IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Medley LLC,[1] Debtor.	Chapter 11 Case No. 21-10526 (KBO)
MEDLEY LLC LIQUIDATING TRUST, Plaintiff, v. EVERSHEDS SUTHERLAND (US) LLP, Defendant.	Adv. Proc. No. 23-50121 (KBO) **Re: Adv. Docket No. 45**

NOTICE OF FILING OF UNSEALED VERSION OF OPPOSITION OF PLAINTIFF MEDLEY LIQUIDATING TRUST TO DEFENDANT EVERSHEDS SUTHERLAND (US) LLP'S MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on January 9, 2026, the above-captioned plaintiff filed the sealed version of the *Opposition of Plaintiff Medley Liquidating Trust to Defendant Eversheds Sutherland (US) LLP's Motion for Summary Judgment* [Adv. Docket No. 45] (the "Opposition").

PLEASE TAKE FURTHER NOTICE that following discussions with the Defendant, the Opposition does not contain any confidential information and attached hereto as **Exhibit A** is the unsealed version of the Opposition.

[*Remainder of Page Intentionally Left Blank*]

[1] The Debtor's current mailing address is c/o Medley LLC Liquidating Trust, c/o Saccullo Business Consulting, LLC, 27 Crimson King Drive, Bear, DE 19701.

211052626011400000000005

Dated: January 14, 2026
Wilmington, Delaware

Respectfully submitted,

/s/ Sameen Rizvi

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Medley LLC,[1] Debtor.	Chapter 11 Case No. 21-10526 (KBO)
MEDLEY LLC LIQUIDATING TRUST, Plaintiff, v. EVERSHEDS SUTHERLAND (US) LLP, Defendant.	Adv. Proc. No. 23-50121 (KBO) **Re: Adv. Docket No. 26**

OPPOSITION OF PLAINTIFF MEDLEY LIQUIDATING TRUST TO DEFENDANT EVERSHEDS SUTHERLAND (US) LLP'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Medley LLC Liquidating Trust (the "Liquidating Trust"), in support of its opposition to Defendant Eversheds Sutherland (US) LLP's ("Eversheds") motion for summary judgment, submits this memorandum of law along with the Declaration of Anthony M. Saccullo (the "Saccullo Declaration") of Saccullo Business Consulting, LLC, the Medley LLC Liquidating Trustee; the Declaration of Douglas I. Koff, a partner at the law firm of McDermott Will & Schulte (the "Koff Declaration"); and the Declaration of Randall L. Morrison Jr., a partner at the law firm of Kelley Drye & Warren LLP (the "Morrison Declaration").

PRELIMINARY STATEMENT

1. Eversheds continues to have an issue with candor before the Court. First, in sworn declarations filed with the Court to support its retention by Debtor (defined below), Eversheds misrepresented both the amount and source of payments it received from Debtor during the 90 days preceding the bankruptcy filing. Eversheds declared that it received approximately $1 million from insurers for pre-petition legal services Eversheds performed for Debtor. Eversheds did not amend, clarify or restate these misrepresentations until the Liquidating Trustee discovered after the Effective Date (defined below) that Debtor (not any insurer) paid Eversheds more than $2 million during the preference period and a total of approximately $5.3 million in avoidable transfers that form the basis of the Complaint in this adversary proceeding.

2. More than two years after answering the Complaint, Eversheds continues to misinform the Court through its motion for summary judgment. Eversheds now argues, for the first time, that it is an unnamed released party under the March 2022 Settlement Agreement (defined below) that provided for mutual releases solely between the Liquidating Trust on the one hand, and the Taubes (defined below), Medley Management Inc., and certain directors and officers on the other hand. Specifically, the Liquidating Trust released those parties from avoidance action

claims, and those parties released the Liquidating Trust from any administrative expense claims. Eversheds was not a party to, or beneficiary of, the mutual releases.

3. To the contrary, a separate letter agreement between the Liquidating Trust and Eversheds expressly preserving Eversheds's administrative expense claim was a condition precedent to the March 2022 Settlement Agreement (defined below). Notwithstanding that letter agreement, Eversheds now contends that it released the very same administrative expense claim that Eversheds continues to pursue against the Liquidating Trust. Eversheds's position is illogical, and is irreconcilable with the text, structure, and conditions of the March 2022 Settlement Agreement.

4. In the more than two years that this adversary proceeding has been pending, Eversheds never indicated that it was released from the $5.3 million in avoidable transfers that Debtor paid to Eversheds. Eversheds also never acted as if it had released the Liquidating Trust from Eversheds's administrative expense claim. To the contrary, Eversheds continues to press the Liquidating Trust to satisfy its administrative claim. These persistent efforts, as well as a settlement resolving the Liquidating Trust's motion to vacate Eversheds's final fee award, clearly violated the reciprocal release provisions in the March 2022 Settlement Agreement. Simply put, if Eversheds was an unnamed released party in the March 2022 Settlement Agreement, it should have never continued its efforts to collect its administrative claim from the Liquidating Trust.

5. Faced with $5.3 million in exposure, Eversheds filed the motion for summary judgment to conjure a potential defense. The motion, however, suffers from the same lack of candor that permeates Eversheds's conduct throughout the case. The plain language of the release provision, the settlement agreement read as a whole, related Court orders, Eversheds's actions

following execution of the March 2022 Settlement Agreement in the case, and Eversheds's actions in this adversary proceeding all demonstrate that Eversheds was not a released party.

BACKGROUND

A. Bankruptcy Case Background

6. On March 7, 2021 (the "Petition Date"), Medley LLC ("Debtor") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Court.[2] On October 14, 2021, Debtor filed the *Modified Third Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* (the "Plan").[3] On October 18, 2021, the Court entered an Order confirming the Plan,[4] which became effective that same day (the "Effective Date").[5] On the Effective Date, the Liquidating Trust was established,[6] and Saccullo Business Consulting, LLC, by and through Anthony M. Saccullo, was appointed to serve as the Medley LLC Liquidating Trustee (the "Liquidating Trustee") to administer the Liquidating Trust.[7]

B. The Medley Entities and SEC Investigation

7. Debtor was the direct subsidiary of Medley Management Inc. ("MDLY"), a publicly traded company.[8] Debtor's day-to-day operations were conducted through its direct subsidiary, Medley Capital LLC,[9] and Debtor had multiple other direct and indirect subsidiaries.[10] Debtor, MDLY, Medley Capital LLC, and the other subsidiaries of Debtor (collectively, the

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2 D.I. 1. As used herein, citations to "D.I. _" refer to documents filed in *In re Medley LLC*, Case No. 21-10526 (Bankr. D. Del.). Citations to "Adv. D.I. _" refer to documents filed in the adversary proceeding.

3 D.I. 431.

4 D.I. 445.

5 D.I. 445, 449.

6 D.I. 445.

7 *Id.* at ¶ 16.

8 D.I. 5, First Day Decl., at ¶ 8.

9 *Id.* at ¶ 11.

10 *Id.*, Exhibit A.

"Medley Entities") were formed by brothers Brook Taube and Seth Taube (collectively, the "Taubes") and controlled by the Taubes and certain other directors and officers.

