IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RAIL ENGINEERING SOLUTIONS, LLC, DAVID WILKERSON, and ANDREA OLVERA,	)	
Plaintiffs,	)	
	)	C.A. NO. 2025-0782 DJB
v.	)	
ROMIC GROUP LIMITED, f/k/a ROMIC CONSULTING LIMITED and ROBERT COLEMAN,	)	
Defendants.	)	

Date Submitted: October 29, 2026
Date Decided: November 19, 2026

Memorandum Opinion

***On Defendant's Motion to Dismiss* – DENIED, without prejudice**

Andrew L. Cole, Esquire, Nathaniel J. Klepser, Esquire, and Jamie P. Clare, Esquire, Cole Schotz P.C., Wilmington, Delaware, *Attorneys for Rail Engineering Solutions, LLC, David Wilkerson, and Andrea Olvera*.

Stephanie S. Riley, Esquire, Alexander P. Wharton, Esquire, and Andrew M. Moshos, Esquire, Womble Bond Dickinson (US) LLP, Wilmington, Delaware, *Attorneys for ROMIC Group Limited and Robert Coleman.*

BRENNAN, J.[1]

[1] Sitting as a Vice Chancellor of the Court of Chancery of the State of Delaware by designation of the Chief Justice of the Supreme Court of Delaware pursuant to In

I. INTRODUCTION

This litigation spans both the Delaware Superior Court and the Delaware Court of Chancery. The two related matters, addressed at once in briefing and in this Opinion, stem from the degradation of the business relationship between the parties. At the formation of Rail Engineering Solutions, LLC (hereinafter "RES"), all parties worked cohesively, for profit, in the sale of railroad equipment. When the relationship took a turn, outstanding contracts, both oral and written, remained unfulfilled. The filing of the Superior Court breach of contract action by ROMIC Group Limited, f/k/a Romic Consulting Limited (hereinafter "ROMIC") against RES initiated the counterclaims that cross both Superior Court and Chancery.

The Motions to Dismiss filed in each court allege a lack of both subject matter and personal jurisdiction. The RES LLC Agreement (hereinafter "Agreement") contains a mandatory arbitration clause. It is under this clause that ROMIC moves, in part, to dismiss, arguing an arbitrator is to decide both substantive arbitrability and all applicable claims. Additionally, Defendant Coleman moves to dismiss claims against him arguing lack of personal jurisdiction under the Delaware Corporate Consent Statute.

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re Designation of Actions Filed Pursuant to In re: DESIGNATION OF THE HONORABLE DANIELLE J. BRENNAN under Del. Const. art. IV § 13(2) dated October 6, 2025.

The LLC Agreement clearly and unmistakably sets forth that the arbitrator, and not the court, will decide the issue of arbitrability, given its incorporation of the Americal Arbitration Association (hereinafter "AAA"), as well as the broad language used mandating arbitration for "any action" to enforce, interpret, or resolve disputes. Finally, its lack of designation for any other claims for resolution to any court buttresses this finding. Therefore, the Motion to Dismiss is **DENIED without prejudice**, and both the Superior and Chancery Court actions are **STAYED** pending a substantive arbitrability finding by an arbitrator. Should an arbitrator send any claims back to either Court, a Motion to Dismiss on any remaining jurisdictional challenges may be re-filed, if applicable.

II. RELEVANT FACTS

RES is a limited liability company in the business of selling locomotives and rolling stock, formed under the laws of the State of Delaware on May 13, 2021.[2] The founding members of RES were David Wilkerson (hereinafter "Wilkerson"), a resident of the State of South Carolina, and Robert Coleman (hereinafter

[2] *Romic Group Limited, f/k/a Romic Consulting Limited v. Rail Engineering Solutions, LLC, David Wilkerson, and Andrea Olvera v. Robert Coleman*, N24C-12-311 DJB, Docket Item (hereinafter "S.D.I.") 50, ¶ 7-8; *Rail Engineering Solutions, LLC, David Wilkerson, and Andrea Olvera v. ROMIC Group Limited, f/k/a ROMIC Consulting Limited and Robert Coleman*, 2025-0782-DJB, Docket Item (hereinafter "C.D.I.") 19, ¶ 3.

