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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EAGLE FORCE HOLDINGS, LLC, AND EF INVESTMENTS, LLC, Plaintiffs Below, Appellants	:	No. 399, 2017
	:	Case Below:
v.	:	Court of Chancery of the State of Delaware
STANLEY V. CAMPBELL, Defendant Below, Appellee	:	C.A. No. 10803-VCMR

APPELLANTS' CORRECTED OPENING BRIEF

Date: December 5, 2017

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NATURE OF PROCEEDINGS

This case was filed in Chancery Court seeking enforcement of two agreements, a Contribution Agreement (the "Contribution Agreement") and an Amended and Restated Limited Liability Agreement (the "Amended LLC Agreement") (collectively, the "Transaction Documents"), entered into between Richard Kay, on behalf of Plaintiffs, and Stanley Campbell on August 28, 2014. The purpose of the Contribution Agreement was to effectuate Kay's $2.3 million dollar investment in Campbell's start-up company in exchange for a 50% ownership interest in a recently created holding company into which Campbell was to contribute 100% of the ownership of his start-up entity and ownership of original software that he was creating. The purpose of the Amended LLC Agreement was to amend and restate the rules governing the management and operation of the recently created holding company that was to hold Campbell's start-up and related Intellectual Property and receive Kay's investment.

Despite the parties' execution of the Transaction Documents, after Campbell obtained Kay's full contribution of cash (the sole source of funding for the business), Campbell refused to acknowledge the Transaction Documents as binding on him, refused to contribute his company or software, and attempted to unilaterally re-characterize Kay's investment as a loan, with terms to be negotiated later.

In this lawsuit, Plaintiffs, *inter alia*, sought specific enforcement of the Transaction Documents. Plaintiffs also sought a preliminary injunction to protect their interest in the business that was to be contributed and which had received over $2 million of Kay's money. Then-Vice Chancellor Parsons granted the preliminary relief, finding, among other things, that Plaintiffs were likely to be successful on the merits. In September 2016, Vice Chancellor Montgomery-Reeves found Campbell in contempt for paying himself approximately $147,000 over and above his $260,000 annual salary, in violation of the Preliminary Relief Order ("PRO"). The Court heard several subsequent motions for contempt for additional violations of the order by Campbell who continued to pay himself in excess of amounts allowed under the PRO without providing the required notice or obtaining the required order permitting him to make those payments. The court reserved rulings on these subsequent contempt motions pending its decision on the merits of the case.

A five-day trial proceeded February 6-10, 2017. The Chancery Court issued its post-trial Memorandum Opinion, on September 1, 2017 (attached hereto as **Exhibit A**). In the Opinion, the court concluded that it did not have personal jurisdiction over Campbell because it found the executed agreements in which Campbell consented to jurisdiction in Delaware were unenforceable. The court also denied the additional pending motions to hold Campbell in contempt, holding

that because the court lacked personal jurisdiction over Campbell, he was not bound by the Order and cannot have committed contempt by repeatedly violating the Order. Op. 61-62.

The court characterized the executed Contribution Agreement as provisional, and not the final expression of the parties' agreement, concluding that Kay and Campbell failed to agree on terms regarding Campbell's contribution obligation. Op.48. The court concluded that the parties were still negotiating because certain disclosure schedules that Campbell was to provide at a future Closing were incomplete at the time the agreements were executed and because the terms of the agreement were inconsistent with "reality."[1]

The court further concluded that the separate Amended LLC Agreement was also not enforceable because it was "closely related" to the Contribution Agreement and was not intended to stand independently. Op.58.

Finally, the court concluded that although Campbell knew no later than May 13, 2014, that pursuant to the binding April 2014 Letter Agreement between the same parties, he had become a member and manager (President and Chairman of Holdings' Board of Directors with a specific portfolio of designated management responsibilities) of a Delaware LLC (Op. 17), the implied consent to personal

[1] Other than the execution of the Amended LLC Agreement, the deliveries and actions called for at Closing never occurred.

jurisdiction in Delaware which arises under 6 Del. Code §18-109(a) did not apply because Campbell did not actively participate in the management of the Delaware LLC. Op.60-61. The court also concluded that because the later Transaction Documents containing Campbell's consent were unenforceable, it did not have personal jurisdiction over Campbell, so it dismissed Plaintiffs' claims.

SUMMARY OF ARGUMENT

1. Contract: The Chancery Court erred by ignoring fundamental principles of contract interpretation when it held that the Contribution Agreement was unenforceable. The court ignored the objective manifestation of assent expressed by the parties within the four-corners of the Contribution Agreement itself, and instead, improperly used extrinsic evidence to attempt to create ambiguity about whether Campbell was obligating himself to contribute 100% of the ownership of the Targeted Companies, without first establishing that there was ambiguity in the Contribution Agreement itself. Even if extrinsic evidence is considered, the court erred in concluding that the parties failed to agree that Campbell was required to contribute 100% ownership of the Targeted Companies because it confused Stock Appreciation Rights ("SARs") with actual ownership rights or control and presumed that if Campbell failed to obtain releases from existing SARs participants, that would impact control of the enterprise.

2. Contract: The Chancery Court erred in finding that the Amended and Restated LLC Agreement was not a separate and final expression of the parties' agreement concerning management and operation of Eagle Force Holdings, LLC. The court erroneously concluded that the Amended LLC Agreement was so interrelated with the Contribution Agreement that its enforceability was inextricably tied to the enforceability of the Contribution Agreement. While the

two agreements are paired, they are each independent agreements that are part of the same business deal. The Amended LLC Agreement is not contingent upon the Contribution Agreement, covers different subject matter, and amends and restates an Original LLC Agreement which pre-dated the Contribution Agreement by many months, all of which demonstrates that it is an independently enforceable agreement.

3. Personal Jurisdiction: The Chancery Court erred in finding that Campbell did not consent to personal jurisdiction in Delaware based upon Campbell's actual consent contained in the executed Amended LLC Agreement which the court erroneously found was not independently enforceable. The court also erroneously found that Campbell did not give implied consent to personal jurisdiction pursuant to 6 Del. Code §18-109(a), by knowingly accepting 50% member status and management responsibilities as a director and officer in Eagle Force Holdings, LLC, pursuant to the April 2014 Letter Agreement. Campbell knew (as of May 13, 2014 at the latest) that the entity in which he was a 50% member and a manager, director, and officer with specific management responsibilities, was a Delaware LLC because that fact, and his status as a member and a manager, was stated multiple times in every version of the Amended LLC Agreement for the Delaware entity that was reviewed and exchanged between the parties and their counsel. Neither Campbell nor his counsel objected to his status

as a member and manager (President and Chairman of the Board of Directors) of a Delaware LLC or took any action to rescind that status. Campbell's act of signing the Amended LLC Agreement was an unmistakable endorsement of his status as a member and manager of a Delaware LLC even if that agreement itself is unenforceable. Finally, the court failed to correctly apply 6 Del. Code §18-109(a) because the court appeared to conclude that active participation in the management of the Delaware LLC was required, when the statute clearly provides that the status of being designated a manager is sufficient to imply consent to personal jurisdiction.

STATEMENT OF FACTS

A. The Non-Binding November 2013 Letter of Intent

In late 2013, Kay and Campbell decided to form a business venture to use software that Campbell was developing to provide data-processing services to businesses. The parties outlined the principle terms of the venture in a non-binding letter of intent in November 2013. A45-46. Under the principle terms, Campbell was to contribute all of the stock of his existing company EagleForce Associates, Inc., ("Associates") as well as all rights to the Intellectual Property (the "IP") he was developing. *Id*,¶7. Kay would contribute cash of $1.8 million. A45,¶6. Campbell and Kay would jointly run the business with Campbell handling the technology and Kay handling the business operations. A45,¶4.

The parties contemplated that the business would be structured as a holding company, to be newly formed, owning a series of industry specific subsidiaries. A45,¶¶2, 5. Kay and Campbell would each own 50% of the holding company. A45,¶5. The industry specific subsidiaries ended-up being Associates and one other newly formed entity, EagleForce Health, LLC ("Health"), which together are defined in the Contribution Agreement as the "Targeted Companies." A705, "Targeted Companies."

During the due diligence period which followed the November 2013 Letter of Intent, and throughout the parties' negotiations, Kay contributed cash to

Associates without a formal agreement in order to keep the company afloat. A1104-05. Prior to Kay's funding, Associates had no revenue, no customers, and no paid employees. A1911.TrT-Variganti.732/15-18; A1900.TrT-Cresswell.686/8-687/10. Subsequently, Kay formed Eagle Force Investments, LLC ("Investments") through which he continued to fund the business venture. A1363,¶¶3-4. On March 17, 2014, Kay through counsel, formed Eagle Force Holdings, LLC, in Delaware.