8. On December 18, 2019, the Securities and Exchange Commission ("SEC") issued a formal order of private investigation against Debtor, MDLY and the Taubes for violation of the federal securities laws (the "SEC Investigation").[11] On May 7, 2021, the SEC issued Wells Notices disclosing the SEC's intent to bring an enforcement action against MDLY, Debtor, the Taubes and certain other directors and officers of the Medley Entities for violating federal securities laws.[12]

C. Eversheds Retention for the SEC Investigation

9. The Medley Entities retained Eversheds in 2019 to defend the SEC Investigation.[13] About a month after the Petition Date, on April 6, 2021, Debtor filed an application to retain Eversheds as special counsel in connection with the SEC Investigation (the "Retention Application").[14] In support of the Retention Application, Debtor submitted the declaration of Eversheds partner Mark D. Sherrill (the "Original Sherrill Declaration").[15] In the Original Sherrill Declaration, Eversheds disclosed that "[d]uring the 90-day period prior to the Debtor's bankruptcy filing, Eversheds received a total of $1,039,500.81 on account of work performed for the Debtor."[16] And that Eversheds had been reimbursed by insurance carriers, not Debtors.[17] Two material details of the Original Sherrill Declaration were false. First, Eversheds received over $2

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11 *Id.* at ¶ 27.

12 Medley Management Inc., Form 8-K (May 13, 2021), available at sec.gov/Archives/edgar/data/1611110/000121390021026130/ea140836-8k_medleymanagement.htm.

13 Morrison Declaration Ex. 1, Tr. at 11:19-24. Eversheds's representation of Debtor in connection with the SEC Investigation began contemporaneously with its representation of MDLY. *See id.*, Tr. at 17:2-14.

14 D.I. 87, Retention Application.

15 D.I. 87-2, Original Sherrill Declaration.

16 *Id.* at ¶ 14.

17 *Id.* at ¶¶ 9, 13.

million dollars during the 90-day preference period, more than double the amount originally disclosed.[18] Second, Eversheds received the money directly from Debtor, not through insurers.[19]

10. Approximately three weeks after Debtor filed the Retention Application, Eversheds filed a Supplemental Declaration (the "First Supplemental Sherrill Declaration"),[20] and disclosed that prior to the Petition Date, it represented not only Debtor in the SEC Investigation but also the Medley Entities, the Taubes and certain directors and officers, which Eversheds described, collectively, as the "Medley Complex."[21] On May 21, 2021, the Court entered an Order granting Eversheds' retention as special counsel to Debtor (the "Retention Order")[22] unaware that the Original Sherrill Declaration had concealed the additional $1 million in payments that Debtor had paid directly to Eversheds during the 90 days preceding the Petition Date.

D. Eversheds Final Fee Application

11. After the Effective Date, Eversheds filed a final fee application on December 1, 2021, seeking allowance of compensation in the amount of $2,715,049.00 and expenses in the amount of $568,570.50, for a total of $3,283,619.50 (the "Final Fee Application").[23] Subsequently, Eversheds disclosed that it had been paid $1,228,564.31 by an insurer, and was now seeking $2,080,055.19 from the estate.[24] On January 26, 2022, the Court entered an Order authorizing

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18 Adv. D.I. 1 ("Complaint"), ¶ 24.

19 *Id.*

20 D.I. 119.

21 Further, on July 26, 2021, Eversheds filed a Second Supplemental Declaration (the "Second Supplemental Sherrill Declaration"). D.I. 280. The Second Supplemental Sherrill Declaration stated that Debtor had requested to expand Eversheds's scope of services to include SEC filings and that these services would be paid by the estate rather than by an insurer. *Id.*

22 D.I. 167.

23 D.I. 515.

24 D.I. 561 at ¶¶ 12-15.

Eversheds's final fees and expenses in the amount of $2,080,055.19 (the "Final Fee Order").[25] Eversheds's final fee award for legal services performed for Debtor during the case was an award of administrative expenses subject to priority under section 503(b)(2) of the Bankruptcy Code (the "Administrative Fee Claim").[26]

E. Results of the SEC Investigation and SEC Settlement

12. Following the Effective Date, on February 1, 2022, the SEC indicated it would not pursue any action against Debtor or the Liquidating Trust as Debtor's successor.[27] The SEC, however, found that MDLY and the Taubes had materially overstated assets under management in violation of securities law.[28] The SEC negotiated a settlement with MDLY and the Taubes (the "SEC Settlement").[29] Under the SEC Settlement, MDLY and the Taubes were each censured and agreed to pay $10 million in civil penalties, with MDLY paying $4 million, Brook Taube $4 million, and Seth Taub $2 million.[30] The SEC Settlement was finalized in February 2022 and officially published on April 28, 2022.[31]

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25 D.I. 569.

26 *See* 11 U.S.C. § 503:

> "(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> (2) compensation and reimbursement awarded under section 330(a) of this title;"

27 Morrison Declaration Ex. 2; *id.* Ex. 3.

28 *Order Instituting Administrative and Cease-And-Desist Proceedings, Pursuant to Section 8a of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Sections 203(E), 203(F) and 203(K) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order*, available at https://www.sec.gov/files/litigation/admin/2022/33-11057.pdf.

29 *Id.*

30 *Id.* at pp. 23-24.

31 *Id.*; *see also* Morrison Declaration Ex. 2; *id.* Ex. 3.

F. The Liquidating Trust's Investigation

13. Following the Effective Date, the Liquidating Trust investigated potential estate causes of action against MDLY, the Taubes, the Brooke Taube Trust ("BTT"), and certain individuals who were former directors and officers of Debtor, arising under chapter 5 of the Bankruptcy Code (the "Taube Avoidance Action Claims").[32] The Liquidating Trust also investigated breach of fiduciary duty and other similar claims.[33]

G. The March 2022 Settlement Agreement

14. The Liquidating Trust, through its counsel, Reid, Collins & Tsai ("Reid Collins"), ultimately reached an agreement with MDLY, the Taubes, BTT, and certain directors and officers regarding the Taube Avoidance Action Claims.[34] The settlement was memorialized in a settlement agreement executed on March 23, 2022,[35] between the Liquidating Trust, the Taubes, BTT, and MDLY, with certain officers and directors identified as third-party beneficiaries of the agreement (the "March 2022 Settlement Agreement").[36]

15. The March 2022 Settlement Agreement resolved the Taube Avoidance Action Claims in exchange for payments from MDLY and the Taubes of approximately $13.2 million, comprised of (i) $10 million from the SEC Settlement that went directly to Debtor's bondholders,

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32 Saccullo Declaration ¶ 3.

33 *Id.*

34 Saccullo Declaration ¶ 4; Koff Declaration ¶ 4.

35 The March 2022 Settlement Agreement is attached as Exhibit 1 to *the Declaration of Nicholas Christakos, Esq. in Support of Defendant Eversheds Sutherland (US) LLP's Motion for Summary Judgment Based Upon the Release* (the "Christakos Declaration") at Adv. D.I. 28-1.

36 Saccullo Decl. ¶ 5. In negotiating the March 2022 Settlement Agreement, the Taubes were represented by Schulte Roth and Zabel LLP and MDLY was represented by Lucosky Brookman LLP. Reid Collins represented the Liquidating Trust. *See* Koff Declaration ¶¶ 3, 5. Schulte exchanged multiple drafts of the March 2022 Settlement Agreement with Lucosky and Reid Collins. *Id.* ¶ 6.

