# UNREPORTED CASES

## INTRODUCTION

UNREPORTED CASES is a continuing feature of the DELAWARE JOURNAL OF CORPORATE LAW. Select unreported cases of a corporate nature that have not been published by a reporter system are included. The Court of Chancery's opinions and memorandum opinions are printed in their entirety, exactly as received.

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COURT OF CHANCERY OF THE
STATE OF DELAWARE

ANDRE G. BOUCHARD
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Date Submitted: August 15, 2018
Date Decided: September 19, 2018

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RE: *David Schultz, et al. v. QuantPower, Inc., et al.*
*Civil Action No. 12919-CB*

Dear Counsel:

At the conclusion of the hearing held on August 15, 2018, the court denied plaintiffs' motion to dismiss QuantPower, Inc.'s counterclaims against them and took under advisement the parties' cross-motions for partial summary judgment. For the reasons explained briefly below, the cross-motions for partial summary judgment also will be denied.

The cross-motions for partial summary judgment concern Counts I and II of plaintiffs' three-count Verified Complaint and Petition for Appraisal filed on November 18, 2016. Although styled as a single claim, Count I asserts essentially three separate claims arising out of QuantPower's acquisition of Banyan Energy, Inc. in a merger transaction that closed in August 2016 (the "Merger"): (i) a claim for breach of fiduciary duty against the three members of Banyan's board of directors; (ii) a claim for breach of fiduciary duty against Acero Capital, L.P. as Banyan's controlling stockholder; and (iii) a claim for aiding and abetting against QuantPower. Count II asserts a claim for unjust enrichment against QuantPower and Acero relating to the Merger.

On May 10, 2018, plaintiffs moved for partial summary judgment in their favor on Count I. On June 25, 2018, defendants cross-moved for

partial summary judgment in their favor on Counts I and II. Count III of plaintiffs' complaint, which is not the subject of either of the pending motions, seeks an appraisal of their Banyan shares under 8 *Del. C.* § 262.

In simplified terms, the Merger was a stock-for-stock transaction in which each outstanding share of Banyan common stock was converted into the right to receive approximately .075 shares of QuantPower common stock. Banyan and QuantPower are both private corporations. As a condition of the Merger, QuantPower was to acquire, as of consummation of the Merger, certain assets and liabilities of another company called SmartTrak Solar.[1] QuantPower also anticipated completing a Series A preferred stock financing with Acero and certain other investors (the "Series A offering") concurrently with the Merger.[2]

In advance of the Merger, plaintiffs received an Information Statement from Banyan. It stated, in relevant part: "In order to receive Merger Consideration . . . you must review and sign the Stockholder Agreement in the form attached as Annex A-3 to this Information Statement . . . , which entails your representation that you are an 'accredited investor' as defined in Rule 501(a) of the Securities Act of 1933 . . . ."[3] Notwithstanding this statement, the attached form of Stockholder Agreement provided an option for the stockholder to check a box indicating that he was not an accredited investor[4] and other documents in the record indicate that Banyan informed plaintiffs before the Merger closed that they could receive the Merger consideration, apparently without regard to whether or not they were accredited investors.[5]

Plaintiffs assert that Banyan's directors breached their fiduciary duties of care and loyalty by structuring the Merger in a way that prevented them from receiving the consideration offered in the Merger, *i.e.*, shares of QuantPower. Relying on the text of the Information Statement quoted above, plaintiffs contend that because they are not accredited investors, they could not receive shares of QuantPower under federal securities laws. In other words, the director defendants' alleged breach of duty resulted from their failure to ensure that the consideration offered to plaintiffs in the Merger complied with federal securities laws.

As a remedy for this alleged breach of duty, plaintiffs seek damages equivalent to the value of the QuantPower shares that were offered in the

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[1] Pls.' Opening Br. Ex. A at 8 (Dkt. 68).
[2] *Id.* at 11.
[3] *Id.* at 2.
[4] Pls.' Opening Br. Ex. B at PLS00014541.
[5] *See* Transmittal Aff. of Jacqueline A. Rogers Exs. 5, 12 (Dkt. 72).

Merger based on a disclosure in the Information Statement concerning the pre-money value of QuantPower implied by the proposed terms of the Series A offering.[6] This amount would include elements of value attributable to the combination of Banyan and SmartTrak Solar (*e.g.*, synergies) that was a condition of the Merger. In other words, this amount would exceed the value of plaintiffs' shares of Banyan under the appraisal statute, which requires that the court "determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger."[7]

In response, defendants contend that plaintiffs could have received shares of QuantPower in connection with the Merger under the private placement exemption of Section 4(a)(2) of the Securities Act of 1933. Defendants further contend that a Banyan stockholder's status as an accredited investor was relevant to whether that person could participate in the Series A offering, but was irrelevant to whether that person could receive the Merger consideration. Finally, defendants dispute that the Information Statement purports to value Banyan.

Having further considered the parties' submissions and the arguments made during the August 15 hearing, I am denying the cross-motions for partial summary judgment for essentially two reasons. First, genuine issues of material fact exist concerning matters central to deciding the motions. For example, with respect to plaintiffs' breach of fiduciary duty claim against Banyan's directors:

- The record is devoid of evidence concerning the deliberative process the directors undertook in structuring and approving the Merger.[8] None of the directors has been deposed and no evidence has been provided concerning, among other things, their understanding as to whether structuring the Merger as an exchange of shares of Banyan for shares of QuantPower was permissible under federal securities laws. A factual record on these issues is necessary to

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[6] *See* Pls.' Opening Br. Ex. A at 11.

[7] 8 *Del. C.* § 262(h).

[8] Instead of addressing this issue, the parties focused their briefs on whether offering QuantPower shares as the Merger consideration complied with federal securities laws. The answer to that question of federal law, however, does not answer the Delaware law question whether Banyan's directors acted in bad faith. *See, e.g., Nguyen v. Barrett*, 2016 WL 5404095, at *3 (Del. Ch. Sept. 28, 2016) ("A showing of bad faith requires an extreme set of facts to establish that disinterested directors were intentionally disregarding their duties or that the decision . . . [was] so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.") (internal quotations and citation omitted).

adjudicate plaintiffs' assertion that the directors acted in bad faith and breached their duty of loyalty.

- It is unclear from the record whether Banyan's certificate of incorporation contains a provision exculpating its directors for monetary damages for breaches of the duty of care.[9] The existence of such a common provision would be dispositive of plaintiffs' duty of care claim.

- Plaintiffs' theory of damages is extrapolated from a disclosure concerning the post-Merger, pre-money value of QuantPower derived from the pricing of the Series A offering. It is not apparent to the court that this disclosure provides a reliable measure of damages for a breach of the directors' fiduciary duty, if proven, and defendants dispute that this disclosure represents the pre-Merger value of Banyan.

Second, the remaining claims implicated by the parties' cross-motions for partial summary judgment have not been briefed adequately. In particular, plaintiffs' (i) breach of fiduciary duty claim against Acero as Banyan's controlling stockholder, (ii) aiding and abetting claim against QuantPower, and (iii) unjust enrichment claim against both Acero and QuantPower are barely mentioned much less analyzed in any meaningful sense in the parties' briefs so as to fairly present those issues for decision.

For the foregoing reasons, the parties' cross-motions for partial summary judgment are denied. IT IS SO ORDERED.

Sincerely,

*/s/ Andre G. Bouchard*

Chancellor

AGB/gm

[9] When asked, defense counsel was unable to confirm whether or not Banyan's certificate of incorporation contains such a provision. Tr. 47 (Aug. 15, 2018) (Dkt. 84).

**COURT OF CHANCERY**
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Re: *Nabil Akrout v. Roman Jarkoy, Vladimir Bobrovsky, Boris Kalk, and Intelligent Security Systems International, Inc.*
*C.A. No. 2017-0473-JRS*

Dear Counsel:

Plaintiff has moved for reargument under Court of Chancery Rule 59(f) (the "Motion") following the Court's July 10, 2018, memorandum opinion (the "Opinion") in which the Court addressed several case dispositive motions.[1] This is the Court's ruling on the Motion.

**Factual and Procedural Background**

In the Opinion, the Court resolved: (1) Plaintiff's motion for default judgment against Intelligent Security Systems International, Inc. ("ISSI"); (2) Roman Jarkoi's[2] motion to dismiss Count I (breach of fiduciary) of the operative complaint[3]; and (3) Plaintiff's motion for default judgment

[1] *Akrout v. Jarkoy*, 2018 WL 3361401 (Del. Ch. July 10, 2018). Capitalized terms are as defined in the Opinion unless otherwise defined.

[2] I note that Jarkoi's name appears to have been misspelled in the case caption and throughout the Complaint.

[3] Jarkoi was the only defendant who appeared in the litigation. Count I of the operative

against Vladimir Bobrovsky and Boris Kalk, the non-responding Individual Defendants. The Court denied Plaintiff's motion for default judgment against ISSI, a dissolved entity, because the claims were brought outside of the three-year period for post-dissolution winding-up set forth under 8 *Del. C*. § 278. As for the motion to dismiss Count I, the Court granted that motion because the breach of fiduciary duty claim was clearly barred by laches. Finally, the Court dismissed all Counts against Bobrovsky and Kalk, thus mooting Plaintiff's motion for default judgment against these defendants, on the ground that the former directors of ISSI should not be made to answer claims against, or arising out of their service to, a dissolved entity when those claims are brought outside of the statutory winding-up period.

Plaintiff now moves to reargue the Court's denial of the motion for default judgment against the dissolved corporation. For the reasons that follow, Plaintiff's Motion must be denied.

**The Standard**

"A motion for reargument under Court of Chancery Rule 59(f) will be denied unless the court has overlooked a controlling decision or principle of law that would have controlling effect, or the court has misapprehended the law or the facts so that the outcome of the decision would be different."[4] Reargument motions may not be deployed to re-litigate already litigated matters nor to advance arguments or present evidence that could have been raised before the previous judgment.[5] Stated differently, a motion for reargument may not direct the court to new matters beyond "the existing record,"[6] or simply rehash arguments already made.[7]

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alleged that the Individual Defendants, including Jarkoi, breached their fiduciary duty to Plaintiff by failing, *inter alia*, to distribute to him pre-dissolution "dividends" that were allegedly declared and paid to others following Plaintiff's removal as President and CEO of ISSI and for failing to pay him "accrued salary" per his "signed contract" with ISSI.

[4] *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs*., 2008 WL 2133417, at *1 (Del. Ch. May 21, 2008).

[5] 11 Wright Miller, Federal Practice and Procedure § 2810.1 (2005). *See also Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 975581, at *1 (Del. Ch. Mar. 4, 2010) ("[A] motion for reargument is 'not a mechanism for litigants to relitigate claims already considered by the court,' or to raise new arguments that they failed to present in a timely way." (quoting *Am. Legacy Found. v. Lorillard Tobacco Co.*, 895 A.2d 874, 877 (Del. Ch. 2005)).

[6] *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007) (citing *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995)).