B. The Binding April 2014 Letter Agreement

On April 4, 2014, Kay and Campbell executed a letter agreement (the "April 2014 Letter Agreement"), this one stating that it was "legally binding upon the parties." A50, A53,¶18. As before, Campbell's contribution obligation included all ownership of Associates and "all software and source code developed and referenced above as intellectual property. . . ." A51-52,¶7. Kay's contribution was increased from $1.8 million to $2.3 million. A51,¶6. Ownership was still to be 50/50, and the division of areas of responsibility for running the business remained unchanged but were defined in more detail. A51,¶4-5. Management of the LLC was to be through a board of directors with Campbell as its Chairman. A50,¶3, A52,¶11. The April 2014 Letter Agreement stated "[b]y April 21 it is anticipated that a new LLC will be formed to serve as a parent entity ('Holdco') for Eagle Force Associates, Inc. and the recently formed Eagle Force Health Solutions,

LLC…." A50,¶2; Op.10. The parties agreed that they would prepare and sign an LLC operating agreement for Holdings that would include "customary covenants," but that until that agreement was executed, "this letter agreement shall govern their conduct of business and the transactions and matters set out herein." A52-53,¶¶8, 18. The April 2014 Letter Agreement assigned responsibility for preparing the initial draft of the documents to Kay's counsel. A52,¶8.

C. Campbell Became Aware that Holdings Was a Delaware LLC

As found by the Court, by May 13, 2014, Campbell was aware that Holdings had been formed as a Delaware LLC, because that fact was recited in the first version of the agreements being negotiated. Op.17. In May, 2014, Campbell and Kay, through counsel, began negotiating the definitive Transaction Documents: an operating agreement for Holdings, the Amended LLC Agreement, which was to supersede the April 2014 Letter Agreement, and a Contribution Agreement. A54-150. The Amended LLC Agreement specifically recited that the company it pertained to, "Eagle Force Holdings, LLC, a Delaware limited liability company," was formed "under the Delaware Limited Liability Company Act by the filing of a Certificate of Formation with the Secretary of State of the State of Delaware on March 17, 2014," and that the execution of the LLC Agreement would amend the Original LLC Agreement (defined as the Certificate of Formation and the April 2014 Letter Agreement). A99, Intro,¶, Background ¶1-2. Thus, Campbell was

aware no later than May 2014, that by his execution of the April 2014 Letter Agreement (part of the Original LLC Agreement), in addition to becoming a 50% Member, he had become Chairman of the Board and President of a Delaware LLC with specifically assigned management responsibilities. A50,¶3. He also became aware that upon his execution of the Amended LLC Agreement, he would confirm his having become a member and manager of a Delaware LLC through the Original LLC Agreement. A101-102,§3.1; A147.Sch.A; A109,§4.1.1; A149.Sch.C. Additionally, both Transaction Documents included a forum selection clause consenting to personal jurisdiction in the Delaware Courts. A697,§8.9(b); A752-753,§12.2. Neither Campbell nor his lawyers ever commented on, or objected to, the forum selection until after this litigation was filed.

D. All Material Issues in the Transaction Documents Were Resolved As Of the August 14 Meeting Between Campbell and Kay

Throughout the period from mid-May through late August 2014, the language of certain portions of the Transaction Documents was negotiated through counsel. A1365,¶¶12-13. The parties themselves met without counsel numerous times and resolved issues, which was then shared with counsel in order to revise the documents as necessary. A1364,¶¶6-8; A1366,¶21. For the most part, counsel alternated in revising the documents. A1365,¶¶14-16; A1366,¶¶19-20, 22-23.

Each subsequent version of the documents was sent electronically to the other side with a redline version to highlight changes. *Id*.

Throughout this time, Kay (through Investments and Holdings) continued to fund the business, which continued to have no revenue and no paying customers. A1104-05; A1911.TrT-Variganti.732/15-18; A1900.TrT-Cresswell.686/8-687/10. By the end of July 2014, Kay and Investments had advanced at least $751,213 to Associates through Holdings. A1104-05.

Kay was frustrated that negotiations were taking so long and felt that Campbell was stalling to delay formal conclusion of the deal, but all the while Campbell continued to require more and more money to keep the business afloat. A1627.TrT-Offit.82/20-84/23. Starting around August 1, Kay stopped voluntarily funding Associates. A1104-05. The financial pressure on Campbell began to build since Associates had no revenue except for Kay's continued capital investment. A1911.TrT-Variganti.732/15-18; A1900.TrT-Cresswell.686/8-687/10. Campbell had to borrow $50,000 from his wife in order to make the August 7 payroll. A1420 (Incoming Wire of $50,000 from Cheryl Campbell); A1359-60.Campbell.Depo.638/5-16, 639/14-640/8. Campbell had not paid Associate's rent for July or August, and September's rent was not far off. A1667-68.TrT-Powers.244/14-245/15. This financial pressure resulted in an August 14, 2014 meeting between Campbell and Kay. A1366,¶21; A1104-05. At that meeting, the

parties reached resolution on the outstanding issues that effected the terms of the Transaction Documents (as well as some operational matters unrelated to the agreements), which were contemporaneously set forth in a handwritten memo, referred to as the "13-Points Memo." A151-53.

Two items on the 13-Points Memo related to an employee Stock Appreciation Rights ("SARs") Plan. *Id.*; A1653.TrT-Offit.185/15-186/20. This was an important business question relating to the subsidiaries (the SARs Plans were to be only at the subsidiary level), that was referred to in the Transaction Documents, but was recognized as being dealt with in a separate agreement, because no ownership in the business was being offered through the SARs Plan. A1653.TrT-Offit.185/15-186/20.

Campbell's counsel, Don Rogers, revised the Transaction Documents in an attempt to reflect the resolution outlined in the 13-Points Memo and circulated those revisions on August 19. A154-373. Among Rogers' revisions, he inserted a note in the Contribution Agreement addressed to Kay's counsel, Ted Offit, indicating that Rogers wanted to discuss with Offit the representation that Campbell would obtain releases from certain named individuals pertaining to their potential rights in "revenue sharing plans" (SARs). A272-73,§4.3(d). Rogers also added language to §5.7 of the Amended LLC Agreement that earmarked up to 3% of the equity in the subsidiaries to fund bonus payments to key employees under

the (separate) anticipated SARs Plan. A739; A1386.[2] Rogers did not indicate that there were any other issues covered in the 13-Points Memo or otherwise, that required further revisions or negotiations prior to the parties executing the Transaction Documents.

E. On August 25 Rogers Indicated that All of the "Big Issues" Had Been Resolved and That the Documents Were Ready to be "Finalized"

The parties and counsel discussed further refinements needed to the August 19 versions of the Transaction Documents circulated by Rogers, including in a series of e-mails beginning on August 19 through August 25 (A374-78, A381-84), an August 19 conference call with parties and counsel (A154 "Here are the revised drafts with redlines for the call."; A374, "We are all talking at 5 pm."), and at least one face-to-face meeting between Campbell and Kay during these couple of days. A376 ("Rick and I will review the documents face to face tomorrow"). Those discussions culminated in an August 25 e-mail from Rogers to Offit, Kay, and Campbell indicating that all of the "big issues" had been resolved, A382, and that he (Rogers) expected that they would be "able to finalize the document in the next few days" and that he would await Offit's next version. *Id.* Rogers' e-mail specifically clarifies that the concern about the SARs Plan that gave rise to the comment requesting discussions was that he wanted to discuss the separate

[2] A1379-1387 is a spreadsheet prepared by counsel that was admitted at trial which tracks by section all changes made in each revision of the Transactions Documents.

documentation of the SARs Plan so that he understood what was going to be offered to the employees.[3] *Id.* He characterized this request for discussions as "No major issue." *Id.*

Critically, although there was considerable communication between the parties concerning the Transaction Documents between August 19 and August 25, at no time did Rogers or Campbell indicate that there was anything more to negotiate concerning Campbell's contribution obligations or the SARs Plan as it related to the Transaction Documents.

F. The Parties Execute the Transaction Documents

Based upon the parties' belief that the Transaction Documents were nearly ready for execution, Campbell was able to persuade Kay to wire Associates $90,000 on August 21, 2014. A1421 (Incoming Wire of $90,000 from Kay), A1104. The very next day, Campbell used Kay's funds to repay his wife the $50,000 he had borrowed to make the August 7 payroll and used the rest to fund the next payroll which was then due. A1426 (Check No.159). Receipt of these funds was only a partial relief to Campbell's financial woes. The rent for July and August was still overdue, with September's rent due in a few days, and Campbell

[3] The documentation of the Eagle Force SARs Plan was to be contained in separate documents relating to the appropriate subsidiary, which the parties anticipated would be created following execution of the Transaction Documents. A1653.TrT-Offit.186/7-20; A2047.TrT-Rogers.900/10-14.

had no money to pay it. *Id*. *See also* A1420, showing insufficient funds for August 7, 2014 payroll).

