that Article 35 expresses just such a policy for those Panamanian corporations that have local stockholders. Why, then, are foreign stockholders of Panamanian corporations denied the same protection? Defendants offer no explanation and I can find none. While I recognize that other countries do not necessarily adhere to the same notions of justice fundamental to our laws, I am not prepared to find, on this showing, that the laws of Panama were designed to arbitrarily deny foreign minority stockholders the protections they grant to Panamanian minority stockholders. Accordingly, I find that Article 35 does not apply to International and that, consistent with its stated limitation upon the applicability of its laws, Panama would refrain from applying its law to determine the voting rights of International's stockholders.

Based upon the foregoing, the question then becomes what law to apply. In this case, it is not necessary to determine whether Louisiana or Delaware has the more substantial contacts with International inasmuch as both states prohibit a majority-owned subsidiary from voting its parent's stock. *See*, *Restatement*§302, Comment k; 8 *Del. C.* §160(c); Louisiana Business Corporation Law, R.S.§12:75(G). Accordingly, defendants' motion for partial summary judgment must be denied and plaintiff's motion for judgment on the pleadings, which will be treated as a motion for partial summary judgment, is hereby granted.

IT IS SO ORDERED.

MACFADDEN HOLDINGS, INC. v. JOHN BLAIR & CO.

No. 8489

Court of Chancery of the State of Delaware, New Castle

July 2, 1986

Plaintiff commenced this action for a temporary restraining order against John Blair & Co. to prevent it from tendering its shares to

plaintiff's competitor Reliance. Prior to this action plaintiff made an offer to acquire any and all outstanding common shares of Blair for $25 per share cash. Blair's board determined that plaintiff's offer was inadequate and began to solicit other offers for Blair stock. Due to the various amendments made to the offers, the timing advantage originally held by plaintiff shifted to Reliance.

The court of chancery, per Vice-Chancellor Jacobs, declined to grant plaintiff's temporary restraining order against Blair. The court noted that Macfadden was not threatened with imminent irreparable injury that could be prevented by a temporary restraining order. The court held: (1) Macfadden failed to show that it would suffer imminent irreparable injury if injunctive relief was not granted; (2) plaintiff failed to show that the threatened harm—the takedown by Reliance of the tendered shares—would be averted by the entry of a restraining order; (3) there was no evidence of record that showed that Blair stockholders were being coerced to accept an offer unrelated to its merits in any actionable sense; (4) the fact that Reliance was not made a party to this action, even though they had an interest in the outcome, placed a serious concern as to whether relief could be granted.

1. Injunction ⟹ 136(1), 137(1)

The extraordinary remedy of a temporary restraining order will be granted only where it appears that immediate action is required to preserve the status quo and to prevent an immediately threatened irreparable injury that will occur before the matter can be heard on a motion for a preliminary injunction.

2. Injunction ⟹ 136(1), 137(1)

A party seeking a temporary restraining order has the burden of showing a reasonable probability of success on the merits, irreparable injury if injunctive relief is not granted, and a balancing of hardships that favors the moving party.

3. Injunction ⟹ 136(1), 137(1)

An injunction will not issue unless it will prevent the injury that it is claimed will be irreparable.

4. Corporations ⟹ 307

The fact that timing and economic terms of a particular offer induce shareholders to tender does not make it coercive.

Martin P. Tully, Esquire, and Thomas Reed Hunt, Jr., Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and Louis A. Craco, Esquire, of Willkie, Farr & Gallagher, New York, New York, for plaintiffs.

R. Franklin Balotti, Esquire, Jesse A. Finkelstein, Esquire, and C. Stephen Bigler, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Paul C. Saunders, Esquire, of Cravath, Swaine & Moore, New York, New York, for defendant John Blair & Company.

JACOBS, *Vice-Chancellor*

Presently before the Court is the motion of plaintiffs Macfadden Holdings, Inc. and Macfadden Acquisition Corporation ("Macfadden") for a temporary restraining order. Macfadden's motion is the latest episode in a contest for control of defendant John Blair & Company ("Blair")—a contest that began in April, 1986 and has been waged in the federal courts, and the Federal Communications Commission (FCC) as well as in this Court. The competing bidder for control of Blair is Reliance Capital Group, L.P., and certain affiliated entities (collectively "Reliance"), none of whom are parties to this lawsuit.

Plaintiffs' motion for a temporary restraining order was filed on June 23, 1986, and was scheduled to be heard on July 1, 1986, with expedited briefing and discovery to occur during the intervening one week period. Briefing was completed only hours before the oral argument. Because the competing offer of Reliance is scheduled to close at midnight on July 2, 1986, Macfadden advises that its motion must be decided before that time. Given the volume of the record and the briefs, and the limited time frame (*i.e.*, less than 24 hours) in which to decide this matter, any written disposition of this matter must necessarily be summary and abbreviated. With those *caveats*, this is the decision of the Court on the plaintiffs' motion for a temporary restraining order.

I.

To understand the nature and basis for the relief being requested, a brief recital of certain background facts is useful. On April 22, 1986 Macfadden commenced an offer to acquire any and all outstanding common shares of Blair for $25 per share cash. On April 23, 1986 Blair's directors retained Salomon Brothers ("Salomon") and later Drexel Burnham Lambert Incorporated ("Drexel") to render investment banking advice and to work with management to explore alternative transactions that would maximize value to Blair stockholders. Blair's directors later determined that Macfadden's offer was inadequate for several reasons. Those reasons included Salomon's and Drexel's advice to that effect, and also Macfadden's proposal to sell ADVO (a Blair subsidiary) to a third party for $100,000. Blair's investment banker advised—and Blair's Board believed—that ADVO was worth between $40 and $60 million.

On May 15, 1986, Blair entered into a "letter of intent" agreement with Warburg Pincus Capital Partners, L.P. ("Warburg"), which contemplated, *inter alia*, a sale of ADVO preferred stock, convertible into 16 2/3 of the total common stock equity of ADVO, for $10 million cash. The balance of ADVO's stock would be "spun off" to Blair's stockholders, as the Board's chosen method of maximizing shareholder value.

On April 23, 1986, the Blair Board also instructed Salomon to solicit other offers for Blair. Salomon undertook a search for other potential buyers. During the following month Salomon made contact with several potential acquirors, including Macfadden. Salomon informed Macfadden that the Blair Board wished Macfadden to offer its best proposal; however, Macfadden stood by its original $25 per share offer. Salomon also conducted negotiations with representatives of Reliance and others. At a meeting held on May 30, 1986, Blair's Board considered all outstanding offers, including Macfadden's and a proposal made by Reliance. The evidence indicates that Macfadden was offered one final opportunity to make a higher bid before the Board made its decision but Macfadden did not submit a higher bid.

At the May 30, 1986 meeting, Blair's Board approved the Reliance proposal, based in part on Salomon's advice that the Reliance offer was fair and was the financially superior offer. Reliance's proposal was (a) to make a tender offer to purchase up to 8 million shares at $27 per share in cash, (b) to acquire the remaining shares

for debentures having a face value of $27, and (c) to distribute the shares of ADVO to each Blair shareholder.

On June 2, 1986, Blair and Reliance entered into an Agreement of Merger ("Merger Agreement"). Without purporting to be exhaustive, the Merger Agreement provided that a Reliance subsidiary would make a tender for 8 million shares (approximately 70%) of Blair's common stock at $27 per share, with the balance to be converted in a "second step" merger into 12% junior subordinated discount debentures having a $27 principal amount. Salomon advised Blair's Board that this transaction had a "blended value" of $30-$31 per share, which included a value of between $4 and $5 for ADVO. The Merger Agreement also provided (in Section 1.03) that pending final FCC approval of the merger, the common stock purchased pursuant to the Reliance offer would be held in a voting trust ". . .by and in the name of the trustees, as defined in Section 6.19. . ." Section 6.19 provides that the Reliance subsidiary and defendants Mayers, Shayne, Jackson W. Smart, Jr. and Stone (those individuals being Blair's outside directors) "will enter into a Voting Trust Agreement substantially in the form heretofore delivered by the [Reliance] to [Blair]. . ." The record discloses that the above-named parties subsequently did enter into the voting trust agreement provided for in Section 6.19.

The Merger Agreement and the proposed Reliance tender offer were announced on June 3, 1986. Reliance commenced its tender offer on June 5, 1986. By operation of the Federal Securities Laws, Reliance may begin to purchase or "take down" the shares tendered to it, after midnight, July 2, 1986.

Although Macfadden has characterized the Merger Agreement as an effort by Blair's management to give favored treatment to Reliance and to shut off any meaningful auction for Blair, it is not disputed that the Merger Agreement did prompt a series of new and amended offers by Macfadden and Reliance for Blair's common stock.

At the time that Reliance announced its offer, Macfadden had a "timing" advantage, *i.e.*, its $25 purchase cash offer would expire—and any tendered shares could be purchased by it—before the Reliance offer would expire and before Reliance could purchase the shares tendered to it. Had Macfadden elected to amend its offer by increasing the consideration, under federal law, it would have retained that timing advantage.[1]

1. When an existing offer is amended, the waiting period before shares can

On June 5, 1986, Macfadden terminated its $25 per share cash tender offer, apparently because the Reliance bid was higher. On June 10, 1986, Macfadden announced a second tender offer at a higher price, and on June 12, 1986, Macfadden commenced its second tender offer for up to 8 million Blair shares at $30 per share in cash. It also announced its intention to complete a "second step" merger in which the remaining Blair shares would be converted into junior preferred stock having a stated value of $30 per share. Macfadden's second offer was conditioned upon there being no distribution of ADVO stock. Under this new offer, Macfadden lost its previous timing advantage: withdrawal rights end on July 3, 1986, and the proration period ends on July 10, 1986.

One week later, on June 19, 1986, Reliance announced an amendment to its offer. Reliance now offers to purchase up to 7 million shares of Blair stock at $31 per share cash, with the remaining shares to be acquired in a merger for a per share price of $20.75 principal amount of subordinated debentures and approximately 2.5 shares of ADVO common stock. The ADVO stock, however, will not be distributed unless a majority of Blair common shares are tendered to, and purchased by, Reliance.[2]

Finally, on June 26, 1986, in response to the amended Reliance offer, Macfadden amended its second offer. Macfadden is now offering to purchase up to 7 million shares of Blair common stock for $32 per share cash, to be followed by a merger in which the remaining Blair shares will be converted into junior preferred stock with a stated value of $32. Macfadden's amended second offer is also subject to a timing disadvantage, *i.e.*, it will not close until after the July 2, 1986 "takedown" date for the amended Reliance offer.

At the moment, the amended second Macfadden offer and the revised Reliance offer are the two offers on the table. Blair's directors have taken the position in their Schedule 14D-9, that the Reliance offer is the financially superior offer.

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be taken down is ten business days from the date of the amendment. (SEC Exchange Act Rule 14d-7; 17 C.F.R.§ 240.14d-7)). Where an offeror seeks to purchase less than all the shares, the waiting period is twenty business days from the date of the offer. (SEC Exchange Act Rule 14e-l(a); 17 C.F.R.§ 240.14e-l(a)).

2. That last condition was negotiated by Blair's management, by way of a modification to the Merger Agreement, so that the Macfadden and Reliance offers would not be inconsistent, at least as to the ADVO spinoff.

II.

[1,2] The extraordinary remedy of a temporary restraining order will be granted only where it appears that immediate action is required to preserve the *status quo* and to prevent an immediately threatened irreparable injury that will occur before the matter can be heard on a motion for a preliminary injunction. *Bernstein v. Vestron*, Del.Ch., C.A. No. 8404, Allen, C. (March 11, 1986). The party seeking such relief has the burden of showing a reasonable probability of success on the merits, irreparable injury if injunctive relief is not granted, and a balancing of hardships that favors the moving party. *Hecco Ventures v. Sea-Land Corporation*, Del.Ch., C.A. No. 8486, Jacobs, V.C. (May 19, 1986).

In its moving papers, Macfadden has advanced two theories upon which it seeks interim injunctive relief. The first is that Blair's directors have breached the duty imposed upon them by *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173 (1986) to maximize the values for the corporation's stockholders once the directors have determined that the company will be sold. Specifically, Macfadden claims that once it became clear that Macfadden's second offer would be subject to a "timing disadvantage", Blair's directors had a fiduciary obligation to require Reliance to extend its "takedown" date to make it coextensive with the takedown date for Macfadden's offer, thereby creating a "level playing field" for both offers. By not having negotiated or attempted to negotiate such an extension, Blair's directors are said to have breached their fiduciary duty under *Revlon*.

