# Unreported Cases

## INTRODUCTION

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# ENCITE LLC v. SONI

*Court of Chancery of the State of Delaware, New Castle*

No. 2476-CC

August 1, 2008

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Jennifer M. Becnel-Guzzo, Esquire, of Buchanan Ingersoll & Rooney, Wilmington, Delaware; and Gerald E. Burns, of Buchanan Ingersoll & Rooney, of Philadelphia, Pennsylvania, of counsel, for third party defendants Stephen Marsh and Aaron Kleiner.

CHANDLER, *Chancellor*

## I. BACKGROUND

### *A. Nature and Stage of Proceedings*

This case arises from the failure of Integrated Fuel Cell Technologies, Inc. ("IFCT" or the "Company"), a start up company headquartered in Massachusetts and incorporated under the laws of Delaware. IFCT focused on development of fuel cell technology. Though it had received financing from venture capitalists and other investors, IFCT ultimately failed and filed for bankruptcy protection in 2006. Plaintiff Encite LLC ("Encite") purchased IFCT's assets from IFCT's bankruptcy estate. Encite then filed suit against former IFCT directors and former IFCT investors Echelon

Ventures, L.P., Echelon Ventures Special Limited Partners I, L.P., and Echelon Ventures II, L.P. (collectively, "Echelon" or "Third Party Plaintiffs"). The director defendants and Echelon moved to dismiss the amended complaint pursuant to Rule 12(b)(6). On September 4, 2007, this Court dismissed Encite's claim for breach of the covenant of good faith and fair dealing against Echelon, but denied the motion as to the breach of fiduciary duty claim against the director defendants and the aiding and abetting claim against Echelon.

Echelon later amended its answer to include a third party complaint against Stephen Marsh ("Marsh"), Aaron Kleiner ("Kleiner"), and Jeffrey Setrin ("Setrin" and, together, "Third Party Defendants"). Echelon asserts claims against Marsh for breach of the implied covenant of good faith and fair dealing; against Marsh and Setrin for tortious interference with a prospective business relationship; and against all Third Party Defendants for civil conspiracy and contribution.

Now before me are the motions to dismiss the third party complaint pursuant to Rule 12(b)(6) filed by Third Party Defendants; Marsh and Kleiner move together and Setrin moves separately.

### *B. Facts*[1]

Echelon's story of IFCT's ultimate demise features Marsh, the founder and former director and shareholder of IFCT, who is now the majority owner of Encite. Marsh allegedly conspired with Kleiner, a former director and shareholder of IFCT, and Setrin, a former IFCT shareholder. Together, Echelon alleges, they effected a scheme whereby Marsh, through Encite, purchased the assets of the Company in bankruptcy after Marsh destroyed the Company by putting his own interests ahead of those of the Company, thwarting the Company's efforts to hire a new CEO, obstructing the efforts of IFCT to obtain new equity financing, and conspiring with Kleiner and Setrin to prevent the sale of IFCT to Echelon and other investors.

#### 1. IFCT Receives Capital: The Series B Financing

By May 2003, despite previous successful efforts to raise capital, IFCT was again in need of cash. At this time, Marsh was the Company's CEO and Kleiner was a director on its board. Echelon agreed to lead the next round of financing (the "Series B Financing"). Echelon and IFTC entered

[1]The facts recited here are alleged in Echelon's third party complaint.

into a term sheet, which included as a key term the hiring of a new CEO. Echelon alleges that it would not have participated in the Series B Financing without this term because Echelon, along with the other investors participating in the Series B Financing ("Series B Investors") thought Marsh lacked the skills and experience necessary to grow IFCT into a prosperous business. Echelon contends that Marsh was so adverse to relinquishing control of the Company that, in early July 2003, he even attempted to abandon the financing. Despite these purported tribulations, the Series B Financing eventually closed.

Among other terms and in addition to the term providing for the hiring of a new CEO, the Series B Financing also provided a liquidation preference of the Series B stock (equal to twice the original investment plus accrued dividends, the "2X Preference"). This 2X Preference would be reduced if the Company replaced Marsh with a qualified CEO within one year of closing (*i.e.*, by July 10, 2004).

### 2. IFCT Hires a New CEO

Echelon next asserts that Marsh allegedly frustrated, interfered with, blocked, and resisted the search for the new CEO. In February 2004, Marsh signed a letter that Echelon characterizes as Marsh's confirmation that he would not interfere with the search for and hiring of a replacement CEO. Not until Marsh signed this letter, Echelon contends, was the process for selecting a new CEO finally able to get underway. By that time, the July 10, 2004 deadline—the date by which a new CEO must have been in place or else the 2X Preference would not be reduced to 1X—was fast approaching. Echelon alleges that Marsh and Kleiner concocted a scheme to appoint Kleiner's friend as a "puppet CEO" whom Marsh would control. Despite Marsh's alleged machinations, such as apparently calling the meeting on short notice so that opposing directors would be unable to vote their opposition, the so-called scheme was thwarted when no majority vote to approve was obtained.

Thus, though IFCT failed to hire a new CEO by the July 10, 2004 deadline, Echelon contends that Marsh nevertheless continued to frustrate the hiring of a replacement CEO. Marsh's alleged attempt to remove a director to deadlock the board, and further impede the search for a CEO, ultimately failed. Echelon insists that Marsh's behavior became what it describes as increasingly erratic and disruptive to IFCT to the extent that it caused concern that Marsh's behavior was harming the Company. Sometime in 2004, Echelon alleges that Marsh's actions demonstrated that he, along with Kleiner and "possibly others," decided that if Marsh could not control the Company as its CEO, he would drive the Company into the ground and

obtain the assets for himself. Finally, in October 2004, IFCT hired a new CEO, Rick Hess ("Hess").

### 3. IFCT Searches for Operational Financing

Echelon alleges that Marsh also frustrated IFCT's search for operational financing. In 2005, IFCT began to suffer liquidity problems, which Echelon attributes at least in part to the delay in hiring a qualified CEO that was allegedly caused by Marsh and Kleiner. In response, Echelon and other investors loaned IFCT $1.1 million.

During the first half of 2005, IFCT was unable to obtain financing from any additional investors because, Echelon contends, Marsh insisted that the pre-money valuation of IFCT was no less than $18 million. Echelon alleges that Marsh insisted on this valuation because any lesser valuation would dilute the value of his equity ownership.

In September 2005, the board considered a financing proposal from OnPoint Technologies ("OnPoint"), one of the Series B Investors. Given OnPoint's investments in energy companies and its experience in the area, OnPoint's proposal was, Echelon contends, a good market indicator of IFCT's value. OnPoint's pre-money valuation of the Company was $5 million and its proposal required Marsh's resignation from the board. Echelon alleges that Marsh, who controlled 30% of IFCT's voting interest, vocalized his intention to vote against the proposal if it was submitted to the shareholders and that, because Marsh allegedly also influenced at least another 20% of the voting interest, the board concluded that it was unlikely that the OnPoint proposal would obtain shareholder approval. Therefore, the board rejected OnPoint's financing proposal and instead authorized Hess to wind-down IFCT's business affairs and sell the assets of the Company. Soon after Hess was authorized to wind-down IFCT, he terminated Marsh's employment.

### 4. IFCT Attempts to Obtain Wind-Down Financing

IFCT sought financing to fund the wind-down through the end of 2005 while searching for a buyer of its assets. Echelon, with other Series B Investors and other stockholders (collectively, the "Investor Group"), proposed a loan to IFCT to cover operations in exchange for a note, secured by IFCT's intellectual property, which would require a repayment of twice the principal amount. In October 2005, Marsh, on behalf of Kleiner and a group of potential outside investors (collectively, the "Marsh Group"), submitted a competing bid with terms almost identical to those of the Investor Group's financing; Marsh's proposal did not include the twice

principal repayment term. The Investor Group then amended its proposal and eliminated the security interest in IFCT's assets. In addition, IFCT would not be required to satisfy the twice principal repayment term if the Investor Group's note was used in a bid to purchase IFCT's assets. Echelon contends that Marsh refused to amend the Marsh Group's proposal to eliminate the security interest in IFCT's assets because this would undermine his goal of maintaining control. The board ultimately approved the Investor Group's amended financing proposal.

5. The IFCT Assets Purchase Proposals

IFCT, assisted by all Series B Investors (including Echelon) and all board members (except Marsh), conducted a search for potential buyers of IFCT's assets, which Echelon avers was derailed by Marsh, Kleiner, and Setrin. In September 2005, Marsh made an offer to purchase IFCT's assets on behalf of a not-yet-formed company (the "Marsh Group Bid"). The bid proposed to acquire substantially all of IFCT's assets and certain liabilities in exchange for a cash payment of $215,000, the cancellation of certain debts (including a disputed severance payment allegedly owed to Marsh), and a 1% royalty on the future sales up to $25 million. Echelon states that the value of the potential royalty was speculative, at best, and that Marsh's own advisors later valued a similar royalty at less than $100,000. Echelon contends that the Marsh Group Bid was far inferior to OnPoint's financial proposal that valued FICT at $5 million, which Marsh rejected in 2005. Under the terms of the Marsh Group Bid, IFCT's common and Series A shareholders would receive money from potential royalty payments not until and only if the Series B Investors first received approximately $13 million in royalties plus accrued dividends pursuant to the twice principal preference. Thus, Echelon concludes, if the Marsh Group Bid were accepted, the common and Series A shareholder likely would never receive any money from royalty payments. By February 2006, the board had rejected the Marsh Group Bid and all other bids made to that date.

In March 2006, Echelon and the other Series B Investors submitted a proposal for IFCT's assets. The terms of this proposal (the "Series B Bid") provided: (1) the Series B Investors would waive their right to the 2X Preference; (2) the Series B Investors would form a new corporation and exchange the Investor Group note[2] for stock in the new corporation; and (3)

[2]Pursuant to the terms of the wind-down Investor Group financing, because the Investor Group note was being used in a bid for IFCT's assets, the twice principal payment term in the Investor Group note was also waived.

all IFCT stockholders, on an as-if converted to common stock basis, would receive royalty payments of 3% on all revenue generated by the purchased assets over $10 million, with a cap of $7 million. The Series B Bid was later amended to include an additional cash payment.

Marsh then submitted a new bid (the "Second Marsh Group Bid"). This revised bid included $500,000 in cash, which continued to include the allegedly dubious debt asserted by Marsh and his disputed severance payment, and a royalty payment of 2% on all revenue generated by the purchased assets up to $20 million to commence four years after closing. Echelon insists that the Second Marsh Group Bid's refusal to waive the 2X Preference, which was a component of the Series B Bid, was crucial to IFCT's common and Series A shareholders. The Series B Bid proposed to distribute revenue on future royalties to all IFCT stockholders on an equal basis. In contrast, under the Second Marsh Group bid, common and Series A shareholders would not receive any money from future royalties until those royalties exceeded the 2X Preference, which, with accrued dividends, approached $13 million.

In any event, on March 31, 2006, the board voted to approve the Series B Bid. The board considered and reviewed a draft solicitation to IFCT stockholders requesting shareholder approval of the sale of IFCT's assets (the "Draft Solicitation"). The Draft Solicitation, which was designated "IFCT Confidential," was distributed to the board for review. Though the Draft Solicitation disclosed that certain board members had a financial interest in the Series B Bid, it did not identify the members by name. The Draft Solicitation was later revised to include specific names before it was distributed to the IFCT shareholders (the "Final Solicitation").

### 6. The Setrin Lawsuit

As a member of the board, Marsh was given a copy of the Draft Solicitation. Marsh then, Echelon alleges, misappropriated the Draft Solicitation by giving it to Setrin without the permission of IFCT or the board. Echelon alleges that Marsh's purpose in doing so was clear: Echelon contends that Marsh was furious that his bid was rejected and so Marsh intended to disrupt the sale of assets to the Series B Investors and seize the assets for himself.

Echelon concludes that Setrin, by accepting the Draft Solicitation, acted in concert with Marsh. Setrin filed suit to enjoin the sale of IFCT's assets pursuant to the Series B Bid (the "Setrin Lawsuit"). Echelon alleges that the Setrin Lawsuit contained a number of other omissions: first, that Setrin had filed suit "at Marsh's behest;" second, that Setrin had received the "stolen" Draft Solicitation from Marsh, an IFCT board member and bidder

for IFCT's assets; and, third, that the Series B Bid waived the 2X Preference, which was a key element of the bid.

On or about the same day that Setrin filed suit, Marsh sent a letter to all IFCT shareholders urging them to reject the Series B Bid and approve the Second Marsh Group Bid instead. Echelon contends that, on this same day, the IFCT board sent the Final Solicitation, which disclosed the identities of the board members who had a financial interest in the Series B Bid.

Later, when they learned of the lawsuit, director defendants Soni, Weigold, Hess, and Dow resigned from the board. Echelon contends that, though the Setrin Lawsuit was baseless, the director defendants resigned because IFCT had no funds with which to defend the lawsuit and IFCT's director and officer insurance policy was soon to expire.

On April 6, 2006, CEO Hess informed IFCT shareholders that IFCT was withdrawing the Final Solicitation to approve the Series B Bid.