Rogers' e-mail indicated that he expected to finalize the documents upon receipt of Offit's next revision, and Offit circulated the next version of the Transaction Documents two-days later. A385. Consistent with the e-mails and discussions between the parties and their counsel that had occurred following receipt of Rogers' August 19 version of the Transaction Documents, Offit removed Rogers' comment stating his desire to "talk with you [Offit] about documentation of the SAR plan" since that was a post-execution item dealing with separate, not yet created, SARs Plan documentation. A385-660. The day after receiving Offit's version of the Transaction Documents, the parties met, without counsel, just as they had done when they executed the two prior letter agreements, and executed the Transaction Documents. Op.34; A663-798. After Kay and Campbell signed the agreements, Campbell walked around his desk and embraced Kay and Kay's CFO, Katie Powers. Op.35.

G. Rogers' September 9 Version of the Transaction Documents Demonstrates that there Were No Material Issues Remaining When the Parties Executed the Transaction Documents

Neither counsel was aware in advance that the parties were going to meet August 28 to execute the documents. A1632.TrT-Offit.102/11-17; A2036-37.TrT-Rogers.854/21-855/15, 859/7-24. Kay's CFO, Powers, who had witnessed the

signatures, informed Offit of the signing shortly after it occurred and provided him with a copy of the executed agreements the next morning. A661-798. Campbell did not inform Rogers that he had signed the agreements until sometime after September 9, nearly two-weeks after it had occurred. A2036-37.TrT-Rogers.854/21-855/15, 859/7-24; A2069.TrT.Campbell.988/18-21. Without knowing that the documents had been executed, Rogers generated a few minor comments to what had become the executed documents and sent them to Offit on September 9. A799-1075, A1379-87. On the Contribution Agreement, Rogers proposed no changes at all, but simply made two comments. A994-1075, A1379-83. Regarding the Amended LLC Agreement, Rogers proposed only three minor changes. A952,§4.1.8 (regarding the subsidiaries' Boards of Directors), A952,§4.1.8(b) (Campbell's minimum salary), and A957-58,§5.2 (modification of language describing mandatory tax distributions to the members). *See also* A1384-87. The trial court did not cite any of these post-execution proposed changes as material.

Rogers testified that none of the minor revisions or comments he proposed in the September 9 version of Transaction Documents were material. A2047.TrT-Rogers.898/10-15 (LLC Agreement); 898/17-900/4 (Contribution Agreement). Nor in his opinion, would the absence in the executed version of any change he proposed preclude formation of a binding contract. *Id*. Rogers testified that his

comments to §4.3(d) of the Contribution Agreement regarding the SARs Plan were simply a reminder of things he wanted to discuss with Offit regarding a separate SARs Plan document, yet to be created, and were not requested changes to the Contribution Agreement. A2047.TrT.Rogers.900/5-19.

Following Rogers' September 9 version of the documents, there was a conference call between the parties and counsel during which there were discussions about how to proceed now that the Transaction Documents had been executed as well as the possibility that there could be minor amendments. A1633.TrT-Offit.105/11-106/19. Offit testified that during that call, neither Campbell nor Rogers claimed that the signatures on the Transaction Documents were ineffective for any reason or that there were material terms concerning which negotiations had not been completed. A1634.TrT-Offit.111/20-112/3; A1379-87. The Court noted that Offit's recollection of that call was uncontradicted. Op.38.

H. Closing and Campbell's Contractual Requirement to Prepare the Campbell Disclosure Schedules

The executed Contribution Agreement provided that "… for avoidance of doubt, [Closing occurs] not before each of the actions and deliveries described in Sections 3.2 through 3.5 have been taken or made…." A666,§3.1. One of the documents required to be provided at Closing was the executed Amended LLC Agreement. A667,§3.4. Although Closing had perhaps begun with the execution of the LLC Agreement, Campbell had not delivered all of the documents he was

required to deliver so Closing was not completed. A667,§3.3(a). Section 3.6 of the Contribution Agreement provided that following Closing the parties were to cooperate in taking actions "necessary to complete the transactions contemplated by this Agreement." A668,§3.6. In the months that followed execution of the agreements, Kay and Offit each sent e-mails to Campbell and Rogers, A1081-95, discussing steps necessary for Campbell to complete his closing obligations, primarily his creation of the Campbell Disclosure Schedules. *See* A1083 (from Kay dated 10/8/14: "We have signed our agreements and are awaiting the exhibits."); A1087 (from Kay dated 10/28/14: "I understand we have signed the deal but need the exhibits."); A1096 (from Offit dated 11/19/14 reminding Campbell: "You are contractually obligated to: (i) deliver the schedules to the Contribution Agreement, (ii) reopen your bankruptcy case, (iii) assign ownership of all your IP to EagleForce Holdings, LLC, and (iv) assign ownership of EagleForce Associates, Inc. and EagleForce Health, LLC to EagleForce Holdings, LLC."). Rogers agreed that it was Campbell's obligation to provide the Campbell Disclosure Schedules and that Campbell never gave Rogers any of the information necessary for Rogers to prepare any of those schedules. A2049-50.TrT-Rogers.908/18-910/1.

Campbell continued to delay performing the obligations required from him in order to permit Closing to conclude, while continuing to demand that Kay

contribute funds as he was obligated to do by the Transaction Documents. By early February 2015, Campbell had obtained at least $1,983,491.00 for Associates from Kay. A1104-05. On February 9, 2015, Associates received its first customer revenue ever, in the form of $700,000 from a company called PSKW, LLC. A1917-18.TrT-Variganti.756/14-757/13; A1900.TrT-Cresswell.687/1-10. It was only at that point, with another source of funding in place, that Campbell decided to literally lock Kay out of the Eagle Force office. A1100-03; A.1670.TrTPowers.255/16-256/22. During this same period, Campbell stopped using the existing Associates' bank account and set up a new account at a different bank so that Kay and Powers no longer had access. A1916.TrT-Variganti.751/6-752/4. He also froze Kay's and Powers' access to the company's payroll service. A1670.TrT-Powers.255/16-256/22. On February 18, 2015, nine days after receiving the PSKW payment, Campbell wrote an e-mail to Kay stating that "we have reached an impass [*sic*]," and unilaterally re-characterized Plaintiffs' capital contributions of nearly $2 million "as a loan." A1100-01. Kay immediately responded to the e-mail stating "the EF investment money has never been a loan," and that "I am a 50 percent owner and will continue to operate in that role." *Id*. But at that point Campbell had decided he no longer needed Kay. This lawsuit followed.

ARGUMENT

I. THE CHANCERY COURT ERRED IN HOLDING THAT THE CONTRIBUTION AGREEMENT WAS UNENFORCEABLE

A. Question Presented

Did the Chancery Court err in finding that the Contribution Agreement was not objectively intended as the final expression of the parties' agreement concerning the consideration Campbell was to contribute, despite the fact that parties both executed the agreement and thereafter Campbell demanded and obtained from Kay the consideration Kay was obligated by the Contribution Agreement to contribute while withholding his promised consideration?

Plaintiffs argued, and thereby preserved, their argument in their Pre-Trial Brief (1/13/17,TransID6007425), pp.28-46, Opening Post-Trial Brief (3/29/17,TransID60402427), pp.4-38, and Post-Trial Answering Brief, (4/7/17,TransID60447560), pp.27-36.

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Merits of Argument

The Chancery Court incorrectly found that the Contribution Agreement was not the parties' final expression of their agreement as to Campbell's contribution

obligations. Op.48. The court's analysis focused on three specific sections of the Contribution Agreement and their corresponding Campbell Disclosure Schedules: §4.3(a) and schedule 4.3(a) (relating to ownership of the Targeted Companies' securities); §4.12(c) and schedule 4.12(c) (relating to disclosure of the Targeted Companies' existing obligations to employee benefit plans other than the SARs Plan); and §3.5 and schedule 3.5 (relating to assignment by Campbell of agreements, and specifically IP licensing agreement, to Holdings). Op.48. The court concluded that these sections and schedules were either incomplete or inconsistent with "reality" and thus demonstrated that the parties were still negotiating whether Campbell could and would contribute 100% of the Targeted Companies securities to Holdings. Op.57.

In fact, the language of these sections themselves were neither incomplete nor inconsistent with reality. Contrary to the court's suggestion otherwise, these sections, which describe Campbell's contribution, were never the subject of negotiation by the parties. The text of those sections had not been changed or even commented upon throughout months of attorney aided negotiation and the exchange of numerous revisions of the Contribution Agreement. A1379-82. Although Campbell had not completed the corresponding schedules as of the time the Contribution Agreement was executed, he was not obligated to do so until Closing (which has not yet occurred). A666-67,§§3.2(a), 3.3(a). The terms of the

Contribution Agreement describe exactly what was to be listed in the schedules. The fact that Campbell had not provided the schedules prior to execution did not indicate that the parties were still negotiating or that Campbell's contribution obligation was not precisely spelled out in the Contribution Agreement.

The court failed to follow settled rules of contract interpretation in finding that the Contribution Agreement was not enforceable because the parties were still negotiating whether Campbell could and would contribute 100% of the Targeted Companies to Holdings. The court ignored the plain and clear language of the executed Contribution Agreement which set forth Campbell's contribution obligations in terms that are not susceptible of more than one meaning and were never disputed or even negotiated by the parties. Instead, the court improperly considered extrinsic evidence under the guise of attempting to divine the intent of the parties and thereby create ambiguity where none existed.