[7] *Miles*, 677 A.2d at 506 ("Where . . . the motion for reargument represents a mere rehash of arguments already made at trial and during post-trial briefing, the motion must be denied.").

**The Contentions**

As noted, the Motion focuses on the Court's holding that Plaintiff improperly brought his claims against all Defendants beyond the statutory winding-up period following ISSI's dissolution.[8] Plaintiff asserts that he had no occasion to raise his proffered basis to challenge the Court's holding in this regard either in his briefs or at the various oral arguments on his motions because the Court did not focus on this issue until after the motions were submitted for decision. Accordingly, the Court's decision on the statutory winding-up period, as a matter of law, is ripe for reargument.[9]

As for the merits, Plaintiff maintains that his Complaint cannot be deemed untimely under the statutory three-year post-dissolution winding-up period because the deadline to file within the winding-up period fell on a Sunday. Accordingly, under either Court of Chancery Rule 6 or the so-called "Sunday Rule," Plaintiff contends that his filing deadline was extended to the following Monday.[10] Rule 6 states, in relevant part: "In computing any period of time . . . by these Rules, by order of Court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included, [and] [t]he last day of the period so computed shall be included, unless [it] is a Saturday, Sunday or other legal holiday. . . ."[11] According to Plaintiff, Rule 6 applies to Section 278 because there is no evidence that the General Assembly intended that Section 278 would not be subject to the rule.[12] With this guidance in mind, Plaintiff argues that because the expiration of

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[8] 8 *Del. C*. § 278 ("All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized.").

[9] *Kobza v. Target Stores, Inc.*, 2009 WL 5214489, at *3 (W.D.N.Y. Dec. 29, 2009) (inviting a motion for reconsideration because the Court ruled on grounds that neither party had reason to argue).

[10] Pl.'s Mot. for Rearg. (the "Motion"), ¶¶ 3, 5.

[11] Ct. Ch. R. 6(a).

[12] Mot. ¶ 7 (citing *Santow v. Ullman*, 166 A.2d 135, 136 (Del. 1960) ("The general rule for the computation of time under a statute, in the absence of anything showing a contrary intent, is that the first day should be excluded but the day on which the act is to be done should be included. This rule is so well settled that it is embodied in the rules of our trial courts.")).

three years following the filing of the certificate of dissolution fell on a Sunday, the filing of the complaint against the dissolved entity would be timely if made on the following business day.

Citing *In re Citadel Industries*, the Court concluded that the General Assembly, in fact, did intend that the three year statutory winding-up period be calculated as precisely three years, not more or less than three years.[13] In response, Plaintiff argues "Rule 6(a) does not restrict itself to statutes of limitation, but instead applies to all . . . 'applicable statute[s]' includ[ing] statutes setting deadlines for filing documents with the court."[14] Moreover, Plaintiff states, even if Rule 6 does not apply to Section 278, the "Sunday Rule" applies to extend a deadline that expires on a Sunday to the either the following Monday or following business day.[15] Relying on *Nelson v. Frank E. Best Inc.*, Plaintiff argues that because Section 278 defines the relevant time using years, instead of days, the General Assembly must have intended for the "Sunday Rule" to apply.[16]

For his part, Jarkoi contends the Motion should be denied on two alternative threshold grounds before the Court even reaches the merits. First, Jarkoi points out that, notwithstanding the Court's express direction, Plaintiff inexplicably failed on two separate occasions to file an affidavit reflecting notice to and service upon ISSI with regard to his motion for default judgment. This failure, Jarkoi maintains, justified the Court's denial of the motion for default judgment on procedural grounds.[17] Second, Jarkoi maintains that the Motion is procedurally barred because it is nothing more than a rehash of arguments already considered and rejected in the Opinion.[18]

To the extent the Court is inclined to consider the Motion on the merits, Jarkoi argues that the case law makes clear that neither Rule 6(a) nor the "Sunday Rule" applies to Section 278.[19] Jarkoi cites specifically

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[13] Op. at *5–6. *See In re Citadel Indus.*, 423 A.2d 500, 502, 507 (Del. Ch. 1980) (finding that when the Section 278 three-year winding-up period ends, "the statute, as amended, gives this Court no power to 'continue' a corporation for winding-up purposes on an application made after . . . the corporation has ceased to exist as a legal entity").

[14] Mot. ¶ 8; *McGuire v. Ass'n of Owners of Gull Point Condo., Inc.*, 2001 WL 379541, at *2 (Del. Ch. Apr. 2, 2001).

[15] Mot. ¶ 5; Ct. Ch. R. 6(a).

[16] Mot. ¶ 11 (citing *Nelson v. Frank E. Best Inc.*, 768 A.2d at 473, 478–79 (Del. Ch. 2000)).

[17] Defs.' Opp'n to Pl.'s Mot. for Rearg. ("Defs.' Opp'n Br.") at 3.

[18] Id. at 4.

[19] Id. at 5–7.

to *In re Citadel* where the court held that the three-year winding-up period "begins to run as of the date of the filing of the certificate of dissolution and [] it expires three years thereafter."[20]

**Analysis**

Plaintiff sought default judgment against ISSI which had not (and still has not) appeared in the litigation. Thus, by definition, there was no party to oppose the default. When the Court declined to enter the default, therefore, it did so *sua sponte*. While this is entirely proper,[21] the procedural posture in which the ruling was made did not allow Plaintiff to develop fully his arguments regarding the timeliness of his Complaint. Accordingly, I agree with Plaintiff that his arguments on reargument are not procedurally barred. Even so, the Motion still fails on the merits for four separate reasons.

*First*, as Defendants correctly observe that, after being directed by the Court to do so not once but **twice**, Plaintiff without explanation failed to provide notice of his motion for default judgment to any of the defendants, including ISSI.[22] As the Court held in the Opinion, this alone is a basis to deny the motion for default judgment.[23]

*Second*, I remain satisfied that Rule 6 is not applicable to Section 278.[24] In this regard, *In re Citadel Industries* is on all fours. There, the

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[20] Id. at 5 (citing Op. at *5); *In re Citadel Indus.*, 423 A.2d at 502.

[21] *See Kobza*, 2009 WL 5214489, at *2; 2 *Moore's Federal Practice* (*Third Ed.* 2009), § 12.30[1] ("Indeed, even if the parties do not identify a potential problem [with respect to a proffered default], it is the duty of the court—at any level of the proceedings—to address the issue *sua sponte* whenever it is perceived").

[22] *See* Ct. Ch. R. 55(b) ("If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If such party has not appeared written notice shall be served if the Court so directs").

[23] Op. at *6 n.46: "I note that even if Section 278 is not operative here, the motion for default judgment against ISSI must nevertheless be denied because Plaintiff's counsel has twice failed to provide proper notice to ISSI." *See* Tr. of Oral Arg. on Pl.'s Mot. for Default J. Against Def. Intelligent Sec. Sys. Int'l, Inc. (Feb. 27, 2018) (Dkt. 41) at 13–14; Tr. of Oral Arg. on Def. Roman Jarko[i]'s Mot. to Dismiss and Pl.'s Mot. for Entry of Default J. Against Vladimir Bobrovsky and Boris Kalk (Apr. 17, 2018) (Dkt. 42) at 16.

[24] Op. at *6 n.45: "If the deadline at issue was one set by Court rule, or was a statute of limitations, then Court of Chancery Rule 6(a) would extend the deadline to the following Monday, June 26, 2017 . . . [The winding-up period] is, instead, a timeframe within which a corporation 'shall nevertheless be continued' following dissolution 'for the purpose of prosecuting and defending suits' and winding-up affairs. 8 *Del. C.* § 278."

court determined Section 278's winding-up period neither reflects a statute of limitations nor contemplates court filings that would be governed by the court's rules.[25] "Statutes," as referenced in Rule 6, are statutes that address specifically the timing for filing actions in court.[26] In other words, Rule 6 governs the court's interpretation of statutory schemes that are directed to the litigation of disputes in court.[27] In contrast, Section 278 governs how long after dissolution a corporation will be deemed to be alive and breathing for any purpose, including the defense of litigation.[28]

*Third*, the statute leaves no room for common law rules of construction such as the "Sunday Rule." As this court stated in *Nelson*, the "absence of a specific exclusion in the statute is vitally important evidence of the General Assembly's intent not to exclude the final Sunday."[29]

*Finally*, as noted in the Opinion, Plaintiff could have acted within the three-year window to extend the winding-up period.[30] He made no effort to do so. Instead, he waited until the expiration of three years post-dissolution to bring stale claims against defendants who had long since moved on from the dissolved entity.[31] Under these circumstances, default judgment was wholly inappropriate.

For the foregoing reasons, the Motion is DENIED.
IT IS SO ORDERED.

Very truly yours,

/s/ Joseph R. Slights III

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[25] *Citadel*, 423 A.2d at 507 (holding that the "corporation ceased to exist as a legal entity" precisely three years from the date of dissolution [even if on a weekend day] and that this court had "no power to 'continue' a corporation for winding-up purposes on application made after the statutory three-year period has expired").

[26] "'[A]pplicable statute' is best read as referring instead to statutory provisions addressing periods of time (e.g., a statute of limitations) involving events that occur within this court, such as the filing of a complaint." *Nelson*, 768 A.2d at 488.

[27] *McGuire*, 2001 WL 379541, at *2 (holding that Rule 6(a) applies to deadlines that "require[] an action to be performed within the courthouse").

[28] *Citadel*, 423 A.2d at 500, 506.

[29] *Nelson*, 768 A.2d at 480.

[30] Op. at *10.

[31] *See Territory of U.S. Virgin Isl. v. Goldman, Sachs & Co.*, 937 A.2d 760, 789–91 (Del. Ch. 2007) (holding that plaintiff could not pursue claim against dissolved corporation's stockholders or directors arising from their service because the corporation lacked the capacity to be sued).

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| NUVASIVE, INC.,<br>a Delaware Corporation,<br><br>Plaintiff,<br><br>v.<br><br>PATRICK MILES,<br>an individual,<br><br>Defendant. | ) | C.A. No. 2017-0720-SG |

**MEMORANDUM OPINION**

Date Submitted: June 27, 2018
Date Decided: September 28, 2018

Philip Trainer, Jr. and Aaron P. Sayers, of ASHBY & GEDDES, Wilmington, Delaware; OF COUNSEL: Rachel B. Cowen and Michael J. Sheehan, of MCDERMOTT WILL & EMERY, Chicago, Illinois; Christopher W. Cardwell, GULLET, SANFORD, ROBINSON & MARTIN, Nashville, Tennessee, *Attorneys for Plaintiff*.

Philip A. Rovner and Jonathan A. Choa, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; OF COUNSEL: Kenneth M. Fitzgerald and Keith M Cochran, of FITZGERALD KNAIER LLP, San Diego, California, *Attorneys for Defendant*.