"Coleman"), a resident of England.[3] Following its organization, Coleman and Wilkerson served as the co-managers of RES by "jointly participating in the making of material business decisions, controlling RES's operations, and participating in the management of the LLC."[4] Coleman is also the Director of ROMIC, a corporation incorporated in the United Kingdom ("hereinafter UK"). At the time RES was formed, ROMIC was simply a shell company, not doing business independently, but had a functioning website that was ultimately used for RES business.[5]

The LLC Agreement

On July 15, 2021, Coleman proposed to Wilkerson "that they create a formal document to govern the business."[6] Considering his service as RES's Vice President of Sales, active participation in RES's regularly scheduled meetings, and responsibility for business development, customer relations, and contract negotiations, Coleman believed he and Wilkerson should be equal partners.[7] Following this discussion, a Limited Liability Company Agreement (hereinafter the "LLC Agreement") was executed on December 21, 2022.[8] The stated purpose of the LLC Agreement was "to provide for the governance of the Company and the conduct

[3] S.D.I. 50, ¶¶ 2, 6, 9-10; S.D.I. 33, pp. 3, 30; C.D.I. 19, ¶¶ 3, 7, 12-13.; C.D.I. 31, pp. 3, 31.
[4] S.D.I. 50, ¶ 11; S.D.I. 33, p. 4; C.D.I. 19, ¶ 21; C.D.I. 31, p. 4.
[5] S.D.I. 50, ¶ 17; S.D.I. 33, p. 3; C.D.I. 19, ¶ 27; C.D.I. 31, p. 3-4.
[6] S.D.I. 50, ¶ 15; C.D.I. 19, ¶ 25.
[7] S.D.I. 50, ¶¶ 12-15; C.D.I. 19, ¶¶ 22-25.
[8] S.D.I. 50, ¶ 16; C.D.I. 19, ¶ 26.

of its business, and to specify their relative rights and obligations by this written Operating Agreement."[9]

In connection with the execution of the LLC Agreement, Wilkerson transferred 10% of his membership interest in RES to Andrea Olvera (hereinafter "Olvera"). Coleman transferred his membership interests to ROMIC to reduce his tax exposure.[10] At the time, Coleman was President, principal, and controller of ROMIC and represented ROMIC in all dealings with RES.[11] As a result, the members of RES consisted of Wilkerson owning 45%, ROMIC owning 45%, and Olvera owning 10%.[12]

The LLC Agreement includes numerous provisions which subject claims between the members to arbitration.[13] First and foremost, the Agreement begins with a statement subjecting it to the AAA commercial arbitration rules; this statement is written in all capital letters, is bolded and underlined.[14] Further, the mandatory arbitration clause in the Agreement states, "this agreement is subject to arbitration in accordance with the commercial arbitration rules of the American Arbitration

[9] S.D.I. 50, ¶ 16; S.D.I. 33, pp. 3, 6; C.D.I. 19, ¶ 26; C.D.I. 31, pp. 3, 6.
[10] S.D.I. 50, ¶ 17; S.D.I. 33, p. 3; C.D.I. 19, ¶ 27; C.D.I. 31, pp. 3-4.
[11] S.D.I. 50, ¶¶ 4-6; C.D.I. 19, ¶¶ 5-7.
[12] S.D.I. 50, ¶ 18; C.D.I. 19, ¶ 28.
[13] S.D.I. 33, p. 4; C.D.I. 31, p. 4.
[14] S.D.I. 33, pp. 4-5; C.D.I. 33, pp. 4-5.