(ii) $2.65 million to the Liquidating Trust, and (iii) $575,000 to be held for a future settlement of preserved claims.[37]

H. The March 2022 Settlement Agreement Release Provisions

16. The March 2022 Settlement Agreement contains a reciprocal release in Sections 6.1 and 6.2 (each a "Release Provision" and together the "Release Provisions").[38] Section 6.1, titled the "Liquidating Trust's Releases," provides that the Liquidating Trust, the Liquidating Trustee and Debtor release the "Taube Released Parties" from "Released Claims."[39] The Taube Released Parties are defined as

> "[MDLY], the Taubes, BTT, and the Executives, and all of their respective affiliates, subsidiaries, family members, former spouses, trusts, former trusts (including, but not limited to, any trust that has been revoked or terminated), successors, heirs, and assigns, and other entities owned or controlled by them and their officers, directors and financial and legal advisors, and all employees, representatives, agents, vendors, and attorneys of each of the foregoing…"

17. The "Released Claims" include all causes of action against the Taube Released Parties that are not a "Preserved Claim."[40] Preserved Claims were claims covered by available insurance, such as breach of fiduciary duty. Reciprocally, under Section 6.2, the Taube Released Parties released Debtor, Liquidating Trust and Liquidating Trustee from all claims "under or related to sections 502(h) or 503 of the Bankruptcy Code."[41]

18. The Release Date conditioned the effectiveness of the reciprocal release provisions on the satisfaction of several conditions.[42] Two of the conditions required the execution of a

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37 March 2022 Settlement Agreement § II.3.

38 *Id.* §§ II.6.1, 6.2.

39 *Id.* § II.6.1.

40 *Id.*

41 *Id.* § II.6.2.

42 *Id.* § II.5.

forbearance agreement and letter agreement with Eversheds, which, as described below, required Eversheds to temporarily forbear from (but not waive) collection of its Administrative Fee Claim.

I. The Forbearance Agreement and the Eversheds Letter

19. One of the goals to resolving the Released Claims was the preservation of insurance policies to allow the value in the policies to be used to resolve the Preserved Claims. Therefore, simultaneously with negotiations related to the Taube Avoidance Action Claims, there were also negotiations with Eversheds whereby Eversheds would forbear from collecting the Administrative Fee Claim.[43]

20. The Liquidating Trustee and Eversheds entered into a letter agreement dated March 9, 2022 (the "Eversheds Letter") whereby Eversheds agreed to forbear from exercising its right to receive payment on its Administrative Fee Claim until the Liquidating Trust received sufficient funds to make distributions to creditors.[44]

21. Moreover, Eversheds, MDLY, the Taubes, and certain directors and officers,[45] entered into a forbearance agreement dated March 23, 2022 (the "Forbearance Agreement") pursuant to which Eversheds agreed to forbear from exercising its rights to seek recovery of its Administrative Fee Claim from available insurers until such time as the Liquidating Trust, MDLY, the Taubes, and the directors and officers could participate in a mediation to resolve the Preserved Claims.[46] The Forbearance Agreement provides that the Liquidating Trust is third-party beneficiary.[47]

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43 Saccullo Declaration ¶ 4.

44 A copy of the Eversheds Letter is attached as Exhibit 2 to the Christakos Declaration. Adv. D.I. 28-2.

45 The other directors and officers were Jeffrey Tonkel, Richard Allorto, Samuel Anderson, and John Fredericks.

46 A copy of the Forbearance Agreement is attached as Exhibit 3 to the Christakos Declaration. Adv. D.I. 28-3.

47 *Id.* at ¶ 12.

J. Eversheds Post Effective Date Representation

22. Prior to and during the bankruptcy case, Eversheds represented the "Medley Complex," including the Debtor, MDLY and the Taubes, with respect to the SEC Investigation.[48] Eversheds only represented the Liquidating Trust with respect to the SEC Investigation until February 1, 2022, when the SEC informed the Liquidating Trust that it would not pursue any action against it. On that same day, Eversheds sent the Liquidating Trustee an email terminating its representation of the Liquidating Trust.[49] Internally, Eversheds recognized at this time the potential for conflicts with the Liquidating Trust.[50]

23. Though Eversheds is unwilling to admit this directly, the evidence shows that following November 2021 Eversheds did not represent any member of the Medley Complex on any matter. According to the invoices produced by Eversheds, the last work that Eversheds performed on behalf of Debtor was on November 30, 2021.[51] Medley stopped billing the Medley Complex separately in March 2021 – just after the Petition Date – and that invoice reflected work only for MDLY through January 31, 2021.[52] Eversheds has produced no evidence to show their continuing representation of any of the Medley Entities after November 2021.

K. The Insurance Settlement Agreements

24. Following execution of the March 2022 Settlement Agreement, the Liquidating Trust sought to resolve the Preserved Claims.[53] On February 13, 2023, the Liquidating Trust and

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48 First Supplemental Sherrill Declaration ¶ 8.

49 Morrison Declaration Ex. 2.

50 *Id.*, Ex. 3.

51 *Id.*, Ex. 4.

52 *Id.*, Ex. 5.

53 These included (i) claims based on misconduct occurring prior to April 30, 2019 (the "Pre-April 30 Claims") related to quarterly distributions of purported profits that Debtor made to its former members, and (ii) claims based on misconduct occurring after April 30, 2019 (the "Post-April 30 Claims") related to breaches of Debtor's governing documents.

certain former directors and officers of the Medley Entities entered into two settlement agreements to resolve the Preserved Claims (collectively, the "Insurance Settlement Agreements").[54] The Insurance Settlement Agreements contain the same substantive footnote (footnotes 8 and 10, respectively), clarifying the scope of the Release Provision by providing:

> Notwithstanding anything to the contrary, nothing in this Section [7 or 9] or elsewhere in this Agreement or in the March 2022 Settlement Agreement shall constitute a release, waiver, or covenant not to sue regarding any claims or causes of action held by a Settling Party, the Debtor or MDLY (as defined in Schedule I annexed hereto) against any attorney or law firm, other than John Fredericks with respect to [Pre or Post]-April 30 Claims, that may have represented such Settling Party, the Debtor or MDLY.[55]

On February 22, 2023, the Liquidating Trust filed a 9019 motion (the "Insurance 9019 Motion") to approve the Insurance Settlement Agreements. Eversheds was served with the Insurance 9019 Motion through CM/ECF notice.[56] Without any objection by Eversheds, on March 23, 2023, the Court entered an Order incorporating the Insurance Settlement Agreements and approving them.[57]

L. Motion to Vacate

25. During its investigation of potential claims after the Effective Date, the Liquidating Trust discovered that Eversheds's Retention Application and the Original Sherrill Declaration misrepresented both the amounts and source of the payments Eversheds received within the preference period.[58] Eversheds had received five transfers from Debtor, totaling $2,015,986.53, approximately $1 million more than the amount disclosed in the Original Sherrill Declaration. And the Liquidating Trust discovered that Debtor, not an insurer, paid these funds to Eversheds.

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54 D.I. 622, 9019 Motion – formally the (i) "Settlement Agreement and Release of Pre-April 30 Claims," and (ii) "Settlement Agreement and Release of Post-April 30 Claims."