### 7. The Bankruptcy Process and Purchase of the IFCT Assets

After the director defendants resigned, Marsh was left as the sole director of the Company. In April 2006, Marsh caused IFCT to file for relief under Chapter 11 of the Bankruptcy Code.[3] Counsel for IFTC and its chief restructuring officer, both of whom were selected by Marsh, conducted the bankruptcy auction. Marsh participated in the bankruptcy process as a director and lender of IFCT, and also as the leader of one group bidding for IFCT's assets (the "March Bankruptcy Bid"). This conflict of interest apparently was sufficiently serious that the United States Trustee filed a motion to convert the case to a Chapter 7 and appoint a Chapter 7 trustee. The Series B Investors also submitted a bid (the "Series B Bankruptcy Bid") with cash components similar to those of the March Bankruptcy Bid. Ultimately, the Marsh Bankruptcy Bid was accepted as the higher offer.

Echelon alleges that filing for bankruptcy would not have been necessary had Marsh not interfered with the Series B Bid or intended to use the bankruptcy process to acquire IFCT's assets for himself at a discount.

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[3]Echelon alleges that Marsh caused IFCT to enter into a debtor-in-possession loan with a new entity established by Marsh, though, Echelon contends, the loan had no other purpose than to pay the administrative costs of the bankruptcy.

## II. LEGAL STANDARDS

On a motion to dismiss for failure to state a claim,[4] a complaint will be dismissed only if it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, a plaintiff would not be entitled to the relief sought.[5] In considering this motion, the Court must assume the truthfulness of all well-pleaded facts in the third party complaint and must draw all reasonable inferences that may logically flow from the face of the complaint in favor of the nonmovant, Echelon.[6] Though vague allegations may be well-pleaded so long as they give the opposing party notice of the claim,[7] the Court need not accept as true conclusory statements unsupported by fact.[8] In addition, the Court is also permitted to consider the unambiguous terms of documents incorporated by reference in the complaint when the documents are integral to the plaintiff's claims.[9]

## III. ANALYSIS

### A. *Count I: Tortious Interference with a Prospective Business Relationship*

Echelon alleges that Marsh and Setrin tortiously interfered with Echelon's potential business relationship with IFCT, which was Echelon's attempt to acquire IFCT's assets.[10] As a threshold matter, the parties dispute whether Massachusetts or Delaware law applies to this claim. Echelon contends that, because Marsh's alleged conduct substantially occurred in Massachusetts, Massachusetts law applies. Marsh agrees to assume that, only for the purpose of this motion and only for this claim, Massachusetts law applies, whereas Setrin insists that Delaware law should apply to him

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[4] *See* Ct. Ch. R. 12(b)(6).

[5] *E.g.*, *Sample v. Morgan*, 914 A.2d 647, 662 (Del. Ch. 2007) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 610–11 (Del. 2003)); *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985).

[6] *See, e.g.*, *Sample*, 914 A.2d at 662 (citing Malpiede v. Townson, 780 A.2d 1075, 1082 (Del. 2001)).

[7] *E.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

[8] *E.g.*, *id.*; *see also Sample*, 914 A.2d at 662 (citing *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988)).

[9] *E.g.*, *Sample*, 914 A.2d at 662; *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 188 n.55 (Del. Ch. 2006) (citing cases).

[10] Though it appeared that Echelon also asserted this claim against Kleiner, *see* Third Party Compl. at ¶ 3, Echelon acknowledges that it does not assert a claim against Kleiner at this time, Echelon's Opp'n Br. at 21 n.10.

because the Setrin Lawsuit was filed in Delaware.[11] Setrin, however, concedes that the "result would be the same" under either Massachusetts or Delaware law.[12] Because Setrin so concedes and Marsh so assumes, this Court will, for the limited purpose of resolving this motion to dismiss, also assume that Massachusetts law applies to the tortious interference claims asserted against Marsh and Setrin.

Under Massachusetts law, to establish a claim for tortious interference with a prospective business relationship, Echelon must establish: (1) Echelon had a business relationship for economic benefit with a third party; (2) Marsh and Setrin knew of that relationship; (3) Marsh and Setrin interfered with that relationship through improper motive or means; and (4) Echelon's loss of the economic advantage was directly caused by Marsh and Setrin's conduct.[13]

1. Echelon's Prospective Relationship with IFCT

Tortious interference first requires a relationship between the plaintiff and a third party; one who is party to the contract cannot be held liable for intentional interference.[14] Echelon alleges that Marsh and Setrin impermissibly interfered with its proposed contractual relationship with IFCT, as set forth in the Series B Bid, which the IFCT board of directors had approved. Echelon further alleges that it would have economically benefitted from the transaction because Echelon, along with the other Series B investors,

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[11]Under the Restatement's "significant relationship" test utilized in a conflicts of law analysis, *see Travelers Indemn. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (citing RESTATEMENT (SECOND) OF CONFLICTS §§ 6, 145(1) (1971)), Echelon contends that Massachusetts law would apply to its claim against Setrin because the alleged injury to Echelon occurred in Massachusetts, all parties except Setrin are domiciled in Massachusetts, no party is domiciled in Delaware, and both Echelon and IFCT are headquartered in Massachusetts. In any event, however, both states have adopted section 766B of the Second Restatement of Torts, *see Empire Fin. Servs. Inc. v. The Bank of New York*, 900 A.2d 92, 98 n.20 (Del. 2006); *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 23 (Mass. 1990), and both Massachusetts and Delaware require the same elements to be pleaded to state a claim for tortious interference with a prospective business relationship, *compare Driscoll v. MacLean*, No. 044453, 2005 WL 2527199, at *3 (Mass. Super. Ct. Sept. 13, 2005), *with Enzo Life Scis., Inc. v. Digene Corp.*, 295 F. Supp. 2d 424, 429 (D. Del. 2003), so there is no distinction that also makes a difference.

[12]Setrin Opening Br. at n.20.

[13]*See Cavicchi v. Koski*, 855 N.E.2d 1137, 1142 (Mass. App. Ct. 2006); *Kurker v. Hill*, 689 N.E.2d 833, 838 (Mass. App. Ct. 1998).

[14]*Harrison v. NetCentric Corp.*, 744 N.E.2d 622, 632 (Mass. 2001) (citing *Appley v. Locke*, 487 N.E.2d 501, 503 (Mass. 1986) (employer cannot be liable for interference with employee's contract with employer); *Mailhiot v. Liberty Bank & Trust Co.*, 510 N.E.2d 773, 777 (Mass. App. Ct. 1987) (same)).

intended to purchase IFCT's assets and, utilizing IFCT's intellectual property, continue to develop the fuel cell technology.

Marsh contends that he cannot be liable for the alleged tortious interference with Echelon's business relationship with IFCT because, as a director of IFTC, he was a party to the proposed Echelon-IFCT transaction. Marsh, relying on *Harrison v. NetCentric Corp.*,[15] concludes that, as a director and major stockholder of IFCT, he is regarded a party to the proposed relationship and, therefore, Echelon has failed to allege that Marsh interfered with Echelon's relationship with a third party.

In *Harrison*, the plaintiff filed suit against, among others, the CEO of a close corporation for tortious interference, alleging that the CEO interfered with plaintiff's employment contract.[16] The court first observed that, to maintain a tortious interference claim that defendants tortiously interfered with his contractual relations by terminating his employment to repurchase his unvested shares, plaintiff had to demonstrate that the CEO was not a party to plaintiff's at-will employment contract.[17] The court recognized that there are certain situations in which the defendant and the corporation are "indistinguishable" and so the former cannot be liable for tortious interference with plaintiff's relationship with the latter.[18] The court in *Harrison* then specifically noted that, on the summary judgment record before it, whether the CEO—who was also the founder of the company, the chairman of the board, and a large shareholder of the closely held corporation—and the close corporation itself were indistinguishable presented a question of material fact.[19] In addition, the record indicated that the CEO alone made the decision to fire the plaintiff.[20] Even collectively, however, these facts did not enable the *Harrison* Court to conclude, as a matter of law, that the CEO "controlled the operation of the corporation to the degree that he should be viewed as its alter ego."[21]

Against the backdrop of *Harrison* and drawing all reasonable inferences in favor of Echelon, I can conclude on the record before me that Echelon has alleged sufficient facts to show that Marsh and IFCT are distinguishable. Though Echelon has alleged certain facts that may support

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[15]744 N.E.2d 622 (Mass. 2001).

[16]*See Harrison v. NetCentric Corp.*, 744 N.E.2d 622, 625 (Mass. 2001).

[17]*See id.* at 625, 631.

[18]*See id.* at 632 (discussing that director could not be sued in tort for tortious interference where director was sole stockholder of corporation so that corporation and director were indistinguishable).

[19]*Id.* at 633.

[20]*Id.*

[21]*Id.*

a determination that Marsh and IFCT were indistinguishable—that Marsh was founder, director, stockholder, and former CEO of IFCT—Echelon also notes that Marsh was on the outside of the proposed Echelon-IFCT transaction.[22] Because he was considered an interested director with respect to the Marsh Group bid, he was not permitted to participate in any board evaluation of bids submitted by other parties.[23] In addition, Marsh alone did not decide to withdraw the Final Solicitation to approve the Series B Bid; the board, on behalf of IFCT, did. Thus, I can conclude that Echelon has alleged facts that either themselves are sufficient (or from which a reasonable inference may be drawn) that Marsh and IFCT were distinguishable when, even on the record before it, the *Harrison* court was unable to determine, as a matter of law, that the CEO and close corporation in that case were one and the same for purposes of the tortious interference claim.

Setrin also contends that he was party to the proposed transaction. Setrin argues that, because he was an IFCT stockholder, he was a party to the potential Echelon-IFCT transaction and, therefore, cannot be liable for tortious interference. Because I find, below, that Setrin was privileged in filing the Setrin Lawsuit, I need neither address nor resolve Setrin's argument that he was party to a transaction between the company in which he owned stock and a third entity that had a prospective business relationship with that company.

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[22]Echelon Opp'n Br. at 26 (citing Am. Compl. at ¶ 46 ("[B]ecause Marsh was considered an interested director with respect to the Marsh Group's offers, he was excluded from any board meetings at which these offers were discussed.")). A motion to dismiss is typically converted into a motion for summary judgment when the trial court considers matters outside of the complaint. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 168 (citing *Malpiede v. Townson*, 780 A.2d at 1090). "Nevertheless, in some instances and for carefully limited purposes, it may be proper for a trial court to decide a motion to dismiss by considering documents referred to in a complaint." *Id.* (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)). Here, I may consider only that this assertion was made, and not the truth of the assertion. *See Vanderbilt Income and Growth Associates, L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996). Also mindful that, on a motion to dismiss, I must assume the truth of all well-pleaded allegations in Echelon's third party complaint, I do not find that Echelon's reference to Encite's amended complaint is an improper attempt to amend any perceived pleading deficiency and therefore conclude that I may properly consider this reference in deciding the motion to dismiss. *See Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 155 (Del. Ch. 2003) ("Parties may not amend the pleadings through briefing on a motion to dismiss") (internal citations omitted).

[23]Echelon Opp'n Br. at 26 (citing Am. Compl. at ¶ 46). *See supra* n.24.

2. Interference Through Improper, or Malicious, Motive or Means

a. Improper Motive or Means

To state a claim of tortious interference, Echelon next must allege either an improper motive or means,[24] beyond the interfering act or conduct itself.[25] The Restatement sets forth several factors that Massachusetts courts have relied upon in analyzing whether interference is improper.[26] Though motivation of personal gain, including personal financial gain, is by itself generally not enough to satisfy the improper interference requirement, if sufficient facts are alleged that the "real" motive was to hurt or injure plaintiff,[27] or if other facts are alleged that indicate the interference was committed with an improper motive,[28] this requirement may be satisfied.

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[24]*Cf. Kurker*, 689 N.E.2d at 838 ("The standard, however, is interference accompanied by improper motive *or* improper means; the plaintiff need not prove both.") (emphasis in original) (citing *Draghetti v. Chmielewski*, 626 N.E.2d 862, 869 n.11 (Mass. 1994)).

[25]*Hunneman Real Estate Corp. v. Norwood Realty, Inc.*, 765 N.E.2d 800, 808 (2002) ("[I]mproper conduct, beyond the interference itself, is 'an element both in the proof of intentional interference with performance of a contract . . . and in the proof of intentional interference with a prospective contractual relationship.'"). *See also United Truck Leasing Corp.*, 551 N.E.2d at 23 (noting that more than "intentional interference must be established" for proof of intentional interference with performance of a contract or with a prospective contractual relationship) (citing RESTATEMENT (SECOND) OF TORTS §§ 766, 766B (1979)).

[26]*See United Truck Leasing Corp.*, 551 N.E.2d at 24 n.10 (citing RESTATEMENT (SECOND) OF TORTS § 766 and noting that the factors set forth therein "may be helpful in determining whether an act of interference was committed with an improper motive or by improper means"). To determine whether conduct interfering with a prospective contractual relation of another is improper, the Restatement advises consideration of certain factors: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. RESTATEMENT (SECOND) OF TORTS § 766. It is in the application of this section that the most frequent and difficult problems of the tort of interference with a contract or prospective contractual relation arise. *Id.* cmt. a.

[27]*See United Truck Leasing Corp.*, 551 N.E.2d at 24 (affirming directed verdict in favor of defendant) ("[Defendant's] apparent motives were to benefit his customers and himself financially. There is not enough evidence to warrant a finding that his real motive in these matters was to hurt [plaintiff].").

[28]*See supra* n.26.

i. Echelon Has Alleged Marsh's Improper Motive

Echelon alleges that Marsh engaged in conduct sufficient to give rise to liability for tortious interference: enlisting Setrin to file the Setrin lawsuit against IFCT to enjoin the Company's efforts to obtain shareholder approval for the Series B Bid; misappropriating the Draft Solicitation; and providing the Draft Solicitation to Setrin for use in the Setrin Lawsuit to prevent the sale of IFCT's assets to the Series B Investors so that Marsh could acquire the assets for himself at a discount.