Association."[15] Section 9.1 of the LLC Agreement includes the following arbitration provision:

> [a]ny action to enforce or interpret this Agreement, or to resolve disputes with respect to this Agreement as between the Company and a Member, or between or among the Members, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Arbitration shall be the exclusive dispute resolution process.[16]

The LLC Agreement additionally contains language to seemingly prevent members from asserting claims against each other.[17] Specifically, the LLC Agreement states, "[e]ach Member hereby waives any and all rights and claims which they may otherwise have against the other Member and its officers, directors, shareholders, partners, members, managers, agents, employees and Affiliates" for the following activities:

> engag[ing] or invest[ing] in… any business activity of any type or description, including without limitation those that might be the same as or similar to the Company's business and that might be in direct or indirect competition with the Company.
> …
> hold[ing] any investment opportunity or prospective economic advantage for their own account or… recommend[ing] such opportunity to Persons other than the Company.[18]

Section 12.2 of the LLC Agreement contains an integration clause which states:

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[15] S.D.I. 33, pp. 4-5; C.D.I. 31, pp. 4-5.
[16] S.D.I. 33, p. 5; C.D.I. 31, p. 5.
[17] *Id.*
[18] S.D.I. 33, pp. 5-6; C.D.I. 31, p. 5.

> [t]his Agreement constitutes the entire agreement between the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and understandings of the parties. There are no representations, warranties, agreements or understandings, express or implied, written or oral between the parties hereto relating to the subject matter of this Agreement which are not fully expressed herein.[19]

Oral Sales Contracts

The following year, in April and May of 2023, an agent in Nigeria submitted an inquiry to RES about a potential transaction with the agent's customers regarding available locomotive inventory.[20] Wilkerson, Olvera, and Coleman worked towards solidifying a deal with the customer, but the locomotive inventory needed for the potential transaction was located in the United Kingdom.[21] Coleman suggested ROMIC, rather than RES, handle the transaction for two reasons: (1) the seller of the inventory would not add RES to its buyer database and ROMIC was already a customer in that database, and (2) RES couldn't ship the inventory out of the UK since it didn't have export authority there, but ROMIC did, as a UK business.[22] As a result, Olvera, Wilkerson, and ROMIC purportedly entered into contracts whereby

[19] S.D.I. 33, p. 6; C.D.I. 31, p. 6. The Amended Complaint alleges that following the execution of the LLC Agreement, date unspecified, the RES members orally amended the Agreement by having Coleman and Wilkerson continue to act as co-managers. S.D.I. 50, ¶ 19; C.D.I. 19, ¶ 29. This seems to be disputed by ROMIC, as it is tangentially challenged in its briefing, although at this point, this issue is not determinative. S.D.I. 33, p. 4; C.D.I. 31, p. 4.
[20] S.D.I. 50, ¶ 22; S.D.I. 33, p. 7-8.
[21] S.D.I. 50, ¶¶ 24-25.
[22] S.D.I. 50, ¶ 26; S.D.I. 33, p. 8.

Olvera and Wilkerson, personally, agreed to allow ROMIC to pursue sales of locomotive inventory located in the UK in exchange for ROMIC paying commissions from the sale to Wilkerson and Olvera directly.[23]

The Promissory Note

Several months later, on October 24, 2023, ROMIC and RES signed a promissory note (hereinafter the "Note") whereby ROMIC loaned RES a total of $913,950.00.[24] Per the Note, RES was to pay interest at a rate of 8% annually, and make four equal payments of $18,279.00 quarterly for repayment.[25] Specifically, the Note required each $18,279.00 payment due sequentially on January 24, 2024, April 24, 2024, July 24, 2024, and October 24, 2024.[26] Any unpaid principal was due on October 24, 2024, and any if any unpaid principal remained following that date, it accrued interest at an annual rate of 8%.[27] The Note required RES to pay ROMIC's costs of collection in the event RES failed to make obligated payments as they became due.[28] RES made the January 24, April 24 and July 24 payments; no further payments were made on the Note thereafter.[29]