GLASSCOCK, Vice Chancellor

This matter is before me on the Defendant's Motion for Partial Summary Judgment. The Defendant, Patrick Miles, is a resident of California. He was employed by the Plaintiff, NuVasive, Inc. ("NuVasive"), a Delaware corporation doing business in California, where the parties contemplated the employment would be performed. The employment agreement between the parties, absent a choice of law provision, would be subject to California law. The parties agreed in the employment agreement, however, that Delaware law (and forum) would apply. The employment agreement also contained a covenant not to compete. For purposes of this summary judgement analysis, I assume that Miles breached the covenant not to compete when he left NuVasive and accepted employment with a competitor. At the time the contract was entered, California law mandated that all covenants not to compete in employment contracts were void. Delaware, by contrast, enforces reasonable covenants not to compete, and has a strong interest in freedom of contract. The issue before me is therefore stark. If the choice of law provision is enforced, the parties will successfully have contracted around California law, and NuVasive may proceed with this litigation to attempt to hold Miles to his bargain. If California law is applied, the non-compete provision was illusory, and Miles is free to accept employment with a NuVasive competitor.

A similar matter came before this Court recently in *Ascension Insurance Holdings, LLC v. Underwood*. In that case, I applied the choice of law analysis set out in the Restatement (Second) of Conflict of Laws, which required a balance of the public policies of the states involved; in brief, I concluded that Delaware's strong but generalized public policy in favor of freedom of contract was trumped by California's specific policy in favor of freedom of employment. Accordingly, I declined to enforce the Delaware choice of law provision.

After *Ascension* was decided, and after the employment contract in this matter was entered, California amended the California Labor Code, adding Section 925, which prohibits California employers from even attempting to use choice of law provisions to circumvent the protections of California labor law. That general provision, to the extent it adds anything to a choice of law analysis, broadly conveys the interest of the California legislature in preventing contractual circumvention of its labor law.

Section 925, however, has a carve-out pertinent here. It exempts from the restriction on importing another state's law those contracts where the "employee . . . is in fact individually represented by legal counsel in

negotiation the terms of" the choice of law provision.[1] In other words, California's legislature has balanced the state's interests in enforcement of its labor law (which includes freedom of employment) with its additional interest in freedom of contract. It has recognized that in the limited subset of cases where the inequality of bargaining strength of the parties to an employment contract is buffered by the employee being represented by independent counsel, and where counsel participated in negotiation of the terms of a choice of law provision, California's interest in freedom of contract outweighs interest in freedom of employment.

Here, Miles had previously been President and Chief Operating Officer of NuVasive, and the employment agreement in question made him Vice Chairman of the NuVasive board of directors. While the record is not fully developed, I assume for purposes of the current motion that he was represented by counsel in the negotiation of the choice of law and forum provisions of the employment agreement. Section 925 is not retroactive, and under applicable California law the choice of law provision in the employment agreement would be void. Nonetheless, the California legislature has, via Section 925, strongly indicated that California's public interest in prohibiting covenants not to compete, under the narrow factual circumstances present here, is weak, not strong. I apply the choice of law analysis with that understanding, and conclude that I must enforce the parties' choice of Delaware law and forum. My analysis follows.

## I. BACKGROUND

### *A. Miles's Employment at NuVasive*

Plaintiff NuVasive, is a publicly traded Delaware corporation doing business in California.[2] Defendant Miles, a California resident, was first hired by NuVasive in January 2001 and has worked from their San Diego office throughout his employment.[3] From January 2001 to September 2016, Miles held various leadership roles, including President and Chief Operating Officer, and was appointed to the board of directors in August 2016.[4] On September 11, 2016, Miles entered into a new employment agreement (the "Agreement") with NuVasive and became Vice-

[1] Cal. Lab. Code § 925(e).
[2] Aff. of Patrick Miles [hereinafter "Miles Aff."] ¶¶ 2–3.
[3] *Id.* ¶ 3.
[4] Answer ¶ 7.

Chairman.[5] According to the Plaintiff, during negotiations for this position Miles was represented by his personal attorney.[6]

*B. Miles's New Employment Agreement*

The Agreement included a covenant not to compete and a non-solicitation covenant.[7] Under the covenant not to compete, Miles agreed not to "provide any services to any business operating in any line or type of business conducted by NuVasive or its subsidiaries" for a one-year period after the termination of his employment.[8] The Agreement included both a Delaware choice of law provision and a Delaware choice of forum provision.[9]

*C. Miles Leaves NuVasive*

On October 1, 2017, Miles resigned as Vice Chairman of NuVasive and resigned from the board of directors.[10] The following day, Miles joined Alphatec Spine, Inc. ("Alphatec Spine"),[11] a California corporation and a purported competitor of NuVasive, as its Executive Chairman of the Board and its Principal Executive Officer.[12]

*D. Procedural History*

NuVasive commenced this action on October 10, 2017, alleging, among other things, violation of the covenant not to compete in the Agreement.[13] On October 13, 2017, Miles and Alphatec Spine filed a parallel action in the Superior Court of California. On February 20, 2018,

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[5] *See* Def. Br. in Support of Mot. for Partial Summ. J., Ex. A at 3; Pl. Br. in Opp'n to Def. Mot. for Partial Summ. J., Ex. B at 3 [hereinafter "Employment Agreement"].

[6] In his Answer, Miles denied the relevant portions of NuVasive's complaint that alleged he was represented by counsel during negotiation of the Agreement. *See* Compl. ¶¶ 21, 24; Answer ¶¶ 21, 24. However, Miles has not disputed NuVasive's assertion in the briefing for this motion that he was represented by counsel. See Def. Reply Br. in Support of Mot. for Partial Summ. J. For the purposes of this Opinion, and consistent with the standard for summary judgment, I assume that Miles was represented by his personal attorney during these negotiations.

[7] *See* Employment Agreement at 2.

[8] *Id.*

[9] *Id.* at 3.

[10] Answer ¶ 41.

[11] Alphatec Spine, Inc. and Alphatec Holdings, Inc. became defendants in this action after this Motion for Partial Summary Judgment was filed. *See* First Amend. Compl. For purposes of this Motion, I consider the parties as they existed when the Motion was filed.

[12] Answer ¶¶ 41, 43.

[13] Compl. ¶ 54.

the Superior Court of California granted NuVasive's motion to stay that action in part and upheld the forum selection clause in favor of Delaware.[14] Miles then filed a Motion for Partial Summary Judgment in this matter on March 6, 2017, on the grounds that the covenant not to compete and non-solicitation covenant were unenforceable under California law.[15] The parties completed briefing on the Motion for Partial Summary Judgment, and I heard oral argument on June 27, 2018. This Memorandum Opinion addresses Defendant's motion.

## II. ANALYSIS

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law."[16] "In discharging this function, the court must view the evidence in the light most favorable to the non-moving party. This means it will accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts."[17] In this case, NuVasive alleged that Miles was represented by counsel during negotiations. I have accepted this assertion and have also assumed that Miles was represented by counsel during negotiations to the extent that Cal. Lab. Code § 925(e) would be satisfied.

Miles's argument in favor of partial summary judgment, in brief, is that the Agreement is governed by California law despite the Delaware choice of law provision, in accord with this Court's ruling in Ascension Insurance Holdings, LLC v. Underwood.[18] Miles argues that under California law both covenants not to compete and non-solicitation covenants are unenforceable. As a result, Miles seeks summary judgment on Count I, breach of contract; Count V, tortious interference with contractual relations; and Count VI, tortious interference with prospective economic advantage.[19] As an initial matter, it is not clear as a matter of law that a non-solicitation covenant is always unenforceable under California law.[20] Furthermore, there appears to be a factual dispute as to whether Miles breached the non-solicitation covenant.[21] As a result, this Opinion deals primarily with the claims related to the breach of the

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[14] *See* Pl. Br. in Opp'n to Def. Mot. for Partial Summ. J., Ex. G.

[15] *See* Mot. for Partial Summ. J.; Def. Br. in Support of Mot. for Partial Summ. J. at 1.

[16] Ct. Ch. R. 56.

[17] *Merill v. Crothall-American, Inc.*, 606 A.2d 96, 99–100 (Del. 1992) (internal citations omitted).

[18] *Ascension Ins. Hldgs., LLC v. Underwood*, 2015 WL 356002 (Del. Ch. Jan. 28, 2015).

[19] Mot. for Partial Summ. J.

[20] *See* Pl. Br. in Opp'n of Def. Mot. for Partial Summ. J. at 2, n.1; Def. Reply Br. in Support of Mot. for Partial Summ. J. at 8, n.3.

[21] *See* Compl. ¶¶ 46–49; Answer ¶ 46; June 27, 2018 Oral. Arg. Tr. at 16:10–17:4.

covenant not to compete; the claim relating to the non-solicitation covenant requires further factual development. I turn now to the choice of law analysis, which determines whether Delaware or California law governs the covenant not to compete.

### *A. This Court's Ruling in Ascension Insurance Holdings, LLC v. Underwood*

Miles asks that I rely on this Court's ruling in Ascension, where I found under similar circumstances that a Delaware choice of law provision was not enforceable with respect to a covenant not to compete entered in California for employment therein.[22] Accordingly, I found that the covenant not to compete within the contract at issue should be governed by California law.[23] NuVasive, however, contends that a distinguishing feature of this case, combined with a change in California law since Ascension, should produce a different result under the Ascension analysis.

In Ascension, the contract at issue was negotiated in California and "was entered between a California resident and a Delaware limited liability company that has its principal place of business in California."[24] The contract contained a covenant not to compete that was limited in scope almost entirely to California, and "parties agreed to both Delaware venue and Delaware choice of law."[25] The plaintiff moved for a preliminary injunction to specifically enforce the covenant not to compete.[26] I applied the Restatement (Second) of Conflict of Laws (the "Restatement") to determine whether to uphold the choice of law provision.[27] The applicable law was critical because "unlike Delaware, California public policy disallows contractual agreements not to compete," and such contractual provisions are void by law.[28] Pursuant to the Restatement analysis,[29] I first found that California law would apply absent the Delaware choice of law.[30] I then determined that applying Delaware law and enforcing "the non-compete provisions of that agreement would violate a fundamental public policy of California."[31] Under the Restatement, this determination

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[22] *Ascension Ins. Hldgs.*, 2015 WL 356002, at *5.

[23] *Id.*

[24] *Id.* at *3.

[25] *Id.* at *2.

[26] *Id.* at *1.

[27] Delaware follows the Restatement (Second) of Conflict of Laws. See id. at 2, n.7; *see also CompoSecure, L.L.C. v. CardUX, LLC*, 2018 WL 660178, at *20 (Del. Ch. Feb. 1, 2018).

[28] *Ascension Ins. Hldgs.*, 2015 WL 356002, at *2.

[29] *See* Restatement (Second) of Conflict of Laws §§ 187, 188 (1971).

[30] *See Ascension Ins. Hldgs.*, 2015 WL 356002, at *3.