Echelon has sufficiently alleged that, in providing the Draft Solicitation to Setrin and purportedly enlisting him to file suit to prevent shareholder approval of the Series B Bid, Marsh was motivated by his improper desire to acquire IFCT's assets for himself. That Marsh is alleged to have been motivated by his own personal, financial gain may not, in and of itself, be sufficient allegation of impropriety; there is tolerance for competition.[29] This is not, however, simply the situation in which one competitor is charged with tortious interference for luring a customer away from another competitor.[30] Here, Marsh, a director owing fiduciary duties to the shareholders of IFCT, is alleged to have engaged in conduct designed to enjoin shareholder approval of the Series B Bid—the superior bid—so that Marsh could later acquire IFCT's assets for himself at a discount after his own bid had been rejected.[31] Thus, Echelon has alleged that Marsh's conduct, in competing with the investors who submitted the Series B Bid, was motivated by his desire to benefit himself personally, despite his fiduciary obligations and the nature of his relationship to IFCT. On a motion to dismiss, drawing all reasonable inferences in its favor, I conclude that Echelon has adequately pleaded that Marsh acted with the improper motive necessary to state a claim for tortious interference.

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[29] *Melo-Tone Vending, Inc. v. Sherry, Inc.*, 656 N.E.2d 312, 315 (Mass. App. 1995) ("For competition and for the rough and tumble of the world of commerce, there is tolerance, even though the fallout of that rough and tumble is damage to one of the competitors.") (citing *W. Oliver Tripp Co. v. American Hoechst Corp.*, 616 N.E.2d 118, 124–25 (1993); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 307 (Utah 1982)).

[30] *Id.* ("It is one thing to lure a customer away from someone with whom it has been doing business by means of better product, service, or prices but quite another to abet the repudiation of solemn contractual obligations of which the party interfering is well aware.").

[31] *See* Third Party Compl. ¶¶ 91, 66, 69, 71.

### ii. Echelon Has Not Alleged Setrin's Bad Faith

The filing of a lawsuit is privileged and cannot itself form the basis of a claim for tortious interference.[32] Though Massachusetts law does extend a broad privilege to statements made in a complaint and to the complaint itself,[33] this privilege is not absolute. A party may still be liable for tortious interference "on the basis of the filing of a lawsuit if it is alleged that the suit was filed for the ulterior *purpose* of interfering with a prospective business relationship."[34] Thus, though no liability for tortious interference may lie if a party files a lawsuit in a good faith effort to assert legally protected rights,[35] if the lawsuit is filed in bad faith, then the litigation privilege provides no shield against liability.[36] In *G.S. Enterprises*, much like in this case, plaintiff alleged that defendant intentionally interfered with its contract with a third party by filing suit against that third party.[37] In reversing the grant of summary judgment in defendant's favor on that claim, the court determined that the record demonstrated a genuine issue of material fact as to the propriety of the suit.[38] There was compelling evidence that defendant's primary motivation in filing suit was to prevent development of the land,[39]

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[32]*Int'l Floor Crafts, Inc. v. Adams*, 477 F. Supp. 2d 336, 340 (D. Mass. 2007) ("[T]he filing of a complaint is privileged and thus that act, alone, is insufficient to form the basis of a [claim] for tortious interference.").

[33]*Id.* Marsh argues that the privilege associated with the filing of the Setrin Lawsuit also extends to shield him from liability as if he had filed the action himself. Though I suspect this is not so, I need not resolve this particular issue because I find that Marsh's ulterior purpose in allegedly encouraging Setrin to file the lawsuit was his desire to obtain the assets for himself at a discount.

[34]*Id.* (emphasis in original).

[35]*G.S. Enters., Inc. v. Falmouth Marine, Inc.*, 571 N.E.2d 1363, 1370 (Mass. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 773 (1979)). Section 773 provides:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to . . . enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

RESTATEMENT (SECOND) OF TORTS § 773 (1979).

[36]*See G.S. Enters., Inc.*, 571 N.E.2d at 1370 ("A civil action is wrongful if its initiator does not have probable cause to believe the suit will succeed, and is acting primarily for a purpose other than that of properly adjudicating his claims.") (citing RESTATEMENT (SECOND) OF TORTS § 674(a) (1977)).

[37]*Id.* at 1369.

[38]*Id.* at 1369–70.

[39]*Id.* at 1370 ("Three [of defendant's principals admitted outright in a letter to the purchaser that the 'motivating factor' behind their interest in purchasing [the property] was fear of the developer's bulldozer.").

and that defendant filed suit against the third party "in bad faith and without probable cause to believe that the action would succeed, rather than to assert legitimate rights."[40]

Echelon insists that Setrin's bad faith is similarly demonstrated by the following allegations: that Setrin accepted from Marsh the Draft Solicitation; that Setrin attached it to the complaint filed in the Setrin Lawsuit even though its confidential nature was apparent on its face; and that Setrin "intentionally and grossly misrepresented" the terms of the Series B Bid to make it appear inferior to the Marsh Group Bid.[41] Echelon concludes that it has thus adequately alleged Setrin's bad faith.[42]

Setrin argues that the filing of the derivative action, the Setrin Lawsuit, was privileged because he filed it in good faith to protect his interests as a stockholder. Though Echelon is entitled, at this procedural stage, to all reasonable inferences in its favor, I cannot reasonably infer from the conclusory assertions in the third party complaint that Setrin has acted in bad faith or was otherwise motivated by something other than his desire to protect his interest as a stockholder. Though Echelon concludes that Setrin's Lawsuit "fundamentally misrepresented the difference—*i.e.*, the Series B Bid's waiver of the 2X Preference—between the Series B Bid and Marsh Group Bid"[43] it also acknowledges that the lawsuit "was based on a fundamental misapprehension of the difference between" the two bids.[44] An allegation of misapprehension or misunderstanding is not sufficient to state that Setrin acted in bad faith and I do not find such an inference reasonable. Particularly when, as here, Setrin owned Series A-1 shares and common stock,[45] it is not reasonable to infer from the facts alleged that Setrin, in bad faith, misrepresented the terms of the Series B Bid when that bid would benefit him, as a stockholder, more than the terms of the Marsh Group Bid[46]

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[40]*Id.*

[41]Third Party Compl. ¶ 93. That the Series B Bid waived the 2X Preference was, Echelon avers, "one of the elements of the Series B Bid that rendered it superior to the Second Marsh Group Bid." Echelon Opp'n Br. at 24; *see also* Third Party Compl. ¶ 77.

[42]Echelon, in its opposition to this motion, appears to argue that Setrin shared with Marsh the ulterior motive of filing the Setrin Lawsuit to enable Marsh to obtain the assets for himself at a discount. Echelon Opp'n Br. at 24. Though Echelon states that this ulterior motive was alleged in the third party complaint, the Court can find no such allegation as to Setrin's motivations in filing the Setrin Lawsuit. At most, Echelon conclusorily alleges in stating its civil conspiracy claim that "Marsh and Setrin conceived of and executed a plan intended to disrupt the sale of IFCT's assets to the Series B Investors so that Marsh could purchase IFCT's assets for himself at a discount." Third Party Compl. ¶ 99.

[43]Third Party Compl. ¶ 78.

[44]*Id.* ¶ 77.

[45]*Id.* ¶ 9.

[46]*Compare* Third Party Compl. ¶ 9 ("Marsh, Setrin and Kleiner own Series A-1 shares and

and did so in bad faith.[47] At best, Echelon has alleged that Setrin's misrepresentations of the bids resulted from a misunderstanding of the bid terms themselves.[48]

As to the purported ulterior purpose that motivated Setrin to file suit, Echelon alleges only that Setrin sought to enjoin the sale of IFCT's assets pursuant to the Series B Bid.[49] This allegation is wholly insufficient to state an ulterior purpose, much less that such purpose was Setrin's primary motivation. I am required only to draw reasonable inferences from well-pleaded allegations. No such allegations compel me to conclude that Echelon has stated that Setrin filed the Setrin Lawsuit for an ulterior purpose such that he may be liable for tortious interference. Because Echelon has also failed to allege that Setrin filed the Setrin Lawsuit in bad faith, Count I is dismissed as to Setrin.

b. Echelon Need Not Allege that Marsh Acted Maliciously

Marsh further retorts that, even if Echelon has alleged improper means, he, as a director and stockholder of IFCT, enjoys a privilege against liability for a third party's contract with the corporation.[50] To overcome this privilege, Marsh contends that it is Echelon's burden to allege, not that

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common stock of IFCT"), *and id.* ¶ 32 ("Kleiner, who was a Series A-1 investor . . . ."), *with id.* ¶ 37 ("Eliminating the 2X Preference in the Series B stock was clearly in the self-interest of both Kleiner and Marsh, whose Series A and common stock would then enjoy a greater return in any liquidation or subsequent revaluation."). In fact, Echelon contends that the difference between the two bids would be a not insignificant issue to both Series A and common stockholders, who would be poised to receive greater payments under the Series B Bid plan and would receive them sooner. *Id.* ¶ 77.

[47]Echelon argues that the relief sought in Setrin's Lawsuit, coupled with the alleged fact that Setrin stood to benefit more under the Series B Bid than the Marsh Group Bid, demonstrates that Setrin's motive in filing suit was to assist Marsh in "grabbing IFCT's assets for himself." Echelon Opp'n Br. at 30 n.14. Even if I were to consider this argument, which was raised only in Echelon's opposition to this motion and was not well-pleaded in its third party complaint, I certainly do not find it reasonable to infer that Setrin filed suit with some ulterior purpose—much less that such purpose was his primary motivation—from the fact that Setrin, a stockholder, filed a derivative action to enjoin a sale pursuant to a bid, which Setrin alleged suffered from disclosure and process deficiencies, even though he would have benefitted more under that bid than another one that the board had already rejected (the Marsh Group Bid).

[48]Indeed, Echelon alleges that "[o]n information and belief, the differences between the two bids . . . were explained to Setrin's counsel by IFCT's counsel following initiation of the Setrin Lawsuit." Third Party Compl. ¶ 78.

[49]Third Party Compl. ¶ 75.

[50]*See Steranko v. Inforex, Inc.*, 362 N.E.2d 222, 272–273 (Mass. App. Ct. 1977) (corporate officer "enjoy[s] a qualified privilege against liability for interference with [third party's] contractual relationship with the corporation" so long as interference was part of officer's employment responsibilities and officer did not act with actual malevolence or malice).

Marsh acted with improper means or motive, but that he acted with "actual malice unrelated to [a] legitimate corporate interest."[51]

Echelon argues that the actual malice standard applies only in an employment context. Certainly, in considering a tortious interference claim before it, the Massachusetts Supreme Judicial Court specifically observed that it has often had occasion to consider intentional interference with advantageous relationships in the context of employment, and explicitly noted that, when the defendant is an official of the employer, the employment "context affects how a plaintiff employee must prove the element of 'improper motive or means.'"[52] The *Blackstone* Court also, however, noted the narrow scope of this so-called privilege:

> The factual circumstances to which the actual malice standard applies are constrained. *Company officials do not qualify for the standard with respect to all actions taken on behalf of the company.* It is applicable only where the relationship allegedly interfered with is with the company itself: *e.g.*, whom to hire, whom to discipline, whom to fire, with whom to do business.[53]

Thus, Marsh argues, it is entitled to demand that Echelon plead actual malice because this heightened standard applies where the relationship Marsh allegedly interfered with is, as here, between the Company and one with whom the Company would do business. The *Blackstone* Court was careful to limit the protection of the heightened pleading of actual malice; it does not apply to all actions taken on behalf of the company.[54] Thus, if the actual malice standard applies to some, but not all, actions taken on behalf of the company, then it cannot apply if the action taken on behalf of the company, but instead on behalf of an individual or any other entity. Here, there appears to be no dispute that Marsh's actions were not taken "on behalf of" IFCT. Indeed, Echelon specifically alleges that Marsh acted for his own personal benefit: to prevent the sale of IFCT assets so that he could purchase them himself at a discount. I therefore need not address whether Echelon's allegations are sufficient to satisfy the heightened standard of actual malice because I conclude that Echelon has clearly alleged that Marsh's allegedly

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[51] *See Blackstone v. Cashman*, 860 N.E.2d 7, 18 (Mass. 2007). *See also id.* at 13 n.10 ("We now state explicitly what has been implicit in our prior cases: the 'actual malice' standard for proving improper motive or means on the part of a corporate official is a heightened burden placed on the plaintiff, not a defense that must be proved by a defendant.").

[52] *Blackstone*, 860 N.E.2d at 13.

[53] *Id.* at 16 n.14 (emphasis added).

[54] *Id.*

tortious actions were taken on his own personal behalf, as an independent competing bidder, and not on behalf of IFCT.

3. Echelon Has Alleged Causation of the Loss of Its Economic Advantage

Echelon alleges that it has suffered lost opportunity cost, as a result of Third Party Defendants' successful efforts to "sabotage" Echelon's acquisition of IFCT's assets.[55] Echelon specifically alleges that Marsh and Setrin caused the loss of the economic advantage represented by the Series B Bid to purchase the IFCT assets that it, along with the other Series B Investors, submitted.[56] The Series B Bid had been approved by the board over other bids, including the Marsh Group Bid and the Second Marsh Group Bid, and as in the best interests of the shareholders.[57] Echelon alleges that, despite the board's acceptance of the Series B Bid and its request for shareholder approval, the board withdrew its solicitation for shareholder approval as a result of the Setrin Lawsuit.[58] Though I am not unmoved by the arguments of Marsh and Setrin, at this procedural stage of the proceeding, I conclude that Echelon has alleged the proximate causation necessary to survive this motion to dismiss.