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[23] S.D.I. 50, ¶ 41; S.D.I. 33, p. 8.
[24] S.D.I. 1, ¶¶ 1, 21; C.D.I. 31, p. 6.
[25] S.D.I. 1, ¶¶ 1, 21; S.D.I. 33, p. 6-7; C.D.I. 31, p. 6.
[26] S.D.I. 1, ¶ 21.
[27] S.D.I. 1, ¶ 22.
[28] S.D.I. 1, ¶ 3.
[29] S.D.I. 1, ¶ 25; S.D.I. 10, ¶ 25.

Discord Amongst LLC Members

In late December 2023 and early January 2024, tensions began to rise between Coleman and Wilkerson regarding RES contracts, business dealings, and pricing of sales.[30] Coleman and ROMIC initiated termination of the relationship with RES on January 21, 2024, and requested a certification from RES that Coleman had resigned and had no outstanding financial obligations or commitments to RES.[31] At that time, Coleman acknowledged he owed payments to both Wilkerson and Olvera, stating ROMIC would be closed unless Coleman, Wilkerson, and Olvera could "find common ground to work together."[32] As a result, RES held an emergency board meeting to formally address the issue.[33] Following that meeting, RES accepted ROMIC's withdrawal and Coleman's resignation via a January 23, 2024, letter.[34] On April 5, 2024, counsel for RES, memorialized Coleman's withdrawal, resignation, transfer of membership units and other legalities surrounding the separation based upon the Agreement via letter.[35]

[30] S.D.I. 50, ¶ 35; C.D.I. 19, ¶ 32.
[31] S.D.I. 50, ¶ 36; S.D.I. 33, p. 8; C.D.I. 19, ¶ 33.
[32] S.D.I. 50, ¶ 36; C.D.I. 19, ¶ 33.
[33] C.D.I. 19, ¶ 34.
[34] S.D.I. 50, ¶ 5; C.D.I. 19, ¶¶ 35.
[35] S.D.I. 70, Ex. B; C.D.I. 48, Ex. B.

II. PROCEDURAL HISTORY

ROMIC filed suit against RES, David Wilkerson and Andrea Olvera in Superior Court on December 23, 2024.[36] ROMIC's suit against RES alleges Breach of Contract (Count I), Unjust Enrichment (Count II), Quantum Meruit (Count III), and Tortious Interference with Contract (Count IV); Counts I-III are against RES; Count IV is brought against Wilkerson and Olvera, individually.[37] RES, Wilkerson, and Olvera (collectively, "the RES parties") filed an Answer and Counterclaim against both ROMIC and Robert Coleman on March 5, 2025.[38] Coleman, not an original party to the Superior Court action, was added as a counterclaim defendant following the filing of the RES parties' counterclaims in March.[39] Coleman's Answer alleges that only Coleman, personally, resigned from RES, and ROMIC's interest remained.

The original counterclaim brought five (5) causes of action against ROMIC and Coleman: a Declaratory Judgment action regarding ROMIC's status as a member of RES (Count 1), Misappropriation of Trade Secrets (Count 2), Breach of Fiduciary Duty (Count 3), Defamation (Count 4), and Breach of Contract (Count 5).[40] Due to the jurisdictional limitation of Superior Court, Counts 1 through 3 were

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[36] S.D.I. 1.
[37] S.D.I. 1.
[38] S.D.I. 10.
[39] S.D.I. 10; S.D.I. 33, p. 7; C.D.I. 31, p. 7.
[40] *Id.*

voluntarily withdrawn from the Superior Court action and an Amended Counterclaim was filed on July 3, 2025, asserting only Defamation (Count 1) and Breach of Contract (Count 2); the Defamation count is against Coleman, personally, the Breach of Contract count is against ROMIC.[41]

