than by their after-the-fact professed subjective intent." *Id.* (citing *Debbs v. Berman*, 1986 WL 1243, at *7 (Del. Ch. Jan. 29, 1986)). "A contract need not be in writing to be valid" under Delaware law. *Id.* If an oral agreement meets the requisite elements of a valid contract, then it will bind the parties the same as a written agreement. *Id.*

Here, Ney meets these elements as he has alleged the existence of an agreement. Indeed, Ney expressly alleges that the oral agreement was also evidenced by contemporaneous written documentation in the form of text messages and emails now in the exclusive possession of 3i. He has alleged that (1) he and 3i (through Borrows and Olinick) agreed that Ney would be paid $20 million in exchange for Ney staying on as Magnitude's CEO following the sale to completely revamp the company (A0016-17; A0020-21), and (2) Ney and Defendants (through

Borrows and Olinick) confirmed, through one-on-one conversations post-closing, that the promise to pay Ney $20 million was in place, and that promise was not repudiated. A0022-24.

3i repeatedly confirmed the existence of the Post-Closing Agreement, including at a board meeting post-close (A0022), so it is "reasonably conceivable" that the parties intended to be bound by it. And any indefiniteness as to the identity of the parties (AB at 34) was of 3i's own making. *See* A0016 ("Olinick held himself out as a Partner at 3i Group, and after Ney brought suit against 3i Group in Texas, Olinick later claimed he was working only on behalf of 3i Corp, presumably in an attempt to distance himself from the agreement with Ney and the lawsuit in Texas."). Accordingly, Ney adequately pled a breach of contract claim and should be permitted the discovery necessary to attempt to prove up that claim.

III. NEY'S QUASI-CONTRACTUAL CLAIMS WERE DISMISSED PREMATURELY

Because the Transaction Agreements do not apply to Ney's claims, as discussed herein and in Ney's Opening Brief, they do not foreclose his quasi-contractual claims, and the Superior Court dismissed them prematurely.

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))[3]; *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 to prove up his claims. A0016-17.

And 3i's cherry-picking of Ney's allegations in his Complaint are telling as it relates to Ney's quasi-contractual claims. 3i argues that "[b]ased on Ney's own allegations, the purported side deal was connected to the Transaction," but ignores the many allegations in the Complaint that the promises and obligations – documented largely in text messages and emails to which Ney no longer has access

[3] 3i incorrectly points out that Ney relied on *Neurvana* in his Opening Brief. AB at 37. But the citation to *Neurvana* was the Superior Court's in its Opinion, not Ney's.

– are separate and apart from his obligations in connection with the sale of Magnitude. *See* A0016-17.

Ney's reliance on *Cytotheryx* is on point, because the court in *Cytotheryx* correctly held that "whether reliance on the alleged promises was reasonable is a factual question that cannot be resolved on a motion to dismiss." *Cytotheryx, Inc. v. Castle Creek Biosciences, Inc.*, 2024 WL 4503220, at *7 (Del. Ch. Oct. 16, 2024). The *Cytotheryx* court held further that "whether enforcement of the promise is necessary to prevent injustice is a factual inquiry not suitable for resolution at this stage." *Id.* Ney's collateral estoppel claim was dismissed too early, and so too was his claim for unjust enrichment. *Addy v. Piedmonte*, 2009 WL 707641, at *23 (Del. Ch. Mar. 18, 2009) (finding both unjust enrichment and promissory estoppel claims, in face of integration clause, required "a fact intensive inquiry into the details of the parties' dealings," which "[could not] be resolved on a motion to dismiss.").

CONCLUSION

The decision below should be reversed.

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CERTIFICATE OF SERVICE

Samuel T. Hirzel, II, Esquire, hereby certifies that on August 28, 2025, a true and correct copy of the foregoing *Appellant S. Christopher Ney's Reply Brief* was served electronically upon the following:

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