*B. Count II: Civil Conspiracy*

As with the claim for tortious interference, I first must resolve a conflicts of law question. Echelon contends that Massachusetts law applies, and Marsh and Kleiner again assume, for purposes of this motion only, that Massachusetts law applies to Echelon's civil conspiracy claim against them.[59] Setrin, however, argues that Delaware law applies to this claim against him.[60] Under the law of either state,[61] however, I find that this claim against all Third Party Defendants must be dismissed.

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[55]Third Party Compl. ¶ 87.

[56]*Id.* ¶ 97.

[57]*Id.* ¶¶ 66, 71.

[58]*Id.* ¶ 94.

[59]Marsh and Kleiner Opening Br. at 15 n.6.

[60]Setrin does not agree that Massachusetts law applies to the civil conspiracy claim but states that "the result is the same even if Delaware law applies." Setrin Reply Br. at 18 n.26.

[61]For purposes of resolving this motion, my conclusions are equally compelled under Delaware law as under Massachusetts law. *Compare Benihana of Tokyo, Inc. v. Benihana, Inc.*, No. 550-N, 2005 WL 583828, at *7 n.33 (Del. Ch. Feb. 4, 2005) (stating the elements of civil conspiracy: "(1) A confederation or combination of two or more persons; (2) An unlawful act done in furtherance of the conspiracy; and (3) Actual damages" and noting that the combination must be

To be liable for civil conspiracy, there must be some agreement or confederation between two or more persons to commit a wrongful act and some tortious act done in furtherance of the agreement.[62] Even if one does not commit a tort, one may nevertheless be liable for conspiracy if, knowing that the conduct of another person constitutes a breach of duty, one gives substantial assistance or encouragement to the tortfeasor.[63]

Echelon alleges, in a wholly conclusory manner, that Marsh and Setrin "conceived of and executed a plan intended to disrupt the sale of IFCT's assets" to Echelon and the other Series B Investors so that Marsh could purchase the assets for himself at a discount.[64] Echelon repeats its allegation that, in furtherance of the alleged conspiracy, Marsh and Setrin misappropriated the Draft Solicitation, which was attached without the permission of IFCT to the complaint filed in the Setrin Lawsuit.[65] Though Echelon, to state a claim for civil conspiracy, need not necessarily allege that Setrin himself committed a tortious act in furtherance of this plan[66] (and, indeed, I have already concluded that no such allegations have been adequately pleaded as to Setrin), [67] Echelon must assert facts, or facts from which reasonable inferences may be drawn, that an agreement existed between Marsh and Setrin. Simply alleging that Marsh and Setrin acted in concert to prevent the sale of IFCT's assets pursuant to the Series B Bid does not make it so. Thus, for failure to sufficiently plead the existence of a common design or agreement between Marsh and Setrin, this claim is dismissed as to Setrin. Before it may be dismissed as to Marsh, however, I must first consider whether Echelon has alleged a conspiracy between Kleiner and Marsh.

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"undertaken in furtherance of some unlawful purpose") (citing *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–50 (Del. 1987); *Tristate Courier & Carriage, Inc. v. Berryman*, No. 20574-NC, 2004 WL 835886, at *13 n.143 (Del. Ch. Apr. 15, 2004)), *with Aetna Cas. Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1564 (1st. Cir. 1994) (citing RESTATEMENT (SECONDS) OF TORTS, § 876 cmt. b (1977) (civil conspiracy requires "first, a common design or an agreement . . . between two or more persons to do a wrongful act and, second, proof of some tortious act in furtherance of the agreement.")).

[62] *See supra* n.61.

[63] *See Kurker*, 689 N.E.2d at 837 (relying on RESTATEMENT (SECONDS) OF TORTS, § 876(b)(1977)). Though this section of the Restatement has not explicitly been adopted in Massachusetts, it has been cited in appellate decisions and has also provided a basis for recovery. *Id.* (citing *Nelson v. Nason*, 222, 177 N.E.2d 887 (1961) (recovery allowed under concerted action theory of section 876(b)). Because such assistance or encouragement is only alleged as to Kleiner, who assumes for the limited purpose of resolution of this motion that Massachusetts law applies to him, I need not also consider this allegation under Delaware law.

[64] Third Party Compl. ¶ 99.

[65] *Id.*

[66] As noted, under Massachusetts law, assistance or encouragement may be enough. *See Kurker*, 689 N.E.2d at 837 (relying on RESTATEMENT (SECONDS) OF TORTS, § 876(b) (1977)).

[67] *See supra* Section A.3.a.

Kleiner specifically argues that, because Echelon has not alleged any conduct by him in furtherance of the alleged conspiracy, this claim against him must be dismissed. Though Echelon did not allege that Kleiner engaged in any tortious conduct, Echelon does assert that "[o]n information and belief, Kleiner knew of and encouraged" the actions of Marsh and Setrin to disrupt the sale of IFCT's assets to the Series B Investors.[68] This conclusory assertion highlights Echelon's inability to allege any specific conduct by Kleiner, or conduct that could support a reasonable inference of assistance or encouragement to Marsh in executing the purported plan. Moreover, Echelon does not even attempt to establish the existence of such a plan between Kleiner and Marsh.[69] Thus, Echelon's allegations are woefully insufficient to support a claim of civil conspiracy against Kleiner. Therefore, as with the conspiracy claim against Setrin, this claim as to Kleiner is dismissed.

Because one cannot conspire with only oneself, this claim, in light of the foregoing, must also be dismissed as to Marsh.

### *C. Count III: Breach of the Implied Covenant of Good Faith and Fair Dealing*

Echelon asserts that Marsh, by purportedly attempting to frustrate the board's search for a new CEO, breached the implied covenant of good faith and fair dealing allegedly inherent in the February 2004 letter he signed regarding the hiring of a new CEO. The implied covenant of good faith and fair dealing "attaches to every contract."[70] That no such covenant can exist in the absence of a contract is the obvious, and logical, corollary to this fundamental proposition.

Echelon alleges that in the February 2004 letter, Marsh "confirmed his understanding that IFCT's Board of Directors would be responsible for hiring an individual to replace him as CEO of IFCT, and that he, acting as individual, would have no authority over that process."[71] Echelon alleges that Marsh breached the implied covenant because his actions—his continued efforts to frustrate the board's search for a new CEO, and his

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[68]Third Party Compl. ¶ 100.

[69]Though Echelon does at least attempt, but fails, to make such an allegation as to Marsh and Setrin. *See* Third Party Compl. ¶ 99 ("Marsh and Setrin conceived of and executed a plan intended to disrupt the sale of IFCT's assets to the Series B Investors so that Marsh could purchase IFCT's assets for himself at a discount.").

[70]*See, e.g., Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).

[71]Third Party Compl. ¶ 103.

attempt to satisfy the CEO contingency—were motivated solely by his desire to remain CEO.[72]

Though Echelon asserts that the February 2004 letter "constituted a contract between Marsh and Echelon,"[73] even a cursory review of the letter compels me to reject this assertion. In resolving this motion, I may consider the unambiguous terms of the February 2004 letter, which Echelon reproduces in its entirety in its complaint,[74] because the letter is integral to this claim. After carefully considering the terms of the letter, I can make no other determination than the February 2004 letter is merely and only a declaration that it is the responsibility of the board, not of Marsh, to hire a new CEO. Though the impetus to secure such a declaration from Marsh may well have been Marsh's alleged, or perceived, efforts to frustrate the CEO search,[75] the letter itself has no legal effect: it binds no party—Marsh or Echelon—because the letter contains no promise. At most, Marsh merely "confirms . . . [his] expectation" that the board will perform its preexisting duty, which was not designated or otherwise delegated to Marsh, to engage in a process for hiring a new CEO. With no exchange of promises, much less consideration to support those (non-existent) promises, there can be no enforceable agreement; without a contract, there can be no implied covenant of good faith and fair dealing for Marsh to have breached.

Because no underlying, enforceable agreement exists, Echelon's claim for breach of the implied covenant of good faith and fair dealing must necessarily fail. Count III is dismissed. I therefore need not address whether Echelon's claim is time-barred or whether Marsh's conduct operated to deprive the parties of the benefit of their bargain.

### *D. Count IV: Contribution*

Echelon alleges it may pursue contribution from all Third Party Defendants, to the extent that Echelon is found liable to Encite. There is one last dispute among the parties as to whether Massachusetts or Delaware law applies to this contribution claim. No one disputes, however, that, under the law of either state, contribution exists only among joint tortfeasors who are liable for the same injury.[76] Because I have already determined that Echelon

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[72] *Id.* ¶ 104.

[73] *Id.* ¶ 103.

[74] *Id.* ¶ 33.

[75] *See id.* ¶¶ 26-34.

[76] *Compare Wolfe v. Ford Motor Co.*, 434 N.E.2d 1008, 1011 (Mass. 1982) ("There is ample authority for the proposition that contribution is appropriate between persons who are *liable jointly in tort for the same injuries*, even if they are liable on different theories of tort liability.")

has failed to state a claim for tortious interference against Setrin, and because Echelon did not assert such a claim against Kleiner,[77] I rule on this claim only with respect to Marsh. Marsh, for purposes of this motion only, again does not contest the applicability of Massachusetts law to this claim.

Marsh contends that Echelon has failed to allege that he caused the same injury to Encite that Encite has alleged was caused by Echelon. Encite has alleged that its injury has been caused by the tortious conduct of Echelon.[78] Echelon alleges that Marsh caused damages to Echelon through his interference with its prospective business relationship with IFCT. Echelon, however, also alleges that Marsh damaged IFCT by his obstruction of hiring a new CEO, his interference with the sale of IFCT's assets to the Series B Investors, and his exploitation of the bankruptcy process to acquire IFCT's assets for himself at a discount.[79] Thus, to the extent that Encite alleges that Echelon has injured IFCT, Echelon has alleged that Marsh has also injured IFCT—the same injury—and that this injury was caused, in whole or in part, by Marsh.[80] This is sufficient to state a claim for contribution against Marsh. Therefore, Marsh's motion to dismiss this claim is denied.

## IV. CONCLUSION

For all the reasons stated above, Third Party Defendants' motion to dismiss Count I (tortious interference with a prospective business relationship) is granted as to Setrin, but denied as to Marsh. Count II (civil conspiracy) is dismissed as to all Third Party Defendants. Count III (breach of the implied covenant of good faith and fair dealing) is dismissed against Marsh. The motion to dismiss Count IV (contribution), which I consider here only with respect to Marsh, is denied.

IT IS SO ORDERED.

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(emphasis added), *with Builders and Managers, Inc. v. Dryvit Systems, Inc.*, No. 00C11111JEB, 2004 WL 304357, at *2 (Del. Super. Feb. 13, 2004) (noting that contribution is governed by the Contribution Among Tortfeasors Law and that it is an "inherent requirement . . . that the parties are *joint tortfeasors* who share a 'common liability'") (emphasis added), *and* 10 *Del. C.* § 6301 (defining joint tortfeasors as those who are "jointly or severally liable in tort for the *same injury* to person or property") (emphasis added).

[77]Echelon states that it reserves its right to amend its complaint to assert a tortious interference claim against Kleiner and Kleiner indicates that he will oppose any such amendment. If Echelon does so amend, it may assert a claim for contribution against Kleiner at that time, which Kleiner may also, at that time, oppose.

[78]Third Party Compl. ¶ 107.

[79]*Id.* ¶ 109.

[80]*Id.*

JULIAN v. EASTERN STATES CONSTRUCTION SERVICE, INC.

*Court of Chancery of the State of Delaware, New Castle*

No. 1892-VCP

July 8, 2008

Edward M. McNally, Esquire, and Fotini A. Antoniadis, Esquire, of Morris James LLP, Wilmington, Delaware; for plaintiff/counterclaim defendant Eugene M. Julian.

Robert A. Penza, Esquire, and Peter M. Sweeney, Esquire, of Gordon, Fournaris & Mammarella, P.A., Wilmington, Delaware; for defendant Eastern States Construction Service, Inc., defendants/counterclaim plaintiffs Richard J. Julian and Francis J. Julian, and nominal defendants Eastern States Development Company, Inc. and Benchmark Builders, Inc.

Peter B. Ladig, Esquire, Scott G. Wilcox, Esquire, and Stephen B. Brauerman, Esquire, of The Bayard Firm, P.A., Wilmington, Delaware; for defendant Steven Bomberger.

PARSONS, *Vice Chancellor*

This action involves a dispute among three brothers, Eugene Julian, Francis Julian, and Richard Julian (collectively, the "Julian Brothers") who were in business together from the late 1960's until the end of 2005, when Gene precipitously purported to "retire." As of 2005, the Julian Brothers owned three separate, but related, businesses—Eastern States Construction Service, Inc. ("ESCS"), Benchmark Builders, Inc. ("Benchmark"), and Eastern States Development Company, Inc. ("ESDC"). Each of these businesses had its own stockholders agreement to which Gene, Francis, and Richard were all parties. By 2001, relations among the Julian Brothers were becoming strained and they deteriorated over the next several years, culminating in Gene's retirement. None of the three stockholders agreements clearly gave Gene the right to retire before age sixty-two. Nevertheless, in December 2005, Gene purported to do just that and claims to have the right to retain his stock in ESCS, Benchmark, and ESDC until he reaches age

seventy-two, when the various agreements all mandate retirement and resale of a stockholder's stock to the company. Francis and Richard contend the companies had the right to redeem all of Gene's stock as of December 31, 2005, when he ceased to be employed by any of them.