55 D.I. 622-3, 622-4.

56 Morrison Decl. Ex. 6.

57 D.I. 635.

58 D.I. 672, Trust Supplemental Declaration.

26. Accordingly, on January 23, 2023, the Liquidating Trust filed a motion to vacate the Retention Order and that portion of the Final Fee Order awarding Eversheds its Administrative Fee Claim (the "Motion to Vacate").[59] Prior to filing the Motion to Vacate, the Liquidating Trust's counsel contacted Eversheds to advise Eversheds of the Liquidating Trust's findings and to assess the possibility of a consensual resolution. Instead of responding, Eversheds filed on January 23, 2023, the Third Supplemental Declaration of Mark Sherrill in which Eversheds admitted that it had received $2,015,986.53 during the preference period from Debtor, not from an insurer.[60] Later that same day, the Liquidating Trust filed the Motion to Vacate.[61]

27. During discovery related to the Motion to Vacate, the Liquidating Trust obtained a letter from Eversheds to Travelers Casualty and Surety Company of America, seeking reimbursement of defense costs.[62] In this letter, Eversheds admitted that its Administrative Fee Claim related to legal services for the SEC Investigation that Eversheds provided to multiple Medley Entities and directors and officers, and Eversheds allocated $436,673.28 of its Administrative Fee Claim to its legal services specifically to Debtor.[63] On October 26, 2023, the Liquidating Trust and Eversheds settled the Motion to Vacate.[64] The settlement (the "MTV Settlement") reduced Eversheds's Administrative Fee Claim from $2,080,055.19 to $436,673.28 – the amount Eversheds had allocated to its work for Debtor.

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59 D.I. 610.

60 D.I. 609 at ¶¶ 6-11.

61 D.I. 610.

62 D.I. 672, Trust Supplemental Declaration, Ex. A.

63 *Id.*

64 D.I. 686, Order granting 9019 Settlement Motion.

M. Adversary Complaint and Mediation

28. The Liquidating Trust discovered that between April 28, 2017 and the Petition Date, Debtor made fifteen transfers to Eversheds, totaling over $5.3 million. On March 3, 2023, the Liquidating Trust filed the Complaint against Eversheds seeking avoidance and recovery of (i) preferential transfers in the amount of $2,015,986.53; and (ii) fraudulent conveyances in the amount of $3,346,713.39 for a total of $5,362,699.92.[65]

29. On June 23, 2023, Eversheds filed its Answer, Affirmative Defenses, and Counterclaim (the "Answer").[66] Eversheds denied the allegations in the Complaint and asserted affirmative defenses for (i) failure to state a claim; (ii) new value; (iii) ordinary course of business; (iv) statute of limitations; and (v) setoff and recoupment. Eversheds states in the Answer "[t]o the extent that any liability is established, any recovery by the Debtor is subject to Eversheds' right of setoff and recoupment relating to its allowed administrative expense claim" (the "Counterclaim").[67] Eversheds did not raise in its Answer the affirmative defense of release.

30. The Liquidation Trust and Eversheds engaged in extensive discovery in this adversary proceeding.[68] The adversary proceeding was thereafter referred to mediation, which was held on October 28, 2024.[69] No settlement was reached.

N. Eversheds Raises Affirmative Defense of Release for the First Time

31. On May 1, 2025, almost two years after filing the Answer, and after extensive discovery had been conducted and mediation had concluded, Eversheds filed its Amended

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65 Adv. D.I. 1.

66 Adv. D.I. 4.

67 *Id.*

68 Adv. D.I. 8.

69 Adv. D.I. 18.

Answer.[70] The Amended Answer continues to assert the Counterclaim for Eversheds's Administrative Fee Claim. The next day, Eversheds filed the motion for summary judgment arguing that the Liquidating Trustee's claims against Eversheds were released pursuant to the Release Provision of the March 2022 Settlement Agreement.[71]

32. Eversheds's motion for summary judgment is supported by the Declaration of Nicholas Christakos, a member of Eversheds's Office of General Counsel.[72] According to Mr. Christakos, Eversheds did not include the release in its original Answer "[d]ue to an oversight."[73] During his deposition, Mr. Christakos stated that he simply did not realize until April 2025 that the Liquidating Trust's claims were purportedly released in the Release under the March 2022 Settlement Agreement.[74]

ARGUMENT

I. EVERSHEDS IS UNABLE TO SATISFY THE STANDARDS FOR SUMMARY JUDGMENT

33. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[75] Courts find that a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[76] Therefore, disputed questions of fact preclude a finding in favor of

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70 Adv. D.I. 25, Fifth Affirmative Defense.

71 Adv. D.I. 26.

72 Adv. D.I. 28.

73 *Id.* at ¶ 12.

74 Morrison Declaration Ex. 7, Tr. at 15:8 – 16:11.

75 *SodexoMAGIC, LLC v. Drexel Univ.*, 24 F.4th 183, 203 (3d Cir. 2022) (quoting Fed. R. Civ. P. 56(a)).

76 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

summary judgment.[77] Additionally, all inferences from any underlying facts "must be viewed in the light most favorable to the party opposing the motion."[78]

34. The release language is, at worst, ambiguous which means the Court should deny summary judgment. If there are two or more plausible readings to a contractual provision, then it is ambiguous.[79] As described below, the Liquidating Trust's interpretation, if not dispositive, is a plausible interpretation of the March 2022 Settlement Agreement and the Release Provision.[80] As such, the motion for summary judgment should be denied.

35. The Liquidating Trust, however, will demonstrate that Eversheds was not an unnamed released party in the March 2022 Settlement Agreement, and that Eversheds should not be permitted to raise this defense more than two years into litigating this adversary proceeding and participating in mediation. Eversheds purported release defense belies all underlying facts: (i) the March 2022 Settlement Agreement unambiguously did not release Eversheds; (ii) the Court's Order approving the Insurance Settlement Agreements estops Eversheds's efforts to misinterpret the March 2022 Settlement Agreement; and (iii) even if the Release Provision applied to

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77 *See Intell. Ventures I, LLC v. Canon Inc.*, 143 F. Supp. 3d 143, 153 (D. Del. 2015).

78 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

79 *New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 (N.Y. 1st Dep't 2006) ("A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.") (internal citation omitted); *Williams v. Vill. of Endicott*, 91 A.D.3d 1160, 1162 (N.Y. 3d Dep't 2012) ("A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion.") (internal citation omitted).

80 *United Airconditioning Corp. v. Axis Piping, Inc.*, 194 A.D.3d 981, 984 (N.Y. 2d Dep't 2021) ("[W]hen the evidence in the record including, inter alia, the circumstances surrounding the release, as well as the parties' course of dealings, evinces that the parties' intentions were not reflected in the general terms of the release, the release does not conclusively establish a defense as a matter of law.") (internal citation omitted); *Blue Jeans U.S.A. Inc. v. Basciano*, 286 A.D.2d 274, 276 (N.Y. 1st Dep't 2001) ("[W]hen a contract term is ambiguous, parol evidence may be considered 'to elucidate the disputed portions of the parties' agreement.'") (internal citation omitted).

Eversheds, Eversheds's subsequent conduct precludes it from using the March 2022 Settlement Agreement to avoid liability in this adversary proceeding.