Second, Blair's directors are charged with having breached the duty, imposed upon them by *Lynch v. Vickers Energy Corp.*, Del.Supr., 383 A.2d 278 (1977) and subsequent Delaware decisions, to disclose all facts that would be material to Blair shareholders when faced with a choice between the two competing offers. Specifically, Macfadden accuses Blair's directors of having made false disclosures and omissions of material facts in Blair's Form 14D-9 and amendments thereto, and in certain press releases, including (a) the fact that Blair's directors, including the outside directors who comprise the majority of Blair's Board, have a financial self-interest in the success of the Reliance offer, and (b) the value of ADVO, which is a key element of the consideration to be offered in any "second step" merger with Reliance, was overstated, and that the value of ADVO

is substantially less than the value of $70 million imputed to it by Blair's investment bankers.

In its moving papers and brief, Macfadden argued that the above mentioned fiduciary violations entitled it to a temporary restraining order

> "pending a hearing on plaintiffs' motion for a preliminary injunction. . .enjoining defendants from taking any action to perform the Reliance Merger Agreement, as amended. . . ." (Macfadden Brief, p. 49).

It was in terms of that request for relief that the parties joined issue and did battle in their briefs.

However, at oral argument, and for the first time in the case, plaintiffs vastly narrowed, and thus changed, the nature of their request for injunctive relief. At oral argument Macfadden announced that it now seeks a restraining order against the implementation by Blair and the individual defendant directors of the voting trust established by § 6.19 of the Merger Agreement, until (i) Blair makes appropriate corrective disclosures, (ii) the market absorbs the corrective new information and until (iii) a preliminary injunctive motion can be heard, July 10th being the suggested hearing date. The basis for Macfadden's revised request for relief is that it will be irreparably harmed if Reliance is permitted to take down its shares on Tuesday, July 2, 1986. Although Macfadden seeks no relief against Reliance (Reliance was not made a party to this lawsuit and it is not charged with any wrongdoing), Macfadden claims, nonetheless, that because the voting trust arrangement is a precondition to any takedown of the shares tendered to Reliance, to enjoin the implementation of the former would amount, in functional terms, to an injunction against the latter.

Having considered the contentions of the parties, as set forth in the briefs and the oral presentations of counsel, I conclude that Macfadden's motion for a temporary restraining order should he denied. Even taking into account the fact that a showing at this stage will normally (if not invariably) be less extensive than on a motion for a preliminary injunction (*Hecco Ventures v. Sea-Land Corporation, supra*), the showing made by Macfadden, falls far short of what is required at this stage.

III.

The showing made by Macfadden leaves considerable doubt as

to its likelihood of success on the merits. But it is unnecessary to address the merits or even the balancing of hardships in this Opinion, because it is clear, for the reasons now discussed, that Macfadden is not threatened with imminent irreparable injury that could be prevented by a temporary restraining order. On that ground alone, injunctive relief would be totally inappropriate.

First, Macfadden has failed to show that it will suffer imminent irreparable injury if injunctive relief is not granted. The acts that Macfadden now seeks to enjoin—the implementation of Section 6.19 of the Merger Agreement—have already occurred. Section 6.19 provides that the Reliance subsidiary and the named individuals who are Blair's outside directors will enter into a voting trust agreement under which those directors will serve as voting trustees. That has now been accomplished. If more remains to be done under Section 6.19, the record does not disclose it.[3]

[3] Second, even if there were something left to be enjoined, the requested relief should not be granted. An injunction will not issue unless it will prevent the injury that is claimed will be irreparable. *See Hecco Ventures v. Sea-Land Corporation, supra.* In this case there is no showing that the harm claimed to be threatened would be averted by the entry of a restraining order. Macfadden asserts that under Sections 1.3 and 6.19 of the Merger Agreement, as well as under the Communications Act of 1934, "short form approval" by the FCC of the proposed Reliance transaction is a precondition to the takedown by Reliance of the tendered shares, and that to obtain such FCC approval, the voting trust (and voting trustees) must first be in place. While it would appear that FCC approval will be required for Reliance to exercise any voting control of Blair, nothing in the cited provisions of the Merger Agreement precludes Reliance from taking the initial first step of purchasing the tendered shares, subject to obtaining ultimate FCC approval. While Macfadden asserts that the purchase by Reliance is independently precluded

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3. To the extent that Macfadden seeks to enjoin further action under Section 6.19, there is substantial doubt as to this Court's jurisdiction to do so. The Reliance subsidiary, one of the signatories to the voting trust, is not a party to this action, and the remaining signatories (Blair's outside directors) are being sued in their capacity as directors, not as voting trustees. To the extent that relief must be granted against those directors in their capacity as voting trustees, 10 *Del.C.*§3114, the statute upon which *in personam* jurisdiction over them is predicated, would not be applicable. *Instituto Bancario Italiano SpA v. Hunter Eng'g Co.*, Del.Supr., 449 A.2d 210 (1982).

by federal law, Macfadden has not come forward with any federal authority that supports that *ipse dixit* assertion. Macfadden has, therefore, failed to meet its burden of showing that the threatened harm—the takedown by Reliance of the tendered shares—would be prevented by the entry of a restraining order. Accordingly, granting plaintiffs' motion would be a useless act. *See Villa Corp. v. S. D. Walker, Inc.*, 187 F.2d 443 (3d Cir. 1951).

Third, Macfadden's theory of irreparable harm is factually and legally flawed. Its argument runs as follows: Since Reliance can take down the Blair shares tendered into its offer before Macfadden can take down the shares tendered to it, Reliance has a timing advantage. Because of this timing advantage, Blair shareholders will be "coerced" into tendering to Reliance, even though the two offers are "relatively close" on their economic merits, in order to avoid the risk of being forced to accept the non-cash "back-end" consideration from a proposed second step merger with Reliance. The entry of an injunction that would have the effect of postponing Reliance's takedown of the shares, and thus Reliance's timing advantage, would eliminate the coercion.

[4] Macfadden's theory is flawed on two counts. To begin with, there is no record evidence that Blair stockholders are actually being "coerced" in any actionable sense; that is, that they are being wrongfully induced to accept an offer for reasons unrelated to its merits. The evidence of record on that point shows only that shareholders are being influenced by the economic merits of the two offers. The fact that the timing and economic terms of a particular offer induce shareholders to tender does not make it "coercive". *Katz v. Oak Industries, Inc.*, Del.Ch., C.A. 8401, Allen, C. (March 10, 1986).

Moreover, to the extent there is a timing differential, it is not because of the Merger Agreement or any act by Blair's directors. Rather, it is a situation of Macfadden's own making. Had Macfadden elected to amend its original offer, it would have retained its timing advantage. Even if federal law may have required that Macfadden commence a new offer (as Macfadden asserts), Macfadden could have done that on June 4 and thereby retained its timing advantage. It was Macfadden's decision to abandon its first offer, and its decision not to commence its new offer until June 12, that caused its present predicament. Macfadden could not have been unaware of the effect federal securities laws would have on any new offer. Under those circumstances, Macfadden's effort to seek the intervention of this

Court, and to invoke its injunctive processes, comes with less than perfect grace.

Fourth, there are other equitable infirmities that make any grant of interim relief ill-advised. This case is unusual in that the acts sought to be enjoined (the implementation of Sections 1.03 and 6.19 of the Merger Agreement) are not the acts which the plaintiffs claim will cause it irreparable harm. That is because Macfadden is seeking to do indirectly that which, for its own reasons, it has chosen not to do directly. The irreparable harm allegedly threatened is Reliance's imminent takedown of the shares being tendered to it. Yet no effort is made to enjoin Reliance from purchasing those shares. Had Macfadden proceeded straightforwardly to seek such relief, all parties having an interest in the outcome of this motion would he before the Court. Instead, Macfadden has sought to enjoin only some of the parties to the Merger Agreement, thus leaving unrepresented the other parties (*i.e.*, Reliance) who also have any interest in the outcome. In this procedural posture, there is serious concern as to whether relief could be granted in the absence of Reliance. Court of Chancery Rule 19. I do not, because I need not, decide that issue, but refer to it only as an additional reason why, given the several other difficulties with plaintiffs' position, any grant of interim injunctive relief would be ill-advised.

For the foregoing reasons plaintiffs' motion for a temporary restraining order is denied.

IT IS SO ORDERED.

PHILLIPS PETROLEUM CO. v. ARCO ALASKA, INC.

No. 7177

Court of Chancery of the State of Delaware, New Castle

July 9, 1986

Under an Operating Agreement, plaintiffs Mobil Oil Corporation, Phillips Petroleum Company, and Chevron U.S.A. (MPC) and defendants Sohio Petroleum Company, Sohio Alaska Petroleum

Company, ARCO Alaska, Inc., Atlantic Richfield Company, and Exxon Corporation (SAE) were working interest owners of oil and gas leases on land located in Alaska. The Operating Agreement provided that equity of the working interest owners was to be determined on the basis of Hydrocarbon Pore Value (HPV) on two separate occasions: January 1, 1979 and January 1, 1982. It also entitled the parties to invoke binding arbitration if they were unable to agree upon a final redetermined HPV as of January 1, 1982.

On May 8, 1982, two of the defendants initiated arbitration proceedings. During the first of the seven separate phases of the proceedings, the Arbitration Board found in favor of SAE. In its determination of HPV, the Arbitration Board considered: (1) data concerning matters previously resolved in twelve Redetermination Agreements, and (2) HPV-related data from two wells, API 855 and API 871, which had been drilled by SAE after the "data cutoff dates" prescribed by the Data Cutoff Agreement.

On May 3, 1983, MPC filed an action against SAE for declaratory relief alleging that the Arbitration Board had no authority to determine the binding effect of the Redetermination Agreements and that the Operating Agreement and the Data Cutoff Agreement precluded the use of the data from the two disputed wells. SAE moved to stay the action or in the alternative have the action dismissed. On August 3, 1983 a stay was granted and the motion to dismiss deferred. As the conclusion of the arbitration neared, MPC feared that SAE would file a summary confirmation action in the California Superior Court and preempt this action. Therefore, MPC requested that the court dissolve the stay and rule upon the defendants' motion to dismiss. This request was granted and the court held that: (1) MPC was entitled to an independent adjudication of issues in its complaint, (2) the Delaware Chancery Court had jurisdiction, and (3) the availability of a proceeding in California to vacate or confirm a final award by the Arbitration Board was not an adequate legal remedy that would warrant the ouster of the Delaware Chancery Court's jurisdiction.

After the Arbitration Board issued its final award, SAE moved for partial summary judgment. The motion rested upon two grounds: (1) that the Arbitration Board's determination should be accorded *res judicata* effect or at the very least collateral estoppel effect, and (2) that the undisputed facts entitle SAE to a partial summary judgment on MPC's claims that both the Operating Agreement and Data Cutoff Agreements preclude consideration of the data from the two disputed wells.

The chancery court, per Vice-Chancellor Jacobs, held that: (1) the determinations by the Arbitration Board were entitled to neither *res judicata* nor collateral estoppel effect, (2) the issue of whether the Operating Agreement contained a January 1, 1982 cutoff was not appropriate for summary judgment, and (3) summary judgment was inappropriate with respect to SAE's claim that the Data Cutoff Agreement did not bar consideration of the two disputed wells in the HPV redetermination. Consequently, the defendants' motion for partial summary judgment was denied.

1. Arbitration ⟹ 1, 29

Where questions call for a legal interpretation of an operating agreement and a determination of the legal authority of the parties' agents to enter into subsequent implementation agreements, such questions are questions of law and, therefore, outside the grant of limited jurisdiction of the arbitrator who was empowered, by agreement, to interpret the agreement insofar as required for the performance of the arbitrator's duties.

2. Arbitration ⟹ 23.17, 59, 73.2, 73.7(7)

Where an arbitrator finds it necessary to interpret an operating agreement to perform its duties under the agreement, parties to the agreement are entitled to an independent judicial interpretation of questions of law.

3. Arbitration ⟹ 1.1, 1.2, 3

Although Alaska, California, and Delaware have strong public policies encouraging arbitration, those policies are implicated only insofar as the parties have agreed to the arbitration remedy.