After a full trial, I have concluded Plaintiff, Gene, did not have the right voluntarily to "retire" before he reached his sixty-second birthday and retain his stock. Consequently, Gene must sell his ESCS stock back to the company at its net book value as of December 31, 2005. Gene must do the same as to his stock in ESDC, although the price specified for that stock in the relevant stockholder agreement, referred to as the adjusted net book value, is to be calculated slightly differently. Technically, Gene would have had to sell back his stock in Benchmark even earlier, because Francis and Richard effectively terminated his employment at Benchmark in 2003. The evidence shows, however, that Francis and Richard waived their right to insist upon such a resale by knowingly failing to try to enforce that right until December 2005 or later. Accordingly, Gene may retain his stock in Benchmark, but has no right to demand that Benchmark redeem it before his seventy-second birthday.

The other major claim advanced by Gene is for breach of fiduciary duty against Francis, Richard, and Steven Bomberger, a director of Benchmark, for approving bonuses to themselves from Benchmark in 2005, totaling $1.3 million. I conclude that Francis, Richard, and Bomberger, as directors of Benchmark, breached their fiduciary duties in granting those bonuses. To remedy that breach of duty I am ordering Francis, Richard, and Bomberger to disgorge the bonus amounts they received back to Benchmark with interest and to reimburse Gene for his reasonable attorneys' fees in prosecuting this aspect of his complaint.

## I. FACTS

These are the facts as I find them after trial.

Plaintiff is Gene Julian who currently owns stock in ESCS, Benchmark, and ESDC, but no longer works for any of the companies.

Defendant ESCS is a Delaware corporation formed on September 14, 1983.[1] Nominal Defendant Benchmark is a Delaware corporation formed on November 28, 1988. Defendant Steven Bomberger is the President of Benchmark and serves as a director of Benchmark, along with Defendants

[1]Pretrial Stip. ("PT Stip.") ¶ II.1.

Francis and Richard Julian.[2] Nominal Defendant ESDC is a Delaware corporation formed on June 2, 1958. Eastern States Group Management Company, Inc. is a Delaware corporation formed on December 13, 2004 (together with ESCS, Benchmark, and ESDC, the "Julian Businesses").[3]

### A. The Early Years

In the early 1970's, Gene, Francis, and Richard worked for Eastern States Construction Company and First State Enterprises.[4] Eastern States Construction Company was owned by the Julian Brothers' father and their uncle, James Julian, along with several minority shareholders. First State Enterprises was owned by the brothers' father and a company owned by their Uncle James, in equal shares.[5] In 1976 the brothers' father died and the Julian Brothers took on increasing responsibilities in the companies. By the mid-1980's the brothers wanted to buy Eastern States Construction Company, which by that time they ran. Among other things, they objected to the continuing need to pay dividends to Uncle James, who had no active role in the company.[6] The brothers successfully bought out all of the minority interests in the company, except for Uncle James. The brothers attempted to purchase Uncle James' shares, but could not come to terms with him. Consequently, they liquidated Eastern States Construction Company and formed ESCS.[7]

### B. The ESCS Agreements

The Julian Brothers formed ESCS in the mid-1980s to continue in the construction business.[8] On October 14, 1985, the brothers entered into an Agreement of Stockholders of Eastern States Construction Service, Inc. (the "1985 ESCS Agreement").[9] The brothers wanted such an agreement because of the difficulties they experienced without an agreement with Eastern States Construction Company. In forming the agreement, the brothers had two key principles: only people who work for the company

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[2] *Id.* ¶ II.2.

[3] *Id.* ¶ II.4.

[4] T. Tr. at 5-6 (Gene). Citations in this format are to the trial transcript. Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically.

[5] *Id.* at 5 (Gene).

[6] *Id.* at 109-10 (Gene).

[7] *Id.* at 8-9 (Gene).

[8] *Id.* at 9-10 (Gene); *id.* at 202-03 (Francis).

[9] Joint Trial Ex. ("JX") 2, the 1985 ESCS Agreement.

could own stock in the company; and there had to be an established mechanism for determining the price of the stock if a shareholder left or died.[10]

In 1986 the brothers allowed ESCS employees to purchase stock in the business as an incentive to retain employees.[11] ESCS employees Rex Gibson and Stephen Trainer, among others, entered into an Agreement of Stockholders of ESCS on March 1, 1986 (the "Employee Agreement"),[12] which was similar to the 1985 ESCS Agreement. At various times from 1986 to 2001, a few other ESCS employees also signed Employment Agreements.[13]

On November 5, 1991, Gene, Francis, and Richard, together with ESCS, replaced the 1985 ESCS Agreement by entering into an Agreement of the Principal Shareholders of Eastern States Construction Service, Inc. (the "1991 ESCS Agreement").[14]

Article 5 of the 1991 ESCS Agreement governs retirement or total disability of a Principal Shareholder. It provides that if a Principal Shareholder retires from ESCS or ceases to be employed due to total disability, the Principal Shareholder must offer to sell his ESCS stock to the other Principal Shareholders in the manner provided in Article 2. To retire a Principal Shareholder must provide at least three years notice of his intent to retire and sell his stock so that the other Principal Shareholders can prepare for payment. Article 5 defines retirement as, "a voluntary termination on or after a Shareholder's sixty-second birthday." Further, Article 5 provides "[a]ny termination, other than one due to death or total disability, prior to a Principal Shareholder's sixty-second birthday shall result in a resale on termination in accordance with ARTICLE 4."

Article 4 of the 1991 ESCS Agreement deals with the resale of stock upon a termination of employment other than due to death, total disability, or retirement. Upon such a termination, Article 4 requires an employee to sell his stock to the corporation forthwith, and obligates the corporation to purchase those shares at the lower of: "(1) the sale price at which they (the shares) were originally sold pursuant to this agreement by corporation to employee, . . . or (2) the then current book value of the shares."[15] Before

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[10]T. Tr. at 115, 117 (Gene); *id.* at 203-04 (Francis).

[11]*Id.* at 11-12 (Gene).

[12]PT Stip. ¶ II.6.

[13]*See* JX 1, several ESCS Stockholder Employee Agreements.

[14]PT Stip. ¶ II.5; JX 3, the 1991 ESCS Agreement.

[15]As explained *infra*, Defendants no longer seek to force Gene to sell any of his stock at the first of the two potential prices.

January 1, 2006, Gene, Francis, and Richard each owned 250 shares of ESCS stock.[16]

### C. The Benchmark Agreement

In 1988, the Julian Brothers, together with Bomberger, started a home building business, Benchmark Builders, Inc.[17] On March 2, 1994, Gene, Francis, Richard, and Bomberger, together with Benchmark, entered into an Agreement of the Principal Shareholders of Benchmark Builders, Inc. (the "Benchmark Agreement").[18] The terms of the Benchmark Agreement resemble those of the 1991 ESCS Agreement. In particular, the terms of the two agreements track nearly identically as regards a Principal Shareholder's termination of employment, retirement, total disability, and the resulting obligation to offer to sell his stock to the other Principal Shareholders. The agreements even use the same article numbers and titles. A proposed amended and restated agreement among the principal shareholders of Benchmark was drafted in 2005 but never executed because Gene, a principal shareholder, refused to sign the amended agreement.[19]

### D. The ESDC Agreement

After buying out their Uncle James and other investors in First State Enterprises, the Julian Brothers and their father changed the name to Eastern States Development Company.[20] On June 15, 2001, Gene, Francis, Richard, and their sister, Janis Julian, together with ESDC entered into an Agreement of Stockholders of Eastern States Development Company, Inc.[21]

On August 24, 2005, the same parties and two new ESDC stockholders, Amelia Julian and Richard J. Julian, Jr., entered into a First Amendment to Agreement of Stockholders of Eastern States Development Company, Inc.[22] The ESDC Agreement, as amended, differs in several respects from the ESCS and Benchmark Agreements. The preamble to the ESDC Agreement recites the following purposes: "(i) to provide for the purchase by the Company of the shares of any Stockholder in the event of such

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[16]PT Stip. ¶ II.7.

[17]T. Tr. at 306-10 (Bomberger).

[18]PT Stip. ¶ II.8; JX 4.

[19]PT Stip. ¶ II.8.

[20]T. Tr. at 51 (Gene).

[21]PT Stip. ¶ II.9.

[22]JX 5, the ESDC Agreement. For convenience, I refer to the 2001 agreement as so amended as the "ESDC Agreement."

Stockholder's death, and (ii) to provide for the purchase of the shares of a Stockholder who during his lifetime desires to dispose of any of his interest, retires, becomes permanently and totally disabled or voluntarily or involuntarily terminates employment with the Company or any affiliated entity."[23]

Paragraph 5 provides that upon "the termination of employment, whether voluntary or involuntary, with a member of the Eastern States Group (except for voluntary termination by retirement) . . . the Company shall purchase, and the terminated Stockholder. . . shall sell all of the terminated Stockholder's . . . stock in the Company owned at the time of such Stockholder's termination . . . ."[24] Paragraph 6, entitled "Retirement and Notice of Intent to Retire," states:

> Any Stockholder may retire at any time after attaining age sixty-two (62), provided such Stockholder has notified the Company at least three (3) years prior to the Stockholder's intended date of retirement. Any Stockholder must retire upon attaining age seventy-two (72) and shall be deemed to have provided the notice required by this Paragraph 6 on his or her sixty-ninth birthday.

### E. Changes in the Operations of the Julian Businesses

Gene, Francis, and Richard for many years divided the responsibility for running each of the Julian Businesses among themselves, with one of them managing each business. In terms of the day-to-day operations, Gene was in charge of ESDC, Francis was in charge of Benchmark, Eastern States Leasing LLC, and Sentinel Self Storage LLC, and Richard was in charge of ESCS. ESDC, ESCS, Benchmark, Eastern States Leasing, and Sentinel Self Storage are part of a family of related business entities owned at some time by Gene, Francis, and Richard, either as the sole stockholders or in conjunction with others. Although each of the Julian Businesses generally related to construction, real estate development, and leasing activities, they involved distinct operations and were run as separate businesses.[25]

At a meeting of the ESCS board on October 12, 2000, Gene was removed from his role as President of ESCS and made Vice President. In addition to his continuing role as an officer, Gene also served as a director,

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[23] *Id.* at 1.
[24] *Id.* ¶ 5(a).
[25] PT Stip. ¶ II.10.

and received his *pro rata* share of ESCS stock distributions until his resignation on December 31, 2005.[26] Gene also retained check writing authority for ESCS, signing signature cards for ESCS's Wilmington Trust Account as late as November 2005.[27] As Francis and Richard removed Gene from any active role in ESCS, Gene's relationship with his brothers soured. In November 2001, Gene moved out of the building ESCS occupied,[28] and by August 19, 2002, had stopped attending ESCS board meetings.[29] Neither Francis nor Richard requested that Gene sell his stock in ESCS at any time before December 30, 2005.[30]

At a meeting of the Benchmark board of directors held on April 22, 2003, the directors present, Francis, Richard, and Bomberger, passed a resolution removing Gene as a director of Benchmark and providing that Gene would not be considered for re-election as an officer at the next board meeting scheduled for October 2003. Nevertheless, Gene continued to receive his *pro rata* share of Benchmark stock distributions until December 31, 2005.[31] As in the case of ESCS, neither Francis nor Richard requested that Gene sell his Benchmark stock back to the company until December 30, 2005.[32]

By letter dated December 9, 2005, Gene notified Richard and Francis of his resignation as an officer and director of ESCS and ESDC effective December 31, 2005. The letter also announced Gene's retirement from ESDC as of December 31, 2005.[33] Gene was 61 at that time.[34] After Gene tendered his resignation as an officer and director of ESCS, Richard (on behalf of ESCS) sent a letter on December 30, 2005, informing Gene he would have to sell his stock back to ESCS pursuant to Article 4 of the 1991 ESCS Agreement for a sale price of $18,433.34.[35] I infer from the evidence that this number represents the price at which Gene originally acquired his ESCS shares.

At a February 10, 2006 Benchmark board of directors meeting, the board decided by a vote of 2-1, with Bomberger dissenting, to waive enforcement of the final sentence in Article 5 of the Benchmark Agreement.

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[26]T. Tr. at 34-35 (Gene); PT Stip. ¶ II.11.
[27]JX 15, copies of ESCS checks; JX 16, memo re ESCS check signers.
[28]JX 16; T. Tr. at 36-38 (Gene).
[29]JX 12; T. Tr. at 34-36 (Gene).
[30]PT Stip. ¶ II.12.
[31]*Id.* ¶ II.13.
[32]*Id.* ¶ II.14.
[33]*Id.* ¶ II.15.
[34]T. Tr. at 105 (Gene). Gene was born on May 23, 1944. *Id.*
[35]PT Stip. ¶ II.16.