II. THE RELEASE PROVISION OF THE MARCH 2022 SETTLEMENT AGREEMENT DOES NOT APPLY TO EVERSHEDS

36. The plain language of the Release Provision did not release Eversheds. The March 2022 Settlement Agreement is governed by New York law, and, under New York law, a release provision is interpreted to cover the matters that were intended by the parties.[81] "The best evidence of what parties to a written agreement intend is what they say in their writing."[82] If the language is unambiguous, then "the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole."[83] A release provision is interpreted like a contract,[84] and courts, when interpreting any provision of a contact, should read the contract as a coherent whole.[85]

37. Pursuant to the March 2022 Settlement Agreement, the Release Provision applies to "Causes of Action,"[86] (i) asserted against a "Taube Released Party," and (ii) that fall within the

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81 *See Lexington Ins. Co. v. Combustion Eng'g, Inc.*, 264 A.D.2d 319, 322 (N.Y. 1st Dep't 1999) ("A release should not be construed to dispose of 'matters which the parties themselves did not desire or intend.'") (internal citation omitted); *Mangini v. McClurg*, 24 N.Y.2d 556, 562 (N.Y. 1969) ("[T]he cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form."); *Kaminsky v. Gamache*, 298 A.D.2d 361, 362 (N.Y. 2d Dep't 2002) ("The meaning and coverage of a general release necessarily depends upon the controversy being settled and upon the purpose for which the release was given. A release may not be read to cover matters which the parties did not intend to cover.") (internal citation omitted); *Greenfield v. Philles Recs., Inc.*, 98 N.Y.2d 562, 569, 780 N.E.2d 166, 170 (N.Y. 2002) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.").

82 *Tomhannock, LLC v. Roustabout Res., LLC*, 33 N.Y.3d 1080, 1082 (N.Y 2019) (internal citation omitted).

83 *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 (N.Y. 2014).

84 *Smith v. City of New York*, 236 A.D.3d 414, 416 (N.Y. 1st Dep't 2025) ("[A] general release is governed by principles of contract law.") (internal citation omitted).

85 *MAK Tech. Holdings Inc. v. Anyvision Interactive Techs. Ltd.*, 42 N.Y.3d 570, 576 (N.Y 2024) ("We must also be mindful to read a contract as a whole to ensure that undue emphasis is not placed upon the particular words and phrases.") (internal citation omitted); *see also Smith*, 236 A.D.3d at 416 ("Like any contract, a release must be read as a whole to determine its purpose and intent") (internal citation omitted).

86 March 2022 Settlement Agreement, Schedule 1 ("Causes of Action" is defined as any claims, interests, damages, remedies, causes of action, demands, rights, actions, suits, obligations, liabilities, accounts,

definition of a "Released Claim."[87] Neither of those two conditions are satisfied vis-à-vis the claims asserted against Eversheds in this adversary proceeding.

A. Eversheds Is Not a Taube Release Party

38. Eversheds is not one of the "Taube Released Parties" in Section 6.1 of the March 2022 Settlement Agreement, which only includes:

> [MDLY], the Taubes, BTT, and the Executives, and all of their respective affiliates, subsidiaries, family members, former spouses, trusts, former trusts (including, but not limited to, any trust that has been revoked or terminated), successors, heirs, and assigns, and other entities owned or controlled by them and their officers, directors and financial and legal advisors, and all employees, representatives, agents, vendors, and attorneys of each of the foregoing….[88]

39. This standard release language extends the release to legal advisors and attorneys of the parties to the settlement agreement to prevent the Liquidating Trust from circumventing the release by suing a released party's representatives for the same conduct covered by the release. Eversheds argues that it falls within the definition of Taube Released Parties as a legal advisor or attorney for the "Medley Complex" with respect to the SEC Investigation.[89]

40. While Eversheds did previously represent the Medley Complex in the SEC Investigation, the evidence shows that Eversheds did not represent any of the Taube Released

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defenses, offsets, powers, privileges, licenses, liens, indemnities, guaranties, and franchises of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, secured or unsecured, assertable, directly or derivatively, matured or unmatured, suspected or unsuspected, in contract, tort, law, equity, or otherwise against any party, including current and former directors, officers, and employees of the Debtor and its affiliates. Causes of Action also include, but are not limited to: (a) all rights of setoff, counterclaim, or recoupment and claims under contracts or for breaches of duties imposed by law; (b) the right to object to or otherwise contest Claims or interests; (c) claims pursuant to sections 362, 510, 542, 543, 544 through 550, or 553 of the Bankruptcy Code; and (d) such claims and defenses as fraud, mistake, duress, and usury, and any other defenses set forth in section 558 of the Bankruptcy Code.)

87 *Id.* § II.6.1.

88 *Id.*.

89 *See* Adv. D.I. 27 at p. 13.

Parties following November 2021. Other than its own self-serving testimony, Eversheds could not produce any evidence that it was counsel to any of the Taube Released Parties after November 2021 like invoices, emails to the Taube Released Parties, a log of phone calls to the Taube Released Parties or day sheets showing that Eversheds performed legal work for the Taube Released Parties. Eversheds produced none of these documents because none exist. In fact, the last invoice Eversheds sent to any Taube Released Party was dated December 2021 for work completed in November 2021.[90]

41. Notably, the March 2022 Settlement Agreement was conditioned on the "SEC Agreement" that resolved the SEC Investigation, [91] which was resolved no later than February 1, 2022.[92] As such, it was impossible for Eversheds to be counsel to the Taube Released Parties at the time the March 2022 Settlement Agreement was executed. And the "SEC Agreement" was negotiated between the SEC, the Liquidating Trust counsel and Schulte Roth, as counsel to the Taube Released Parties.[93]

42. Further, Eversheds could not have represented both the Liquidating Trust and Taube Released Parties during the negotiations that led to the March 2022 Settlement Agreement. A simultaneous representation of both the Liquidating Trust and the Taube Released Parties would have presented a conflict of interest.[94] Eversheds never produced a waiver of this conflict from the Liquidating Trustee, and the Delaware Rules of Professional Conduct require both clients (the

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90 Morrison Declaration Ex. 4.

91 March 2022 Settlement Agreement § II.2.

92 Morrison Declaration Exs. 2-3.

93 *See* Morrison Declaration Ex. 1, Tr. at 36:11-19.

94 *See* Del. Rule of Professional Conduct 1.7; N.Y. Rule of Professional Conduct 1.7. A choice-of-law analysis is not necessary, where, as here, the laws of different states would produce the same result. *See Pickering v. Teladoc Health Inc.*, 2025 WL 2802954, at *7 (D. Del. Oct. 1, 2025) ("If the laws of the two jurisdictions produce identical results, a 'false conflict' exists, and the court may forego a choice of law analysis.").

Liquidating Trust and the Taube Released Parties) to provide informed consent of the waiver in writing.[95] Eversheds itself recognized the potential for a conflict with the Taube Released Parties.[96]

43. This is important because the Release Provision, by its plain terms, does not apply to former attorneys. While the Release Provision expressly includes "former spouses" and "former trusts," it makes no mention of "former legal advisors" or "former attorneys." The Release Provision, therefore, is limited to those attorneys that represented the Taube Released Parties at the time of the execution of the March 2022 Settlement Agreement.[97]

B. The Claims Against Eversheds Asserted in this Adversary Proceeding Are Not Released Claims

44. The claims released in the March 2022 Settlement Agreement are those that the Liquidating Trust alleged against the Taube Released Parties. The plain language of the Release Provision and the recitals are clear that the stated purpose of the March 2022 Settlement Agreement was to resolve "Causes of Action for damages on behalf of the Liquidating Trust against Medley, the Taubes, BTT and the Executives in their capacity as directors, officers, stakeholders or otherwise of the Debtor or [MDLY]."[98] The "Liquidating Trustee, on behalf of the Liquidating Trust, has alleged certain purported Causes of Action for damages against one or more of the

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95 *See In re Katz*, 981 A.2d 1133, 1147–48 (Del. 2009) ("Rule 1.7(b) now also requires both of those consents to be confirmed in writing."). New York has the same requirement. *See Shelby v. Blakes*, 129 A.D.3d 823, 825 (N.Y. 2d Dep't 2015) ("Pursuant to rule 1.7(b) of the Rules of Professional Conduct (22 NYCRR 1200.0) the potential conflict may be waived if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against the other in the same litigation, and each affected client gives informed consent, confirmed in writing."); *Hotel 237, LLC v. G.M. Canmar Residence Corp.*, 235 A.D.3d 447, 448 (N.Y. 1st Dep't 2025) (disqualifying law firm where there was no written waiver of concurrent conflict).