4. Arbitration ⟹ 1.1, 2, 6

Arbitration is a consensual proceeding binding only upon those who have entered into a written agreement. DEL. CODE ANN. tit. 10, § 5701 (1974).

5. Arbitration ⟹ 2, 48, 59, 72

Under California law, an unconfirmed arbitration award establishes only a contract right which becomes a judgment only upon confirmation. CAL. CIV. PROC. CODE §§ 1287.4, .6 (West 1967).

6. Judgment ⟹ 540, 650

A California trial court judgment will not be given *res judicata* effect pending an appeal.

7. Arbitration ⟹ 59, 72

Judgment ⟹ 540, 550, 552, 644, 650

A confirmed arbitration award will not be given *res judicata* effect, under California law, while the confirmation is the subject of an appeal.

8. Judgment ⟹ 178, 181(1), 181(2), 185(6)

On a motion for summary judgment, the test is whether, after consideration of the evidence, there is a dispute as to any possible issue of fact material to any valid legal theory advanced by the moving party, and whether, based upon the undisputed material facts, the moving party is entitled to a judgment as a matter of law.

9. Judgment ⟹ 181(1), 181(2), 185(2), 185(6)

On a motion for summary judgment, the moving party has the burden of establishing the absence of a material fact dispute, and any doubt must be resolved against granting summary judgment.

10. Judgment ⟹ 181(1), 181(2), 185(6)

Summary judgment will be denied if there are disputed factual inferences to be drawn from the facts that are not in dispute, or if it is desirable to inquire more thoroughly into the facts to clarify the application of the law thereto.

11. Judgment ⟹ 181(1), 181(2), 181(19), 185(6)

Where language of an operating agreement can be construed to support either of the parties' conflicting interpretations, further

inquiry into the facts is required and summary judgment is inappropriate.

12. Equity ⟹ 56

Unless prevented by some positive and mandatory law, equity regards substance rather than form.

13. Equity ⟹ 57

Equity regards as done that which in good conscience ought to be done.

14. Contracts ⟹ 154

To permit defendants to circumvent a Data Cutoff Agreement that would otherwise be applicable by allowing it to rely upon the nonoccurrence of a procedural formality that defendants deliberately chose to preclude would be unconscionable.

15. Partnership ⟹ 1, 70

Manipulation of the unit voting machinery by the controlling equity owners is conduct which is not permitted among business partners and it should not be permitted in a situation such as this where minority owners' rights are dependent upon the adherence by the majority owners to the rules of fair play.

16. Contracts ⟹ 168

Partnership ⟹ 1, 70

The relationship between minority and majority owners gives rise to an implied contractual duty to deal fairly and in good faith and not to engage in conduct that would injure the rights of the other contracting parties to receive the benefits of the agreement.

Henry N. Herndon, Jr., Esquire, Edward M. McNally, Esquire, and Mary N. Johnston, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware; Donald E. Scott, Esquire, and Glenn Summers, Esquire, of Kirkland & Ellis, Washington, D.C., for plaintiffs.

William T. Quillen, Esquire, and Robert K. Payson, Esquire, of Potter Anderson & Corroon, Wilmington, Delaware; James F. Harker, Esquire, of Herlihy & Wier, Wilmington, Delaware; and William F. Cronin, Esquire, and Jeffrey W. Leppo, Esquire, of Bogle & Gates, Seattle, Washington; Barry Wertz, Esquire, of Exxon Corporation and David Marquez, Esquire, of Atlantic Richfield Company, for defendants ARCO Alaska, Inc., Atlantic Richfield Company and Exxon Corporation. Allen M. Terrell, Jr., Esquire, and William J. Wade, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, and Michael E. Arruda, Esquire, of Sohio Petroleum Company, San Francisco, California, for defendants Sohio Petroleum Company and Sohio Alaska Petroleum Company.

JACOBS, *Vice-Chancellor*

I.

Presently pending before the Court is the defendants' motion for partial summary judgment. This action was brought by plaintiffs Mobil Oil Corporation, Chevron U.S.A., Inc. and Phillips Petroleum Company (collectively "plaintiffs" or "MPC") against defendants ARCO Alaska, Inc., Atlantic Richfield Company, Exxon Corporation, Sohio Petroleum Company and Sohio Alaska Petroleum Company (collectively, "defendants" or "SAE") for a declaratory judgment to determine the parties' rights under an agreement, entitled "Prudhoe Bay Unit Operating Agreement" ("Operating Agreement"), which was entered into by the parties in 1977. The parties are Working Interest Owners, or Unit Owners, of oil and gas leases on tracts situated on the Prudhoe Bay Permo-Triassic Reservoir, which is located on the North Slope of Alaska. Plaintiffs own a 5% interest in the Prudhoe Bay field, defendants own a 94% interest, and others who are not parties to this lawsuit own the remaining 1%.

Broadly speaking, this litigation involves the questions of what issues and evidence may be considered in determining the parties' equity interest in the oil and gas produced by the Prudhoe Bay field, and which tribunal—an arbitration panel or this Court—will decide such issues. Under the Operating Agreement, equity is to be determined on the basis of Hydrocarbon Pore Volume ("HPV"), which is the amount of oil and gas contained in the pores of the underground rock located within the parties' respective tracts as of the date of field discovery. Under the Operating Agreement, HPV was to be "redetermined" on two separate occasions: provisionally as of January 1, 1979 and finally as of January 1, 1982. If the parties were

unable to agree upon a finally redetermined value for HPV as of January 1, 1982, the Operating Agreement entitled them to invoke binding arbitration to resolve certain HPV-related issues. On May 8, 1982, two of the defendants, ARCO Alaska and Exxon, initiated arbitration after it had become clear that the parties could not reach agreement upon the final HPV values. The arbitration proceeding lasted for three years. In August, 1985, the ultimate arbitration award was handed down.

The issues that underlie this lawsuit surfaced during the first of what became seven separate phases of the arbitration proceedings. During the first phase, the Arbitration Board, which consisted of six petroleum engineers who were not law-trained, determined what issues and what evidence relating thereto would form the subject matter of the arbitration. In that procedural context MPC argued that certain matters were not arbitrable, because they had been previously resolved in twelve "Redetermination Agreements", that were negotiated by the Equity Subcommittee of the Unit and covered various technical aspects of the HPV redetermination. MPC contended that the matters resolved by the Redetermination Agreements were outside the Arbitration Board's jurisdiction and, hence, were not subject to arbitration.

MPC also objected to the submission by SAE of HPV-related data from two wells (wells API 855 and API 875)[1] which had been drilled by SAE in December 1982 and January 1983. MPC contended that the Board had no authority to consider data from those two wells, because the data had been generated after the "data cutoff" dates that were proscribed by the "Data Cutoff Agreement", dated August 1, 1980.[2]

On April 12, 1983, over MPC's objection, the Arbitration Board ruled that it would receive data with respect to the aforementioned disputed issues, subject to its determining at a later phase whether that evidence would be considered in making the final HPV redetermination. In August 1985, the Arbitration Board ultimately ruled in SAE's favor with respect to both of those disputed issues. That

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1. "API . . ." refers to a designation and number assigned to a well by the American Petroleum Institute which, I am advised, assigns numbers to petroleum wells, wherever drilled.

2. The Data Cutoff Agreement is discussed more fully later in this Opinion. MPC also objected to other matters which subsequently became moot by reason of certain decisions—favorable to MPC—by the Arbitration Board.

is, the Board arrived at a HPV redetermination based upon data from the two disputed wells. It further decided those matters that MPC contended had been previously resolved by the twelve Redetermination Agreements, on the ground that those Agreements were not legally binding.

On May 3, 1983, the same day that the "merits" phase of the arbitration proceedings was to begin, MPC filed this action for declaratory relief. In its complaint MPC alleged that the Arbitration Board had no authority to determine the binding effect of the Redetermination Agreements, and that the data from wells API 855 and 875 could not legally be considered, by reason of the Operating Agreement and the August, 1980 Data Cutoff Agreement. The defendants moved to dismiss the suit on various jurisdictional grounds, or, alternatively, to stay the action pending the conclusion of the arbitration. In a decision handed down on August 3, 1983, Chancellor Brown stayed this action, including all discovery, and deferred ruling upon the defendants' motion to dismiss. *Phillips Petroleum Company, et al. v. ARCO Alaska, Inc., et al.*, Del.Ch., C.A. No. 7117, Brown C. (August 3, 1983) ("MPC I").

In 1985, shortly before the arbitration was to conclude, MPC became concerned that SAE would seek to preempt this lawsuit by filing a summary confirmation action in the California Superior Court. Accordingly, MPC requested this Court to dissolve the stay for the purpose of enabling it to rule upon the defendants' dismissal motion. In an opinion handed down on May 15, 1985, Vice Chancellor (now Justice) Walsh dissolved the stay and denied the defendants' motion to dismiss. *Phillips Petroleum Company, et al. v. ARCO Alaska, Inc., et al.*, Del.Ch., C.A. 7177, Walsh, V.C. (May 15, 1985) ("MPC II"). In *MPC II*, Vice Chancellor Walsh held, *inter alia*, that (i) MPC was entitled, under the Operating Agreement, to an independent adjudication of the issues alleged in the complaint, (ii) this Court had jurisdiction to adjudicate such issues under the Delaware Declaratory Judgment Act (10 *Del.C.* §6501, *et.seq.*) and (iii) the availability of a proceeding in California to vacate or confirm a final award by the Arbitration Board was not an adequate legal remedy that would warrant the ouster of this Court's jurisdiction over the disputed matters.

On August 13, 1985, MPC served and filed a second amended complaint. On August 28, 1985, the Arbitration Board issued its final award. Thereafter, the parties engaged in discovery and the defendants moved for partial summary judgment. This is the decision of the Court on SAE's motion for partial summary judgment.

The defendants' motion rests upon two independent grounds. First, defendants argue that the Arbitration Board's determinations should be accorded *res judicata* effect or that, at the very least, the Board's factual findings should be given collateral estoppel effect, thereby precluding MPC from relitigating those same claims and issues here. Second, the defendants contend that independent of any determinations made by the Arbitration Board, the undisputed facts entitle defendants to partial summary judgment as a matter of law on plaintiffs' claims that both the Operating Agreement and the August, 1980 Data Cutoff Agreement provided "data cutoffs" that precluded any data from wells API 855 and 875 from being considered in the final HPV redetermination.

Defendants' summary judgment contentions are now addressed.

II. *The Res Judicata And Collateral Estoppel Arguments*

A.

In arguing that the arbitration award should be accorded *res judicata* or collateral estoppel effect in this action, the defendants reason as follows: Under § 38.006 of the Operating Agreement, Alaska law governs as to substantive matters. *Res judicata* and collateral estoppel are substantive legal defenses; therefore, Alaska law governs their application. Under Alaska law, a final judgment rendered by a court in a prior litigation will be given *res judicata* or collateral estoppel effect in a later action involving the same issues or claims and the same parties or persons in privity with them. *State v. Baker*, Alaska Supr., 393 P.2d 893 (1964). In Alaska a trial court judgment is final for *res judicata* purposes, even if an appeal is pending. *Vertecs Corp. v. Reichhold Chemicals, Inc.*, Alaska Supr., 671 P.2d 1273 (1983). Defendants argue that for *res judicata* purposes, an arbitration award, even though not yet confirmed, should be treated as if it were a trial court judgment that is being appealed.[3] That result, defendants urge, is consistent with the strong public policy of Alaska, California, and Delaware favoring arbitration. To hold otherwise, they argue, would erode that policy and deprive the defendants of the contractual remedy which the parties bargained for and agreed to. Defendants argue, in the alternative, that even if the arbitration award is not entitled to *res judicata* effect, the Board's factual findings

3. Defendants cite no Alaska decision wherein an unconfirmed arbitration award was given *res judicata* effect.

would be entitled to collateral estoppel effect, because the Board's technical expertise and the time and effort expended by the parties justify judicial deference to technical factual findings.

For the reasons that follow, the defendants' arguments are not well-founded. First, to give preclusive effect to the findings of the Arbitration Board would do violence to those provisions of the Operating Agreement that allocate jurisdiction between the Arbitration Board and the courts. Second, such a result would effectively overrule Vice Chancellor Walsh's determination in *MPC II*—which is the law of this case—that the plaintiffs are entitled to an independent judicial determination of the claims alleged in the complaint. Third, the defendants have not demonstrated that the Arbitration Board's award would be given the preclusive effect they seek by the courts of either Alaska or California, the two states having the predominant interest in the controversy.