That sentence provides: "Any termination, other than one due to death or total disability, prior to a Principal Shareholder's sixty-second birthday shall result in a resale on termination in accordance with Article 4."[36] Likewise, ESCS's counsel stated during the course of this litigation that ESCS also waived enforcement of the final sentence of Article 5 of the ESCS Agreement, which is substantially identical to Article 5 of the Benchmark Agreement. The latter waiver moots the December 30, 2005 letter from Richard to Gene demanding resale of Gene's ESCS stock for just over $18,000.[37]

ESCS, Benchmark, and ESDC are each subchapter S corporations whose income is treated for tax purposes as if it has been received by their stockholders.[38] Before June 2006, Richard and Francis, as the controlling stockholders and directors of ESCS, Benchmark, and ESDC, caused each of those entities to make regular distributions of income to, *inter alia*, permit their stockholders to pay the taxes imputed to each of them based on the income of those entities (the "Tax Distributions").[39] Before Gene's December 9, 2005 letter, Gene regularly received Tax Distributions because Richard and Francis properly recognized Gene as a stockholder in ESCS, Benchmark, and ESDC.[40] There is no evidence Gene received any Tax Distributions after June 2006.

### F. Benchmark Bonuses

At a meeting of the Benchmark board of directors on December 20, 2005, the board approved a $1,000,000 bonus to Eastern States Group Management Company (the "Management Group Bonus") and a $300,000 bonus to Bomberger (the "Bomberger Bonus," collectively the "Benchmark Bonuses") for calendar year 2005. Defendants allege the board discussed two business reasons for the bonuses—to reward management for a good year and to reduce retained earnings so that fewer assets would be at risk in the event of a lawsuit.[41] The meeting took less than half an hour and no legal or financial advisors attended.[42]

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[36] *Id.* ¶ II.17.

[37] *Id.* ¶ II.18.

[38] *Id.* ¶ II.19.

[39] *Id.* ¶ II.20. In September 2004, an advisory board for Eastern States Group was assembled to advise the Julian Businesses. The board includes three independent members. *Id.* ¶ II.22.

[40] PT Stip. ¶ II.21.

[41] T. Tr. at 319 (Bomberger).

[42] *Id.* at 333 (Bomberger); JX 20, Minutes of the Benchmark Board of Directors, 12/20/05. The length of the meeting and the absence of outside advisors were typical for Benchmark. *See* T.

Before the December 20, 2005 meeting, Francis discussed the possibility of awarding bonuses with Richard for approximately fifteen minutes.[43] Both Francis and Richard recognized that payment of any bonuses would decrease the net book value of Benchmark, and thereby benefit Benchmark in the event of a buyback of Gene's shares.[44] Yet, the Benchmark directors did not consult anyone else before deciding to pay the bonuses.[45] Several days after the board meeting, Benchmark issued a check to Eastern States Management Group for $1,000,000, which then distributed the bonus in equal shares to Francis and Richard.[46] Benchmark paid the Bomberger Bonus in 2006.[47]

The Benchmark Bonuses constituted 22.28% of Benchmark's adjusted income in 2005. For historical context, from 1996 to 1998, Benchmark paid no bonuses. Between 1999 and 2004, Benchmark's bonuses ranged from 3.30% to 3.36% of its adjusted income.[48] Further, the Bomberger Bonus was the first bonus Bomberger received during his career at Benchmark beyond the compensation provided for in his Employment Agreement. A portion of Bomberger's contractual compensation in 2005 and earlier years was based on a percentage of Benchmark's gross profit or income before taxes.

Additionally, the portion of the Benchmark Bonuses paid to Francis, Richard, and Bomberger directly correlates to their respective stock ownership in Benchmark. Specifically, Francis and Richard each own 250 shares of Benchmark stock and Bomberger owns 150 shares. Their respective bonuses each translate into a payment to them of $2,000 per share.[49]

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Tr. at 187 (Gene); *id.* at 314-15 (Bomberger).

[43]*Id.* at 269 (Richard).

[44]*Id.* 243-44 (Francis).

[45]*Id.* at 269 (Richard).

[46]Francis and Richard knew before the Management Group Bonus was paid it would be split equally between them. T. Tr. at 268 (Richard); JX 24. Historically, the Julian Brothers pooled any bonus money from the Julian Businesses and distributed the money equally among them. Gene, however, received none of the Management Group Bonus, even though he worked for the Julian Businesses in 2005. *See* T. Tr. at 210-11 (Francis).

[47]PT Stip. ¶ II.24; JX 20.

[48]Although the record regarding Benchmark's bonuses lacks precision, the big picture is readily discernible.

[49]T. Tr. at 323-25 (Bomberger). In addition to Gene, who owned 250 shares, Benchmark had at least one other shareholder, Frank T. Fortunato, who received distributions between 2000 and 2006. JX's 89-95, Form 1120 S of Benchmark for Fiscal Years 2000-2006. There is no evidence Gene or Fortunato received any payments in connection with the Benchmark Bonuses.

### G. McMullen Square

On July 25, 2005, ESDC and Eastlawn Associates, LLC entered into an Agreement of Purchase and Sale for a tract of land, the "McMullen Square" property. On April 12, 2006, ESDC assigned all of its interests in the agreement to McMullen Square Associates, LLC.[50] The members of McMullen Square Associates were Francis, Richard, and Bomberger. On August 17, 2006, Gene amended his complaint to add a claim of diversion of corporate opportunity for the transfer of ESDC's rights in the McMullen Square property. After that amendment, Defendants transferred the rights back to ESDC, backdated the relevant agreements, and thereby mooted Gene's claim regarding the McMullen Square property.[51]

## II. PROCEDURAL HISTORY

Plaintiff Gene Julian filed this action on January 18, 2006, seeking a judgment declaring him the rightful owner of 250 shares of ESCS stock. On August 17, 2006, Gene filed an amended complaint adding a breach of fiduciary duty count against Defendants Richard and Francis Julian—the directors and majority shareholders of ESCS, ESDC, and Benchmark—for withholding Gene's shareholder distributions from these companies after June 2006.[52] The amended complaint also added a diversion of corporate opportunity count on behalf of ESDC against Francis and Richard for acquiring the McMullen Square property Gene claimed rightfully belonged to ESDC.

Defendants filed an answer to the amended complaint and a counterclaim on September 20, 2006, asserting claims for specific performance, breach of contract, and breach of fiduciary duties that challenged the validity of Gene's "retirement" in December 2005. On September 28, 2006, Gene replied to the counterclaim.

On March 23, 2007, Gene filed a second amended complaint (the "Complaint") adding a sixth cause of action for breach of fiduciary duties by the directors of Benchmark based on the $1.3 million in bonuses paid by Benchmark for 2005. The Complaint also added Bomberger as a defendant

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[50]*See* JX 48, Agreement of Purchase and Sale between ESDC and Eastlawn, 7/25/05, and Amendment, 9/2/05; JX 51, Settlement Statement between McMullen Square Associates and Eastlawn Associates, 4/12/06.

[51]PT Stip. ¶ II.25.

[52]Gene alleges Francis and Richard began to withhold from him the regular distributions of income when he declined to resolve the litigation on the terms they demanded.

and Benchmark as a nominal defendant. On April 30, 2007, Francis and Richard answered the Complaint and re-filed their counterclaim without revisions. Bomberger filed his answer on May 2, 2007.

Trial was held on September 12 and 14, 2007. After extensive briefing, the Court also heard post-trial argument.

## III. ANALYSIS

### A. Gene's Stock in ESCS, Benchmark, and ESDC

Gene seeks a declaratory judgment that he has the right to continue to own his stock, and Defendants seek a declaratory judgment that Gene must sell back his stock in ESCS, Benchmark, and ESDC. The purpose of the statute on declaratory judgments "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations."[53] Declaratory judgment is appropriate when there is an actual controversy between the parties.[54] In this case, an actual controversy exists regarding Gene's status as a shareholder in each of ESCS, Benchmark, and ESDC. A declaratory judgment, therefore, would settle the uncertainty regarding Gene's rights and status.

#### 1. Contract interpretation principles

To resolve the parties' dispute, this Court must construe the relevant shareholder agreements. Under Delaware law, contract construction is a question of law.[55] When interpreting a contract, the court strives to determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent."[56] If the contractual language is "clear and unambiguous," the ordinary meaning of the language generally will establish the parties' intent.[57] Therefore, where there is an unambiguous integrated written contract, the language of that contract will

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[53]10 *Del. C.* § 6512.

[54]*Dana Corp. v. LTV Corp.*, 668 A.2d 752, 755 (Del. Ch.), *aff'd*, 670 A.2d 1337 (Del. 1995).

[55]*Rhone-Poulenc Basic Chems. Co. v. Amer. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

[56]*Matulich v. Aegis Comm'ns Group, Inc.*, 2007 WL 1662667, at *4 (Del. Ch. May 31, 2007) (citing *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996)); *Brandywine River Prop., Inc. v. Maffet*, 2007 WL 4327780, at *3 (Del. Ch. Dec. 5, 2007).

[57]*Brandywine River*, 2007 WL 4327780, at *3; *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003).

control.[58] Additionally, when interpreting a contractual provision, a court attempts to reconcile all of the agreement's provisions when read as a whole, giving effect to each and every term.[59] In doing so, courts apply the well settled principle that "contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'"[60]

A contract is ambiguous, however, when the language "in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[61] If a contract is ambiguous, "the court may consider extrinsic evidence to uphold, to the extent possible, the reasonable shared expectations of the parties at the time of contracting."[62] In considering extrinsic evidence, the court may consider "'overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry.'"[63] Review of the extrinsic evidence "may render an ambiguous contract clear so that an 'objectively reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties to be.' In such a case, the court would enforce the objectively reasonable interpretation that emerges."[64]

When examining the shared intent of the parties to an ambiguous agreement, if review of the extrinsic evidence does not lead the court to an obvious conclusion, the court may apply the "forthright negotiator principle."[65] Under that principle, "in cases where the extrinsic evidence does not lead to a single, commonly held understanding of a contract's meaning, a court may consider the subjective understanding of one party that

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[58] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 19 (Del. Ch. 2005).

[59] *See, e.g., Council of the Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *11 (Del. Ch. Nov. 2, 2007) ("Delaware courts do prefer to interpret contracts to give effect to each term rather than to construe them in a way that renders some terms repetitive or mere surplusage.").

[60] *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006).

[61] *Rhone-Poulenc*, 616 A.2d at 1196. Ambiguity does not exist simply because the parties do not agree on a contract's proper construction. *United Rentals, Inc. v. Ram Holdings, Inc.*, 2007 WL 4496338, at *15 (Del. Ch. Dec. 21, 2007).

[62] *Comrie*, 837 A.2d at 13.

[63] *Id.* (quoting *Supermex Trading Co. v. Strategic Solutions Group*, 1998 WL 229530, at *3 (Del. Ch. May 1, 1998)).

[64] *United Rentals, Inc.*, 937 A.2d at 835 (quoting *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307455, at *10 (Del. Ch. June 6, 1996)). In considering extrinsic evidence, the court adheres to the objective theory of contracts; the subjective understandings of the negotiators are unhelpful in interpreting the contract. *Id.*

[65] *Comrie*, 837 A.2d at 13.

has been objectively manifested and is known or should be known by the other party."[66]

Before examining the agreements at issue here, I note that each of the three Julian Brothers is a successful business person. Consequently, I consider them all sophisticated parties. Additionally, the three primary agreements at issue are not entirely consistent and are difficult to harmonize, as is the conduct of the parties in reference to them. The failure of the Julian Brothers, individually and collectively, to pay more attention to these agreements and to confront and resolve differences regarding the nature of their business relationships, when they arose, has complicated significantly the issues before me. Because Gene, Francis, and Richard are sophisticated parties, however, the Court's function is to determine what it is they agreed to and to implement those agreements as closely as possible in the factual circumstances of this case.

No material differences exist between the ESCS and Benchmark Agreements for purposes of the current dispute, but the ESDC Agreement differs markedly from those earlier agreements. Additionally, Gene's involvement in each of the three companies and Francis and Richard's interactions with Gene in terms of the specific companies varied during the relevant period before Gene delivered his December 9, 2005 letter announcing his retirement from ESDC. I therefore analyze Gene's claimed rights to continue owning his stock in each company separately. I begin by addressing a few material issues of contract interpretation.

### 2. The 1991 ESCS Agreement and the Benchmark Agreement[67]

Gene argues the terms "employee," "employed," and "employment" as they appear in Articles 4 and 5 of the 1991 ESCS Agreement are unambiguous and must be given their plain and ordinary meaning. Because the terms are not defined in the agreements, Gene cites Black's Law Dictionary, which defines "employee" as: "A person who works in the service of another person (the employer) under an express or implied contract for hire, under which the employer has the right to control the details of work performance."[68] "Employment" is defined as: "Work for

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[66] *United Rentals, Inc.*, 937 A.2d at 836.

[67] Because the relevant provisions of the 1991 ESCS Agreement and the Benchmark Agreement are essentially identical, I discuss primarily the 1991 ESCS Agreement. Unless otherwise noted, my interpretation of the disputed terms in that agreement applies equally to the Benchmark Agreement.

[68] BLACK'S LAW DICTIONARY 564 (8th ed. 2004). Gene cited to the seventh edition, but the eighth edition is the most current and contains the same definition as the seventh.

which one has been hired and is being paid by an employer."[69] Gene further argues the case law confirms his position that individuals who do not receive compensation and who do not perform any duties other than holding the title of an officer are not "employees." According to Gene, he was not under the direct control of an employer and did not receive a salary. Thus, he contends he was not an employee and cannot be forced to sell his shares pursuant to the 1991 ESCS Agreement or the Benchmark Agreement.

Francis and Richard assert the terms employee, employed, and employment, as used in the agreements, are ambiguous. They therefore urge this Court to look to extrinsic evidence to determine the parties' shared intent as to those terms. Francis and Richard point, for example, to the historical catalyst for the operating agreements. The underlying purpose in creating the first operating agreements, the 1985 ESCS Agreement and the Employee Agreements, was to ensure that only people who work for ESCS could own stock in ESCS and to establish a mechanism to determine the price upon a sale of stock to avoid any disputes. Hence, according to Francis and Richard, Gene is subject to the shareholder agreement provisions that compel the resale of stock upon termination of employment or retirement.