On July 7, 2025, RES filed a Complaint in the Court of Chancery for the Declaratory Judgment (Count 1), Misappropriation of Trade Secrets (Count 2), Breach of Fiduciary Duty (Count 3) actions against ROMIC and Coleman, individually.[42] Given the natural overlap and connection between the two court actions, the parties' request for cross-designation was granted on October 6, 2025.[43] On December 11, 2025, RES filed an Amended Complaint in the Chancery action and a Second Amended Counterclaim in the Superior Court on February 20, 2026.[44] Multiple Stipulations regarding deadlines to file amendments to the counterclaim and responses to all claims were filed by the parties. Ultimately, ROMIC moved to dismiss RES's counterclaims in both RES' Superior Court and Court of Chancery actions.[45] For purposes of judicial economy, identical motions to dismiss were permitted to be filed in each court. For those same reasons, both motions will be considered in this one Opinion, filed separately in each Court.

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[41] S.D.I. 26.
[42] C.D.I. 1.
[43] S.D.I. 29; C.D.I. 11, 13.
[44] S.D.I. 50; C.D.I. 19.
[45] S.D.I. 33, 54; C.D.I. 30-31.

Pending before the Courts are ROMIC and Coleman's March 24, 2026, Motions to Dismiss in the Superior Court and in the Court of Chancery.[46] Oral argument on this Motion was held June 10, 2026.[47] Following argument, the parties were permitted supplemental filings as to an issue raised for the first time at argument. ROMIC's supplemental filing was submitted on June 11, 2026.[48] On July 1, 2026, RES responded.[49] ROMIC filed its brief Reply on July 9, 2026.[50] During the Court's review pending decision, the Court requested counsel provide a copy of Mr. Coleman's withdrawal letter to RES.[51] This was provided on October 29, 2026.[52] The matter is now ripe for decision.

III. STANDARD OF REVIEW

ROMIC challenges RES's counterclaims under Superior Court Civil Rule of Procedure 12(b)(1) & (2), as well as under Chancery Rule of Procedure 12(b)(1), (2), and (6).

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[46] S.D.I. 33, 54; C.D.I. 17, 30-31. Note the Motion to Dismiss and the Opening Brief in Support were filed on separate days in the Court of Chancery docket, the Motion on March 24, 2026, and the Opening Brief on March 25. C.D.I. 30-31.
[47] S.D.I. 57; C.D.I. 32.
[48] S.D.I. 64; C.D.I. 42.
[49] S.D.I. 66, C.D.I. 43.
[50] S.D.I. 67, C.D.I. 45.
[51] S.D.I. 68, C.D.I. 46.
[52] S.D.I. 69, 70; C.D.I. 47, 48.

A. Superior Court Rule 12(b)(1).

Pursuant to Superior Court Rule 12(b)(1), this Court may dismiss a claim where it lacks jurisdiction over the subject matter.[53] Under Delaware law, a court "lacks subject matter jurisdiction over a claim that is 'properly committed to arbitration.'"[54] While the Court cannot compel arbitration, it can determine "whether an enforceable arbitration agreement exists for purposes of subject matter jurisdiction."[55] In making this determination, the Court should consider both "whether a valid binding arbitration agreement exists" and "whether the scope of the agreement covers the pending claims."[56]

The burden of establishing subject matter jurisdiction, or lack thereof, rests with the moving party.[57] "On a Motion to Dismiss under Rule 12(b)(1), the Court must accept every well-pled allegation as true and draw all reasonable inferences in the non-movant's favor."[58] Such a motion will be denied unless it appears to a