B.

The provisions of the Operating Agreement that relate to the *res judicata* issue are §§ 37.103, 38.004 and 38.006. Those provisions would be undercut if defendant's *res judicata*/collateral estoppel contentions were credited.

Section 37.103 pertinently provides that "in the event the Working Interest Owners do not agree on redetermined HPV values by January 1, 1982, the redetermination thereof shall be submitted to binding arbitration in accordance with Article 38. . . ." That section then goes on to provide that

> "The arbitrations shall be limited to those issues involving HPC values on which the Working Interest Owners are not finally agreed at the time of the preliminary hearing . . . ."

The "redetermination" would involve "a complete technical redetermination of the HPV of all affected areas, geologic formations, and hydrocarbon zones in the Reservoir. . . ." § 37.103.

Article 38, to which §37.103 refers, deals in its entirety with the procedural aspects of the arbitration. Section 38.004(a) grants to the Arbitration Board "original and exclusive jurisdiction over all subject matters, issues and controversies for the determination or resolution of which [the Operating Agreement] expressly requires arbitration." Section 38.004(b) confers permissive jurisdiction upon the Board "over all subject matters, issues and controversies that arise out of [the] Agreement, the determination or resolution of

which the Working Interest Owners mutually agree to submit to arbitration."

Central to the *res judicata* question is § 38.006, which provides:

> *The arbitration proceedings* shall be held at such location in California that may be agreed to by the Working Interest Owners and *shall be in accordance with and subject to California law as to procedural matters (including the applicable arbitration statutes) and in accordance with and subject to Alaska law as to substantive matters.* In the event of any conflict between the provisions herein and the applicable state law, the provisions herein shall take precedence to the maximum possible extent. If within ten days after a petition for hearing is filed, as hereinafter provided, the Working Interest Owners do not agree on a location in California at which the arbitration proceedings shall be held, the then President of the American Arbitration Association, upon request by any Working Interest Owner, shall be authorized to designate said location in California at his or her sole discretion. *The Board shall have no authority to decide any questions of law. However, the Board is authorized to interpret and administer the provisions of this Article 38 and to interpret any other provisions of this Agreement insofar as may be required for performance of the Board's duties pursuant to this Article 38. Nothing herein, however, shall bar any Working Interest Owner from seeking a judicial interpretation or construction of such provisions.* (Emphasis added)

Thus (and by way of summary), the purpose of the arbitration was to obtain a "complete technical redetermination" of HPV. Consistent with that approach of focusing the arbitration upon technical factual issues, the arbitrators were expressly denied jurisdiction to decide "questions of law". While the Board was granted a limited jurisdiction to "interpret" the provisions of the Operating Agreement (including Article 38), such jurisdiction was granted only "insofar as may be required for performance of the Board's duties" pursuant to Article 38. And even that limited jurisdiction was made conditional, that is, it was made subject to the right of any Working Interest Owner to seek "a judicial interpretation or construction of such provisions".

[1,2] The issues presented by the amended complaint in this lawsuit are: (1) whether the twelve Redetermination Agreements were legally binding upon the parties and (2) whether the Operating Agreement and/or the August 1, 1980 Data Cutoff Agreements

contain a data cutoff date that would preclude any data from wells API 855 and 875 from being considered for purposes of finally redetermining HPV. To regard those issues as involving anything other than "questions of law" is, in my view, fanciful. Those questions call for a legal interpretation of the Operating Agreement and August 1, 1980 Data Cutoff Agreement. They also require a determination of the legal authority of the parties' agents or representatives to enter into the twelve contested Redetermination Agreements. Moreover, even if it were assumed that the Arbitration Board found it necessary to interpret the Operating Agreement to perform its duties under § 38.006, MPC would nonetheless be entitled to an independent judicial determination of those questions.

[3,4] It follows that to give *res judicata* effect to the Board's interpretation of the Operating Agreement or of the August 1, 1980 Agreement would be to treat as conclusive and final, rulings that the Arbitration Board had no jurisdiction to make. At the very least it would deprive MPC of their right— expressly spelled out in the Operating Agreement—to an independent judicial determination of those issues. While, to be sure, Delaware, Alaska and California have strong public policies encouraging arbitration, those policies are implicated only insofar as the parties have agreed to the arbitration remedy. As this Court recently observed in *Lester Building Associates, Inc. v. John Davidson, et.al.*, Del.Ch., C.A. No. 7735, Berger, V.C. (May 27, 1986), at p. 6:

> Arbitration is a consensual proceeding binding only upon those who have entered into a written agreement to arbitrate. *See*, 10 *Del.C.* § 5701. 'The parties are bound only to the extent, and in the manner, and under the circumstances pointed out in their agreement. . . .' pointed out in their agreement. . . . *Fagnani v. Integrity Finance Corporation*, Del.Super., 167 A.2d 67, 74 (1960). Absent agreement, a party may not be forced to arbitrate. *Pettinaro Construction Co., Inc. v. Harry C. Partridge, Jr. & Sons, Inc.*, Del.Ch., 408 A.2d 957, 963 (1969).

In short, to give *res judicata* effect to the arbitration award would undercut the Operating Agreement and defeat the judicial remedy that the parties expressly contracted for. *See Restatement, Judgments* § 84.

Second, to credit defendants' *res judicata* argument would render meaningless, and effectively reverse, Justice Walsh's ruling in *MPC II* on pages 11-12 that:

> Although the Board did make rulings prior to this suit with respect to the arbitrability of these issues, this action is not, strictly speaking, a review of those decisions. Rather, the Operating Agreement expressly provides for an independent judicial interpretation or construction of its provisions and the plaintiffs are merely exercising the right granted them by the Operating Agreement.
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> * * *
>
> There is some ambiguity implicit in the Board's power to interpret and apply the provisions of the Operating Agreement, but this does not diminish the Working Interest Owners' right to seek an independent ruling by a court. Of course, the Operating Agreement does not contemplate that a party will arbitrate an issue and then, having lost, seek *de novo* judicial review of that issue. However, this is not the situation here. The plaintiffs brought this action at the beginning of the arbitration proceedings, and consistently disputed any effort by the arbitrators, none of whom are law—trained, to interpret the Agreement.

Finally, defendants have failed to establish that the courts of either California or Alaska would give *res judicata* or collateral estoppel effect to an unconfirmed arbitration award, and particularly one which, as a result of a recent California Court of Appeal decision, is now subject to possible invalidation on independent procedural grounds.

Section 38.006 of the Operating Agreement provides that as to substantive matters the law of Alaska applies, and that as to procedural matters, the law of California (including applicable arbitration statutes) applies. Citing federal court decisions that characterize the *res judicata* doctrine as "substantive" for choice of law purposes under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), defendants argue that the *res judicata* effect of an arbitration award is "substantive". But even if defendants' premise is correct, the conclusion they seek to draw from it does not follow, because defendants are unable to cite any Alaska decision holding that an arbitration award (let alone an unconfirmed arbitration award) is entitled to *res judicata* or collateral estoppel effect. Defendants' argue that since Alaska follows the rule that a trial court decision is final for *res judicata* purposes even if an appeal is pending, ". . .[i]t is only logical that Alaska would adopt the same rule with regard to an arbitration award absent vacation." (SAE Reply Br., p. 12). However, the speculation of a Delaware Judge of what might or might not be "logical" for an Alaska court

to decide, hardly meets the defendants' burden of establishing the law of Alaska on that point.

[5-7] Moreover, the Operating Agreement itself suggests, persuasively if not conclusively, that the parties specifically agreed that California law would govern the legal status and effect of any arbitration award. Section 38.006 provides that the arbitration proceedings "shall be in acordance with and subject to California law as to procedural matters (including the applicable arbitration statutes). . ." Those statutes include *Cal. Code Civ.P.* Section 1287.6, which provides that an unconfirmed arbitration award establishes only a contract right, and Section 1287.4, which provides that the award becomes a judgment only upon confirmation. California law is clear (and the defendants concede) that a California trial court judgment will not be given *res judicata* effect pending an appeal, *Sandoval v. Superior Court*, 190 Cal.Rptr. 29 (1983), and even a confirmed arbitration award will not be given *res judicata* effect while the confirmation is the subject of an appeal. *Thriftimart, Inc. v. Superior Court*, 21 Cal.Rptr. 19, 22 (1962). In this case the arbitration award has not been confirmed.[4] Moreover, recent developments indicate that the award is potentially subject to invalidation by the California courts.

Shortly after the arbitration was commenced, MPC brought an action in California to enjoin and invalidate the arbitration on the ground that the procedure utilized by ARCO/Exxon and Sohio to select arbitrators violated the Operating Agreement provisions which relate to that subject. Part 38.200 of Article 38 of the Operating Agreement provided that nominations and vetoes of arbitrators would be made by three independent Working Interest Owner groups: MPC, ARCO/Exxon and Sohio Petroleum Company. Although that tripartite selection procedure was followed here, MPC argued that it should not have been, because the underlying intent of Part 38.002 was that each of the three groups would be truly independent of the

4. After the Arbitration Board handed down its final award in August, 1985, and while MCP's appeal was pending, the defendants (ARCO/Exxon) filed an action in the California Superior Court to confirm the arbitration award. MPC moved for a stay of the confirmation action pending both the outcome of its appeal to the California Court of Appeals in its action challenging the selection of arbitrators and the outcome of this lawsuit. On October 21, 1986, the California Superior Court stayed the confirmation proceedings "pending decision by the California Court of Appeal and the Delaware Chancery Court." Defendants have appealed that stay order to the California Court of Appeal.

others, but that was not, in fact, what occurred. In its California lawsuit, MPC showed that ARCO Exxon and Sohio had entered into a settlement agreement under which their HPV dispute was settled and ARCO/Exxon was made primarily responsible for conducting the arbitration (on behalf of SAE) against MPC. MPC argued that as a consequence of the settlement, Sohio was no longer independent of ARCO/Exxon, there were no longer three sides to the arbitration, and, therefore, Sohio had no standing to nominate one-third of the arbitrators—a result which, when combined with the other third selected by ARCO/Exxon, enabled SAE to select two-thirds of the members of the Arbitration Board.

The California Superior Court granted the defendants' motion for judgment on the pleadings, and summarily dismissed MPC's action. MPC appealed that dismissal to the California Court of Appeals.

On February 29, 1986, the California Court of Appeal handed down a decision reversing the California Superior Court's dismissal of MPC's action. The appellate court ruled that the trial court had erred in refusing to hear extrinsic evidence concerning the underlying intent of the arbitration provisions of the Operating Agreement, as well as evidence that would show that SAE's conduct had violated an implied convenant of good faith and fair dealing. Remanding the case for further proceedings, the appellate court stated:

> We reject the defendants' equitable plea to let the arbitration proceed because of the time and money expended; defendants freely accepted the risk that arbitration might be invalidated when they decided to proceed as they did." (Plaintiffs' Supp. Appendix, Exh. 68, p. 11)

For all of these reasons, the determinations by the Arbitration Board of the matters disputed in this lawsuit are not entitled to *res judicata* or collateral estoppel effect.

The remaining question is whether, apart from any determinations made by the Board, the independent evidence of records entitled the defendants to partial summary judgment on the "data cutoff" issues. I now turn to that question.

III. *The Data Cutoff Issues*

An understanding of the nature and the procedural significance of the "data cutoff" issues requires some brief background. At stake is whether technical data obtained from wells API 855 and 875 can be considered as evidence in making the final HPV redetermination.

Wells API 855 and 875 were drilled by the defendants, on land covered by their leases, in December 1982 and January 1983, for the admitted purpose of developing evidence to rebut MPC's HPV-related contentions in the arbitration. Neither the defendants' purpose in drilling the wells, nor the data they obtained therefrom, were disclosed to MPC until the arbitration proceeding. MPC objected to the introduction and to any consideration of that data on the ground that its use was barred by the August 1, 1980 Data Cutoff Agreement which prohibited the use of data obtained from certain wells drilled on SAE's leasehold land after April 1, 1981, for purposes of the final HPV redetermination. SAE disputed MPC's contention. As previously stated, the Arbitration Board ultimately ruled in favor of SAE and considered the well data in arriving at its final HPV redetermination.