Turning to the language of the 1991 ESCS Agreement, Article 5, entitled "Retirement or Total Disability," states in pertinent part:

> *In the event a Principal Shareholder ceases to be employed by the corporation* by reason of retirement or total disability, he must offer to sell his shares to the other Principal Shareholders in the manner provided in Article 2 hereof . . . . Principal Shareholders must give at least three years notice of intent to sell stock in order for the other Principal Shareholders to prepare for payment, except that, in the event of total disability, an employee must notify the corporation of his total disability and of his intent to sell his stock six months prior to the date of sale. Retirement is defined as a voluntary termination on or after a Shareholder's sixty-second birthday. Any termination, other than one due to death or total disability, prior to a Principal Shareholder's sixty-second birthday shall result in a resale on termination in accordance with ARTICLE 4.[70]

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[69] *Id.* at 566.

[70] The 1991 ESCS Agreement Art. 5 (emphasis added).

Article 2, which applies in the case of retirement, provides for valuing each Principal Shareholder's stock in ESCS at current net book value. In contrast, for any termination before a Principal Shareholder's sixty-second birthday, other than for death or total disability, Article 5 refers back to Article 4, which calls for a resale of the shareholder's stock for as low as the price he originally paid for it.[71]

> Article 4, entitled "Resale on Termination of Employment," provides:
>
> *If the employment of an employee with the corporation is terminated* (a) from the date of this agreement by employee's resignation, discharge, with or without cause, disability, or any other reasons except the employee's death or total disability, or (b) at any time, if employee has committed acts of dishonesty or disloyalty or acts substantially detrimental to the welfare of corporation, then in either case, if such termination occurs while employee is the registered owner of the shares, employee shall be bound to sell to corporation forthwith, and corporation shall be bound to purchase from employee, the shares at the lower of (1) the sale price at which they were originally sold pursuant to this agreement by corporation to employee, . . . or (2) the then current book value of the shares.[72]

The validity of Gene's claim to a contract right to continue to hold his stock in ESCS turns largely on the proper interpretation of the references to "employment" in Articles 4 and 5 of the 1991 ESCS Agreement.

I conclude the language of Article 5 is dispositive. That Article deals with the situation in which a "Principal Shareholder ceases to be employed by the corporation [ESCS] by reason of retirement or total disability" or is subject to "termination, other than one due to death or total disability, prior to a Principal Shareholder's sixty-second birthday." The plain language of Article 5 makes clear the signatories to the 1991 ESCS Agreement, Gene, Francis, and Richard, considered themselves to be "employed by" ESCS in the ordinary, colloquial sense of working for the company in some gainful capacity. As I understand Gene's argument, he contends he was an owner or Principal Shareholder of ESCS, but never an "employee," in the legal sense

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[71] As discussed *infra*, Defendants do not seek to compel Gene to resell his stock in any of the three companies for what he paid for it. Instead, they essentially would set the price at the net book value, although the determination of that value is slightly more involved in the case of ESDC.

[72] The 1991 ESCS Agreement Art. 4 (emphasis added).

of that term for purposes of employment law, for example. That begs the question, however, of whether Gene was "employed by" ESCS within the meaning of Article 5. The 1991 ESCS Agreement he signed plainly indicates he was. Nothing in that agreement suggests the parties intended the word "employed" in Article 5 to have the more narrow legal meaning Gene now attempts to ascribe to it. Thus, the agreement is not ambiguous in that regard.

Even assuming the terms "employee," "employed," and "employment" in the 1991 ESCS Agreement are ambiguous, however, I reach the same conclusion that Gene was "employed by" ESCS at least until 2001 and more likely until he resigned as an officer and director of ESCS effective December 31, 2005.[73]

Assuming the employment related terms are ambiguous, I look to the ordinary meaning of the contract language and attempt to reconcile all of the agreement's provisions when read as a whole. First, the agreement is a Principal Shareholder Agreement, and, as is also true for the Benchmark Agreement, the signatories are all the Principal Shareholders, namely Gene, Francis, and Richard (each with 250 shares).[74] Gene denies ever being an "employee" in ESCS or Benchmark. Further, in Gene's view, under the terms of the Principal Shareholder Agreements, Gene's ties with ESCS could never be severed in a manner that would require him to sell back his stock, other than through mandatory retirement when he reached his seventy-second birthday. Before reaching that age, Gene could retire at any time, he contends, and either hold onto his stock or, by complying with the notice and age requirements of Article 5, compel the company to buy it back.

Other provisions of the 1991 ESCS Agreement, however, reflect the parties' intention that only people who work for the company can own stock in the company. For example, Article 1 restricts a Principal Shareholder's ability to transfer his stock to an immediate family member by requiring that the family member be "employed in a full-time position by" ESCS. This reflects the Julian Brothers' intent that only people who work for the company can be stockholders in the company and supports the conclusion that the parties intended the term "employee" of the company to include one who works for ESCS, such as an officer.

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[73]The exact date as of which Gene ceased to be employed by ESCS arguably could be relevant to Gene's waiver argument discussed *infra* Part III.A.4. I need not address that issue further, however, in view of my resolution of the waiver issue and the fact that Defendants do not contend Gene ceased to be employed by ESCS before December 31, 2005.

[74]Similarly, the Benchmark Agreement's signatories are its Principal Shareholders, namely Francis, Richard, Gene, and Bomberger (the brothers owning 250 shares each and Bomberger owning 150 shares).

Assuming arguendo the concept of employment is ambiguous in both the 1991 ESCS and Benchmark Agreements, the Court may consider extrinsic evidence to determine the reasonable expectations of the parties at the time of contracting. Here, the parties' overt acts and prior dealings help to clarify any perceived ambiguities. Specifically, the facts surrounding the creation of the operating agreements shed light on the parties' shared intent. From the 1970's through the mid-1980's the Julian Brothers ran businesses in which they lacked total ownership. The brothers therefore paid dividends to passive shareholders, who in their minds did not contribute to the business, chiefly Uncle James. To remedy this situation, the brothers sought complete control, and when they could not reach a mutually acceptable buy-out arrangement with Uncle James, they liquidated the company. Around the same time, Gene, Francis, and Richard formed ESCS. Wanting to avoid another Uncle James scenario, the brothers entered into a stockholders agreement in 1985, which they later amended in 1991. A key purpose of those agreements was to ensure that only people who worked for the company could own stock in the company.

In this context, I find nothing in the existing evidence to support Gene's hypertechnical argument that he was never "employed" by ESCS. On the contrary, the evidence confirms the parties understood Gene was a Principal Shareholder employed by ESCS when they entered into the 1991 ESCS Agreement.

Because Gene was a Principal Shareholder, I look to Article 5 of the 1991 ESCS Agreement to determine what rights, if any, he has to continued stock ownership. Article 5 explicitly defines retirement as "a voluntary termination on or after a Shareholder's sixty-second birthday." Gene was not yet sixty-two when he resigned in December 2005 as an officer and director of ESCS. Thus, Gene's resignation cannot be considered a "retirement" under the 1991 ESCS or Benchmark Agreements. Rather, under Article 5, Gene's departure qualifies as a "termination," other than one due to death or total disability, prior to his sixty-second birthday. Under the 1991 ESCS Agreement, therefore, Gene's voluntary termination would give rise to an obligation on his part to resell his stock in accordance with Article 4. That Article required Gene to sell his shares to ESCS "forthwith" after the date of his termination, and ESCS was bound to purchase those shares. While under the agreement, ESCS was only required to buy Gene's shares at the sale price at which they were originally sold to Gene, a value lower than the shares' then current book value, Defendants here seek only a declaration that Gene must sell his ESCS shares back at their current book value as of December 31, 2005.

Although I interpret the Benchmark Agreement the same way as the 1991 ESCS Agreement, the facts regarding Gene's involvement with

Benchmark are different. At a meeting of the Benchmark board of directors on April 22, 2003, Francis, Richard, and Bomberger passed a resolution removing Gene as a director of Benchmark. Later in 2003, they also caused Gene not to be reelected as an officer of Benchmark. From that time until December 31, 2005, Gene had little, if any, involvement with Benchmark. To the extent Gene ceased to be employed by Benchmark sometime before December 31, 2005, I conclude for the same reasons as for ESCS, that Benchmark would have had the right to require Gene to sell back his stock forthwith. Benchmark did not demand such a resale of stock until after Gene purported to retire in December 2005, by which time he admittedly had severed all working ties with the Julian Businesses. Moreover, in February 2006, the Benchmark board waived the final sentence in Article 5 of the Benchmark Agreement in favor of "mak[ing] arrangement for the Company to purchase Eugene's shares of stock in the Company based on the year end 2005 net book value as defined in Article 2" of the Benchmark Agreement.[75]

### 3. The ESDC Agreement[76]

There are significant differences in form and substance between the 1991 ESCS and Benchmark Agreements, on one hand, and the ESDC Agreement, on the other hand. I therefore turn next to the ESDC Agreement.

Gene contends the ESDC Agreement gives each stockholder three options: (1) voluntarily retire before sixty-two with the right to keep your stock but no right to demand the company purchase your interest; (2) retire at sixty-two with the option of retaining your stock or demanding the company acquire your interest, provided the stockholder provides three years notice; or (3) continue working for the company until age seventy-two, at which time retirement is mandatory and the company must buy out your interest. Gene argues he voluntarily retired before sixty-two and is therefore entitled to hold his stock until mandatory retirement.

Francis and Richard respond that when Gene departed ESDC, the company had the option to enforce the age sixty-two retirement limit, the three year notice requirement, or both. Alternatively, they argue Gene did not "retire" under Paragraph 6 of the ESDC Agreement, and therefore Paragraph 5 applies and requires that Gene sell his stock to the company. Francis and Richard also challenge Gene's interpretation of the agreement,

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[75]JX 21.

[76]Unlike the situation with ESCS and Benchmark, Gene makes no waiver argument as to the ESDC Agreement.

because it would permit a stockholder, who works for none of the Julian Businesses, to retain stock in those entities. Such a result, they contend, would violate the parties' key principle in drafting the operating agreements–people who do not work at the company cannot own stock.

In determining whether or not Gene is entitled to hold his ESDC stock, the ESDC Agreement controls. Like the operating agreements for ESCS and Benchmark previously discussed, the ESDC Agreement uses the term employment in a broad sense. When the agreement is construed as a whole and giving effect to all of its provisions, Paragraphs 5 and 6 are the relevant provisions because they cover the situations in which a stockholder is required to sell his stock.

In a letter dated December 9, 2005, Gene notified Francis, in his capacity as Chairman of ESDC, of his self-styled retirement. Gene wrote: "This is to provide formal written notice that I will retire from Eastern States Development Company on December 31, 2005. Effective on that date I will also resign as an Officer and Director of Eastern States Development Company and Eastern States Construction Service."[77] The procedure for retirement appears in Paragraph 6 of the ESDC Agreement.

Paragraph 6, entitled "Retirement and Notice of Intent to Retire," provides:

> (a) Any Stockholder may retire at any time after attaining age sixty-two (62), provided such Stockholder has notified the Company at least three (3) years prior to the Stockholder's intended date of retirement. Any Stockholder must retire upon attaining age seventy-two (72) and shall be deemed to have provided the notice required by this Paragraph 6 on his or her sixty-ninth birthday.

The agreement's language confines the concept of "retirement" to two circumstances, one permissive and one mandatory. First, a stockholder, who is sixty-two years old or older, may opt to retire provided the stockholder notified ESDC at least three years before the intended date of retirement. Second, all stockholders who still hold stock on their seventy-second birthday must retire, and are deemed to have provided proper notice. In both cases, the stockholder would have the right to require ESDC to redeem his shares for their adjusted net book value.

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[77] JX 8.

Here, Gene did not "retire" under Paragraph 6 of the ESDC Agreement. Gene was not yet sixty-two when he departed; he was only sixty-one. Therefore, he was not eligible to retire under the permissive retirement provision. Moreover, permissive retirement under Paragraph 6 requires three years prior notice and Gene only provided several weeks notice. Therefore, Gene's voluntary departure does not fall under Paragraph 6. Further, although Gene claims he had a right under the ESDC Agreement to "retire" voluntarily before age sixty-two and simply retain his stock until he reached the mandatory retirement age of seventy-two, nothing in Paragraph 6 supports that claim. Rather, it appears his situation would come within Paragraph 5.

Paragraph 5 addresses the ramifications of a stockholder's death or termination of employment on her stock ownership. In pertinent part, Paragraph 5 states:

> (a) Upon (i) the termination of employment, whether voluntary or involuntary, with a member of the Eastern States Group[78] (except for voluntary termination by retirement) . . . the Company shall purchase, and the terminated Stockholder, . . . shall sell all of the terminated Stockholder's . . . stock in the Company owned at the time of such Stockholder's termination . . . .

Paragraph 5 further provides that the purchase price for the stock shall be its adjusted net book value, and specifies the procedures under which ESDC can pay the amount due over time with interest.

According to Francis and Richard, Gene's December 9, 2005 letter provided notice of his voluntary termination of employment effective December 31, 2005. Thus, they contend that as of December 31, 2005, ESDC was required to purchase and Gene was required to sell all of his stock in ESDC. Gene disagrees and proffers a different interpretation of the ESDC Agreement.