1. The Chancery Court Ignored the Objective Manifestation of Assent Expressed by the Parties in the Contribution Agreement

On its face, the Contribution Agreement states Campbell's contribution obligations clearly and without ambiguity. "Delaware adheres to the 'objective' theory of contracts, *i.e.* a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn*, 991 A.2d 1159 (footnote omitted). When interpreting a contract, the court "will give priority to the parties' intentions as reflected in the four-corners of the agreement," construing

the agreement as a whole and giving effect to all its provisions. *GMG Capital, LLC v. Athenian Venture P'rs I, LP*, 36 A.3d 776, 779 (Del. 2012). "Ambiguity does not exist where the court can determine the meaning of a contract 'without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends.'" *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co*., 616 A.2d 1192, 1196 (Del. 1992)(citation omitted).

Most significantly, when the language of contract is plain and unambiguous, "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997).

The case law cited in the Opinion indicates that the court ignored the objective manifestation of assent to be bound expressed within the four-corners of the executed Transaction Documents. The court mischaracterized detailed, lengthy agreements as being in the nature of mere letters of intent that are "provisional and tentative" with "open and uncertain" terms. Op.45-47. The primary case cited in the Opinion, *Leeds v. First Allied Connecticut Corp*., 521 A.2d 1095 (Del. Ch. 1986), involved a one-page letter of intent to purchase a nursing home and real estate for $3.5 million that was written by both parties without the benefit of counsel. The court in *Leeds* identified a "myriad topics and terms" that would be expected in a transaction of that sort that were omitted from the single-page letter

of intent. *Id*. at 1103. The court concluded that absent some reasonable basis to establish that the parties intended to be bound without negotiating the missing terms, "a reasonable negotiator in a transaction of this size and type would not be justified in concluding that such was the unexpressed intention." *Id*. at 1103.

The stark contrast between *Leeds* and this case is self-evident. Rather than being a single-page letter created without benefit of counsel, the Transaction Documents consist of more than 100-pages and were the product of months of negotiations with each party being represented by counsel, culminating in both parties executing the documents.[4] Here, the letter of intent stage had been supplanted by full-blown, negotiated documents that express a clear intent to be bound. There is nothing in the executed Transaction Documents themselves which

[4] The other cases cited in the Opinion at 46, while inapposite factually (brief letter of intent or oral agreement), generally support Plaintiffs' position that the Transaction Documents are sufficiently complete to be enforceable as the final expression of the parties' agreement. *See Gillenardo v. Connor Broad. Del. Co*., 1999 Del. Super. LEXIS 530, *18 (Oct. 27, 1999) (denying motion for summary judgment in breach of contract claim based on brief letter of intent because letter contained precise material terms, despite letter stating it was "contingent upon reaching a final written agreement"); *Gallagher v. E.I. DuPont De Nemours & Co.*, 2010 Del. Super. LEXIS 194, *10-11 (Apr. 30, 2010) (dismissing breach of contract claim based on vague oral promise to pay "significant compensation"); *CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2015 Del. Ch. LEXIS 115, *51-52 (Del. Ch. Apr. 21, 2015) (denying motion to dismiss breach of contract claim based on oral agreement to lease a theatre notwithstanding amount of rent and term of lease being "left open or uncertain").

contemplated further negotiations on the issues and terms covered in those documents.

2. The Chancery Court Improperly Used Extrinsic Evidence to Create Ambiguity Without First Establishing That There Was Ambiguity in the Contribution Agreement

The Supreme Court has cautioned trial courts against considering background facts in the guise of placing a "contractual provision in its historical setting," but in so doing, violating the principle that extrinsic evidence may not be used to create ambiguity where the words of the contract are not ambiguous to a reasonable third-party. *Eagle Indus*., 702 A.2d at fn.7. That is exactly what the Chancery Court did in this case.

The court failed to articulate two or more different meanings that would be reasonable based upon the term or provision in question in order to deem the contract ambiguous. *Rhone-Poulenc*, 616 A.2d at 1196. Instead, the court attempted to divine the intent of the parties by finding disputed facts and applying those disputed facts to create ambiguity in contract terms that are otherwise clear and unambiguous on their face. This is precisely what this Court in *Eagle Industries* stated was improper under contract interpretation principles.

3. In the Context of the Contribution Agreement as a Whole, the Incomplete Schedules Do Not Create Ambiguity or Evidence Incomplete Negotiations

The court concluded that because schedules 3.5, 4.3(a), and 4.12(c) were incomplete, "the parties were still negotiating" them and therefore had not agreed on Campbell's contribution obligation. Op.57. However, the words of the Contribution Agreement describe what was to appear on those schedules in sufficient detail so as to make the completion of the schedules themselves a mere ministerial act which Campbell was obligated to perform as part of the Closing. *Brown v. Stornawaye Capital LLC/New Falls Corp*., 2012 Del. LEXIS 195, *2 (Del. Apr. 10, 2012) (a ministerial act is one that does not involve the exercise of discretion). Within the four-corners of the Contribution Agreement, even with the incomplete schedules, there is no ambiguity as to Campbell's contribution obligations.

a. The Contribution Agreement, §2.2(a), Unambiguously States that Campbell Was Obligated to Contribute All Ownership of the Targeted Companies

As the court acknowledged, "Section 2.2(a) of the Contribution Agreement states that part of Campbell's contribution shall be 'all right, title and interest in the Targeted Companies Securities, such that, after such contribution, the Company shall hold all of the Targeted Companies Securities." Op.48 (citing A665,§2.2(a) (emphasis added)). Similarly, §3.2.1 of the Amended LLC Agreement (in the

section titled: "Initial Capital Contributions…") provides that "Campbell has contributed to [Holdings] (i) all of the outstanding shares of capital stock of Eagle Force Associates, Inc., a Virginia corporation, and all of the outstanding membership interests in EagleForce Health, LLC…." A722,§3.2.1 (emphasis added). These terms are not susceptible to inconsistent expectations.

Additionally, Campbell made a representation and warranty that as of Closing (a future event at the time the Contribution Agreement was executed), he would be the "true and lawful owner" of "all of the issued and outstanding Targeted Companies Securities" and that he would have "full capacity, power and authority to surrender the Targeted Companies Securities for exchange pursuant to the terms of this Agreement, free and clear of any Encumbrances…." A671,§4.3(e) ("Ownership of the Targeted Companies Securities"). Thus, there is no ambiguity within the four-corners of the documents as to the securities Campbell was obligated to contribute. The court erred in characterizing this obligation as a missing term.

b. Campbell's Failure to Complete Schedule 4.3(a) Does Not Create Ambiguity Concerning His Contribution Obligation or Evidence that Negotiations Were Incomplete

The court concluded that Campbell's failure to complete Schedule 4.3(a) of the Contribution Agreement ("Capitalization Schedule") prior to execution of the Contribution Agreement created an ambiguity about Campbell's contribution

obligation and indicated that negotiations were incomplete, thus justifying the court's review of extrinsic evidence. Op.49. However, the incomplete Capitalization Schedule did not constitute an ambiguity or missing term that still had to be negotiated. The purpose of Schedule 4.3(a) was for Campbell to provide detail concerning the classes and quantity of outstanding stock and membership interests in the Targeted Companies, not to identify the owners of the Targeted Companies. However, even without that detail, the word "all" used in the Contribution Agreement §2.2(a) and the Amended LLC Agreement at §3.2.1 to describe the securities of the Targeted Companies that Campbell was required to contribute, continued to mean "all."

Delaware courts consider whether contract terms are ambiguous by determining whether their "common meaning" would create inconsistent expectations when considered by a reasonable person in the position of either party to the contract. *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014). "We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage. We will not read a contract to render a provision or term meaningless or illusory." *Osborn*, 991 A.2d at 1159 (internal quotations and citations omitted).

Campbell's obligation to contribute <u>all</u> ownership of the Targeted Companies is consistent throughout the Transaction Documents. The fact that

Campbell had not yet specified the precise form of what "all" consisted of does not make the common meaning of the term "all" susceptible to inconsistent expectations by reasonable people. Nor is there need for the court to supply an essential contract term here because the Transaction Documents provide unequivocally that Campbell was obligated to contribute all ownership of the Targeted Companies. *See Osborn*, 991 A.2d at 1159 (citing *Ramone v. Lang*, 2006 Del. Ch. LEXIS 71, at *36 (Del. Ch. Apr. 3, 2006)). There is no other reasonable expectation based upon the words agreed upon by the parties in the Transaction Documents.