In this action MPC contends that the Operating Agreement and the August 1, 1980 Data Cutoff Agreement each independently barred consideration of any data generated from the two wells. In their motion for summary judgment, the defendants claim that the plaintiffs' data cutoff contentions are incorrect as a matter of law and that, therefore, they should be eliminated as issues in this case. Because the arguments that are addressed to the Operating Agreement are quite distinct from those that are directed to the August 1, 1980 Data Cutoff Agreement, I deal with them separately.

A. *The Operating Agreement*

The Operating Agreement does not contain language that either expressly or in so many words "cuts off" the use of well data created after a specified date. However, § 37.101 does explicitly provide for a redetermination of HPV on January 1, 1979 and also for a redetermination "for the final time *on January 1, 1982*". (emphasis added)[5] Likewise, Section 37.103 provides that:

> The redetermination of HPV values for each tract within each of the Initial Participating Areas *as of January 1, 1982*, will involve a complete technical redetermination of the HPV of all affected areas. . . . (emphasis added)

MPC contends that from the requirement of a final redetermination

5. Under §§ 37.102 and 37.103 the final (January 1, 1982) redetermination is made subject to arbitration; the January 1, 1979 redetermination is not.

"on" or "as of" January 1, 1982, it logically and necessarily follows that such a redetermination must be based upon evidence that was in existence on or before January 1, 1982. MPC further argues that the record evidence shows that during the negotiations conducted by the parties' representatives, the parties understood that the January 1, 1982 redetermination date would have such a data cutoff effect.

The defendants argue that the record evidence shows precisely the opposite, *i.e.*, that the January 1, 1982 date was intended not as a data cutoff but, rather, as a date after which the parties would be free to commence arbitration if they could not agree upon a final redetermination value for HPV. Defendants argue that MPC's position is refuted by the August 1, 1980 Data Cutoff Agreement to which MPC were signatories, the first sentence of which recites that "The [Operating Agreement]. . .does not specify a date after which data from new wells cannot be used for the January 1, 1982 Redetermination of Hydrocarbon Pore Volume (HPV)."[6] They also point to other conduct of MPC which, in their view constitutes fatal admissions by plaintiffs that the Operating Agreement contains no data cutoff. Specifically, defendants point to (a) testimony by Mr. Agers (Mobil's representative to the Unit Owners' Committee) that the subject of including a data cutoff in the Operating Agreement was never discussed and that its omission was an "oversight"; (b) a statement made by MPC's counsel at the arbitration hearing to the effect that the Operating Agreement did not contain a data cutoff; (c) a similar statement attributed to ARCO's representative, Mr. Norgaard, at a Unit Owners' Committee meeting on December 12, 1979 to which no one on MPC's side took exception; (d) the rejection by MPC representatives, at a December 10, 1979 meeting of the Equity Subcommittee, of a proposal for a data cutoff for the arbitration; and (e) plaintiffs' never having taken the position in the arbitration— indeed, not until this action—that the Operating Agreement contained a data cutoff.

Finally, defendants argue that their position is consistent with the language and underlying concepts of the Operating Agreement itself. Defendants stress that it does not necessarily follow that, because the redetermination is "as of January 1, 1982", evidence

6. An earlier draft of this Agreement dated January 11, 1980 contained similar language. Defendants point out that no one on MPC's side objected to that language either in that draft or in the Agreement in its final version.

developed after that date cannot be used in redetermining HPV. They point to the contractual definition of HPV in § 26.002 of the Operating Agreement as "the original in-place pore volume within the reservoir or a portion thereof *at the time of field discovery*" (emphasis added). Since the field discovery was in 1968 and not January 1, 1982, SAE argues that there is no logical reason to conclude that January 1, 1982 was either intended, or is logically required, as a data cutoff date. Moreover, defendants argue, such a construction would be inconsistent with the Operating Agreement itself, which provides (in § 37.103) that "the best available data and technical procedures will be used in the final redetermination" and (in § 38.309(a)) that "The Working Interest Owners may offer such evidence as they desire." SAE concludes that the true purpose of the January 1, 1982 date is to fix a date for commencing arbitration if the parties could not agree on the finally-redetermined HPV values.

[8-10] The defendants' evidence, if viewed in isolation, has considerable persuasive force. However, on a motion for summary judgment the test is whether, after consideration of all the evidence, there is a dispute as to any possible issue of fact material to any valid legal theory advanced by the moving party, and whether, based upon the undisputed material facts, the moving party is entitled to judgment as a matter of law. The moving party has the burden of establishing the absence of a material fact dispute, and any doubt must be resolved against granting summary judgment. *Warshaw v. Calhoun*, Del.Ch., 213 A.2d 539, *aff'd*, Del.Supr., 221 A.2d 487 (1966); *Brown v. Ocean Drilling & Exploration Co.*, Del.Supr., 403 A.2d 114 (1979). In that vein, summary judgment will be denied if there are disputed factual inferences to be drawn from the facts that are not in dispute, or if it is desirable to inquire more thoroughly into the facts to clarify the application of the law thereto. *Vanaman v. Milford Memorial Hospital, Inc.*, Del.Supr., 272 A.2d 718, 720 (1970); *Ebersole v. Lowengrub*, Del.Supr., 180 A.2d 467 (1962).

Measured by those standards, the defendants' showing on the present record is insufficient to warrant a finding that, as a matter of law, the Operating Agreement has no "data cutoff" for purposes of the final HPV redetermination. The evidence submitted by MPC creates a genuine fact dispute as to whether the parties, in agreeing to a final redetermination of HPV "on" and "as of" January 1, 1982, intended to bar the use of data from wells drilled after that date.

MPC's evidence takes several forms. First, there are inferences

from the language of the Operating Agreement itself, which calls for a final redetermination of HPV ". . . *on* January 1, 1982" (§ 37.101) and elsewhere ". . . *as of* January 1, 1982"(§ 37.103) (emphasis added). While not conclusive on the issue, it would appear sensible, at least as a matter of logic, to infer that a determination of a value "as of" or "on" a specified date can only be based upon evidence that was in existence on or before that date. If evidence that came into existence at a later time could be utilized, one would expect that somewhere in the Agreement the parties would spell out that intention.

SAE suggests that such an intent is spelled out by provisions that permit the parties to use the "best available data" (§ 37.103) and "such evidence as they desire" (§ 38.309(a)), and also by the contractual definition of HPV as the "original, in-place pore volume within the reservoir . . . at the time of field discovery [*i.e.*, 1968]". (§ 26.002). The apparent thrust of defendants' argument is that if the parties agreed to the use of post-1968 evidence to prove a value that existed in 1968, then they must, perforce, have similarly intended to allow post-1982 data to prove a January 1, 1982 redetermined value. Defendants reiterate that, when read in its proper context in § 37.103, the January 1, 1982 date was intended solely as an "arbitration trigger" date, and not a data cutoff date.

The problem with the defendants' arguments, at least on this record, is that they represent only one of at least two equally reasonable interpretations of the cited contract provisions, taken either singly or together. Section 37.103 does not conclusively establish that the sole function of the January 1, 1982 date is as an "arbitration trigger" date. The second paragraph of § 37.103 specifically, expressly, and separately provides that January 1, 1982 will be the arbitration trigger date. The first paragraph, which contains the "as of " language, does not so provide. Indeed, it is silent on that issue. If defendants' interpretation of § 37.103 were accepted, one must either read into the first paragraph a gloss that is nowhere expressed or treat the "as of January 1, 1982" language as a trigger-date reference that is surplusage. Neither interpretive approach is compelled either as a matter of law or logic. *See Jefferson Chemical Co. v. Mobay Chemical Co.*, Del.Ch., 267 A.2d 635 (1970). Moreover, the provisions allowing the parties to introduce "such evidence as they may desire" are too vague and unspecific to be controlling. Indeed, such language begs the question of what would constitute admissible "evidence" within the meaning of § 38.309(a).

Finally, while the contractual definition of HPV is anchored to a 1968 date (the time of field discovery), that fact hardly compels a conclusion, as a matter of law, that it was the parties' intention not to create time-based limitations on the data upon which the January 1, 1982 redetermination would be predicated. It must be kept in mind that the Operating Agreement was not executed until 1977, 9 years after the 1968 field discovery date. In 1977 it was physically impossible, by definition, for the parties to determine HPV as of 1968 except by reference to data which came into existence after 1968. Accordingly, the parties provided for two future post-1968 redeterminations of HPV, the latter of which would occur "on" and "as of" January 1, 1982. Thus, in 1977, when the parties were looking to a redetermination as of January 1, 1982, they clearly had it within their power to restrict the data that could be used for such a redetermination. The fact that HPV was defined in the Operating Agreement in terms of an event that had occurred in 1968, 9 years before, does not give rise to an inference, let alone compel the conclusion, that the parties intended to place no restrictions on the evidence that would be considered in arriving at the final HPV redetermination.

[11] To put the matter somewhat more succinctly, on the present record the language of the Operating Agreement can be construed, quite reasonably, to support either of the parties' conflicting interpretations. For that reason alone, further inquiry into the facts is required to determine what the contracting parties intended as to the permissible evidentiary uses of well data gathered after January 1, 1982.

In addition to the Operating Agreement provisions, MPC relies upon the affidavit and deposition testimony of certain witnesses that, during the negotiation process, even though the Operating Agreement had no explicit data cutoff language, the parties' representatives understood that the January 1, 1982 redetermination date would have the effect of precluding the evidentiary use of data created thereafter. (*See, e.g.*, Affidavit of Thomas M. Blume and Deposition of Glen Taylor (April 25, 1986)). In addition, MPC cites certain documents that lend support to that view. (*See* Exhibits 19, 48 and 49 to Appendix to Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment.) That evidence creates a dispute as to a material fact, namely, whether the parties understood the January 1, 1982 redetermination date to have a "data cutoff" effect.

Finally, there is the conduct of MPC's representatives, which

defendants attempt to portray as an admission that the Operating Agreement had no data cutoff date. While certainly bearing upon the ultimate credibility of MPC's position, such conduct is far from conclusive on the issue of intent. According to MPC, the term "data cutoff" was commonly used to refer to a date prior to the redetermination date, not the redetermination date itself. This is because the parties needed a fixed point of reference from which a stable data base could be created and utilized, with sufficient time for the parties to make the necessary measurements and calculations in advance of the redetermination deadline.[7] Given that perspective,the recital in the August 1, 1980 Data Cutoff Agreement (and drafts thereof) that the Operating Agreement does not "specify a date after which data from new wells cannot be used for the January 1, 1982 [HPV] redetermination," is not necessarily inconsistent with MPC's position that the January 1, 1982 redetermination date necessarily operated as the ultimate data cutoff. It would also explain the absence of any reference to a January 1, 1982 data cutoff in the contemporaneous documentation: as a practical matter a January 1, 1982 cutoff date would be unhelpful to the parties who needed to have a data cutoff well in advance of that date. Accordingly, the parties' focus was upon a pre-January 1982 data cutoff date, which led them to enter into the August 1, 1980 Data Cutoff Agreement.

For the foregoing reasons, the issue of whether the Operating Agreement contains a January 1, 1982 cutoff is not appropriate for summary judgment.

B. *The August 1, 1980 Data Cutoff Agreement*

Defendants' final argument is that, as a matter of law, the August 1, 1980 Data Cutoff Agreement does not bar their evidentiary use of data from wells API 855 and 875 in the HPV final redetermination. The Data Cutoff Agreement states, in relevant part, that:

> [The] Prudhoe Bay Unit Operating Agreement does not specify a date after which data from new wells cannot be used for the January 1, 1982 Redetermination of Hydrocarbon Pore Volume (HPV). In order to achieve the schedule for the 1982 Redetermination specified in the Agreement,

7. The Data Cutoff Agreement supports that concept: it recites that "In order to achieve the schedule for the 1982 Redetermination specified in the [Operating] Agreement, a well data cutoff date prior to May 1, 1981 is needed."

a well data cutoff date prior to May 1, 1981 is needed. *Therefore, the undersigned agrees that no data from any Unit-approved development well drilled on ARCO/Exxon or Sohio leases and open hole logged in the Prudhoe Bay (Permo-Triassic) Reservoir as defined in Section 26.002 of the Unit Operating Agreement) on or after April 1, 1981, can be used in the final HPV computations or arbitration proceedings to penalize equity.* All development wells drilled on the Mobil/Phillips/Chevron acreage after April 1, 1981, will be considered in the redetermination up to final agreement of HPV by the undersigned." (emphasis added; emphasis on last sentence deleted).