96 Morrison Declaration Ex. 3.

97 *See Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (N.Y. 2014) ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission.").

98 March 2022 Settlement Agreement § I.G.

Taube Released Parties (defined in Section 6.1) for Wrongful Acts."[99] Decretal paragraphs I and J of the March 2022 Settlement Agreement each clearly identify Preserved Claims and Released Claims.[100] The Release Provision released claims against the Taube Released Parties — not against their former attorneys from claims that had nothing to do with the Taube Avoidance Action Claims.

45. The claims asserted in this adversary proceeding were not, and could not have been, alleged by the Liquidating Trust in March 2022. Eversheds's fraudulent concealment of the pre-petition transfers it received from Debtor vitiated the Liquidating Trust's ability to allege these causes of action at that time, and, as such, are outside of the definition of "Released Claims."[101]

46. The March 2022 Settlement Agreement's provision for Unknown Claims is similarly limited, since it covers only unknown "Released Claims" of the character of those already alleged, such as other unknown avoidable transfers made by the Taube Released Parties.[102] It does not make sense that the "alleged" causes of action being released could be a cause of action wholly unknown to the Liquidating Trust against Eversheds, which was not even a party to the March 2022 Settlement Agreement. There was no intention, express or implied, that the Release Provision would extend to such unknown claims, which Eversheds had concealed.

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99 *Id.* § I.I.

100 For releases in particular, the recitals are critical for understanding the agreement. *See Abdulla v. Gross*, 124 A.D.3d 1255, 1257 (N.Y. 4th Dep't 2015) ("It has long been the law that 'where a release contains a recital of a particular claim, obligation or controversy and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby.'") (internal citation omitted); *Morales v. Solomon Mgmt. Co., LLC*, 38 A.D.3d 381, 382 (N.Y. 1st Dep't 2007) (same); *see also Kaminsky*, 298 A.D.2d at 361 ("If from the recitals therein or otherwise, it appears that the release is to be limited to only particular claims, demands or obligations, the instrument will be operative as to those matters alone.") (internal citation omitted). The "meaning and scope of a release must be determined within the context of the controversy being settled." *Kaprall v. WE: Women's Ent., LLC*, 74 A.D.3d 1151, 1152 (N.Y. 2d Dep't 2010) (internal citation omitted).

101 Saccullo Declaration ¶¶ 7-8.

102 March 2022 Settlement Agreement § II.7.

III. THE MARCH 2022 SETTLEMENT AGREEMENT READ AS A WHOLE DEMONSTRATES THAT EVERSHEDS DID NOT RECEIVE A RELEASE

A. Eversheds is Not an Intended Third-Party Beneficiary

47. Eversheds is not an intended third-party beneficiary of the Release Provision. Under New York law, only a contracting party or intended third-party beneficiary can enforce a contract.[103] Absent an express intent to benefit a third party, a third party is merely an incidental beneficiary with no right to enforce the contract.[104] To qualify as an intended third-party beneficiary, Eversheds must show the existence of a valid contract that was intended for Eversheds's benefit and that the benefit is sufficiently immediate, rather than incidental, to indicate the contracting party's obligation to compensate Eversheds if the benefit is lost.[105]

48. Section 22 of the March 2022 Settlement Agreement, titled "Third-Party Beneficiaries," states in full: "The Executives are third-party beneficiaries of this Agreement and the releases contained herein." Section 22 is the sole reference to intended third-party beneficiaries. When parties use a term in one part of a contract but omit it in another, the *expressio unius* maxim precludes reading in the omitted term.[106] Eversheds is not an intended third-party beneficiary of the March 2022 Settlement Agreement and was not named as one of the explicit third-party beneficiaries.[107] Thus, Eversheds cannot enforce the Release Provision as a third-party beneficiary. Clearly, the March 2022 Settlement Agreement was not intended for Eversheds's benefit and there

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103 *Dormitory Auth. v. Samson Constr. Co.*, 30 N.Y.3d 704, 710 (N.Y. 2018).

104 *Id.*

105 *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 (N.Y. 2006).

106 *Quadrant Structured Prods. Co.*, 23 N.Y.3d at 560 ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission."); *Samsung Elecs. Co. v. MPEG LA, L.L.C.*, 235 A.D.3d 603, 604 (N.Y. 1st Dep't 2025) (explaining the *expressio unius est exclusio alterius* maxim).

107 March 2022 Settlement Agreement § II.22.

was no immediate benefit to Eversheds, as the benefit Eversheds now asserts (two years later) is a release of claims that at the time, Eversheds was fraudulently concealing.

B. Reading Eversheds into the Taube Released Parties Would Obviate the Need for the Eversheds Letter and Forbearance Agreement

49. In the motion for summary judgment, Eversheds ignores the language of Section 6.2 of the March 2022 Settlement Agreement, which provides the Liquidation Trust with a reciprocal release of all claims pursuant to sections 502 and 503 of the Bankruptcy Code. Specifically, Section 6.2 of the March 2022 Settlement Agreement provides:

> Taube Released Parties Releases. On the Release Date, the Taube Released Parties hereby release, waive, relinquish, disavow and forever discharge the Debtor, the Liquidating Trust and the Liquidating Trustee of and from any and all claims, actions, or causes of action arising under or related to sections 502(h) or 503 of the Bankruptcy Code.[108]

50. If Eversheds reciprocally released its Administrative Fee Claim, the March 2022 Settlement Agreement, read as a whole, would not make sense. There would be no need for the Eversheds Letter by which Eversheds reserved its rights to collect its Administrative Fee Claim.

51. Eversheds's interpretation of the March 2022 Settlement Agreement, when considered with the Eversheds Letter, renders the contract internally inconsistent and illogical. The Eversheds Letter was a condition precedent to the effectiveness of the Release Provision and went effective simultaneously with the execution of the March 2022 Settlement Agreement. As such, the March 2022 Settlement Agreement and the Eversheds Letter should be read as one coherent agreement.[109] Pursuant to New York law, the Court is obligated to interpret the March 2022

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[108] *Id.* § II.6.2.

[109] *1471 Second Corp. v. NAT of NY Corp.*, 162 A.D.3d 449, 450 (N.Y. 1st Dep't 2018) ("[A]greements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one.") (internal citation omitted).

Settlement Agreement in a manner that provides meaning to all provisions.[110]

52. Under Eversheds's interpretation of the Release Provisions, Eversheds was simultaneously preserving its Administrative Fee Claim while also releasing that same claim in the same contract. Such an interpretation defies logic and basic principles of contract construction, which require that agreements be read to give effect to all provisions and to make sense at the time they were executed.[111] Eversheds's newly offered interpretation of the Release Provision renders meaningless the March 2022 Settlement Agreement's requirement of the Eversheds Letter.