[31] *Id.* at *4.

further necessitated a balancing of the interests of California and Delaware.[32] I found that "California's specific interest is materially greater than Delaware's general interest in the sanctity of a contract that has no relationship to this state."[33] While I noted that Delaware's general interest in contract is "significant" and "profound,"[34] I also noted that such a general interest could not trump California's specific interest in limiting covenants not to compete. I declined to enforce the Delaware choice of law provision and denied the motion for a preliminary injunction.[35]

*B. California Passes Cal. Lab. Code § 925 After Ascension Was Decided*

The determination in Ascension that non-compete agreements violate California fundamental public policy was grounded in California statute.[36] Under Cal. Bus. & Prof. Code § 16600 ("Section 16600"), "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[37] This prohibition had one limited exception,[38] which did not apply to the contract at issue in Ascension.[39]

Since Ascension, California has passed Cal. Lab. Code § 925 ("Section 925"),[40] which prohibits employers from requiring employees to agree to choice of law and choice of forum provisions that would deprive them of the substantive protection of California law or that would require them to adjudicate their claims outside of California.[41] Section 925, if anything, strengthens an analysis of California's interest in preventing

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[32] *See* Restatement (Second) of Conflict of Laws § 187 (1971).

[33] *See Ascension Ins. Hldgs.*, 2015 WL 356002, at *5.

[34] *Id.*

[35] *Id.* at *5–6.

[36] *Id.* at *3–4.

[37] "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600.

[38] *See id.* § 16601.

[39] *Ascension Ins. Hldgs.*, 2015 WL 356002, at *3–4.

[40] Section 925 was enacted on September 25, 2016. *See* Cal. Lab. Code § 925. *Ascension* was decided on January 28, 2015. *See Ascension Ins. Hldgs.*, 2015 WL 356002.

[41] "An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

(1) Require the employee to adjudicate outside of California a claim arising in California.

(2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California." Cal. Lab. Code § 925(a).

Any such provisions are voidable by the employee. *Id.* § 925(b).

contractual end-runs around its public policy as expressed in its labor law. Section 925, however, contains a carve-out pertinent here. It explicitly does not apply to contracts with employees who are represented by their own legal counsel in negotiations.[42] NuVasive argues that this exception reflects an exception to California fundamental public policy because where, as here, the employee is represented by legal counsel, it allows the parties to make a choice of foreign law even when doing so would deprive them of the substantive protection of California law, such as Section 16600's prohibition on covenants not to compete.

Miles points out that Section 925 does not apply retroactively. If California law applies, it would have no effect, and the choice of law provision here would be void. Miles argues that a non-retroactive change in law postdating the contract should form no part of my choice of law analysis.

Miles entered into the agreement on September 11, 2016, which is before the effective date of January 1, 2017 specified by Section 925.[43] However, my focus in balancing relative interests must be informed by examining fundamental public policy and state interests as they currently exist.[44] The fact that Section 925 would not apply to the Agreement does not negate Section 925's significance to California's current fundamental public policy interests. Therefore, NuVasive's contention that the California Legislature's passing of Section 925 creates an exception to fundamental public policy necessitates a return to the Restatement analysis in Ascension.

*C. Restatement Analysis Given the Passage of Cal. Lab. Code § 925*

Given the intervening passage of Section 925, I must re-visit the Restatement analysis in Ascension to see if a different result would be reached in this case.

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[42] "This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied." *Id.* § 925(e).

[43] "This section shall apply to a contract entered into, modified, or extended on or after January 1, 2017." *Id.* § 925(f).

[44] This does not preclude the significance of the timing of the contract relative to the effective date of Section 925 under California or Delaware law, once the Restatement analysis has led to one of those laws.

1. California Law Would Govern Absent the Choice of Law Provision

Similar to the facts in Ascension, Miles is a California resident, NuVasive is a Delaware corporation that has its principal place of business in California, and the Agreement was negotiated in California. Miles ultimately left NuVasive for Alphatec Spine, which also has its principal place of business in California.[45] Therefore, California is the state with the strongest contacts to the contract and California law would apply absent the choice of law provision.[46]

Given the finding that California law would be applicable absent the choice of law provision, the Restatement provides that I must next "determine whether enforcement of the covenant would conflict with 'fundamental policy' of California. If so, I must determine whether California has a materially greater interest in the issue—enforcement (or not) of the contract at hand—than Delaware. If both these questions are answered in the affirmative, California law will apply notwithstanding the choice of law provision."[47]

2. Enforcement of the Covenant Not to Compete Would Not Violate a Fundamental Policy of California Under These Circumstances

Neither party proposes that California has reversed its fundamental public policy against the enforcement of non-compete agreements since Ascension. Instead, NuVasive contends that enforcing the non-compete under these specific circumstances does not violate that policy. NuVasive

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[45] Furthermore, NuVasive alleges that the parties entered into the Agreement in direct response to an offer Miles received from Alphatec Spine in September 2016. See Compl. ¶ 17; Answer ¶¶ 17, 25. As a result, we can assume for the purposes of this Motion that the covenant not to compete was also specifically in response to Alphatec Spine's offer and was therefore primarily geographically limited to California.

[46] According to Restatement § 188(2): "In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue." Restatement (Second) of Conflict of Laws § 188 (1971); *see also Ascension Ins. Hldgs.*, 2015 WL 356002, at n.11.

[47] *Ascension Ins. Hldgs.*, 2015 WL 356002, at *3; Restatement (Second) of Conflict of Laws § 187 (1971).

points to Section 925's exception to the prohibition on choice of law provisions for employees who have legal representation as a cogent expression of California's current public policy. In response, Miles's argues that the exception has no effect because California "has a clearly-established public policy of enforcing Section 16600's prohibition against non-competes without regard for contrary choice of law provisions."[48] Miles cites California case law to support this proposition; however, all of the cited cases predate Section 925. In Section 925, I find, the California legislature has stated strongly its general view that the prohibition of covenants not to compete (as well as other requirements of its labor law) cannot be evaded by choice of law provisions, but has made a policy decision that when contracting parties' rights are protected by representation, freedom of contract trumps this interest.

Miles argues generally that Section 16600 is unwaivable and therefore that Section 925 cannot create an exception to California public policy. But this analysis begs the question. California's policy is expressed statutorily, and in the precise situation under review, currently permits parties to choose law that will vindicate covenants not to compete.

Since *Ascension*, California has passed a law that recognizes the validity of choice of law provisions in the narrow circumstance where an employee has legal representation during negotiations. Upholding the Delaware choice of law and thereby potentially enforcing the covenant not to compete would not violate California's fundamental public policy, because this case falls into that narrow exception.

3. Neither Would California Have a Materially Greater Interest Than Delaware in Covenants Not To Compete Under These Circumstances

Since I have not found that employing the parties' choice of Delaware law would violate California fundamental public policy, I need not balance the competing interests of the states. I note, however, that although California maintains a strong interest in prohibiting covenants not to compete, that interest is slight in the specific instance, as here, where the parties' bargaining power is equalized by counsel for the employee negotiating the covenant and a choice of law provision that will vindicate it. Against this weak interest is Delaware's fundamental but general

[48] ef. Reply Br. in Support of Mot. for Partial Summ. J. at 16 (citing *Frame v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 20 Cal. App. 3d 668, 673 (Cal. Ct. App. 1971); *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881, 902 (Cal. Ct. App. 1998)).

interest in freedom of contract. Given those competing interests, I cannot say that California has a "materially greater interest" than Delaware.

## III. CONCLUSION

Under the Restatement Analysis, I find that the Delaware choice of law provision is enforceable and California law does not apply. I recognized in *Ascension* that "the entire purpose of the Restatement analysis is to prevent parties from contracting around the law of the default state by importing the law of a more contractarian state, unless that second state also has a compelling interest in enforcement."[49] Here, California has condoned contracting around their laws in the narrow circumstance where an employee has legal representation during negotiations. It does not violate California's right "to limit contractual ordering for its citizens," or violate comity, to uphold the parties' choice of Delaware law under these circumstances.[50]

For the forgoing reasons, the Defendant's Motion for Partial Summary Judgement is denied. An Order accompanies this Memorandum Opinion.

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[49] "In other words, in every instance where the parties seek to circumvent application of the law of the default state, the state whose law was chosen and is asked to enforce the contract will have the interest of protecting freedom to contract. It would be a tautology to suggest that such an interest alone, arising in every case, can trump the public interest of the default state, which, by definition, has the greatest contacts with the contract at issue; otherwise, the Restatement test would be meaningless, and the default state would lose its ability to constrain pernicious enforcement of contract rights." *Ascension Ins. Hldgs.*, 2015 WL 356002, at *5.

[50] Compare to this Court's reasoning in Ascension: "To protect those policy interests, and for reasons of comity, states embracing the Restatement approach recognize that necessary to the right of a jurisdiction to limit contractual ordering for its citizens is a limitation on the ability of contracting parties to choose the law of a foreign jurisdiction which does not impose that limitation, and which itself has little or no interest in the enforcement of the contract at hand." *Id.* at *6.

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| NUVASIVE, INC., a Delaware Corporation, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. 2017-0720-SG |
| PATRICK MILES, an individual, | ) | |
| Defendant. | ) | |

**ORDER**

AND NOW, this 28th day of September, 2018,

The Court having considered the Defendant's Motion for Partial Summary Judgment, and for the reasons set forth in the Memorandum Opinion dated September 28, 2018, IT IS HEREBY ORDERED that the Defendant's Motion for Partial Summary Judgment is DENIED.

SO ORDERED:

/S/ Sam Glasscock III
Vice Chancellor

**COURT OF CHANCERY**
**OF THE**
**STATE OF DELAWARE**

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
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Date Submitted: June 27, 2018
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Re: *Manti Holdings, LLC et al. v. Authentix Acquisition Co., Civil Action No. 2017-0887-SG*

Dear Counsel:

This matter involves the sale via merger of Authentix Acquisition Co. (the "Company") by written consent, to a third-party Guernsey[1] entity. The Petitioners seek a statutory appraisal under Section 262 of the DGCL. This brief Letter Opinion will address a narrow predicate issue: whether the Petitioners are barred by contract from exercising their appraisal rights.

The Petitioners are among the stockholders of the Company who lost their shares via the merger. The Company has moved for a judgment under the terms of a stockholders' agreement (the "SA"), to which the Petitioners and the Company were parties. The SA was entered in 2008 (and amended in 2009) to induce investment in the Company by investors, to whom I will refer collectively as the "Carlyle Group."[2] The Carlyle Group was the majority stockholder and controller of the Company.[3]

[1] The reference is archipelagic, not bovine.

[2] *See* Pet'rs' Opening Br. in Support of their Mot. to Dismiss Ex. A, Stockholder Agreement [hereinafter, "Stockholder Agreement"].

[3] *Id.* at 21; June 13, 2018 Hr'g Tr. at 69:24–70:1.

According to Authentix, the Petitioners are barred contractually from asserting appraisal rights.[4] The Petitioners read the contract differently.[5]

After Authentix was sold, the cash consideration was (or will be) distributed to the various categories of stock via the waterfall provision of the Certificate of Incorporation.[6] The Petitioners and other common stockholders (including the Carlyle Group) will, it appears, receive little or nothing for their equity interest in the Company.