It is undisputed that wells API 855 and 875 were "drilled on ARCO/Exxon or Sohio leases. . .on or after April 1, 1981." Defendants contend, however, that as a matter of undisputed fact and law, wells API 855 and 875 were neither "Unit Approved" nor "development wells", and, hence, were not subject to the April 1, 1981 data cutoff in the August 1, 1980 Data Cutoff Agreement. Specifically, defendants claim that a well does not become "Unit Approved" unless it is first considered by the requisite vote[8] of the Unit Owners Committee. It is undisputed that wells API 855 and 875 were never put to such a Unit Vote.

Defendants also contend that the two disputed wells were not "Development Wells" because, even though it is "very likely" that they will ultimately be sold to the Unit for development purposes, they were not originally drilled for development at Unit expense; rather, they were drilled at defendants' own expense for the purpose of generating data to rebut MPC's case in the arbitration. Defendants argue that the evidence documenting the negotiations leading up to the August 1, 1980 Data Cutoff Agreement establishes that none of the parties intended to prevent the use of information from "tract wells" that any party chose to drill "on their own". (*See* Exhibit 18 to Appendix to MPC's Summary Judgment Briefs and Exhibit D to Appendix to ARCO/Exxon's Summary Judgment Briefs). SAE argue that wells API 855 and 875 were "tract wells" drilled at their own expense. They further point out that MPC drilled seven such wells on their own leases for purposes of gathering data for the final redetermination.

8. Section 35.105.01 of the Operating Agreement, which is entitled "Development Wells" provides that the drilling of "Producing Wells" requires either a 70% or 90% Oil Rim Vote, depending upon the depth and other characteristics of the well to be drilled.

The plaintiffs take issue with practically all of SAE's arguments, and contend that as to each of them, there are material fact disputes that preclude summary judgment. A review of the pertinent evidence persuades me that the plaintiffs are correct.

The plaintiffs have adduced evidence which, if ultimately credited at a trial on the merits, would support a finding that wells API 855 and 875 were "development wells" within the meaning of the August 1, 1980 Data Cutoff Agreement. Although the wells were drilled for the initial purpose of gathering data for the arbitration, it is undisputed that SAE ultimately intended to sell the wells to the Unit as "producing wells" upon the completion of arbitration. Internal authorization documents of both ARCO and Sohio indicate that the wells were intended for "development". (Exhibits 29, 30 and 34 to Appendix to MPC's Summary Judgment Briefs). In their applications for drilling permits from the State of Alaska, ARCO and Sohio represented that they were drilling for "development oil". (*Id.*, Exhibits 32 and 33). During an unscheduled flyover of the drillsite of API 875, MPC's representatives observed that the wells had been connected with pipes and holes in the manner typical for producing wells. Two days later, when MPC's representatives physically arrived to inspect the site, the pipes had been removed and the holes had been filled in—circumstances that MPC points to as evidence that SAE were attempting to cover up the fact that API 855 and 875 were producing wells.

In addition, under the Operating Agreement, development wells were to be drilled within a defined "development area", depicted on a map. Both wells were drilled within that defined development area, which was located on ARCO/Exxon and Sohio leases (Exhibits 36 and 60 to Appendix to MPC's Summary Judgment Briefs).

As previously stated, SAE argues that the two wells were not "producing wells" but rather were "tract wells", drilled at SAE's own expense and that as a consequence, defendants were entitled to use the resulting data in the arbitration, even though it came into existence after April 1, 1981. SAE suggests that it was doing precisely what MPC did when they drilled seven wells on their tracts for evidentiary purposes. But this argument ignores the fact that MPC wells drilled on their leases after April 1, 1981 were not covered by the Data Cutoff Agreement. The Data Cutoff Agreement expressly excludes from its coverage ". . .[a]ll development wells drilled on the [MPC] acreage after April 1, 1981." In any event, all of the MPC wells were drilled before April 1, 1981. Of primary significance, however, is evidence that the two disputed wells were not entirely

paid for by SAE: they were constructed on pads that had been approved and paid for by the Unit; they were equipped with pipes, gas lifts, manifolds and other accessories that had been paid for at Unit expense; and they were drilled with the intent that after the arbitration was concluded, the wells would be purchased by the Unit—a result that MPC was powerless to prevent, since SAE owned 94% of the equity of the Unit.

Lastly, the plaintiffs have adduced evidence which permits the inference that wells API 855 and 875 were "Unit Approved" within the meaning of the Data Cutoff Agreement.

[12] In terms of substance, the two wells clearly received the 70% or 90% authorization required by the Operating Agreement. Collectively SAE represented 94% of the voting power of the Unit, and the record shows that SAE did vote among themselves to approve wells API 855 and 875. (Exhibits 40 through 43 to Appendix to MPC's Summary Judgment Briefs). Although SAE argues that a formal meeting of the Unit Owners' Committee was required, § 35.003 of the Operating Agreement provides that "[v]otes may be taken without meetings in accordance with Article 36." It is clear that with or without a formal meeting of the Unit Owners Committee, the requisite authorization of the wells would have been a foregone conclusion. Unless prevented by some positive and mandatory law, equity regards substance rather than form. *Judah v. Shanghai Power Co.*, Del.Supr., 494 A.2d 1244, 1249 (1985); *Monroe Park v. Metropolitan Life Ins. Co.*, Del.Supr., 457 A.2d 734, 737 (1983); *Krysztofel v. Krysztofel*, N.J.Super., 65 A.2d 103, 104 (1949). In terms of substance, the wells were "Unit approved".

Even assuming, without deciding, that a vote taken at a formal meeting of the Unit Owners' Committee was required, the ability to meet that requirement was exclusively within the control of SAE which, as Unit Operator and 94% equity owner, was empowered to decide whether a Unit Owners meeting would be convened. If a formal meeting and Unit Owners' vote was a requirement that was not satisfied, it is solely because SAE unilaterally took steps to assure that it would not be, by simply not convening a meeting and by not circulating the requisite budgetary forms among the Unit ownership. Instead, for self-interested reasons, presumably to obtain a tactical advantage in the arbitration, SAE chose to keep the wells (and the resulting data) from the knowledge of MPC, SAE's adversary and the owner of all but 1% of the remaining equity ownership. It can be inferred that, but for their self-interest in increasing their

equity at MPC's expense, SAE would have taken the the necessary steps to bring the matter before the Unit Owner's Committee. Absent an adverse self-interest, SAE would have had no reason not to do so. Certainly in its capacity as Unit Operator, untainted by any self-interest, it is hard to imagine that SAE would not have seen to it that this were done.

[13-15] Under these circumstances, the record suggests at least two rationales for equitably precluding SAE from advancing their "no-Unit-approval" argument in this litigation. First, equity regards as done that which in good conscience ought to be done. *Monroe Park v. Metropolitan Life Ins. Co.*, *supra*, 457 A.2d at 737; *Equitable Trust Co. v. Ward*, Del.Ch., 48 A.2d 519, 527 (1946). To permit SAE to circumvent a Data Cutoff Agreement that would otherwise be applicable by allowing it to rely upon the nonoccurrence of a procedural formality that SAE itself deliberately chose to preclude, would be unconscionable. To permit such a result would convert the Data Cutoff Agreement into an illusory, one-sided agreement favoring only SAE. It would also reward the controlling equity owners for conduct that amounts to a manipulation of the Unit voting machinery for their benefit and to the detriment of the minority equity owners. Such conduct is not permitted among business partners, *see Pelmar Company v. Morgas, Inc.*, Del.Ch., C.A. No. 7519, Brown, C. (April 16, 1984); nor should it be permitted in a situation such as this where minority owners' rights are dependent upon the adherence by the majority owners to the rules of fair play.[9]

[16] Second, those relationships and principles gave rise to an implied contractual duty of SAE to deal fairly and in good faith with MPC, and not to engage in conduct that would injure the rights of the other contracting parties to receive the benefits of the Agreement. *Guin v. Ha*, Alaska Supr., 591 P.2d 1281, 1291 (1979); see *Mitford v. LaSala*, Alaska Supr., 666 P.2d 1000, 1006 (1983).

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9. There is evidence that, on at least one occasion, SAE were not unwilling to use their power as Unit Operator to advance their interests as Unit Owners. Under the Data Cutoff Agreement, MPC had the right to use the data from wells drilled on its leases for the January 1, 1982 redetermination, even if those wells were drilled after the April 1, 1981 cutoff date. In April, 1981, ARCO's representative advised MPC that the Equity Subcommittee might not approve the drilling of new development wells on MPC acreage, because of their "equity implications," unless MPC agreed that the wells would be "[excluded] from the equity process". (Exh. 46 to Appendix to MPC's Summary Judgment Briefs) Thus, SAE was using its position as Unit Operator to force MPC to forego its clear right under the Data Cutoff Agreement to have the data from these wells considered for HPV redetermination purposes.

The present record supports an inference that SAE did not conduct itself in a manner consistent with its implied duty of good faith and fair dealing. By not disclosing the data from wells API 855 and 875 (assuming those wells are ultimately found to be development wells) SAE deprived MPC of its right under the Operating Agreement, § 37.101, to ". . .all available well information. . .obtained at Unit Expense. . . ." And by attempting to rely upon the nonoccurrence of a formal Unit Owners' vote to validate their own 94% *de facto* approval of the drilling of the two wells—a formality that they could have easily caused to occur—SAE attempted to deprive MPC of their bargained-for right under the Data Cutoff Agreement *not* to have data from wells drilled on SAE leases after April 1, 1981 considered for equity redetermination purposes. On this basis as well, summary judgment would be inappropriate with respect to plaintiffs' claim that such data is barred by the Data Cutoff Agreement from consideration in the final HPV redetermination.

* * *

For the foregoing reasons, the defendants' motion for partial summary judgment must be denied. IT IS SO ORDERED.

SEAHAWK OIL MANAGEMENT CORP. v. DISCOVERY OIL, LTD.

No. 8529

Court of Chancery of the State of Delaware, New Castle

July 16, 1986

Plaintiff, intending to conduct a proxy battle for control of defendant, brought action pursuant to DEL. CODE ANN. tit. 8, § 211 to compel defendant to hold an annual shareholders' meeting. Defendant corporation filed a motion to dismiss plaintiff shareholder's action asserting that court of chancery did not have jurisdiction pursuant to DEL. CODE ANN. tit. 8, § 211 (1981). The chancery court, per Vice-Chancellor Hartnett, denied defendant's motion and held that plaintiff stated a *prima facie* cause of action under DEL. CODE ANN. tit. 8, § 211 when defendant had not held an annual meeting for over thirteen months.

1. Corporations ⟹192, 201

A shareholder has *prima facie* standing to bring an action to compel an annual shareholders' meeting pursuant to DEL. CODE ANN. tit. 8, § 211, where no such meeting has been held for over thirteen months. DEL. CODE ANN. tit. 8, § 211 (1981).

Stephen E. Jenkins, Esquire, of Ashby, McKelvie & Geddes, Wilmington, Delaware, for plaintiff.

Lewis H. Lazarus, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for defendant.

HARTNETT, *Vice-Chancellor*

On July 2, 1986, plaintiff brought this action pursuant to 8 *Del. C.* §211 seeking to compel defendant to hold an annual stockholders meeting. Defendant, on the eve of trial, which is scheduled for tomorrow, filed a motion to dismiss asserting that this court does not have jurisdiction pursuant to 8 *Del. C.* §211 because the by-laws of the corporation provide for an annual stockholders meeting to be held on July 22 and that 30 days have not elapsed after that date.

I find that this court does have jurisdiction and the motion to dismiss must be denied.

I

The essential facts are not disputed. Plaintiff intends to conduct a proxy battle for control of defendant which is now in dire financial circumstances. Plaintiff has been seeking to compel defendant to hold an annual meeting for some time and on May 9, 1986, it filed a prior complaint seeking to compel it. With defendant's consent, plaintiff voluntarily dismissed that suit on May 21, 1986, stating that it appeared that defendant had already taken action to schedule its annual meeting on July 22, 1986, and to establish May 30, 1986, as the record date. No notice of the July 22, 1986, annual meeting has been sent and it is conceded that no annual meeting will take place on that date. Nor has any other date been set. The last annual meeting was held on May 30, 1985.