Contrast this with *J.W. Childs Equity Partners LP v. Paragon Steakhouse Restaurants*, 1998 Del. Ch. LEXIS 221 (Del. Ch. Nov. 6, 1998) relied upon by the court. Op.47. There the court dismissed a specific performance claim because the letter of intent sued upon stated that it was not a binding contract and the terms contained in the letter lacked necessary information to determine what the purchaser was purchasing and what the cost of the purchase would be. There is no such imprecision in the present case. Campbell was required to contribute "all" ownership of the Targeted Companies.

c. Campbell's Failure to Complete Schedule 3.5 Does Not Create Ambiguity as to Which IP Licenses He Was Contributing or Evidence that Negotiations Were Incomplete

Next, the court concluded that the parties did not reach agreement on which third-party IP licenses Campbell was obligated to contribute to Holdings, citing the incomplete Schedule 3.5 of the Contribution Agreement. The court found that this was also a material term that the parties were still negotiating. Op.52. However, as the Opinion acknowledged, the Contribution Agreement left no doubt as to what was to be included on Schedule 3.5. "Sections 4.20(d) and 4.20(f) make clear that Schedule 3.5 includes all of Campbell's intellectual property license agreements." Op.52 (emphasis added). Section 3.5 itself includes a footnote confirming that "Schedule 3.5 should include any of Campbell's licenses to Intellectual Property." A668,§3.5.fn.2.

Campbell's obligation to contribute all of his IP license agreements is not susceptible to inconsistent expectations by the parties. The court erred in holding otherwise.[5]

[5] Plaintiffs dispute that these IP licenses from third-parties were a material issue and point out that they are not even listed in Article II of the Contribution Agreement which sets forth Campbell's "Contribution of Assets." This was a "boilerplate" provision that was never disputed or actively negotiated as evidenced by the fact that it remained unchanged from the first version (May) through the last (August). *Compare* A57-58 with A668, *see also* A1379. Campbell testified that his IP was completely original. A1922.TrT-Campbell.773/9-774/5;

In addition, the court's discussion of Schedule 3.5 is based on the unfounded assumption that if any IP license used by Associates was not assigned to Holdings, the entire Contribution Agreement is incomplete or enforceable. Op.56-57. However, the Schedule on its face applies to IP licenses that Associates (an existing operating company) was already using. Since Associates itself was being contributed to Holdings, and was intended to continue as an operating company, a failure to assign IP licenses to Holdings simply meant that Holdings would own those licenses indirectly rather than directly. Thus, an incomplete Schedule 3.5 was not actually material to the overall agreement of the parties.

d. Campbell's Failure to Complete Schedule 4.12(c) Does Not Create Ambiguity and Has Nothing to Do With His Contribution Obligation

The third of the three incomplete schedules identified by the court as evidencing that the parties were still negotiating material terms is Schedule 4.12(c) (Effect of Transaction). Op.48, 57. As an initial matter, §4.12 of the Contribution Agreement relates to "Employee Benefits," not ownership of the companies. For the court to cite (Op.51) any part of this section and the related schedules as evidence that Campbell may not have owned 100% of the Targeted Companies is misleading and inappropriate. Section 4.12(a) is a representation that there are no

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A1356.Campbell.Depo.93/1-7. There is no evidence that there were any licenses to be assigned which renders this assignment obligation moot.

employee benefit plans or similar obligations *other than the SARs Plan*. Section 4.12(c) is a related representation that the Contribution Agreement will not trigger payments to anyone other than those payments listed in Schedule 4.12(c). The court commented, without actually finding, that certain employees "appear" to have rights that might be triggered by the Contribution Agreement, citing several letter employment agreements.[6] Op.51-52. There was no evidence offered at trial that the Contribution Agreement would actually trigger payments under any letter employment agreements, and thus no basis to speculate that Schedule 4.12(c) was supposed to contain anything. There is no basis for the court's assertion that

[6] The court's consideration of these "employment agreements" is improper because they were not introduced at trial. Rather, they were introduced by Campbell at a post-trial hearing on May 5, 2017, concerning the second of the three separate motions to hold Campbell in contempt of court for repeatedly violating the court's Preliminary Relief Order ("PRO") by taking extra money for himself from Associates. That hearing not only occurred long after Campbell had rested his defense at trial, but also after all post-trial briefing was concluded. Plaintiffs had no opportunity or reason to respond to the evidence or argue its meaning to the trial court in the context of the enforceability of the Transaction Documents. The fact that Campbell did not introduce these letter agreements at trial shows that Campbell did not consider them material to the question of whether the Contribution Agreement was final or enforceable.

At the Contempt Hearing, the letters were introduced by Campbell to attempt to justify commissions he had paid to himself in violation of the PRO. Campbell claimed that although he did not have a contract giving him rights to a commission, others did (May 5, 2017 Hr'g Tr. 60-65), so he was also entitled to commissions even though the PRO precluded them without notice and consent. Reliance on these documents as evidence with regard to issues that were not before the court at this Contempt hearing is improper.

Campbell's failure to complete Schedule 4.12(c) prior to execution of the Contribution Agreement indicated that the parties were "still negotiating" this schedule or that the schedule involved a material term. Op.57. Even if there was a payment to an employee that would be triggered by the Contribution Agreement, the parties had anticipated that contingency and provided a source of funds to pay any such payment in §5.7 of the Amended LLC Agreement. The court erred in holding that this provision and schedule indicate that the parties were still negotiating a material term.

4. The Chancery Court Has Improperly Added a Condition Precedent to the Transaction Documents That the Parties and Their Counsel Did Not Include

The court's conclusion that there is no evidence that the parties agreed to "complete the transaction documents" without the three schedules is contrary to the executed documents. Op.57. The court attempted to add a material condition precedent to the Contribution Agreement that the parties did not include: making all rights and obligations of the transaction contingent upon Campbell providing the Campbell Disclosure Schedules *prior to* execution of the Contribution Agreement.[7] Not only is this contingency not found in the document itself, but it is illogical. The Campbell Disclosure Schedules are purely for Campbell's benefit

[7] Although the court's reference to providing "the schedules" is general, none of the other schedules (other than 3.5, 4.3(a), and 4.12(c)) were found to be material.

because they "modify (by setting forth exceptions to) the representations and warranties contained [in the Contribution Agreement]." A700. Implying a condition precedent that the Contribution Agreement would not be enforceable unless Campbell provided his disclosure schedules prior to execution would allow Campbell to appear to enter into the agreement by executing it, obtain Kay's consideration, but then prevent Kay from enforcing the agreement because Campbell chose not to provide exclusions to his representations and warranties. If the parties intended to condition enforceability on a condition precedent, they would have included it in the agreement or not executed the agreement until the Campbell Disclosure Schedules were completed.

5. The Contribution Agreement Unambiguously Required Campbell to Create the Schedules that Were Incomplete

In yet another example of the court ignoring the unambiguous terms of the executed agreements and attempting to use extrinsic evidence to create ambiguity, the Opinion states that "…the evidence indicates that Kay and Campbell had not agreed on who would create [the Schedules]." Op.57. The Opinion indicated awareness of, but then ignored the unambiguous terms of the Contribution Agreement which assigns to Campbell, creation of the "Campbell Disclosure Schedules," which are defined to include "any numbered schedule" referenced in the agreement, unless otherwise specified. A700. Each of the schedules discussed

in the Opinion is a "Campbell Disclosure Schedule." The court's conclusion that the parties had not agreed on who would create the schedules is contrary to the clear language of the agreement and no evidence is directly cited in support of this conclusion. Op.57.

Given the clear language of the agreement, resort to extrinsic evidence to determine if the agreement is complete and therefore enforceable is improper. However, even if extrinsic evidence is considered, it does not support the court's conclusion that there was no agreement as to whose obligation it was to create the Campbell Disclosure Schedules. After the documents were executed on August 28, 2014, Kay sent several e-mails to Campbell in October 2014 demanding that Campbell produce the schedules so that Closing could be completed. Op.39, fn.180 (A1083-84); fn.185 (A1085-86). At times following execution of the agreements, Campbell and his counsel asked Kay to assist Campbell by preparing the Campbell Disclosure Schedules, but there is no evidence that Kay agreed to amend the Contribution Agreement to relieve Campbell of his contractual obligation. In this same period, Campbell acknowledged that he was bound by the executed documents to provide certain documents by the Closing, writing to Kay: "attached [are documents] as required from me [by the executed Transaction Documents] relating to closing." Op.37, fn.173 (A1076-80).

6. The Chancery Court Erred in Concluding that Extrinsic Evidence Showed that the Parties Failed to Agree that Campbell Was Required to Contribute 100% of the Targeted Companies

Underlying the Court's focus on the schedules is the more significant legal determination that the parties "did not come to agreement on terms" detailing the scope of Campbell's obligation to contribute ownership of the Targeted Companies to Holdings. Op.51. This conclusion is not based on the language of the Contribution Agreement. Rather it is based upon the court's interpretation of the intent of the parties based upon extrinsic evidence. The Opinion attempts to justify use of extrinsic evidence by claiming that the language of the Contribution Agreement requiring Campbell to contribute 100% of the Ownership of the Targeted Companies is inconsistent with the intent of the parties. Op.49, 51. This is precisely what this Court in the *Eagle Industries* case wrote was improper under settled contract interpretation principles. 702 A.2d at fn.7 (quoted above).