On January 17, 2018, the Petitioners filed a Motion to Dismiss the Respondent's counterclaims, and on January 24, 2018, the Respondents filed a Motion for Partial Summary Judgment on Entitlement Issues. At oral argument, the parties agreed to consider the matter of waiver or estoppel of Petitioner's right to appraisal as submitted on a stipulated record.[7] The facts are undisputed; it remains only to apply the law and the language of the SA to the facts. The nature of the motion practice—cross motions and briefing, cross openings and answers—led to the parties' issues and grounds for relief being less than perfectly congruent. Counsel raised issues at argument that were not clearly presented in the briefs, and other issues that were briefed were never mentioned. Accordingly, I allowed short post-argument submissions. I address here only those issues presented at oral argument and in the supplemental submissions; issues not so presented I deem waived.[8]

## I. BACKGROUND

Because I find the Petitioners contractually bound to refrain from seeking appraisal, the Company's motion is granted, and that of the Petitioners is denied. My reasoning follows.

I will recite in this Letter Opinion only those facts and contractual provisions necessary to my decision. Section 3(e) of the SA provides certain contractual rights and duties arising in the context of a "Company Sale"—a defined term that all parties agree occurred here.[9] Section 3(e) provides generally that parties agree to consent to such a sale. It also

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[4] *See* Resp't's Answering Br. to Pet'rs Mot. to Dismiss at 10–11.

[5] *See* Pet'rs' Opening Br. in Support of their Mot. to Dismiss at 22.

[6] *See* Pet'rs' June 20, 2018 Letter Ex. D at 7.

[7] June 13, 2018 Hr'g Tr. at 3:12–4:2.

[8] *See In re Crimson Exploration S'holder Litig.*, 2014 WL 5449419, at *26 (Del. Ch. Oct. 24, 2014) (waiving the plaintiffs' claim where they "did not mention [the claim] in their Opposition Brief or at the Argument.") (citing *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del.Ch. Apr. 28, 2003)).

[9] Stockholder Agreement at 12.

imposes specific duties. One such duty that a contractually-compliant sale imposes on the Petitioners is set out at Section 3(e)(iv): to "refrain from the exercise of appraisal rights with respect to such transaction." I may state, therefore, two principles that must guide my decision: 1) Assuming that Section 3(e)(iv) is both enforceable and unambiguously applicable under these facts, the Company is entitled to Summary Judgement; and 2) if ambiguities lurk in the SA such that I cannot find it applicable on its face, the SA cannot be construed to bar the Petitioners' right to appraisal. Demonstrating a waiver of the statutory right to appraisal requires language evincing the clear intent to waive[10]—evidence that is not present on this stipulated record outside the language of the SA itself. I turn, then, to the Petitioners' various arguments negating the applicability of Section 3(e)(iv).

## II. ANALYSIS

### *A. The Termination of the SA As Of The Time Of Sale*

The Petitioners point to Section 12 of the SA, which provides, unremarkably, that "[t]his agreement, and the respective rights and obligations of the Parties, shall terminate upon the . . . consummation of a Company Sale. . . ."[11] The parties agree that rights vested before termination are not extinguished by such a provision, but the Petitioners argue strenuously that the SA did not vest a right, or concomitant obligation, to refrain from appraisal, post-close. The rights and duties of Section 3(e) arise at the time of (and "in the event that") "a Company Sale is approved by the Board."[12] The Board approved the transaction at issue at a time when the SA was unquestionably in effect. Nonetheless, the Petitioners contend that the explicit language of Section 3(e)(iv) compels the conclusion that their right to appraisal was not extinguished, but was only in abeyance, as of the time of sale. Per Petitioners, once the Company Sale was "consummated," the duty to refrain from appraisal terminated, leaving the Petitioners free to pursue this appraisal action. The Petitioners point out that the SA could have, but did not, use language that the right to exercise appraisal was "waived" or "void" as of the time of Board approval of the sale; instead, Section 3(e)(iv) imposes a duty on Petitioners to "*refrain" from "exercise*" of those rights.[13] According to the

[10] *Halpin v. Riverstone Nat'l, Inc.* 2015 WL 854724, at *8 (Del. Ch. Feb. 26, 2015).
[11] Stockholder Agreement at 27.
[12] *Id.* at 12.
[13] *Id.* (emphasis added).

Petitioners, "refrain" implies live—non-extinguished—rights *from which to refrain*, and thus cannot refer to irrevocably waived rights.[14] At the least, according to the Petitioners, the language is ambiguous, and thus insufficient to support a finding of waiver.[15]

The Petitioners make a valiant attempt to freight the term "refrain" with more ambiguity than anyone since Arlo Guthrie.[16] Nonetheless, to my mind, the SA is clear. No contracting party, agreeing to the quoted language, would consider itself free to exercise appraisal rights in light of Board approval of a contractually-compliant Company Sale. In that case, the contracting parties were bound to "assent to" and to "raise no objections against" the sale, and specifically to refrain from exercise of appraisal rights. This language is not ambiguous.

My finding is bolstered by the obvious fact that the "exercise of appraisal rights" with respect to a transaction is meaningless until the transaction is accomplished: under the Petitioners' reading, subsection (iv) is a nullity. That is because, in the Petitioners' view, parties must "refrain" from exercise of appraisal rights *only* pre-close, but at the same time, the exercise to be refrained from could *only* be consummated in the post-sale period in which, per Petitioners, the enforcement of parties' rights and duties is foreclosed. This is not a reasonable reading of the quoted language, which, again, I find unambiguous.[17]

For the foregoing reasons, I find the termination of rights and obligations set out in Section 12 is no bar to the Company's motion.

*B. Petitioners' Contention That The Sale Is Not Contractually Compliant So As To Trigger Waiver Of Appraisal Rights*

The Petitioners contended at oral argument that the duty to refrain from appraisal, and other "Bring Along" duties imposed by the SA on the Petitioners in case of a Company Sale, are conditioned on the "acquisition

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[14] Pet'rs' Opening Br. in Support of their Mot. to Dismiss at 19.

[15] June 13, 2018 Hr'g Tr. at 9:5–6.

[16] *See* Arlo Guthrie, *City of New Orleans* (Reprise Records 1972).

[17] I am unpersuaded by the Petitioners' argument that perhaps the parties meant to exclude appraisal *only* where approval of the transaction was by stockholder vote, and not by consent. They argue that satisfying the demand requirement of Section 262(d) of the statute, which occurs pre-close, must be the "exercise" of appraisal "rights" referred to, preventing the perfection of appraisal rights, but only if Section 262(d) is implicated. I do not, however, think any reasonable reader of the language here would so conclude.

of Petitioners' [Equity] Securities [being] on the Same Terms and Conditions as the [Equity] Securities held by the Carlyle [Group]" in connection with such transaction.[18] The SA defines "Terms and Conditions" to mean price.[19] Since preferred and common shares did not receive the same value in the distribution of the merger proceeds, Petitioners argue, and because the mix of preferred and common shares held by the parties was dissimilar, the price paid the Carlyle Group and the Petitioners, per share, was not the same. Thus, argue the Petitioners, the Bring Along duties were never triggered. The same-price condition could have been satisfied, again per the Petitioners, by a pre-close conversion of all preferred into common stock. This contention was the subject of supplemental letter briefing by counsel. The parties contest whether the "Same Terms and Conditions" provision, if applicable, operates in the way the Petitioners advocate. I find the Petitioners' reading doubtful. Nonetheless, I need not reach their contention because, even if they read the provision correctly, I find it inapplicable here.

The pertinent facts are that the sale was by merger, and that the merger agreement did not address distribution, which instead was, or is to be, pursuant to a waterfall provision in the company charter.[20] As the Respondents point out, under the SA, a "Company Sale" of the type at issue here may be either by "merger" *or by* "sale or transfer of the Company's capital stock."[21] "Equity Securities" is defined as company stock or options.[22] Where, as here, the Board has approved a Company Sale, the Petitioners are bound to consent to the transaction. In addition, where "any such transaction is structured as a sale of Equity Securities"—that is, as a sale of stock—the non-Carlyle stockholders must "take all action" to assist the consummation of the transaction required by the Carlyle Group or the Board. The latter requirement is conditioned, however, on the sale of Equity Securities being at the same price enjoyed by the Carlyle Group. In other words, the SA differentiates between Company Sales 1) by merger, with the fiduciary protections that entails, in which case the stockholders must consent and raise no objections to the Sale, and 2) a Company Sale by transfer of Equity Securities. In the latter case, the SA imposes an additional affirmative duty on stockholders to take action in aid of the Sale, *so long* as the price per share is the same.

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[18] Pet'rs' June 20, 2018 Letter at 5.
[19] Stockholder Agreement at 7.
[20] *See* Pet'rs' June 20, 2018 Letter Ex. D at 7.
[21] Stockholder Agreement at 4.
[22] *Id.* at 5, 7.

I conclude that the plain terms of the SA impose the "same Terms and Conditions" provision, and the resulting affirmative duty of cooperation, on the parties only where a sale is accomplished by an agreement by the Carlyle Group to sell its stock. Such a sale may implicate drag along duties as well as cooperation duties on the minority stockholders.[23] The additional duties are imposed only where those stockholders are protected by receiving for their shares the same consideration given for the stock of the Carlyle Group. By contrast, where the Company Sale is accomplished by merger, the additional duties are not imposed and the "Same Terms and Conditions" provision is inapplicable. Here, the Company Sale was by merger approved by the Board.

I conclude that the Petitioners were bound contractually to consent and not object to the sale, which general duty includes a duty "refrain from exercise of appraisal rights."

*C. The Company May Enforce The SA*

Finally, the Petitioners argue that, even if the SA embodies an enforceable waiver of appraisal rights, it is nevertheless not enforceable *by the Company*.[24] The Company was made a party to the SA, presumably because of a determination by the Board that attracting capital was in the interest of the Company. The Board approved this merger as a Company Sale, and notably, the Petitioners have not brought an action against the directors for breach of fiduciary duty or breach of contract. Where, as here, a Company Sale has taken place, none of the signatories to the SA, other than the Company itself via its purchasers, have an interest in enforcing the contract. Specifically, should a party violate the duty to refrain from seeking appraisal, the petition would be filed on, and any duty to pay would fall on, the Company.[25] Presumably, the ability to avoid appraisal would make the Company more attractive to potential buyers, a consideration surely contemplated by the parties to the SA. The SA precluded sale of the Petitioners' stock absent a Company Transaction, so all the Petitioners, as parties to the SA, knew they would be bound by the SA at the time of any Company Sale.