Approximately four years ago defendant adopted a by-law setting the first Monday in May as the date for its annual meeting. In April, in the midst of plaintiff's continuing expressed intent to solicit

proxies, defendant amended its by-laws to move the annual meeting date to the fourth Tuesday of July (July 22, 1986).

II.

Defendant predicates its motion to dismiss on its assertion that this court does not have jurisdiction to entertain plaintiff's suit until after August 21, 1986, which is 30 days after the July 22 date which the by-laws set for the annual meeting. Its argument is based on its reading of 8 *Del. C.* §211(c) which provides in pertinent part:

> If the annual meeting for election of directors is not held on the date designated therefor, the directors shall cause the meeting to be held as soon thereafter as convenient. If there be a failure to hold the annual meeting for a period of thirty days after the date designated therefor, or if no date has been designated, for a period of thirteen months after the organization of the corporation or after its last annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director.

[1] Plaintiff counters that if no annual meeting has occurred for thirteen months then plaintiff has *prima facie* standing to bring an 8 *Del. C.* §211 action, citing *Saxon Industries v. NKFW Partners*, Del. Supr., 488 A.2d 1298 (1984); *Giuricich v. Emtrol Corporation*, Del. Supr., 449 A.2d 232 (1982); *Coaaxial Communications, Inc. v. CNA Financial Corp.*, Del. Supr. 307 A.2d 994 (1976); *Prickett v. American Steel and Pump Corporation*, Del. Ch., 251 A.2d 576 (1969). I agree.

If defendant's position is followed to its logical conclusion, defendant could postpone indefinitely its annual meeting by merely continually amending its by-laws to set a date far in advance. *Cf.*, *Robert M. Shay v. Morlan International, Inc.*, Del. Ch., C.A. No. 7243-N.C., Longobardi, V.C. (July 29, 1983).

I, therefore, find that plaintiff has stated a *prima facie* cause of action pursuant to 8 *Del. C.* §211 and defendant's motion must be denied.

I do find, however, that the clear provisions of the statute give defendant a 30-day grace period in which to hold its annual meeting. No order can, therefore, be entered which provides for a meeting sooner than August 21, 1986.

The motion to dismiss is therefore denied. IT IS SO ORDERED.

SHAH v. SHAH

No. 904(k)

Court of Chancery of the State of Delaware, Kent

September 25, 1986

This action was filed by one of three partners seeking dissolution of the partnership and an accounting with respect to certain disputed partnership transactions. Defendant Shashi B. Shah (Shashi) filed an answer also seeking to dissolve the partnership. On August 5, 1986, Shashi moved for a temporary restraining order prohibiting the plaintiff (Mahendra) from entering the partnership premises, a Motor Lodge, from interfering with the operation of the Motor Lodge, and from communicating directly with the employees of the partnership. On August 8, 1986, the parties entered into an order by which Mahendra consented to be temporarily restrained from activities relating to the partnership property. Shashi then moved for an injunction to continue in effect the consent order. This is the decision on Shashi's motion for a preliminary injunction.

The court of chancery, per Vice-Chancellor Jacobs, held that since Shashi demonstrated a reasonable possibility of ultimate success on the merits and a likelihood of irreparable harm if the injunctive relief were denied, the injunction would be granted.

1. Injunction ⟹151

To succeed on an application for a preliminary injunction, the party seeking the injunction must demonstrate a reasonable possibility of ultimate success on the merits and the likelihood of irreparable harm if the injunctive relief is denied.

2. Injunction ⟹151

To succeed on an application for a preliminary injunction, the court must be persuaded that the hardships to the party requesting relief outweigh the hardships to the nonmoving party if relief is granted.

3. Contracts ⟹143, 152

When interpreting a contract, a court must read the contract

as a whole and give the terms therein their plain and ordinary meaning.

4. Contracts ⟹143

The parties' agreement to confer upon a partner, by virtue of his 60% ownership, unequal decision-making authority is a contract term that the court is not at liberty to change.

5. Partnership ⟹14

Although normally all partners in a general partnership are equally entitled to participate in the management's business, that right may be abrogated by mutual agreement.

William A. Denman, Esquire, of Schmittinger & Rodriguez, of Dover, Delaware, for plaintiff Mahendra H. Shah.

Robert B. Coonin, Esquire, of Berkowitz, Greenstein, Schagrin & Coonin, of Wilmington, Delaware, for defendant Shashi B. Shah.

JACOBS, *Vice-Chancellor*

This controversy arises out of a dispute between two of the three partners of a Delaware general partnership ("the partnership") that owns and operates the Capitol City Motor Lodge, which is located on Route 13 in Dover, Delaware ("the Motor Lodge"). On April 18, 1986, one of the partners, plaintiff Mahendra H. Shah ("Mahendra"), filed this action seeking the dissolution of the partnership and an accounting with respect to certain disputed partnership transactions. In his petition, Mahendra alleges that the defendant, Shashi B. Shah ("Shashi"), a partner who owns a 60% interest in the partnership, has refused to determine and distribute each partner's proportionate share of the partnership's cash flow, as required by the partnership agreement.

On May 22, 1985, Shashi filed an answer and counterclaim, alleging, among other things, that Mahendra has continued to harass the employees of the Motor Lodge and to interfere with their performance of their duties. Specifically, Shashi claims that Mahendra has countermanded Shashi's directions to the employees and has threatened to fire them if they continue to follow Shashi's orders.

In his counterclaim Shashi seeks the liquidation of Mahendra's interest in the partnership and an accounting of certain partnership funds that Mahendra is charged with having misappropriated. Shashi also seeks an order temporarily and permanently enjoining Mahendra from continuing to reside on the premises of the Motor Lodge and from harassing the employees of the partnership.

On August 5, 1986, Shashi moved for a temporary restraining order prohibiting Mahendra from entering upon the partnership premises, from interfering with the operation of the Motor Lodge, and from communicating directly with the employees of the partnership until further order of the Court. That motion was heard on August 6, 1986. On August 7, 1986, the parties entered into an order in which Mahendra consented to be temporarily restrained from certain activities relating to the Motor Lodge and its employees ("the consent order"). Shashi then moved for a preliminary injunction that would continue in effect the prohibitions of the consent order. Mahendra opposed that motion, which was briefed and heard on September 17, 1986.

This is the decision of the Court on Shashi's motion for a preliminary injunction.

I.

Although certain of the parties' factual claims are controverted, most of the underlying facts out of which the dispute arises are not contested. By agreement dated August 4, 1977, Mahendra, Shashi, and Rajnikant H. Mehta ("Mehta"), formed a Delaware general partnership for the purpose of operating the Capitol City Motor Lodge in Dover, Delaware. Under the terms of Article III of the Partnership Agreement (as revised), Mahendra and Mehta each own a 20% interest in the partnership. Shashi owns the remaining 60% interest. The partners' percentage interests are proportionate to the capital contribution made by each partner.

Since September, 1979, Mahendra has resided in the Motor Lodge in guest room #29, an efficiency guest room located directly above the Motor Lodge office. Until June, 1985, Mahendra also actively participated in the management of the partnership. The precise nature of Mahendra's management role is, however, uncertain from the record. Shashi has variously characterized the position held by Mahendra during this period as that of "resident manager" (Answer and Counterclaim of Shashi B. Shah, ¶37), "managing partner" (Answer and Counterclaim of Shashi B. Shah, ¶¶45, 46), and "managing agent" (Motion for Temporary Restraining Order,

¶¶5, 6). Mahendra, for his part, has referred to his own management role as that of "caretaker" of the partnership property (Aff. of Mahendra H. Shah, ¶3). While acknowledging his participation in the partnership, Mahendra denies that he was the "Managing Agent" (Plaintiff's Response to Shashi B. Shah's Motion for Temporary Restraining Order, ¶¶5, 7). (The relevance of these facts will become apparent at a later point.) Be that as it may, it is undisputed that up until June of 1985, both Mahendra Shah and Shashi Shah were involved in the management of the Motor Lodge and that both gave orders and delegated duties to the partnership employees.

By June 1985, the personal and professional relationship between Mahendra and Shashi had significantly deteriorated. At that time, Shashi instructed Mahendra to vacate room #29 and to refrain from further participation in the management of the Motor Lodge. Shashi then designated himself as "managing agent" of the partnership by virtue of his 60% partnership interest. It is Shashi's authority to designate himself as "managing agent" under the terms of the Partnership Agreement that forms the central issue in this controversy.

Ignoring Shashi's instructions, Mahendra has continued to live in room #29. Since July of 1985, Mahendra has on several occasions countermanded directions and orders given partnership employees by Shashi concerning the management of the Motor Lodge. The situation came to an impasse on August 4, 1986, when a verbal and physical confrontation occurred between Shashi and Mahendra at the entrance to Mahendra's room as a result of Shashi's decision to replace the doors on the motel rooms (including room #29) with solid wood doors and new locks. Since that time, the two partners have not been on speaking terms.

Despite their irreconcilable differences, Mahendra and Shashi have agreed that the Motor Lodge should be sold, and the partnership liquidated, and arrangements (through the parties' respective attorneys) are presently underway for the sale of the Motor Lodge. As previously noted, Shashi seeks, by way of his motion for preliminary injunctive relief, to continue in effect the prohibitions of the consent order entered on August 7, 1986. That order, in essence, prohibited Mahendra from participating in the management of the partnership. Shashi argues that the partnership will be irreparably harmed if the consent order restraints are not continued *pendente lite*, because of the disruptive impact that Mahendra's involvement will have on the operation and management of the Motor Lodge.

II.

[1,2] To succeed on an application for a preliminary injunction, the party seeking the injunction must demonstrate a reasonable possibility of ultimate success on the merits and the likelihood of irreparable harm if injunctive relief is denied. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173, 179 (1986). The Court must also be persuaded that the hardships to the party requesting relief outweigh the hardships to the nonmoving party if relief is granted. *Shields v. Shields*, Del.Ch., 498 A.2d 161, 166 (1985), *app. den'd*, Del.Supr., 497 A.2d 791 (1985).

A.

Turning first to the question of irreparable harm, I am persuaded, given the present record, that this requirement is satisfied. The uncontroverted affidavits of certain key employees of the Motor Lodge establish that certain of Mahendra's activities on the Motor Lodge premises have been so disruptive to them that unless those activities are restrained, the employees will resign. Should that occur, the Motor Lodge's operations will be severely impaired and may cease entirely. As previously noted, the parties are presently making arrangements to sell the Motor Lodge as a going concern, which represents its highest potential value of that asset to the partnership. That going concern value will be diminished in an amount (and to an extent) not easily ascertainable in damages if the Motor Lodge is forced to close, or should its operations be severely impaired, by the departure of its key employees. On that basis Shashi has established that the partnership is likely to be irreparably harmed if Mahendra is not enjoined from participating in the management of the business and from directing the activities of, and verbally confronting, the Motor Lodge's employees. *See Brinati v. Telestar Inc.*, Del.Ch., C.A. No. 8118, letter op. at 11-12, Berger, V.C. (September 3, 1985).

B.

Turning to the probability of success on the merits, the crucial issue is whether Shashi has a legal right to oust Mahendra from the management role that he (together with Shashi) occupied before the parties arrived at their present impasse. Specifically, the issue is whether Shashi, by virtue of his 60% ownership interest in the partnership, had the authority to designate himself as Managing

Agent and single-handedly to manage the affairs of the partnership until the business is sold. Shashi argues that, as a 60% partner, he has such authority, because under Section 705 of the Partnership Agreement, the partner holding the majority interest determines how the partnership will be managed. Section 705 provides that:

> §705. Except as otherwise specifically provided in this Agreement, all decisions concerning the Partnership and Partnership property shall be made by those Partners who are not then in default under this Agreement, who, as among themselves and only among themselves (treating the interests of those Partners then in default under this Agreement for purposes of this Section 705 non-existent) own at least fifty-one percent (51%) interest in the Partnership.