Referencing a SARs Plan, the Court claimed that "both Kay and Campbell recognized that Campbell likely does not own 100% of the equity of [the Targeted Companies] and Campbell had not obtained releases related to any employees' potential ownership of equity in the EagleForce businesses." Op.51. The Court concluded that the Contribution Agreement somehow does not reflect a meeting of the minds because the agreement does not reflect "terms that addressed this reality [*i.e.* the existence of the SARs Plan]." Op.51. Even if it was proper for the court

to attempt to interpret the intent of the parties where there is no ambiguity in the contract, the Chancery Court's legal conclusions are incorrect.

a. The Chancery Court Improperly Ignored Campbell's Judicial Admission that He Owned 100% of the Targeted Companies

The court concluded that Campbell believed that he "likely does not own 100% of the equity" in those companies. Op.51. This is a demonstrably improper and incorrect conclusion. In his Answer to Plaintiffs' First Amended Complaint, Campbell specifically and without any qualification admitted that he owned 100% of the Targeted Companies. A1320,¶5. This admission was made in a pleading, and as such, is considered a judicial admission. *Merritt v. UPS*, 956 A.2d 1196, 1202-02 (Del. 2007). Judicial admissions are "traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court." *Id*. "Th[e] judicial admission is not merely another layer of evidence, upon which the [trial] court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case." *Id*. at fn.18. Campbell's ownership of the Targeted Companies was not an issue that was tried because it was conclusively admitted.

The court's conclusion that the Contribution Agreement was contrary to the parties' intent or to "reality" because the parties believed it was likely that Campbell did not own 100% of the Targeted Companies is thus contrary to

Campbell's judicial admission and cannot form a proper basis for the court's conclusion that the contribution requirement in the document was still being negotiated or did not take into account "reality."

b. The Opinion Confuses SARs Equity With Ownership Rights or Control

SARs have nothing to do with ownership or control. Yet the Opinion conflated the two, incorrectly stating in an extended discussion that SARs obligations related to ownership and control of the company. Op.53-56. As is evident from Campbell's judicial admission there was no question in either party's mind that Campbell was the sole owner of the Targeted Companies. At most, there was a question about whether an employee might be entitled to a payment based upon his participation in the SARs Plan.

Transaction counsel for both parties testified at trial that SARs do not represent ownership in the company. A1653.TrT-Offit.185/12-24; A2032.TrT-Rogers.840/24-841/18. This understanding is also consistent with the common usage of the term "Stock Appreciation Rights." Equity in this context meant profit-sharing not ownership.

The Opinion itself attempted to create a question about whether SARs pertained to ownership by referring to bracketed place-holder language found on the incomplete Schedule 4.3(a) which reads: "[Also describe SARS Plan]." The court implied that because the SARs Plan was to be described in a schedule which

was to list "Ownership of Targeted Companies Securities" (A670,§4.3(a)), that the SARs Plan created questions as to ownership of the Targeted Companies. No evidence is cited to support this interpretation and, in fact, the testimony at trial disproves the court's implication. Campbell's counsel testified that this specific reference (the bracketed language) did not mean that SARs rights were ownership. He explained that although SARs are sometimes referred to as

> an equity interest, it's not actually you're owing a piece of the company, you have an economic right to some portion of the company. And that is really a deferred compensation program established for employees, directors, *et cetera*, but it's not actual stock ownership.

A2032.TrT-Rogers.841/6-11.

The SARs Plan is also expressly referenced in §4.12(a) as an "Employee Benefits" plan. Nothing in the letters purportedly awarding SARs Plan rights to four individual employees suggests that they had rights to ownership. Yet the court cited these employment agreement letters as giving those employees "some form of equity in the EagleForce businesses" implying ownership. Op.49. The language in the letters provides for "equity participation" in the "Stock Appreciation Rights (SAR's) plan" of Associates (for employee Morgan (A2224-

25)) and Health (for employee Cresswell (A22230-31)). This language clearly refers to payments based on stock appreciation, not ownership. [8]

The court appears to have concluded that the Cresswell and Morgan employment letters entitled each of them to immediate vesting of any SARs they had been granted "upon a sale or change of control of the EagleForce businesses." Op.14. As noted above in footnote 6, no evidence was admitted at trial to support this finding. Campbell did not introduce any evidence that any employee had payments that were triggered by the Contribution Agreement, nor did Campbell make this argument at trial. Since the rights of Cresswell and Morgan pursuant to these letters was not before the court (either at the Campbell Contempt Hearing or in the trial based on Plaintiffs' Amended Complaint) the court's conclusion in this regard appears to be non-binding *dicta*.[9]

c. The Chancery Court Incorrectly Concluded that Campbell Did Not Agree to Obtain Releases from SARs Participants

The Opinion stated that Campbell never agreed to representations in the Contribution Agreement that he would obtain releases from SARs participants

[8] The court's reference to SARs participation opportunities addressed to Said Salah and Haney Salah in this context is misplaced. Those opportunities expired by their terms for failure to meet vesting requirements and thus are irrelevant. A2226-29; Op.6.

[9] In the event that this case is remanded, or in any other litigation or forum, Plaintiffs reserve their rights to dispute the existence, terms, or vesting of SARs participation by Cresswell or Morgan.

Op.50. Since the plain words of the document executed by Campbell included Campbell's representation that he *would* obtain these releases (A671,§4.3(d)), it appears the court's statement that he did not agree to do so must be based on the implication that he did so unknowingly and imprudently. Indeed, the Opinion seems to suggest as much, citing a comment to Offit contained in Rogers' August 19, 2014 revision of the Contribution Agreement indicating that Rogers wanted to discuss the SARs plan further with Offit. Op.50. The court noted that Rogers' comment "was removed in Offit's August 27 version, which Kay and Campbell signed on August 28 while Rogers was out of town and unreachable." Op.50. The unfounded implication is that Offit removed Rogers' comment requesting a discussion about the SARs Plan without talking to Rogers first, and that Rogers believed that the parties still needed to discuss the SARs issue before executing the agreement.

In fact, the record indicates that the parties and their counsel did have discussions concerning Rogers' comments contained in his August 19 version prior to Offit's issuance of the August 27 version, which the court failed to take into account. During that period, the parties and counsel discussed further refinements needed to the August 19 versions, culminating in an e-mail from Rogers to Offit, Kay, and Campbell dated August 25, which indicated that as of then (August 25) all of the "big issues" had been resolved. Rogers wrote that he expected that they

would be "able to finalize the document in the next few days" and that he would await Offit's next version. A382. Significantly, Rogers' e-mail specifically mentions the SARs Plan, stating: "Also, I would like to have the opportunity to talk to you about the documentation of the SAR plan and the offer letters. No major issue. Just want to make certain that there is total clarity on what is being offered to employees." *Id.* Thus, the record does not support the implications created by the Opinion. Rogers' comment meant that he wanted to discuss the documentation of the SARs Plan which was to be a separate document, and not because there was a dispute about whether Campbell would undertake to obtain SARs releases from his employees.

Further, the mere fact that Campbell did not have the releases in hand when he executed the documents does not establish or justify a finding that Campbell would not agree to the representation or that it was premature to sign the agreement. Op.50. Again, the Opinion ignored the plain and clear language of the agreements which specify the time when those representations and warranties began to run. Art. IV of the Contribution Agreement begins with the statement that "Campbell hereby represents and warrants to the Company that the following representations and warranties are, as of the Execution Date, *and will be, as of the Closing Date*, true and correct." A668 (emphasis added). Use of the language "will be, as of the Closing Date, true and correct" connotes that Campbell had until

the Closing Date to obtain the releases from Cresswell and the others. So the fact that he had not obtained them as of the Execution Date is in no way inconsistent with his acceptance of the obligation to obtain the releases. Like Campbell's other closing obligations and deliveries, the Contribution Agreement anticipates that obtaining the releases would occur after the Contribution Agreement was signed and enforceable.[10]

Even if Campbell did fail to obtain the releases on a timely basis, the Contribution Agreement provides a remedy for that in the form of a breach of warranty claim. The logic of the court's holding would effectively permit any party who breaches a warranty to simply claim that the breach of warranty is really his expression that he never agreed to the warranty in the first place, or worse, that the breach of warranty negates the enforceability of the agreement. There are remedies for breaches of warranties, but the possibility of such a breach does not affect the enforceability of the underlying contract.

[10] The Contribution Agreement included a "Further Assurances" provision that expressly recognized that actions might still need to be done after execution or even after the Closing. A697-98,§8.13.

d. The Chancery Court Incorrectly "Presumed" that Campbell's Failure to Obtain SARs Releases Would Impact Joint Control of the Enterprise

Building on the incorrect premise that the Contribution Agreement is not enforceable because Campbell had concerns about his ability to fulfill his obligation to obtain releases from the SARs participants, the Opinion compounded its error: it "presumes" that Campbell's failure to contribute 100% of ownership in the Targeted Companies would be taken out of his share of Holdings and would thus "directly affect the number of units or the size of the capital account Holdings would provide to Campbell." Op.53. From this, the court concluded that Campbell's equal control of Holdings might be at risk if he was unable to obtain the releases, and since equal control was a material issue for Campbell, there is no enforceable agreement. Op.56. This argument is both improper and irrelevant.