53. Notably, the recitals to the Eversheds Letter state: "WHEREAS, the Liquidating Trustee is negotiating a settlement . . . of the Liquidating Trust's causes of action that are not covered by insurance against Seth Taube, Brook Taube and [MDLY] (the "Settling Defendant")."[112] This decretal paragraph makes clear that: (i) Eversheds is not an intended release beneficiary; and (ii) the cause of action being released are those asserted against the "Settling Defendants" – Seth Taube, Brook Taube, BTT, and MDLY. While Eversheds is not a party to the March 2022 Settlement Agreement, Eversheds is a party to the Eversheds Letter. If Eversheds contemporaneously believed that it was receiving a release through the March 2022 Settlement Agreement, it should have modified this language, which makes clear that Eversheds is explicitly not released.[113] Eversheds made no such request.

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110 *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 374 (N.Y. 2006) ("A contract 'should be read to give effect to all its provisions.'") (internal citation omitted); *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004) ("It is well settled that our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract.").

111 *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (N.Y. 2004) ("It is well settled that our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract.").

112 Adv. D.I. 28-2.

113 *See, e.g.*, *Quadrant Structured*, 23 N.Y.3d at 560 ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission.").

54. Similarly, the recitals to the Forbearance Agreement (an attachment to the March 2022 Settlement Agreement) describe the Release Provision as releasing "Medley, the Medley D&Os, and certain other individuals and entities from the alleged Causes of Action that the Liquidating Trust has against one or more of the Insured Parties."[114] The term "Insured Parties" is defined as "MDLY, its affiliates and subsidiaries, and the Executives."[115] Eversheds is not an "insured party" like MDLY or the Executives (as defined by the Forbearance Agreement). Again, Eversheds, as a party to the Forbearance Agreement, should have modified that clause to clarify it was also released, but Eversheds did not do so. In the same unified document (the Forbearance Agreement is Exhibit A to the March 2022 Settlement Agreement) Eversheds signed an agreement clarifying that it was not a released party.

C. Eversheds Provided No Consideration in Exchange for A Purported Release

55. Eversheds contributed no value to the Liquidating Trust for the alleged release of avoidance action claims against Eversheds. The scope of a release can be inferred from the amount of consideration exchanged.[116] Eversheds seeks a release for claims based on its own independent liability to the Liquidating Trust, not liability that is derivative of its client. Eversheds provided no consideration to the Liquidating Trust to support a release of avoidance action claims against Eversheds. The Court should not read into the March 2022 Settlement Agreement a release for a

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114 March 2022 Settlement Agreement, Exhibit A.

115 *Id.* § I.C.

116 *Johnson v. Lebanese Am. Univ.*, 84 A.D.3d 427, 431 (N.Y. 1st Dep't 2011) ("[I]t is appropriate to consider whether a relatively small amount of consideration paid to a releasor in exchange for signing a release suggests that the scope of the release is narrower than is urged by the releasee."); *Haynes v. Garez*, 304 A.D.2d 714, 716 (N.Y. 2d Dep't 2003) ("[T]he amount paid here appears consistent with partial payment for property damage only."); *see also* 19A N.Y. Jur. 2d Compromise, Accord, and Release § 103 ("The amount of consideration paid for a release may have a very significant bearing on the determination of what claims the parties to the instrument intended to release.").

party that provided no consideration.[117]

IV. EVERSHEDS IS ESTOPPED FROM CHALLENGING THE COURT'S PRIOR RULING ON THE SCOPE OF THE RELEASE PROVISIONS

56. The Insurance Settlement Agreements contain the same substantive footnote (footnotes 8 and 10), clarifying the scope of the Release Provision by providing:

> Notwithstanding anything to the contrary, nothing in this Section [7 or 9] or elsewhere in this Agreement or in the March 2022 Settlement Agreement shall constitute a release, waiver, or covenant not to sue regarding any claims or causes of action held by a Settling Party, the Debtor or MDLY (as defined in Schedule I annexed hereto) against any attorney or law firm, other than John Fredericks with respect to [Pre or Post]-April 30 Claims, that may have represented such Settling Party, the Debtor or MDLY.[118]

57. The Order dated March 23, 2023, incorporated and approved the Insurance Settlement Agreements.[119] The Insurance Settlement Agreements included the carve-out for claims against attorneys because the Liquidating Trust's investigation had uncovered Eversheds's misrepresentations.[120]

58. The Insurance 9019 Motion was filed on February 22, 2023, and served on Eversheds via CM/ECF.[121] Eversheds was aware of the Insurance Settlement Agreements when the Insurance 9019 Motion was filed.[122] Eversheds did not oppose the Insurance 9019 Motion or oppose entry of the Order.[123] This further demonstrates Eversheds's knowledge that it was not a released party in the Release Provision.

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117 *See, e.g.*, *Haynes*, 304 A.D.2d at 716 (amount of consideration did not appear to reflect release of personal injury claims).

118 D.I. 622-3, 622-4.

119 D.I. 635.

120 Saccullo Decl. ¶ 9.

121 Morrison Declaration Ex. 6.

122 Morrison Declaration Ex. 7, Tr. at 53:16 – 54:25.

123 D.I. 635.

V. IF EVERSHEDS WAS INCLUDED IN THE RELEASE PROVISION, THE RELEASE PROVISION IS UNENFORCEABLE

59. If the Court determines that Eversheds was included in the Release Provision, Eversheds should not be permitted to use the Release Provision to avoid liability in this adversary proceeding because Eversheds: (i) would have obtained the release through fraud; (ii) has breached the mutual releases in the March 2022 Settlement Agreement, and therefore, cannot continue to claim a benefit therefrom; and (iii) has waived the defense.

A. Eversheds Cannot Enforce a Release Obtained Through its Fraud

60. Eversheds should not be allowed to enforce the Release Provision, which was obtained (if at all) through Eversheds's fraud.[124] At the time the execution of the March 2022 Settlement Agreement, the Litigation Trustee was not aware of any cause of action against Eversheds because of Eversheds's misrepresentations and fraudulent concealment from the filing of the Retention Application through the entry of the Final Fee Order. When the Litigation Trustee became aware of the pre-petition payments made to Eversheds, the Litigation Trust filed the Motion to Vacate in January 2023, and then initiated this adversary proceeding in March 2023. These actions were taken almost one year after execution of the March 2022 Settlement Agreement. The Liquidating Trust relied on Eversheds's representations concerning the amount of pre-petition payments that it received, the source of those funds, and that only Debtor benefitted

[124] *Xeriant, Inc. v. XTI Aircraft Co.*, 762 F. Supp. 3d 345, 353 (S.D.N.Y. 2025) (*quoting GoSmile, Inc. v. Levine*, 81 A.D.3d 77, 81 (N.Y. 1st Dep't 2010)) ("To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury."); *R. Vig Properties, LLC v. Rahimzada*, 213 A.D.3d 871, 872 (N.Y. 2d Dep't 2023) ("A cause of action to recover damages for fraudulent misrepresentation requires 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'… A cause of action to recover damages for fraudulent concealment requires, in addition to the elements of a cause of action to recover damages for fraudulent misrepresentation, 'an allegation that the defendant had a duty to disclose material information and that it failed to do so.'") (internal citations omitted).

from Eversheds's services. To be clear, Eversheds had access to all information necessary to adequately disclose the payments that it received. It simply failed to exercise proper diligence prior to the Liquidating Trust's discovery of accurate information.