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[53] Super. Ct. Civil R. 12(b)(1); *see*, *W. IP Commc'ns, Inc. v. Xactly Corp.*, 2014 WL 3032270 at *5 (Del. Super. Ct. June 25, 2014).
[54] *Id*. (quoting *Aquila of Del., Inc. v. Wilm. Trust Co.,* 2011 WL 4908406, *1 (Del.Super.Oct. 10, 2011)).
[55] *Donofrio v. Peninsula Healthcare Servs., LLC*, 2022 WL 1054969 at *2 (Del. Super. Apr. 8, 2022) (citing *Jones v. 810 Broom St. Operations*, 2014 WL 1347746, at *1 (Del. Super. June 25, 2014)).
[56] *Jones v. 810 Broom St. Operations LLC*, 2014 WL 1347746 at *1 (Del. Super. Apr. 7, 2014) (citing *Elia v. Hertrich Family of Automobile Dealerships*, Inc., 2014 WL 843839 (Del. Super. Mar. 4, 2014)).
[57] *Donofrio*, 2022 WL 1054969 at *2.
[58] Skinner *v. Peninsula Healthcare Servs., LLC*, 2021 WL 778324 at *1 (Del. Super. Mar. 1, 2021).

"'reasonable certainty' that the plaintiff would not be entitled to relief under any set of facts that could be proved to support them."[59]

B. Superior Court Rule 12(b)(2)

When asserting a claim against a non-resident defendant, a plaintiff generally does not have the burden to plead facts in a Complaint that establish personal jurisdiction.[60] However, once challenged under Rule 12(b)(2), the burden is upon the Plaintiff to establish jurisdiction is proper.[61] "When no meaningful discovery has been conducted, the plaintiff must make a *prima facie* showing that personal jurisdiction exists."[62] In its review, the Court "is not limited to the pleadings and can consider affidavits, briefs of the parties, and the record as a whole."[63] Unless an allegation is contradicted by an affidavit, "the Court must (1) accept as true all well-pleaded allegations in the complaint; and (2) construe the record in the light most favorable to the plaintiff."[64]

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[59] *Id*.
[60] *State ex rel. Jennings*, 2024 WL 98888, at *7 (citing *Green Am. Recycling, LLC v. Clean Earth, Inc.*, 2021 WL 2211696, at *3 (Del. Super. June 1, 2021) (alteration in original) (quoting *Focus Fin. Partners, LLC v. Holsopple*, 241 A.3d 784, 800 (Del. Ch. 2020)).
[61] *State ex rel. Jennings*, 2024 WL 98888, at *7 (citing *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437-38 (Del. 2005)).
[62] *State ex rel. Jennings*, 2024 WL 98888, at *7 (internal citations omitted).
[63] *Green Am. Recycling, LLC v. Clean Earth, Inc.*, 2021 WL 2211696, at *3 (Del. Super. June 1, 2021).
[64] *State ex rel. Jennings*, 2024 WL 98888, at *7 (internal citations omitted).

C. Chancery Court Rule 12(b)(1)

Under Chancery Court Rule 12(b)(1), a party may raise lack of subject matter jurisdiction as a defense to a claim for relief.[65] The non-moving party bears the burden to plead sufficient facts to establish the Court's jurisdiction.[66] To determine whether the non-movant has satisfied its burden, "the Court should accept the material factual allegations in the complaint as true, and all inferences therefrom should be construed in the non-moving party's favor."[67] In consideration of the motion, the Court must also "address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate."[68]

D. Chancery Court Rule 12(b)(2)

"Generally, a plaintiff does not have the burden to plead in its complaint facts establishing a court's personal jurisdiction over defendant."[69] But "[w]hen a

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[65] Del. Ch. Ct. R. 12.

[66] *VT Shareholder Representative, LLC v. Edwards Lifesciences Corp.*, 2023 WL 8597956, at *5 (Del. Ch. Dec. 12, 2023), aff'd, 326 A.3d 370 (Del. 2024) (citing *de Adler v. Upper New York Inv. Co. LLC*, 2013 WL 5874645, at *7 (Del. Ch. Oct. 31, 2013)); *see also S'holder Representative Servs. LLC v. Alexion Pharms., Inc.*, 2021 WL 3925937, at *4 (Del. Ch. Sept. 1, 2021) (citing *Hall v. Coupe*, 2016 WL 3094406, at *2 (Del. Ch. May 25, 2016)).