The basis for the court making that presumption is highly debatable, since the SARs Plan is expressly carved out of the applicable representations and warranties. *See* A670-71,§4.3(b) and (d) (relating to capitalization). Moreover, the court's discussion of the possible remedy for this breach is highly speculative. The parties agreed in §5.7 of the Amended LLC Agreement to each set aside 10% of the equity in each subsidiary to be available to cover SARs obligations and additional investors. A739,§5.7. As a result, any concession that was required

would be at the subsidiary level, and would not impact Campbell's ownership or control of Holdings. A1644-45.TrT-Offit.152/23-153/10.

The court's holding would allow a party to a contract to claim that if his breach of that contract could cause him to lose something he considers material, the court should bail him out by holding that he could not have intended to accept that risk and therefore, there was no enforceable contract. This is clearly not a recognized cannon of contract law and it was improper for the court to make such a presumption.

e. The Chancery Court Mistakenly Concluded that the Agreement the Parties Reached Preserving Equal Control of Subsidiaries Was Not Incorporated Into the Executed Agreements

The Opinion correctly states that Kay and Campbell dealt with all remaining SARs concerns in their 13-Points Memo reflecting their agreements on August 14, 2014 (A151-53), but then incorrectly asserts that the agreed-upon solution "was never incorporated into the [executed] Transaction Documents." Op.49-50. The supposed omission of the agreed-upon solution to the SARs issue became another lynch-pin for the court's conclusion that Campbell never agreed to Transaction Documents (despite his signatures thereon) because they failed to address the SARs "reality." The solution stated in the 13-Points Memo was added to the August 19, 2014 version of the Amended LLC Agreement (A339-340,§5.7) by

Campbell's own counsel and was unchanged in the executed agreement.[11] Thus, contrary to the court's statement, the executed Transaction Documents do reflect an agreement on this point, the wording of which was created by Campbell's own counsel.

7. The Possibility That at Some Future Time Campbell Might be in Breach of a Representation Concerning the Effect of This Transaction on Certain Payments Does Not Provide a Basis for Concluding That the Parties Did Not Enter Into an Enforceable Agreement

The Opinion incorrectly concluded that the mere possibility that Campbell might be in breach of representations and warranties at some point after executing the Contribution Agreement is evidence that the parties did not come to agreement on terms concerning Campbell's obligation to obtain waivers from SARs participants. Op.51 (citing Contribution Agreement §§4.12(a) and (c)).

A mere possibility that a representation or warranty may be breached does not mean as a matter of law that there is no enforceable contract. The breach was by no means certain. There could be no actual breach until Closing, which has not yet been completed. If Campbell obtained the waivers he undertook to obtain in

[11] Compare "13-Points Memo" (A152, ¶3, 5) with executed Amended LLC Agreement. A739.§5.7. The resolution was that the parties agreed to each set aside 10% of the equity in subsidiaries for additional investors, three percent of which was to be reserved for funding a SARs Plan, thus preserving their equal control of the subsidiaries and providing a source of funding for SARs Plan obligations. *See also* A1645.TrT-Offit.154/11-23.

§4.3(d) at or prior to completion of Closing, there would be no breach. If he listed SARs agreements for which no waiver was obtained on Schedule 4.12(c), they would be excluded from his representation and warranty. If he failed to list the SARs agreements on the schedule, and failed to obtain the waivers, he might be in breach of this provision if the acceleration language in the SARs letters was found to have been triggered and was binding, neither of which is by any means certain. All of this is pure conjecture.

This term is not material to the overall deal because, as already discussed above, the SARs obligation was limited to subsidiary companies, involved only the payment of a bonus, and did not involve control or ownership. Funds for paying this liability, if it existed, were already set aside in §5.7 of the Amended LLC Agreement. A739. Finally, even in the event that this §4.12(c) was determined to be unenforceable (because it violated some employee's vested rights), the agreement provides that "to the maximum extent permitted by law, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement or any other such instrument." A696,§8.7; A756,§13.4.

8. Permitting a Trial Court to Attempt to Interpret the Intent of the Parties in Order to Render an Unambiguous Comprehensive Contract Unenforceable Will Create Substantial Insecurity for All Potential Parties to Delaware Contracts

If permitted to stand, the court's decision would create substantial insecurity amongst parties to Delaware contracts because it would stand for the proposition

that an executed unambiguous comprehensive contract is rendered unenforceable if both parties were aware of a possibility that one of the parties may not be able to perform each and every obligation he undertook thereby.

Parties must be free to enter into contracts where there is a risk that one party or the other may not be able to perform some obligation. In this case, the court held that because the parties knew that there was a possibility that Campbell might not be able to obtain releases from each SARs participant, there was no enforceable contract because "they did not come to agreement on terms that addressed this reality." Op. 51. A party to a future contract, relying on the Opinion below, could likewise invalidate the agreement if he fails to perform an obligation where both parties recognized that failure was possible. This would permit a breaching party to turn his breach, or even the possibility of his breach, into a sword to eliminate his obligation rather than pay the consequences for his breach. This case should not be allowed to create such an unfair and unpredictable business environment in Delaware.

II. THE CHANCERY COURT ERRED IN FINDING THAT THE AMENDED LLC AGREEMENT WAS NOT A SEPARATE AND FINAL EXPRESSION OF THE PARTIES' AGREEMENT CONCERNING MANAGEMENT AND OPERATION OF EAGLE FORCE HOLDINGS, LLC

A. Question Presented

Did the Chancery Court err when it concluded that the Amended LLC Agreement was unenforceable simply based on the Court's conclusion that the Contribution Agreement is unenforceable, even though the Court found no material missing terms or ambiguities in the LLC Agreement itself, and even though the Amended LLC Agreement was replacing an existing LLC Agreement?

Plaintiffs argued, and thereby preserved, their argument in their Pre-Trial Brief (1/13/17,TransID6007425) pp.28-46, Opening Post-Trial Brief (3/29/17,TransID60402427) pp.4-38, and Post-Trial Answering Brief (4/7/17,TransID60447560) pp.27-36.

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)

C. Merits of Argument

1. The Chancery Court Erred in Holding That the Amended LLC Agreement Does Not Stand As Independently Enforceable

The Opinion incorrectly tied the enforceability of the Amended LLC Agreement to the enforceability of the Contribution Agreement. While the two agreements are clearly paired, they are not "two halves of the same business transaction" (Op.59), but rather are two independent agreements that are part of the same business deal. The Contribution Agreement addresses the terms of Campbell's contribution of his existing business (Associates) and IP to Holdings. The Amended LLC Agreement addresses the traditional components of an LLC operating agreement – formation, membership, management, books and records, capital accounts, transfer of membership interests, dissolution, and so on. Just as the court did not cite any material omission or missing term in the Amended LLC Agreement, it also did not cite any provision in it that requires the Contribution Agreement in order for the Amended LLC Agreement to become operative.

The court relied upon *E.I. DuPont de Nemours & Co. v. Shell Oil Co*., 498 A.2d 1108, 1115 (Del. 1985), in support of its conclusion. Such reliance is misplaced. In that case, this Court held that two agreements were to be interpreted as one because specific obligations in one agreement were expressly contingent upon performance of the other agreement. *Id*. at 1115. "The two agreements work in tandem with respect to ordering, delivery and payment." *Id*.

Here, the Amended LLC Agreement amends and restates the Original LLC Agreement, which pre-dated the Contribution Agreement by many months and thus obviously existed independently before the Contribution Agreement was ever signed. The Amended LLC Agreement delineates the rights and obligations of the members of the LLC, A719 (*See* (a)-(d) in fourth "whereas" clause), none of which are contingent upon or created by the Contribution Agreement. The Amended LLC Agreement would be functional even if the Targeted Companies were not contributed to Holdings, as many LLC operating agreements are executed before the business becomes operational.[12] After all, Holdings already had an operating agreement (the April 2014 Letter Agreement) which the parties acknowledged was a binding agreement which governed the business of Holdings until the Amended and Restated LLC Agreement was executed.

The Opinion cited the fact that there are references in each document to the other agreement, citing A722,§3.2.1, Op.58, but unlike in the *Shell* case, those references do not represent intertwining obligations, but are merely acknowledgements of the expected effects of the other agreement. *See* A722,§3.2.1 (acknowledgement in Amended LLC Agreement that the Contribution Agreement was how Campbell was expected to contribute the Targeted Companies

[12] Conversely, the Contribution Agreement is enforceable even if there is no LLC Agreement, as long as Holdings existed, which it did.

to Holdings); A664-665,§2.1 (acknowledgement in the Contribution Agreement that the Amended LLC Agreement was expected to be signed at Closing). These cross-references are mere recitals that do not create any rights, obligations, or contingencies.