Nonetheless, the Petitioners claim the Company is precluded as a matter of public policy from enforcing obligations under the SA. They argue that DGCL Section 151(a) requires limitations on classes of stock to be set out in, or derived from, the corporate charter. Enforcing the SA

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[23] *Id.* at 10–12.
[24] *See* Pet'rs' Answering Br. in Opp'n to Resp't Mot. for Partial Summ. J. at 20.
[25] *See* DGCL§ 262(f).

would, per Petitioners, limit the rights to appraisal that inhere in shares of Company stock; in other words, enforcement would impermissibly permit the Board to impose a limitation on classes of stock by contract, in contravention of the intent expressed in the statute.[26]

In my view, enforcing the SA is not the equivalent of imposing limitations on a class of stock under Section 151(a). Here, the corporation determined it was in the corporate interest to entice investment. It, and its stockholders individually, all entered an agreement with the Carlyle Group that was presumably to the benefit of all parties. The parties, including the Company, did not transform the Petitioner's shares of stock into a new restricted class via the SA; instead, individual stockholders took on contractual responsibilities in return for consideration. One set of these responsibilities was the Bring Along rights through which the Carlyle Group could facilitate an exit, which included the obligations on stockholders arising in case of a Company Sale. Those obligations include the obligation to refrain from appraisal—an obligation only the Company would be in a position to enforce. The SA, in other words, did not restrict the appraisal rights of the classes of stock held by the Petitioners; instead, the Petitioners, by entering the SA, agreed to forbear from exercising that right. I find, therefore, that the Company, in seeking to enforce the SA, is not in contravention of the DGCL or public policy under these facts.

## III. CONCLUSION

The Petitioners agreed in the SA to consent to and not oppose a Company Sale approved by the Board, a duty that specifically included forbearance from exercise of appraisal rights. For the forgoing reasons, the Respondent's Motion for Determination of Entitlement to Appraisal and Partial Summary Judgment on Entitlement Issues is granted, and the Petitioners' cross-motion is denied. The parties should provide an appropriate form of order, and inform me what issues, if any, remain.

Sincerely,

*/s/ Sam Glasscock III*

Sam Glasscock III

[26] *See* Pet'rs' Answering Br. in Opp'n to Resp't Mot. for Partial Summ. J. at 22.

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| VILLAGE GREEN HOLDING, LLC, CCI HISTORIC INC. and VG ECU HOLDINGS LLC, | ) | |
| Plaintiffs, | ) | |
| | ) | C.A. No. 2018-0631-TMR |
| v. | ) | |
| JONATHAN HOLTZMAN, VILLAGE GREEN RESIDENTIAL PROPERTIES, LLC, and VGM CLEARING, LLC, formerly known as VILLAGE GREEN MANAGEMENT CLEARING COMPANY, | ) | |
| Defendants. | ) | |

# MEMORANDUM OPINION

Date Submitted: September 25, 2017
Date Decided: October 5, 2018

Richard P. Rollo, Anthony M. Calvano, and Courtney A. Carvill, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Alan S. Loewinsohn and Kerry Schonwald, LOEWINSOHN FLEGLE DEARY SIMON LLP, Dallas, Texas; *Attorneys for Plaintiff*.

Brian E. Farnan and Michael J. Farnan, FARNAN LLP, Wilmington, Delaware; Marc L. Newman, THE MILLER LAW FIRM, P.C., Rochester, Michigan; *Attorneys for Defendant*.

**MONTGOMERY-REEVES, Vice Chancellor.**

Pending before me is Plaintiffs Village Green Holding, LLC ("Village Green Holding"), CCI Historic, Inc. ("CCI"), and VG ECU Holdings, LLC's ("VG ECU") (collectively, "Plaintiffs") Motion for Interim Injunctive Relief, which I will treat as a motion for a preliminary injunction. Plaintiffs' motion requests that this Court enter a preliminary injunction against Defendants Jonathon Holtzman ("Holtzman"), Village Green Residential Properties LLC ("VGRP"), and VGM Clearing, LLC, formerly known as Village Green Management Clearing Company ("VGM Clearing") (collectively, "Defendants") in relation to VGRP's motion seeking to modify the sale order (the "Sale Order Motion"[1]) in the Court of Common Pleas of Allegheny County, Pennsylvania, No. GD-17-006216 (the "Pennsylvania Action"). Plaintiffs seek an injunction to (1) prohibit Defendants from taking any action to further pursue the Sale Order Motion, (2) prohibit Defendants from filing a new action in Pennsylvania as VGRP declares it intends to do in the Sale Order Motion[2] (the "New Pennsylvania Action"), and (3) direct Defendants to withdraw the Sale Order Motion without prejudice. Because the parties have contracted for exclusive forum-selection clauses requiring these claims be litigated in the Delaware State Courts or the Federal District Court for the District of Delaware, I grant the motion and (1) prohibit VGRP from taking any action to further pursue the Sale Order Motion, (2) prohibit VGRP from filing the New Pennsylvania Action, and (3) mandate that VGRP withdraw the Sale Order Motion. I mean no disrespect to my sister court in Pennsylvania by ruling that Plaintiff may not bring its claims there. This decision simply enforces the parties' contractual exclusive forum-selection agreement as I am required to do under Delaware Supreme Court authority.

## I. BACKGROUND

Plaintiffs and Defendants are in the middle of a messy business divorce. In 2011, CCI invested as a fifty-percent owner in the Village Green family of companies.[3] The Holtzman family previously owned the Village Green family of companies and used the companies to develop and manage multifamily housing.[4] By 2016, the relationship between the parties had deteriorated, and on February 1, 2016, they signed a redemption agreement (the "Redemption Agreement") to effectuate a

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[1] Compl. Ex. E.
[2] *Id.* Ex. 2, at 2.
[3] Master Consol. and Am. Verified Compl. 11, *In re Morrow Park Hldg.*, C.A. No. 2017-0036-TMR (consol.) (Del. Ch. May 2, 2018) (the "Master Complaint").
[4] *Id.* at 3.

separation.[5] Under the Redemption Agreement, Holtzman received the option to acquire corporate entities that controlled two then-unfinished properties, Morrow Park and Southside Works, upon the fulfillment of certain conditions related to the two properties' construction and occupancy.[6] The current litigations stem from a dispute over some of those conditions.

The structure of the business organization that CCI and Holtzman created under the Redemption Agreement is a central feature of this case. Morrow Park City Apartments, a 213-unit apartment building located at 5250 Liberty Avenue, Pittsburgh, Pennsylvania (the "Apartments" or "Property") is 100% owned by Morrow Park City Apartments, LLC ("MP Operating").[7] MP Operating is majority owned and managed by VG Morrow Park Capital LLC ("MP Managing") and minority owned by non-managing investor L.A.V. Associates, LP ("L.A.V.").[8] MP Managing is majority owned and managed by Morrow Park Holding, LLC ("MP Holding") and minority owned by Compatriot Capital, Inc. ("Compatriot"), the 100% owner of CCI.[9] MP Holding is co-managed and equally owned by CCI and VGRP, with VG ECU as a minority non-managing investor.[10]

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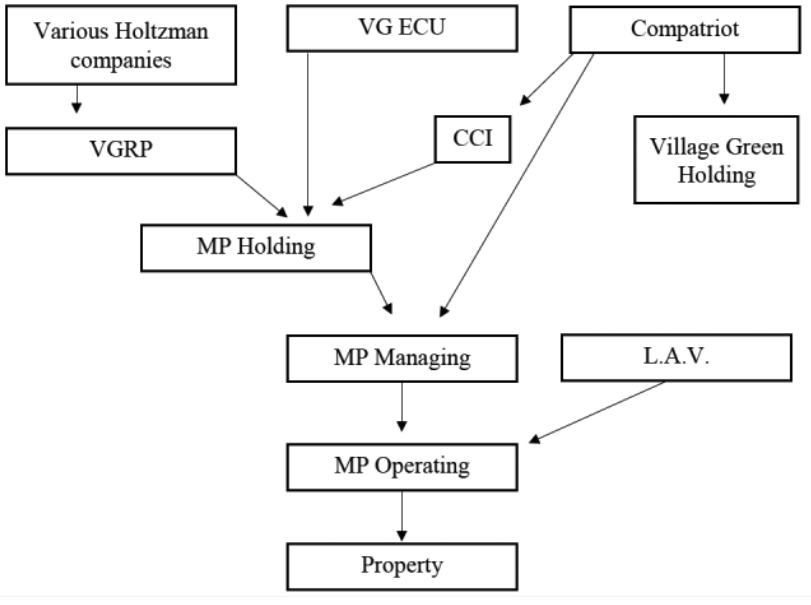
[5] *Id.* at 11.
[6] *Id.* at 3-4.
[7] Opp'n to Mot. to Refund the Cash and Mot. to Increase the Inj. Bond 9, *In re Morrow Park Hldg.*, C.A. No. 2017-0036-TMR (consol.) (Del. Ch. Mar. 28, 2018).
[8] *Id.*
[9] *Id.*
[10] Master Compl. 8.




The Redemption Agreement covers the broad relationship between the companies associated with Holtzman, on the one hand, and the companies associated with Compatriot, on the other, and represents the divorce agreement as a whole.[11] The MP Holding Operating Agreement signed on May 27, 2016 ("the Operating Agreement"), specifically controls the parties' responsibilities with respect to MP Holding.

The focus of the dispute here centers around the process to buy or sell interests in certain corporate entities. Section 1.1(a)(iv)(2) of the Redemption Agreement lays out the rights of the Holtzman companies to purchase CCI's membership interests in MP Holding and MP Managing upon the fulfillment of construction and occupancy conditions and, if the Holtzman companies do not exercise their rights, CCI's right to purchase the Holtzman companies' interests in MP Holding and MP Managing. Section 10.10 of the Operating Agreement lays out VGRP's right to (1) purchase CCI's interest in MP Holding, (2) purchase Compatriot's interest in MP Managing, and (3) provide cash to MP Holding which MP Holding will use to repurchase Executive Common Units from VG ECU, also upon conditions related to the construction and occupancy of the Apartments.[12] The terms of the Operating Agreement give VGRP a specific amount of

[11] Compl. Ex. 1 § 15.17, *In re Morrow Park Hldg.*, C.A. No. 2017-0036-TMR (consol.) (Del. Ch. Jan. 17, 2017).

[12] *Id.* Ex. 1 § 10.10(b); Compl. 2.

time to make those purchases, and in the event that VGRP does not exercise that right, CCI then may buy out VGRP's interests in the entities in the same way for its own specified period of time.[13]

Both agreements have exclusive forum-selection clauses in favor of Delaware courts. The Redemption Agreement says that each party

> HEREBY CONSENTS TO THE J URISDICTION OF ANY UNITED STATES DISTRICT COURT OR DELAWARE STATE COURT LOCATED IN WILMINGTON, DELAWARE, AND IRREVOCABLY AGREES THAT ALL ACTIONS OR PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER SUCH ACTIONS OR PROCEEDINGS ARE BASED IN STATUTE, TORT, CONTRACT OR OTHERWISE), SHALL BE LITIGATED IN SUCH COURTS. EACH PARTY . . . AGREES THAT IT WILL NOT BRING ANY SUCH ACTION OR PROCEEDING IN ANY COURT OTHER THAN SUCH COURTS. EACH PARTY ACCEPTS FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, GENERALLY AND UNCONDITIONALLY, THE EXCLUSIVE AND IRREVOCABLE JURISIDICTION AND VENUE OF THE AFORESAID COURTS.[14]

The Operating Agreement says that each party

> HEREBY CONSENTS TO THE J URISDICTION OF ANY UNITED STATES DISTRICT COURT OR DELAWARE STATE CHANCERY COURT LOCATED IN WILMINGTON, DELAWARE AND IRRECOVABLY AGREES THAT ALL ACTIONS OR PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER SUCH ACTIONS OR PROCEEDINGS ARE BASED IN

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[13] Compl. 3.