In opposition, Mahendra argues that, by its terms, Section 705 applies "[e]xcept as otherwise specifically provided in this Agreement," and that the parties "otherwise specifically provided" in Section 701, which states that:

> §701. *Partners*, at all times and from time to time, shall select a person (herein referred to as "Managing Agent") to provide, through the employees of the Partnership, all services rendered to or for the Partnership property and its tenants and guests.
> (emphasis added)

Specifically, Mahendra argues that although under Section 705 the partner holding the majority interest has the power to make decisions concerning the partnership and its property, under Section 701 it is the "partners", *i.e.*, a majority of the partners, irrespective of their partnership interest, who must select the "Managing Agent". Mahendra claims that under Section 701, no single partner, even if he owns the majority interest, can appoint the "Managing Agent". He further argues that by wording Section 701 in this manner, the partners clearly intended that the majority-in-interest provision of Section 705 would not apply, emphasizing that if the parties intended otherwise, they were perfectly capable of saying so. As evidence, Mahendra points to Section 704, which provides:

> §704. The accountant and legal counsel for the Partnership shall be designated by the Partners in accordance with Section 705 hereof.

Based upon his interpretation of Section 701, Mahendra con-

cludes that for Shashi to be properly designated as "Managing Agent", the assent of at least one other partner, either Mahendra or Mr. Mehta,[1] was required. Since no such concurrence was ever obtained, Shashi's self-anointment as Managing Agent is invalid, and the "Managing Agent" is the person whom Shashi purported to displace, namely, either Mahendra or the combination of Mahendra and Shashi.

Having considered the parties' arguments and the terms of the Partnership Agreement, I conclude that Shashi has established a reasonable possibility of success on the ultimate merits, albeit for reasons somewhat different from those proffered by him.

[3] When interpreting a contract, a court must read the contract as a whole and give the terms therein their plain and ordinary meaning. *Gertrude L. Q. v. Stephen P. Q.*, Del.Supr., 466 A.2d 1213, 1217 (1983). Applying that principle to this case, I agree with Mahendra that the use of the terms "partners" in Section 701 means that the "Managing Agent" must be selected by a majority vote of the partners. The failure of Section 701 expressly to refer that issue to the majority-in-interest decision-making process of Section 705 (as was done by Section 704) persuades me that the parties intended that the selection of the Managing Agent would be accomplished by the majority vote of 2 of the 3 partners, irrespective of their partnership interests.

However, that conclusion only begins, rather than concludes, the relevant inquiry. It still remains to be decided who is the "Managing Agent" within the meaning of Section 701 of the Partnership Agreement. Only by answering that question can it be determined what role, if any, will be played by Mahendra in the management of the partnership and the Motor Lodge.

On that issue the record is in hopeless confusion. In his Motion for a Temporary Restraining Order (¶5) Shashi represented that in June, 1985, the partners selected Mahendra as "Managing Agent". But in his Response to Shashi B. Shah's Motion for a Temporary Restraining Order, Mahendra denies having acted as "Managing Agent", and describes himself only as a "caretaker" of the partnership's property (Aff. of Mahendra Shah, ¶3). Hence, the admissions of both parties contradict both each other and the parties'

1. It seems that Mr. Mehta has not involved himself in this dispute, and has neither appeared nor in any way participated or taken any position in this litigation.

own present litigating positions. Shashi's present position is that if he is not the "Managing Agent", then that role must devolve upon Mrs. Aileen Domke and her husband Arthur Domke, the "Resident Managers" of the Motor Lodge. The record shows that Mrs. Domke has supervised the running of the Motor Lodge office and has kept the books and records, while Mr. Domke has supervised the maintenance of the grounds and physical facilities. Both Mr. and Mrs. Domke reside in the manager's quarters at the rear of the office of the Motor Lodge, and both were interviewed jointly by Shashi and Mahendra. However, there is no evidence in the record that the partners ever formally designated the Domkes as "Managing Agent" in a *de jure* sense.

Based upon the confused, contradictory record before me, I am unable to conclude that the partners have formally designated anyone as "Managing Agent" of the partnership prior to June, 1985, even though the Domkes were employed to supervise and conduct the day-to-day operations of the Motor Lodge. Since there has been no proper designation of a "Managing Agent" within the meaning of Section 701 of the Partnership Agreement, Mahendra has failed to establish his entitlement to a role in the management of the partnership's affairs.

[4,5] Under those circumstances, the power to manage the partnership's affairs resides in Shashi, in his capacity as 60% partner, under Section 705. Only if two of the three partners agree to designate Mahendra as Managing Agent would Mahendra have a management role. But even then, such a role would be limited by the terms of 701 itself, which narrowly defines the Managing Agent's function as being "to provide, through the employees of the Partnership, all services rendered to or for the Partnership property and its tenants and guests." That function is similar to what the Domkes are performing now, and is of a distinctly lesser order than the power to make ultimate decisions concerning the partnership and its property. Stated differently, the Managing Agent, be it Mahendra, the Domkes, or anyone else, is subject to ultimate direction from the majority-in-interest partner acting pursuant to Section 705, in this case, Shashi Shah.[2]

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2. Mahendra's contrary contention, that the Managing Agent is subject to directions jointly from the "partners" appointing him or her, is without basis in the Agreement or in law. Although normally all partners in a general partnership are equally entitled to participate in the management's business, that right may be abrogated by mutual agreement. *Chaiken v. Employment Security Commission*, Del.Super.,

Finally, I conclude that the balancing of equities weighs in favor of granting preliminary injunctive relief. By not enjoining Mahendra's participation in the management of the Motor Lodge, it is likely that the partnership's business will be irreparably damaged to the detriment of all partners, including Shashi and Mahendra. Although the injunction will preclude Mahendra from participating in the management of the partnership, that restraint is temporary, because the Motor Lodge will soon be sold and its affairs wound up. In the interim, Mahendra will be entitled to a full and fair accounting of his partnership interest, and will continue to have access (subject to all rights and obligations afforded any tenant) to room #29 pending final disposition of the case.

* * *

For the above reasons, Shashi B. Shah's application for a preliminary injunction is granted. It does not follow from this ruling, however, that all of the terms of the August 7, 1985 consent injunction should be continued in effect. Counsel are directed to confer in an effort to agree upon an appropriate form of order that conforms with this opinion. If no agreement can be reached, a hearing will be scheduled to settle the appropriate form of order.

IT IS SO ORDERED.

TENAGLIA v. PSYCHIATRIC HOSPITALS

No. 8264

Court of Chancery of the State of Delaware, New Castle

September 9, 1986

Plaintiff, a stockholder of defendant Psychiatric Hospitals, commenced suit on November 22, 1985, pursuant to DEL. CODE ANN.

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274 A.2d 707, 709 (1971). That is what was done here, both in terms of the distribution of cash flow (which is made proportionate to the partners' respective interests in the partnership) as well as the ultimate decision-making authority. The parties' agreement to confer upon Shashi, by virtue of his 60% ownership, unequal decision-making authority, is a contractual term that the Court is not at liberty to change. *Hajoca Corporation v. Security Trust Co.*, Del.Super., 25 A.2d 378, 383 (1942).

tit. 8, § 220, seeking to inspect the books and records of the corporation and the corporate stocklist. Plaintiff also sought to compel the holding of an annual meeting of the stockholders pursuant to DEL. CODE ANN. tit. 8, § 211. After suit was filed, an annual meeting was held pursuant to written stockholder consents executed pursuant to DEL. CODE ANN. tit. 8, § 228, therefore this second demand is now moot. Defendant now seeks to have the suit dismissed because it claims the demands for inspection of the records and stocklist did not state a proper purpose and was overbroad. The court, per Vice-Chancellor Hartnett, refused to dismiss plaintiff's claim but stated that plaintiff must set forth a more proper demand before he will be entitled to inspection.

1. Action ⟹ 71

Dismissal and Nonsuit ⟹ 58(1)

Equity ⟹ 363

On a motion to dismiss a complaint, all well-pleaded allegations must be accepted as true.

2. Action ⟹ 71

Dismissal and Nonsuit ⟹ 58(1)

Equity ⟹ 363

When considering a motion to dismiss, the complaint and all inferences therefrom must be viewed in the light most favorable to the plaintiff.

3. Action ⟹ 71

Dismissal and Nonsuit ⟹ 58(1)

Equity ⟹ 363

A complaint will not be dismissed for failure to state a claim unless it appears to a reasonable certainty that the plaintiff would not be entitled to relief under any set of facts which could be proved in support of his claim.

Allan J. Hoffman, Esquire, of Dilworth, Paxson, Kalish & Kauffman, Philadelphia, Pennsylvania, for plaintiff.

Richard A. Levine, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, for defendant.

HARTNETT, *Vice-Chancellor*

Plaintiff, a stockholder of defendant, a Delaware corporation, commenced this suit on November 22, 1985, pursuant to 8 *Del. C.* §220 seeking to inspect the books and records of the corporation and the corporate stocklist.

The plaintiff also sought to compel the holding of an annual meeting of the stockholders pursuant to 8 *Del. C.* §211. After suit was filed an annual meeting was apparently held pursuant to written stockholder consents executed pursuant to 8 *Del. C.* §228 and this demand is therefore now moot.

Defendant now seeks to have the suit dismissed because it claims the demands for inspection did not meet the mandate of the statute in that the demand to inspect the stocklist did not state a proper purpose and the demand to inspect the other books and records of the corporation was overbroad.

I find that the suit should not be dismissed but that plaintiff must set forth a more proper demand before he will be entitled to an inspection.

The demand, on its face, does not comply with the mandate of *Northwest Industries, Inc. v. The B. F. Goodrich Company*, Del. Supr., 260 A.2d 428 (1969). Indeed plaintiff now apparently concedes as much but opposes a dismissal because he urges that any defects can he cured at trial. *Henshaw v. American Cement Corp.*, Del. Ch., 252 A.2d 125 (1969); *Hatleigh Corp. v. Lane Bryant, Inc.*, Del. Ch., C.A. No. 6318-NC, Hartnett, V.C. (Feb. 5, 1981). Defendants do not dispute that any defects can be cured at trial but point out that the issue is before the Court now on a Motion To Dismiss before trial.

[1] On a motion to dismiss, all well-pleaded allegations must he accepted as true. *Penn Mart Realty Co. v. Becker*, Del. Ch., 298 A.2d 349 (1972).

[2,3] The complaint and all inferences therefrom must also be viewed in the light most favorable to the plaintiff; *Vale v. Atlantic Coast & Inland Corp.*, Del. Ch., 99 A.2d 396, 400 (1953), and a complaint will not be dismissed for failure to state a claim unless it

appears to a reasonable certainty that the plaintiff would not be entitled to relief under any set of facts which could be proved in support of his claim. *Penn Mart Realty Co. v. Becker, supra.*

Here I cannot find that it appears with a reasonable certainty that the plaintiff would not be entitled to relief under any set of facts which could be proved in support of his claim.

I therefore deny the Motion To Dismiss but direct plaintiff to file an amended demand within twenty (20) days. IT IS SO ORDERED.

Delaware Journal of Corporate Law

Volume 12 1987 Number 3

TRIBUTE TO PROFESSOR FAIRFAX LEARY, JR.

This issue of the *Delaware Journal of Corporate Law* is dedicated to Fairfax Leary, Jr. who, until his recent retirement, was the Distinguished Senior Professor of Law at Delaware Law School. Professor Leary, "Fax" to his friends, began his teaching career at the University of Pennsylvania Law School in 1946. It was during this period that Fax was also devoting his precious time and talents to the creation of the Uniform Commercial Code. As one of the original drafters of the Uniform Commercial Code (UCC), Fax served as an associate reporter for Article 3 and as the reporter for Article 4.

In 1950, Fax returned to private practice. After twenty years he decided to resume teaching in order to convey his seemingly endless knowledge of commercial law. His first stop was the Temple Law School, where he remained until mandatory retirement brought him to the newly established Delaware Law School in 1977. He taught at Delaware until June 20, 1987 when, at age seventy-seven, Fax decided to retire from teaching.

It is the occasion of his retirement which causes us to reflect upon Fax's accomplishments and to pay tribute to this truly remarkable man. He contributed to the drafting of numerous statutes and he has been active in the Philadelphia, Pennsylvania, and American Bar Associations. He has given countless lectures, both in and out of the classroom, and has testified frequently at federal and state legislative hearings. He also has worked with Ralph Nader's Public Interest Research Group and has published voluminously.

Fax's friends, like his accomplishments, are many. The following commentaries have been contributed by eight of those who have the opportunity to call Fax their friend. In addition to these eight people, we at the *Delaware Journal of Corporate Law* would like to say thank you Professor Leary for being our teacher and counting us among your friends. We are honored to know you and wish you continued luck and success in all of your endeavors.