61. To the extent the Release Provision includes Eversheds as a Released Party, which it does not, Eversheds secured the release through fraudulent concealment and unclean hands. It would be inequitable to award Eversheds a release it secured through fraud on the Court.[125]

B. Even if Eversheds Were Released, Eversheds Breached Section 6.2 of the March 2022 Settlement Agreement and Can No Longer Avail Itself of the Release

62. If the Court agrees that Evershed was entitled to a release in the March 2022 Settlement Agreement, Eversheds would have provided a reciprocal release to the Liquidating Trust regarding Eversheds's Administrative Fee Claim. Section 6.2 of the March 2022 Settlement Agreement makes this reciprocal release clear. Eversheds, in contravention of this reciprocal release: (i) executed the Eversheds Letter that preserved its ability to recover the Administrative Fee Claim from the Liquidation Trust; (ii) negotiated the MTV Settlement, which again preserved its ability to seek payment from the Liquidating Trust for the portion of the Administrative Fee Claim that it believes is attributable to Debtor; and (iii) filed the Counterclaim in this adversary proceeding, seeking to recover the Administrative Fee Claim.

63. It is axiomatic that a party cannot breach a contract and continue to inure itself to the benefits of that contract.[126] If Eversheds was released, it has breached the March 2022 Settlement Agreement and can no longer assert the releases as an affirmative defense.

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125 *Adams v. Gillig*, 199 N.Y. 314, 317 (N.Y. 1910) ("Any contract induced by fraud as to a matter material to the party defrauded is voidable."); *Dalessio v. Kressler*, 6 A.D.3d 57, 61 (N.Y. 2d Dep't 2004) ("[F]raud in the inducement renders the obligation voidable based upon facts occurring prior or subsequent to its execution.").

126 *EXRP 14 Holdings LLC v. LS-14 Ave LLC*, 228 A.D.3d 498, 499 (N.Y. 1st Dep't 2024) ("Defendant's failure to be prepared to close by that outside date constituted a material breach excusing performance by plaintiff.").

C. Eversheds Has Waived the Defense of Release

64. If the Court agrees that the Release Provision applies to Eversheds, Eversheds's failure to raise the release prior to May 2, 2025, constitutes a waiver of this defense.[127] A right is waived when a party actively participates in litigation (and mediation) without raising the right.[128]

65. First, in the Motion to Vacate, the Liquidating Trust asserted that (i) Eversheds had misstated its prepetition preference exposure, and (ii) Eversheds Final Fee Application included work for non-debtors. Eversheds fought the Motion to Vacate and engaged in discovery, which led to arduous negotiations. At no point during these negotiations did Eversheds assert that (i) the prepetition payments it received from Debtor had been released or (ii) Eversheds had released its Administrative Fee Claim.

66. The MTV Settlement would have been unnecessary if Eversheds had released its Administrative Fee Claim. In fact, the MTV Settlement contains language specifically requested by Eversheds, stating: "this Stipulation shall not, and no negotiations relating to this Stipulation shall be, admissible into evidence in any proceeding, including the adversary proceeding pending against Eversheds in the Chapter 11 Case (Adversary Proceeding # No. 23-50121)."[129] By

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127 *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 104 (N.Y. 2006) ("Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned."); *Kamco Supply Corp. v. On the Right Track, LLC*, 149 A.D.3d 275, 280 (N.Y. 2d Dep't 2017) ("Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage.") (internal citation omitted).

128 *Reich v. Wolf & Fuhrman, P.C.*, 36 A.D.3d 885, 887 (N.Y. 2d Dep't 2007) ("[a right is] waived by the defendants when they actively participated in the litigation, raising no objection to the defect…"); *Aurora Loan Servaurs., LLC v. Tobing*, 172 A.D.3d 975, 976–77 (N.Y. 2d Dep't 2019) ("[T]he plaintiff waived its right to object to the Supreme Court's authority to order a reference to determine whether the 30–day notice of default was properly sent in accordance with the terms of the subject mortgage by failing to object to the reference and by actively participating in the hearing before the Referee."); *cf. Kenyon & Kenyon v. Logany, LLC*, 33 A.D.3d 538, 538–39 (N.Y. 1st Dep't 2006) ("[I]ts failure to insist on such notice for nearly 10 months after receiving plaintiff's oral notification, while acting as if it had accepted the oral exercise of the option, knowing plaintiff's action in reliance on defendant's conduct, constituted a waiver of any right to insist on written notice.").

129 Adv. D.I. 686-1 at ¶ 9.

including this caveat in the stipulation, Eversheds clearly knew it was not a released party in the March 2022 Settlement Agreement, as Eversheds wanted to maintain its Administrative Fee Claim.[130]

67. Second, after the Liquidating Trust initiated this adversary proceeding, Eversheds litigated for over two years, including engaging in mediation, before raising the release defense. On March 3, 2023, the Liquidating Trust filed the Complaint, seeking to avoid the $2,015,986.53 in preferential and $3,346,713.39 in fraudulent transfers. On June 23, 2023, Eversheds filed its Answer, asserting affirmative defenses of new value and ordinary course of business and a counterclaim seeking setoff and recoupment relating to the Administrative Fee Claim — which would have been released if Eversheds was a Taube Released Party in the March 2022 Settlement Agreement. The Answer did not set forth the affirmative defense of release.

68. In over two years of litigation, Eversheds never raised this apparently case-dispositive defense.[131] The self-serving Christakos Declaration states that "settlement and release" were not included in Eversheds's original Answer "due to an oversight," suggesting that Eversheds always understood the release provision to include Eversheds.[132] The declaration goes on to reveal that Eversheds "discovered" the release language and "realized" that it had this defense on "April 23, 2025" even though Eversheds filed its Answer on June 23, 2023.[133] These statements are

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130 Moreover, the stipulation resolving the Motion to Vacate contains an integration clause stating: "This Stipulation contains the entire agreement between the Parties and supersedes any prior agreements and understandings, written or oral, between the Parties pertaining to the subject matter hereof." *Id.* at ¶ 12. Because the settlement of the Motion to Vacate directly concerns the Administrative Fee Claim, which Eversheds now claims was released in the March 2022 Settlement Agreement, the Court could find that the settlement of the Motion to Vacate overrides the March 2022 Settlement Agreement.

131 The Liquidating Trust expressly reserves all rights to recover from Eversheds the attorneys' fees and costs the Liquidating Trust has incurred in litigation from March 2022 to the present due to Eversheds's failure to assert the release, which resulted in a waste of the Liquidating Trust's resources.

132 Adv. D.I. 28, Christakos Declaration ¶¶ 12, 14.

133 *Id.* ¶¶ 13-14; Morrison Declaration Ex. 7, Tr. at 15:8 – 16:11.

irreconcilable. It is obvious that this was not an oversight because Eversheds would not have litigated this case for two years – wasting the time of the Liquidating Trust, the mediator and the Court – if Eversheds believed the avoidance action claims against Eversheds had been released in March 2022 Settlement Agreement.

CONCLUSION

WHEREFORE, the Liquidating Trust respectfully requests that the Court deny the motion for summary judgment and provide such other and further relief as the Court deems appropriate.

Dated: January 9, 2026
Wilmington, Delaware

Respectfully submitted,

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