[67] *Shareholder Representative Servs. LLC*, 2021 WL 3925937, at *4 (quoting *de Adler*, 2013 WL 5874645, at *7).

[68] *AffiniPay, LLC v. West*, 2021 WL 4262225, at *4 (Del. Ch. Sept. 17, 2021) (quoting *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009)).

[69] *Partners & Simons, Inc. v. Sandbox Acquisitions, LLC*, 2021 WL 3161651, at *3 (Del. Ch. July 26, 2021) (citing *Focus Fin. P'rs, LLC v. Holsopple*, 241 A.3d 784,

defendant moves to dismiss a complaint pursuant to Court of Chancery Rule 12(b)(2), the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the defendant."[70] "In ruling on a Rule 12(b)(2) motion, the court may consider the pleadings, affidavits, and any discovery of record."[71] "If the Court has not held an evidentiary hearing, 'plaintiffs need only make a *prima facie* showing of personal jurisdiction and the record is construed in the light most favorable to the plaintiff.'"[72]

IV. ANALYSIS

A. Substantive Arbitrability Issue is not Waived

ROMIC raised the issue of who decides arbitrability for the first time during oral argument. In so doing, ROMIC argues that an arbitrator, and not the court, should make the determination of arbitrability. Objecting to the procedural lateness of ROMIC's presentation of this issue, RES urges the Court to decline to consider this argument waived, since it was not raised in ROMIC's extensive briefing.[73]

If the parties have contracted that an arbitrator is to decide issues of arbitrability, the court's jurisdiction, while technically proper, is divested to honor

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800–02 (Del. Ch. 2020) (quoting *Benerofe v. Cha*, 1996 WL 535405, at *3 (Del. Ch. Sept. 12, 1996)).

[70] *Partners & Simons, Inc.*, 2021 WL 3161651, at *3 (citing *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007)).

[71] *Partners & Simons, Inc.*, 2021 WL 3161651, at *3 (citing *Ryan*, 935 A.2d at 265).

[72] *Partners & Simons, Inc.*, 2021 WL 3161651, at *3 (citing *Ryan*, 935 A.2d at 265).

[73] S.D.I. 67, C.D.I. 45.

the contractual terms. Therefore, as this is an issue regarding jurisdiction, any such argument on this topic cannot be waived.[74] Further, upon this issue being raised at argument, RES was given the opportunity to submit a supplemental submission of law addressing this claim following time to hear and respond to ROMIC's arguments. Therefore, because RES was provided with this time, prejudice is minimal, if any. While the Court shares in RES's frustration that this issue was belatedly raised, it will nonetheless hear and consider it, as ROMIC is correct: this is a gatekeeping issue and must be decided prior to an examination of the other arguments raised.[75] Judicial economy is best served by addressing this issue at the forefront and the Court will do so now.

B. The Arbitrator, not the Court, will Determine Substantive Arbitrability

When the question of who determines substantive arbitrability arises, the default is that the Court, and not the arbitrator decides.[76] An exception to the default exists when the contract evidences a "clear and unmistakable intent" to submit the question of substantive arbitrability to the arbitrator.[77] When the contracting parties

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[74] *Donofrio v. Peninsula Healthcare, LLC*, 2022 WL 1054966, *2 (Del. Super. Apr. 8, 2022).
[75] *360 Campaign Consulting, LLC v. Diversity Communication, LLC*, 2020 WL 1320909, *3 (Del. Ch. Mar. 20, 2020), citing *James & Jackson, LLC v. Willie Garey, LLC*, 906 A.2d 76, 79 (Del 2006).
[76] *SBC Interactive, Inc. v. Corp. Media Pr'rs*, 714 A.2d 758, 761 (Del. 1998), *see also 360 Campaign Consulting*, 202 WL 1320909 at *6.
[77] *Willie Garey, LLC*, 906 A.2d at 79.