Gene places great weight on the parenthetical language in Paragraph 5, "except for voluntary termination by retirement." Gene alleges he insisted that language be included in the ESDC Agreement to make clear that a Stockholder could voluntarily retire before age sixty-two and not be required to sell back his stock. In addition, Gene acknowledges that, in that circum-

[78]Paragraph 1 of the ESDC Agreement defines "Eastern States Group" as including Benchmark, ESCS, ESDC, Eastern States Leasing, L.L.C., and Sentinel Self Storage L.L.C.

stance, a stockholder could not require the company to redeem his stock before he reached his seventy-second birthday. There is no evidence, however, that Gene or his counsel ever conveyed that understanding to Francis or Richard during the negotiation of the ESDC Agreement in 2001 or the August 2005 First Amendment to it. Nor does anything in the record suggest Francis or Richard themselves shared Gene's understanding. In fact, they deny ever thinking that a stockholder of ESDC could cease to be employed by at least one member of the Eastern States Group and still continue to hold stock in ESDC.

The reference to "voluntary retirement" in the parenthetical itself has at least one other plausible interpretation. Paragraph 6 of the ESDC Agreement deals with retirement, whether permissive or mandatory. Conceivably, voluntary retirement refers to the concept I have called "permissive" retirement under Paragraph 6. Otherwise, the ESDC Agreement makes no mention of the term "voluntary retirement," except for the parenthetical reference in Paragraph 5.

In particular, by the parenthetical "except for voluntary termination by retirement" the parties may have meant only to carve out the situation covered explicitly in Paragraph 6 regarding "Retirement and Notice of Intent to Retire." Yet, such a reading arguably would render the parenthetical little more than mere surplusage, a result courts try to avoid, if possible, in construing contract terms. In the absence of any evidence that Gene or his representatives ever fairly conveyed his purported understanding of the importance of the parenthetical to Francis, Richard, or anyone acting on their behalf in negotiating or drafting the original ESDC Agreement or the First Amendment to it, I consider the carve out construction discussed above to be the only reasonable interpretation of the disputed language. In that regard, I also note the parties slightly modified the language of the parenthetical to delete the reference to total disability in the First Amendment, which they entered into only a few months before Gene "voluntarily retired." By that time, the hostility and distrust among the brothers in terms of their business dealings was high. In those circumstances, Gene acted at his own risk by relying on a particular understanding he had of an arguably ambiguous phrase, when he knew or should have known his brothers did not share that understanding.[79]

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[79]*See United Rentals, Inc.*, 937 A.2d at 835-36 (quoting *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007)) (stating where an examination of extrinsic evidence does not lead to an obvious, objectively reasonable conclusion, the Court may employ the forthright negotiator principle and consider "the evidence of what one party subjectively believed the obligation to be, coupled with evidence that the other party knew or should have known of such

In reaching this conclusion, I also find the ESDC Agreement, like the other operating agreements, to be less than a model of clarity. For example, the agreement does not expressly address whether or not a stockholder could "retire" before sixty-two and retain his stock. In construing the agreement as a whole, I read the contract as equating a voluntary "retirement" before a stockholder's sixty-second birthday to a voluntary termination under Paragraph 5, requiring the stockholder to sell his stock to the company. Not only the agreement's language, but also the extrinsic evidence supports this interpretation. Gene's argument that a stockholder can retire before sixty-two and retain his stock in ESDC runs afoul of the brothers understanding that to own stock in the Julian Businesses one must work for the businesses. Under Gene's interpretation, a stockholder hypothetically in his forties could decide unilaterally to stop working for ESDC and any of the other Eastern States Group companies and yet continue to own stock in ESDC. I find that result would violate the intent of the Julian Brothers when they entered into the ESDC Agreement, and that Gene knew it would.

There is no dispute Gene ceased to be employed by any company in the Eastern States Group as of December 31, 2005.[80] Thus, I hold Gene was required to sell his stock in ESDC to the company promptly after that date.

### 4. Waiver

Gene argues Francis and Richard waived their right to demand the resale of his stock in ESCS and Benchmark. According to Gene, when Francis and Richard forced him out of ESCS and Benchmark, they did not attempt to enforce any specific buy-back provisions in the shareholder agreements and should be estopped from doing so now. Gene asserts he was terminated from any active role in ESCS in October 2000, and that between then and December 2005 neither Francis nor Richard attempted to acquire his ESCS stock. Similarly, Gene contends he was removed as a director and officer of Benchmark in 2003, ending any work he did for that company. Further, Gene disputes Francis and Richard's argument that so long as he continued to work for ESDC, he could retain his stock in ESCS and Benchmark. According to Gene, Francis and Richard incorrectly base that argument on language in the Employee Agreements and the ESDC

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belief.'").

[80]It is not clear whether Gene bases his argument for maintaining his ESDC stock on his not having been in the "employment" of ESDC within the meaning of the ESDC Agreement. To the extent Gene does make that argument, I reject it as unconvincing. The agreement indicates the parties proceeded on the premise that stockholders such as Gene and his brothers were "employed" by ESDC or another member of the Eastern States Group at the time they signed both the original ESDC Agreement and the First Amendment.

Agreement that refers, respectively, to employment with ESCS or an affiliate and with the Eastern States Group. Similar cross-employment language does not appear, however, in the ESCS or Benchmark Agreements.

Francis and Richard respond that Gene has failed to meet the exacting standards for proving waiver. First, they argue that until December 31, 2005, Gene still played roles in both ESCS and Benchmark. Regarding ESCS, while Gene was removed as President in 2001, he was elected Vice President at the same time. Therefore, although Gene was no longer involved in the day-to-day management of ESCS, Francis and Richard allege ESCS still consulted Gene and that Gene retained check writing authority and executed signature cards for ESCS's Wilmington Trust Account. Further, Francis and Richard assert that despite Gene's removal as an officer of Benchmark in April 2003 and lack of any formal association with the company thereafter, Benchmark still consulted Gene occasionally.

Moreover, Francis and Richard allege the parties all understood that so long as a stockholder was working for one of the Julian Businesses, he could retain his stock in all of the entities, but once the stockholder no longer worked for any of the Julian Businesses, he or she had to sell their stock back to the respective companies. To support their position, Francis and Richard point to the ESDC Agreement, which expressly contains such a provision, noting Gene admitted at trial that the ESDC Agreement was a further refinement of the earlier shareholder agreements. Francis and Richard also cite to the example of Rex Gibson, an employee who worked for ESCS, obtained shares in ESCS, and retained those shares when he left ESCS to work solely for ESDC.

Under Delaware law, "[a] contractual requirement or condition may be waived where (1) there is a requirement or condition to be waived, (2) the waiving party must know of the requirement or condition, and (3) the waiving party must intend to waive the requirement or condition."[81] Gene bears the burden of proving the existence of those elements.

### a. The cross-employment argument

Francis and Richard purportedly understood that a Principal Stockholder in ESCS or Benchmark did not have to sell his stock in that entity until he ceased to be employed by any of the Julian Businesses. Because that circumstance applies to both ESCS and Benchmark, I initially address the merits of Francis and Richard's alleged understanding. I then

[81] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

address whether such a subjective belief, if plainly mistaken, would negate Gene's claim of waiver.

There is no question the Julian Brothers could have written the ESCS and Benchmark Agreements to include the concept that so long as a stockholder works for one of the Julian Businesses, he could retain his stock in all of the companies. The fact is, however, they did not include language to that effect. The absence of any cross-employment language is striking, given the brothers used such language in other contemporaneous agreements, suggesting they intentionally left it out of the ESCS and Benchmark Agreements. For example, the Julian Brothers, at various times from 1986 through 2001, entered into several Employee Agreements that contained cross-employment language.[82] Specifically, the Employee Agreements provided for the resale of stock upon termination of "employment of a minority Shareholder employee with the corporation or with a corporation affiliated with the corporation."[83] Additionally, the initial 1985 ESCS Agreement contained identical cross-employment language, not found in the current 1991 ESCS Agreement.[84] Further, the ESDC Agreement, which all Julian Brothers acknowledge is a further refinement of their earlier shareholder agreements, expressly provides that, with the exception of Janis Julian, stock in ESDC could only be held by individuals who continued to be employed by "a member of the Eastern States Group" -- *i.e.*, Benchmark, ESCS, ESDC, Eastern States Leasing, L.L.C., or Sentinel Self Storage L.L.C.[85] The operative ESCS and Benchmark Agreements, however, do not include any such language. Rather, the agreements provide for the resale of stock "[i]f the employment of an employee with the corporation is terminated . . . ."[86] Therefore, I reject the argument that so long as Gene worked for one of the other Julian Businesses he had a contractual right to retain his stock in ESCS and Benchmark. To the extent Francis and Richard attempt to rebut Gene's waiver argument by contending they acted on the premise that cross-employment was sufficient, their argument is unpersuasive.[87]

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[82]JX 1, several ESCS Stockholder Employee Agreements. Indeed, Rex Gibson entered into one of these agreements with cross-employment language. This explains why he could leave ESCS to work for ESDC and still hold his ESCS stock. Similar cross-employment language, however, is not included in either the ESCS or Benchmark Agreements.

[83]Although even this language is not a model of clarity, the parties seem to agree that it should be read to mean a stockholder is under no obligation to sell stock so long as he continues to be employed by at least one Julian company.

[84]*See* JX 2.

[85]*See* JX 5 ¶¶ 1, 4.

[86]*See* JX 3 Art. 4.

[87]The parties did not address whether waiver examines a party's intent from an objective or subjective perspective. For purposes of this dispute, the issue is immaterial. Based on the facts of

### b. Was there a waiver as to ESCS?

Turning to waiver regarding Gene's ESCS stock, I look to the extent and duration of Gene's role in ESCS. Beginning in 1985, Gene served as President of ESCS. On October 12, 2000, however, the ESCS board removed Gene as President, demoting him to Vice President. As Francis and Richard stripped away Gene's responsibilities in ESCS, Gene's relationship with his brothers soured. In November 2001, Gene moved out of the building ESCS occupied, and as of August 19, 2002, he stopped attending ESCS board meetings. Although Gene's involvement with ESCS waned over the years, he retained check writing authority. Further, Gene continued to serve as both an officer and a director of ESCS, and receive his *pro rata* share of ESCS stock distributions, until his resignation on December 31, 2005.

To demonstrate Francis and Richard waived their ability to require Gene to sell his shares in ESCS back to the company, Gene would have to show that there was a requirement he sell his shares back before December 2005, Francis and Richard knew of that requirement, and they intentionally waived it. Although Gene's role in ESCS greatly diminished in the period after October 2000, when he ceased being its President, he continued to be an officer and director and have check writing authority until he resigned in 2005. In these circumstances, Gene has not shown that his employment with ESCS terminated before December 2005. Moreover, even if it did in a legal sense, Francis and Richard reasonably could have believed otherwise. Indeed, Gene's December 2005 letter in which he resigned as an officer and director of ESCS supports an inference that he continued to be employed by the company up until that time. Therefore, I conclude that Gene has not proven Francis or Richard waived their right to demand that Gene sell his ESCS stock back to the company as of December 31, 2005.

### c. Was there a waiver as to Benchmark?

Next, similar to the ESCS waiver analysis, the possibility of a waiver as to Benchmark largely turns on Gene's role at Benchmark. On April 22,

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this case, I find Francis and Richard's claimed reliance on a cross-employment theory to be objectively unreasonable. Further, as discussed *infra*, I find Francis did not subjectively hold this belief. Rather, he acknowledged that in April 2003, when Gene left Benchmark, Benchmark at least arguably had a basis to insist upon the reacquisition of Gene's Benchmark stock. At that time, however, Gene was still "employed" by ESDC and ESCS. Therefore, I find that even if Francis and Richard subjectively held the belief that as long as a shareholder worked for one of the Julian Businesses, he could retain his stock in all of the companies, they also knew that belief was subject to question in terms of the ESCS and Benchmark Agreements and chose to ignore that problem.

2003, the Benchmark board removed Gene as a director. In addition, the board resolved that Gene would not be considered for re-election as an officer at the next board meeting in October.[88] Thus, by the end of 2003, Gene no longer had a formal relationship with Benchmark other than as a stockholder. Francis and Richard allege, however, that Benchmark continued to consult Gene from time to time. The record contains no details of that activity, however. Further, even assuming the truth of the consulting allegations, under my construction of the Benchmark Agreement, that kind of informal, unstructured relationship would not fall within the concept of "employment," as used in the Benchmark Agreement. Thus, by the end of 2003, Gene's employment with Benchmark had terminated and Benchmark had the right to demand the reacquisition of Gene's Benchmark shares.

Additionally, the evidence shows Benchmark knew of, and intentionally chose not to enforce, this right. For example, on cross-examination, Francis acknowledged that in April 2003, Benchmark decided not to exercise its right to demand the buy-back of Gene's stock:

> Q: Now, the reason you did not ask for Mr. [Gene] Julian's Benchmark stock at that point [April 2003] is because you wanted to carry out what you understand was the general intention of the three of you: that so long as you were working in the Eastern States group that you could retain your stock in any of the companies in that group; correct?
>
> A: Yes.
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> Q: And also you thought that by not asking him for his stock that you would continue to "make good relations." Isn't that what you testified to?
>
> A: Yes.
>
> Q: And so you understood that, to the extent that the Benchmark Builders' agreement could be read to provide for the mandatory sale of a terminated person's stock, you decided not to enforce that agreement. Isn't that fair?

[88]JX 19, Minutes of the Benchmark Board of Directors, 4/22/03.