[14] Compl. Ex. 2 § 11.13, *In re Morrow Park Hldg.*, C.A. No. 2017-0036-TMR (consol.) (Del. Ch. Jan. 17, 2017).

> STATUTE, TORT, CONTRACT OR OTHERWISE), SHALL BE LITIGATED IN SUCH COURTS. EACH PARTY . . . AGREES THAT IT WILL NOT BRING ANY SUCH ACTION OR PROCEEDING IN ANY COURT OTHER THAN SUCH COURTS. EACH PARTY ACCEPTS FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, GENERALLY AND UNCONDITIONALLY, THE EXCLUSIVE AND IRREVOCABLE JURISDICTION AND VENUE OF THE AFORESAID COURTS.[15]

## II. THE LITIGATIONS

VGRP filed the first lawsuit in this Court on January 17, 2017, against CCI, Compatriot, and VG ECU (the "First Delaware Action").[16] The dispute centered on the valuation of the Apartments and arose out of a disagreement over the appraisal procedures required under the Operating Agreement.[17] The parties were to use that appraisal to value MP Holding and MP Managing, the companies whose interests the parties were to buy and sell. The parties do not dispute that the Apartments met the construction and occupancy conditions for a potential sale on September 23, 2016.[18] VGRP notified CCI of its intent to purchase effective November 22, 2016; the terms of the Operating Agreement required the sale to close no later than January 23, 2017.[19]

This dispute over the appraisal, however, was delaying the sale, and VGRP was at risk of running out of time on its purchase option, as well as losing its financing commitment.[20] VGRP initially sought an injunction to compel CCI to close on the deal.[21] This Court denied that injunction but granted an order (the "Status Quo Order") (1) preventing either party from exercising its rights to purchase the other party's interests under the Operating Agreement until thirty calendar days after the appraisal dispute was adjudicated

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[15] *Id.* Ex. 1 § 15.17.
[16] Compl. 1-2.
[17] Master Compl. 15.
[18] *Id.* at 16.
[19] *Id.* at 17.
[20] *Id.* at 29.
[21] Mot. for TRO, *In re Morrow Park Hldg.*, C.A. No. 2017-0036-TMR (consol.) (Del. Ch. Jan. 17, 2017).

and (2) maintaining the status quo.[22] The Status Quo Order also (1) prevents either party from transferring its rights without the consent of the other party, (2) prevents the rights of either party under the Operating Agreement from expiring during the pendency of the case, and (3) requires VGRP to post a stipulated $2,000,000 bond as security pursuant to Rule 65(c) of the Rules of the Court of Chancery of the State of Delaware.[23]

What began as a narrow dispute over appraisal procedures expanded into a major legal battle. As a result of the dispute, MP Operating became dysfunctional, leading L.A.V. to file the Pennsylvania Action.[24] The Pennsylvania Action sought dissolution of MP Operating and has resulted in a court-ordered sale of the Property.[25]

The Pennsylvania court's sale procedures explicitly allow for both parties to bid on the Property, and both parties have done so.[26] The parties have also made offers for each other's interests in the various corporate entities.[27] On July 13, 2018, City Club Apartments, LLC ("CCA"), a Holtzman company, offered $58.5 million for the Property.[28] On July 27, 2018, Compatriot offered $58.75 million for the Property in fee simple, or alternatively upon consent of the parties required by the Status Quo Order, Holtzman's interests in MP Holding.[29] On August 3, 2018, CCA offered $58.5 million for the property in fee simple, or alternatively a buyout of CCI's membership interests in MP Operating, in which case the price would be based on a value of $60 million for the Property.[30] The Pennsylvania sale process is
ongoing.[31]

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[22] Order Granting Inj. (Modified*), In re Morrow Park Hldg.*, C.A. No. 2017-0036-TMR (consol.) (Del. Ch. Jan. 20, 2017)

[23] *Id.*

[24] Compl. Ex. E Ex. 2, at 6.

[25] *Id.*

[26] Defs.' Resp. in Opp. to Mot. for Interim Injunctive Relief 7-8.

[27] *Id.*

[28] Compl. Ex. E Ex. 8.

[29] *Id.* Ex. 10, Attach. 2.

[30] *Id.* Ex. 9.

[31] Plaintiff CCI claims that VGRP violated the Status Quo Order through its August 3 offer, which unlike CCI's July 27 offer was not conditioned on consent. Because VGRP's offer was for MP Operating, which is not covered by the Status Quo Order, VGRP's offer did not violate the Status Quo Order.

VGRP filed the Sale Order Motion and announced its intention to file the New Pennsylvania Action. VGRP seeks modification of the Pennsylvania court's sale procedures such that the procedures give VGRP a priority purchase right in the Pennsylvania court-ordered sale, as VGRP says it is entitled to under the Operating Agreement.[32] In response, Plaintiffs filed this action seeking to (1) prohibit Defendants from taking any action to further pursue the Sale Order Motion, (2) prohibit Defendants from filing a new action in Pennsylvania as VGRP declares it intends to do, and (3) direct Defendants to withdraw the Sale Order Motion without prejudice.

## III. ANALYSIS

### A. The Standard for Injunctive Relief

Plaintiffs seek a preliminary injunction to prevent Defendants "from (i) taking any action to further pursue the [Sale Order Motion], and (ii) filing the New Pennsylvania Action, until after this Court renders a decision concerning the final injunctive relief sought in the Complaint."[33]

This Court has broad discretion in granting or denying a preliminary injunction.[34] "A preliminary injunction may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief."[35] "The moving party bears a considerable burden in establishing each of these necessary elements. Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief 'will never be granted unless earned.'"[36] Yet, "there is no steadfast formula for the relative weight each deserves. Accordingly, a strong demonstration as to one element may serve to overcome a marginal demonstration of another."[37]

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[32] Compl. Ex. E Ex. 2, at 1-2.

[33] Compl. 9.

[34] *Data Gen. Corp. v. Dig. Comput. Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citing *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49 (Del. 1952)).

[35] *Nutzz.com, LLC v. Vertrue, Inc.*, 2005 WL 1653974, at *6 (Del. Ch. July 6, 2005).

[36] *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (citing *Lenehan v. Nat'l Comput. Analysts Corp.*, 310 A.2d 661, 664 (Del. Ch. 1973)).

[37] *Alpha Builders, Inc.,* 2004 WL 2694917, at *3 (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

Timing also plays a role when courts consider injunctions that prohibit litigation in other states:

> Another consideration, perhaps related to the irreparable harm inquiry, that often factors into the Court of Chancery's analysis with regard to motions to enjoin the filing or prosecution of actions in the courts of other states is whether a later-filed action is actually pending as opposed to being merely threatened. The mere prospect of being harassed and vexed by possible future litigation ordinarily is not deemed sufficient to warrant injunctive relief. Thus, absent the existence of a second suit, a movant must demonstrate clearly that the threat of future suits is real and imminent. The Court of Chancery will not enter an injunction merely because a party fears that a lawsuit relating to the same controversy might be filed against it in another forum. However, where the threat of a later-filed action involving the same controversy is sufficiently concrete and other equitable considerations warrant relief, the Court of Chancery will enjoin a party from commencing suit in a foreign jurisdiction.[38]

Plaintiffs also seek an injunction to require Defendants to "withdraw the [Sale Order Motion], without prejudice, to ensure that further proceedings do not occur until after this Court renders a decision concerning the injunctive relief sought in this action."[39]

> To prevail on a motion for a mandatory injunction, Petitioners must satisfy a modified version of the three prong test generally applicable to injunctions. First, Petitioners must establish, based on the undisputed facts, that they are entitled to judgment as a matter of law on the

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[38] *See Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1992 WL 212516 (Del. Ch. July 29, 1992) (sitting by designation); *Air Prods. & Chems., Inc. v. Lummus Co.*, 235 A.2d 274 (Del. Ch. 1967); *Gray Co., Inc. v. Alemite Corp.*, 174 A. 136, 143 (Del. Ch. 1934); Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery § 5.03* (2018) (some citations omitted).

[39] Compl. 10. During the Friday, September 21, 2018 hearing, Plaintiffs and Defendants discussed an email Defendants had sent possibly withdrawing the Sale Order Motion. Because there was no stipulation or representation regarding whether Defendants withdrew the Sale Order Motion, I must rule on the matter.

> merits of their claim. Second, Petitioners must demonstrate that they will suffer future irreparable injury if the Court does not grant the requested relief. Third, the Court must balance the equities involved. That is, Petitioners must establish that the potential harm they will suffer in the future if the Court refuses to enjoin Respondents outweighs the potential harm to the interests that Respondents seek to protect *(i.e.*, potential harm to children in the care of Petitioners).[40]

When parties seek injunctions to enforce something other than the status quo, or "[s]pecifically, where application for a TRO effectively becomes a form of mandatory relief, a plaintiff 'must clearly establish the legal right he seeks to protect or the duty he seeks to enforce' and, where application for the TRO serves as a final resolution of the matter, the plaintiff must show that the material facts are not in substantial dispute."[41]

**B. Success on the Merits**

As to the first element, Plaintiffs point to their right under the Delaware exclusive forum-selection clauses to have any claim based on the Operating Agreement and/or Redemption Agreement brought in Delaware.[42] The forum-selection clauses both require that all actions arising out of or related to the respective agreements be litigated exclusively in the United States District Court for the District of Delaware or either any Delaware State Court (for the Redemption Agreement) or the Delaware Court of Chancery (for the Operating Agreement).[43]

Delaware law favors the enforcement of forum-selection clauses. In *Ingres Corp. v. CA, Inc.*, the Delaware Supreme Court held that "in cases where a contract identifies Delaware as the chosen forum in a legally enforceable forum selection clause. . . . a court should honor the parties' contract and enforce the clause."[44] The Supreme Court added that "[f]orum selection [ ] clauses are 'presumptively valid' and should be

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[40] *Joyland Daycare Ctr. v. Dir. of Dep't of Servs. for Children, Youth and Their Families*, 1996 WL 74713, at *2 (citing *Gimbel v. Signal Cos.*, 316 A.2d 599, 602-03 (Del. Ch. 1974)).

[41] *Arkema Inc. v. Dow Chem. Co.*, 2010 WL 2334386, at *3 (Del. Ch. May 25, 2010) (citing *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. 1990)).

[42] Compl. 4-6.

[43] Compl. Ex. 1 § 15.17, *In re Morrow Park Hldg.*, C.A. No. 2017-0036-TMR (consol.) (Del. Ch. Jan. 17, 2017).

[44] 8 A.3d 1143, 1145 (Del. 2010).