wish the question of arbitrability to be placed before an arbitrator, the "arbitration clause generally provides for arbitration of all disputes" and the contract "incorporates a set of arbitration rules that empower arbitrators to decide arbitrability."[78]

The LLC Agreement at issue here beings a sentence, written in all capital letters, and says: "NOTICE: THIS AGREEMENT IS SUBJECT TO ARBITRATION IN ACCORDANCE WITH THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION."[79] ROMIC argues that this alone satisfies the requirement that the intent be clear and unmistakable.[80] RES disagrees and argues the Court should decide substantive arbitrability as it interprets the arbitration clause narrowly.[81] Clear and unmistakable intent is not found solely from incorporating the AAA rules into an agreement. As will be discussed, this intent is found not only from the incorporation of the AAA rules, but in reviewing the Agreement as a whole and, importantly, considering the clear language in the arbitration clause itself.

Section 9.1 of the Agreement, the arbitration clause, states "[a]ny action to enforce or interpret this Agreement, or to resolve disputes with respect to this

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[78] *Id.* (internal citations omitted).
[79] S.D.I. 33, p. 5; C.D.I. 31, p. 5.
[80] D.I. 67.
[81] D.I. 66.

Agreement as between the Company and a Member, or between or amount the Members, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association."[82] This provision broadly mandating arbitration further evidences the parties' intent that arbitrator decide substantive arbitrability.[83] The lack of any other language in the Agreement permitting other disputes to the courts further support such a reading.[84]

Section 9.2 to the Agreement provides a party the option of "applying to any court of competent jurisdiction for such injunctive or other provisional relief as maybe be necessary to protect that party from irreparable harm or injury or to preserve the status quo pending resolution of a dispute."[85] However, this does not negate the clear and unmistakable intent expressed elsewhere. Section 9.2 specifically states this option is available only to protect the parties "pending the resolution of a dispute," essentially awaiting determination via arbitration. In

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[82] S.D.I. 33, pp. 4-5; C.D.I. 33, pp. 4-5.
[83] *See GTSI Corp. v. Eyak Technology, LLC*, 10 A.3d 1116, 1119-1120 (Del. Ch. Nov. 15, 2010) (finding the words "shall" and "any dispute…including the validity, scope and enforceability of these arbitration provisions" evidenced a clear and unmistakable intent to send the issue of substantive arbitrability to the arbitrator).
[84] *C.f. 360 Campaign Consulting*, 2020 WL 1320909 at *4 (declining to find clear and unmistakable intent where the challenged LLC Agreement had an arbitration clause, but also had separate sections which contemplated that other disputes, such as disputes not between Members, would be decided by the courts).
[85] S.D.I. 33, pp. 5-6; C.D.I. 31, p. 5.

reading the Agreement in its entirety, the parties have evidenced a clear and unmistakable intent to subject the issue of arbitrability to the arbitrator.[86]

C. The remaining litigation in both Courts is STAYED Pending the Decision of the Arbitrator

Because the question of substantive arbitrability is for the arbitrator, the cases pending in both Superior and Chancery Courts are **STAYED** following the arbitrator's decision,[87] and the motions to dismiss are **DENIED** without prejudice. Should the arbitrator decide that any claims raised in the instant litigation fall outside of the LLC Agreement, those matters will remain active and any relevant motions may be re-filed. To the extent the arbitrator determines that some or all of the claims currently before the Court fall under the LLC Agreement, those counts will then be dismissed pursuant to Superior and Chancery Court Rules 12(b)(1), respectively.

IT IS SO ORDERED.



Danielle J. Brennan, J.

[86] See generally, *360 Campaign Consulting*, 2020 WL 1320909 (Del. Ch. Mar. 20, 2020).
[87] *Id.* at * 10.