'specifically' enforced unless the resisting party '[ ] clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.'"[45] The Supreme Court affirmed that holding in *National Industrial Group (Holding) v. Carlyle Investment Management*, ruling that "[a] valid forum selection clause must be enforced."[46]

Defendants make three arguments about why Plaintiffs are unlikely to succeed on the merits: (1) the forum-selection clause is inapplicable and invalid under *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*;[47] (2) the MP Operating forum-selection clause—which designates Pennsylvania—should apply;[48] and (3) Defendants had to bring the Sale Order Motion in Pennsylvania to preserve their rights.

First, in *El Paso*, the Court of Chancery dismissed Plaintiff El Paso's claims that the Court should enjoin Defendant TransAmerican from litigating its claims outside of the Delaware Court of Chancery based on the parties' contractual exclusive Delaware forum-selection clause, holding that the Court had no basis for jurisdiction and that a contract could not create that basis.[49] The Delaware Supreme Court affirmed, explaining that Plaintiff's core mistake "rest[ed] upon the faulty premise that jurisdiction in the Delaware Court of Chancery is a right that could be created by contract."[50] The Court of Chancery could not hear the case "[b]ecause El Paso had no power to confer exclusive jurisdiction over all

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[45] *Ingres*, 8 A.3d at 1146 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (all but first alterations in original) (some citations omitted)); *see also id.* at 1146 n.9 (citing *Capital Grp. Cos. v. Armour*, 2004 WL 2521295, at *3 (Del. Ch. Nov. 3, 2004); *M/S Bremen*, 407 U.S. at 15 ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."); *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *3 (Del. Super. Jan. 16, 2007) ("Mere inconvenience or additional expense is not the test of unreasonableness. In light of present day commercial realities, a forum clause should control absent a strong showing that it should be set aside."); *Elia Corp. v. Howard Corp.*, 391 A.2d 214, 216 (Del. Super. 1978) ("Such an agreement is unreasonable only when its enforcement would, under the circumstances then existing, seriously impair the plaintiff's ability to pursue his cause of action."); *Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341, 345 (3d Cir. 1966) ("[I]t should be respected as the responsible expression of the intention of the parties so long as there is no proof that its provisions will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.")).

[46] 67 A.3d 373, 381 (Del. 2013) (emphasis added) (citation omitted).

[47] 669 A.2d 36 (Del. 1995).

[48] Defs.' Resp. in Opp. to Mot. for Interim Injunctive Relief 15-16.

[49] *El Paso*, 669 A.2d at 38-39.

[50] *Carlyle*, 67 A.3d at 382 (citing *El Paso*, 669 A.2d at 40).

disputes, including purely legal ones, on the Court of Chancery" as the clause at issue purported to do.[51] The *El Paso* exclusive forum-selection clause failed because it was "facially invalid. . . . El Paso had no basis to argue that it was suffering an irreparable injury . . . because the rights it sought to enforce never legally existed."[52]

El Paso is inapplicable here. The forum-selection clauses at issue do not purport to confer exclusive jurisdiction over all claims, including purely legal ones, on the Court of Chancery. Furthermore, a basis for jurisdiction in this Court exists through the statutory delegation in Section 18-111 of the Limited Liability Company Act ("Section 18-111").

Section 18-111 grants the Court of Chancery subject matter jurisdiction over

> [a]ny action to interpret, apply or enforce the provisions of a limited liability company agreement, or the duties, obligations or liabilities of a limited liability company to the members or managers of the limited liability company, or the duties, obligations or liabilities among members or managers and of members or managers to the limited liability company, or the rights or powers of, or restrictions on, the limited liability company, members or managers, or any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of this chapter, may be brought in the Court of Chancery.[53]

Interpretation of rights and obligations under an operating agreement falls under the plain language of Section 18-111. The focus of this case is on the rights of members under Section 10.10 of the Operating Agreement. Additionally, in this case, as in *Duff v. Innovative Discovery LLC*, this Court has subject matter jurisdiction on the basis that it must interpret the Redemption Agreement, which, as an agreement among LLC members, is contemplated under the Limited Liability Company Act and subject to this Court's jurisdiction.[54] Thus, VGRP's *El Paso* argument fails.

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[51] *Id.*
[52] *Id.*
[53] 6 *Del. C.* § 18-111.
[54] 2012 WL 6096586 (Del. Ch. Dec. 7, 2012).

Second, Defendants argue that a different forum-selection clause should apply. Defendants point out that MP Operating's "Operating Agreement provides that the appropriate forum for disputes between [MP Operating] and its members is Pennsylvania."[55] Defendants' argument refers to the wrong corporate entity. This case deals with MP Holding's Operating Agreement, which specifies the Delaware Court of Chancery or the United States District Court for the District of Delaware as the appropriate forum. Who purchases the Property in the Pennsylvania Action is entirely distinct from who buys the membership interests in MP Holding and MP Managing as a result of the Delaware Action. The parties are not free to pursue their claims under the MP Holding Operating Agreement in the Pennsylvania Action.

Third and finally, Defendants argue that they have no choice but to bring the Sale Order Motion in Pennsylvania because the bidding there is ongoing and to do anything else is to forfeit their rights under the Operating Agreement. Again, Defendants miss the mark. The two sale processes involve separate entities and separate property interests. The outcome of one sale has no impact on the other, and Defendants' consternation that they might not succeed in purchasing the Apartments in the Pennsylvania Action does not allow them to seek interpretation of their rights under the MP Holding Operating Agreement in the Pennsylvania Action.

The forum-selection clause in question is presumptively valid, and Delaware Courts strongly support enforcement of forum-selection clauses. Defendants have not shown that enforcement would be unreasonable or unjust. Defendants have not shown any fraud or overreach. Plaintiffs have clearly established the legal rights they seek to protect, and the material facts of the forum-selection clause are not in substantial dispute.

### C. Imminent Threat of Irreparable Injury

Plaintiffs argue that violation of a valid exclusive forum-selection provision is per se irreparable harm because it is a right bargained for by contract.[56] "Under binding Delaware Supreme Court precedent, a party suffers irreparable harm when forced to litigate in a jurisdiction other than

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[55] Defs.' Resp. in Opp. to Mot. for Interim Injunctive Relief 15-16.
[56] Pls.' Mot. for Interim Injunctive Relief 6-8.

the one selected by a valid forum-selection clause."[57] "This Court consistently has held that the procession of a claim in an unwarranted forum poses a threat of irreparable harm warranting a preliminary injunction."[58]

Defendants argue that recognition of their contractual priority rights by the Pennsylvania Court does no harm to Plaintiffs because Plaintiffs are already litigating in Pennsylvania and that whether VGRP has priority rights to purchase CCI and Compatriot's interests in Morrow Park City Apartments is separate from what the appraised price should be, which Defendants say is the only claim CCI currently has in Delaware.[59]

The ongoing Pennsylvania Action, however, relates to the sale of the Property in fee simple or an interest in MP Operating, while the contractual rights being litigated in Delaware concern interests in MP Holding and MP Managing. Once again, these are legally distinct entities and agreements. As filed, the actions are independent, and the Property could sell without affecting the rights Defendants are litigating in Delaware, unsatisfying as that might be to Defendants. Those rights—defined by Section 10.10 of the Operating Agreement and Section 1.1(a)(iv)(2) of the Redemption Agreement—are subject to exclusive forum-selection clauses in both the Operating Agreement and Redemption Agreement that mandate resolution of disputes based on the Operating Agreement or Redemption Agreement be resolved in the United States District Court for the District of Delaware or either any Delaware State Court (for the Redemption Agreement) or the Delaware Court of Chancery (for the Operating Agreement). Requiring Plaintiffs to litigate that right outside of the contracted forum, as the Sale Order Motion or New Pennsylvania Action would do, is per se irreparable harm.[60] Defendants effectively argue that Plaintiffs' participation in the Pennsylvania Action and bids for the Property constitute a waiver of Plaintiffs' contractual exclusive-forum-selection-clause rights under the Operating Agreement. The ongoing litigation of distinct rights in the Pennsylvania Action does

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[57] *BE & K Eng'g Co., LLC v. RockTenn CP, LLC*, 2014 WL 186835, at *23 (Del. Ch. Jan. 15, 2014) (citing *Carlyle*, 67 A.3d at 385-86; and *Ingres*, 8 A.3d 1143, 1147), *aff'd*, 103 A.3d 512 (Del. 2014).

[58] *ASDC Hldgs., LLC v. Malouf*, 2011 WL 4552508, at *8 (Del. Ch. Sept. 14, 2011) (citing *Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *2 n.5 (Del. Ch. Nov. 13, 2009); *HDS Inv. Hldg., Inc. v. Home Depot, Inc*., 2008 WL 4604262, at *9 (Del. Ch. Oct. 17, 2008); *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1259 (Del. Ch. 2004)).

[59] Defs.' Resp. in Opp. to Mot. for Interim Injunctive Relief 3.

[60] *See, e.g., Carlyle*, 67 A.3d at 385-86 ("[Plaintiff] would suffer irreparable harm if it were required to litigate in [a different forum] in contravention of the bargain it struck with [Defendant] that is set forth in the forum selection clause of the Subscription Agreement.").

not constitute waiver of Plaintiffs' contractual forum-selection rights.

D. Balance of Equities

As to the third element, a balance of the equities in favor of the moving party, Plaintiffs argue that Defendants will suffer no harm as a result of the enforcement of contractual provisions to which they agreed.[61] Conversely, Defendants argue that an injunction would cause them to lose a "valuable property right—the right to purchase [the Property]."[62]

Plaintiffs have shown that the Operating Agreement's exclusive forum-selection clause mandates disputes be brought in the Delaware Court of Chancery or United States District Court for the District of Delaware and that it will suffer irreparable harm if that contractual right is breached. Defendants' argument that an injunction would cause it to lose the right to purchase the Apartments is misguided. Section 10.10 of the Operating Agreement does not give Defendants the right to purchase the Apartments, and Defendants fail to point the Court to any other provision that does. To the extent that such a right exists in the MP Operating operating agreement, which has an exclusive forum-selection clause choosing Pennsylvania courts, Defendants have not pointed it out and it is not before me.

Much of Defendants' argument hinges on a disagreement about the corporate formalities involved. Defendants appear to see themselves as fighting for ownership of the Property in both the Delaware and the Pennsylvania Actions. As practical as that view might be, corporate formalities matter. In Delaware, Defendants are fighting for their rights to purchase interests in parent companies. In Pennsylvania, Defendants are involved in an auction for the Property itself. Although Defendants' desired outcome is the same in both actions, the two do not overlap.

Plaintiffs have shown that the equities are in their favor.

## IV. CONCLUSION

For the foregoing reasons, I conclude that Plaintiffs have satisfied the requisite elements for both prohibitory and mandatory injunctive relief, and I grant Plaintiffs' Motion for a Preliminary Injunction.

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[61] Pls.' Mot. for Interim Injunctive Relief 9.
[62] Defs.' Resp. in Opp. to Mot. for Interim Injunctive Relief 20.

**IT IS SO ORDERED.**

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