The court's mischaracterization of the cross-references between the two agreements is best shown in their respective integration clauses. In particular, §13.10 of the Amended LLC Agreement, A757 ("Complete Agreement") does not include the Contribution Agreement in its definition of the "complete agreement." This further establishes that the Amended LLC Agreement was not intended to be contingent upon the enforceability of the Contribution Agreement. In contrast, the integration clause of the Contribution Agreement incorporates "other Transaction Documents" (which includes the anticipated Amended LLC Agreement) as part its definition of the "entire agreement", but this simply serves the practical function of preventing the subsequent signing of the Amended LLC Agreement from inadvertently superseding the Contribution Agreement, which might otherwise negate Campbell's ongoing obligations for warranties and representations.[13]

[13] The court completely overlooked the "Entire Agreement" provision. The two provisions of the Contribution Agreement it did cite, Op.58,fn.243, do not support the court's conclusion. Recital C and §2.3 of the Contribution Agreement (A664-665) merely allude to the fact that Campbell will receive securities in Holdings in exchange for contributing the Targeted Companies.

These are critical and determinative differences between these documents and those considered in the *Shell* case where the obligations in one agreement were contingent upon performance of the other agreement. 498 A.2d at 1115.

In sum, there is no basis not to enforce Campbell's irrevocable "Consent to Jurisdiction … of the state and Federal Courts sitting in the State of Delaware" found in §12.2 of the Amended LLC Agreement.

2. The Chancery Court Erroneously Relied Upon Trivial Non-Substantive "Facts" to Support Its Conclusion That the Amended LLC Agreement Does Not Stand As Independently Enforceable

In the absence of any substantive terms that create inter-dependent obligations between the two agreements, the court instead resorted to trivial "facts" and notations in an attempt to support the court's conclusion that the Amended LLC Agreement is not independently enforceable. First, the Opinion stated that "many of the blank schedules to the Contribution Agreement are actually attached to the LLC Agreement" (referring specifically to Schedules 4.3(a) and 4.12(c)). Op.59. This observation simply addresses an unfortunate previously undetected error in the collation of pages for trial exhibits JX78 (the executed Contribution Agreement) (A663-717) and JX79 (the executed Amended LLC Agreement) (A718-798), and obviously does not reflect the actual content of the agreements themselves. This an after-the-fact collation error is easily recognized in two ways.

First, the numbering of the blank schedules attached to the JX79 (the executed Amended LLC Agreement) (A773-798) obviously were intended to be attached to the Contribution Agreement because their numbers and titles precisely correspond to sections of the Contribution Agreement in the customary way (the titles and subject matter are the same and the schedules are referenced in the text of the corresponding section). These schedules do not relate in any way to sections with corresponding numbers in the Amended LLC Agreement. In fact, for the schedules numbered 4.6 and higher, there are no corresponding sections in the Amended LLC Agreement at all. *See* A524-604 (the August 26, 2014 draft Contribution Agreement, correctly containing all numbered schedules) and A606-660 (the August 25, 2014 draft Amended LLC Agreement, correctly containing none of the numbered schedules).

Second, each numbered schedule also bears a document control number (found at the bottom left of every page of the two agreements) which matches the document control number of the Contribution Agreement, not the Amended LLC Agreement. The same control number ("DC\3196800.6") appears in every draft of the Contribution Agreement beginning with the first version, A54-97, and a different control number ("DC\3195590.9") appears in every draft of the Amended LLC Agreement beginning with the first version. A98-150. All of the numbered schedules bear the Contribution Agreement document control number, not the

Amended LLC Agreement number. A773-798, Sch.4.3(a)-4.28. The Amended LLC Agreement only includes schedules that use letters ("A" through "C"). The numbered Schedules were correctly attached to the Contribution Agreement that was sent to the parties just before they were signed, but evidently at some point, some of the schedules were inadvertently placed behind the Amended LLC Agreement. *Compare* A498-523 and A524-604 (the August 26, 2014 drafts), with A663-717 and A718-798 (the same documents but after the signatures were added). This collation error was not raised at trial and was therefore not addressed. The court's reliance on this collation error to demonstrate that the Amended LLC Agreement and the Contribution Agreement are so interrelated as to be considered a single document is obviously misplaced.

In the same way, the court improperly made much of the fact that the cover page of Contribution Agreement included a version designation ("OK DRAFT 8-26-14") whereas the executed Amended LLC Agreement did not. Op.58. The court claimed that the absence of a version designation on the cover page, and the fact that the Amended LLC Agreement was an exhibit to the Contribution Agreement, meant that the Amended LLC Agreement was not intended as a separate agreement. Op.58-59. The two agreements were literally separate documents with separate document control numbers, just as they were substantively and functionally separate documents. The obvious reason the

Amended LLC Agreement was identified as an exhibit to the Contribution Agreement is that the Contribution Agreement was expected to be signed at an earlier point in time, prior to Closing, and the Amended LLC Agreement was expected to be signed at Closing. Exhibit B to the Contribution Agreement was identified as "the form" of the Amended LLC Agreement, which the parties agreed "[a]t Closing" Campbell would "execute and deliver." A665,§2.1. As it happened, the parties executed both documents the same day, but that was not how the documentation was structured and its intended structure does not require that the Contribution Agreement must be executed in order to validate the Amended LLC Agreement.

In sum, the Amended LLC Agreement stands independently enforceable and is not contingent upon the enforceability of the Contribution Agreement. As such, the Chancery Court erred in concluding otherwise.

III. THE CHANCERY COURT ERRED IN FINDING THAT CAMPBELL DID NOT CONSENT TO PERSONAL JURISDICTION IN DELAWARE

A. Question Presented

Did the Chancery Court err when it concluded that it did not have personal jurisdiction over Campbell because his actual and statutorily implied consent to jurisdiction was unenforceable, given that (1) Campbell's actual consent was set forth in the Amended LLC Agreement which is a separate enforceable agreement and (2) alternatively, even if the Amended LLC Agreement is not enforceable, Campbell's signature on the Amended LLC Agreement unmistakably endorsed his statutorily implied consent to jurisdiction in Delaware based on being a member and manager of a Delaware LLC, which he became pursuant to the April 2014 Letter Agreement?

Plaintiffs argued, and thereby preserved, their argument in Plaintiffs' Pre-Trial Brief (1/13/17,TransID60074254) p.55 and Post-Trial Answering Brief (4/7/17, TransID60447560) pp.44-49.

B. Scope of Review

A determination of whether personal jurisdiction may be exercised is a question of law and is reviewable *de novo*. *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004).

C. Merits of the Argument

1. The Chancery Court Erred When it Found Campbell's Actual Consent to Personal Jurisdiction in Delaware Unenforceable

If this Court reverses the Chancery Court's finding that the Transaction Documents are not enforceable, it follows that Campbell has consented to personal jurisdiction of the Delaware Courts. A697,§8.9(b); A752,§12.2. However, even if this Court does not reverse the determination that the Contribution Agreement is not enforceable, the executed Amended LLC Agreement stands as an independent agreement and is enforceable because it meets all the requirements for a valid and enforceable contract and it contains Campbell's affirmative consent to jurisdiction in Delaware.

2. The Chancery Court Erred in Holding That Campbell Has Not Consented to Personal Jurisdiction in Delaware Pursuant to 6 Del. Code §18-109(a)

Campbell consented to personal jurisdiction in Delaware even if the Amended LLC Agreement is found to be unenforceable because he became a member and manager of Holdings by signing the binding April 2014 Letter Agreement, which was signed after Holdings had been formed in Delaware. While the court found Campbell was not aware of the Delaware situs when the April agreement was signed, it also found that he became aware that Holdings was a Delaware entity "at least by May 13, 2014." Op.17. It is undisputed that after learning that Holdings was a Delaware LLC, Campbell did not to object to its situs

or to his status as a member and manager of a Delaware LLC. Campbell took no action to withdraw from his member and manager status, thereby confirming his acceptance of that status.

On April 4, 2014, the parties entered into a letter agreement (A50-53) that both parties agree was binding. A1357.Campbell.Depo.255/16-257/7. Pursuant to that agreement, Campbell agreed to became a member, President, and Chairman of the three member Board of Directors of a new LLC, referred to in the April 2014 Letter Agreement as "Eagle Force Holding" or "Holdco" (A50-52,¶¶3, 6, 11) that would be formed to serve as a parent entity for Associates and Health. A50-51,¶¶3-4. In the letter agreement, Campbell agreed that he would have primary management responsibility over all information technology, product development, research and development, customer service, and maintenance for Holdings. A50,¶3. Additional management functions which Campbell accepted are set forth in paragraphs 4 and 5. Campbell and Kay further agreed that until a full operating agreement for the LLC was executed, the April 2014 Letter Agreement "shall govern their conduct of business and the transactions and matters set out herein." A53,¶18.

A month after signing the April 2014 Letter Agreement, Campbell received the first version of the Amended LLC Agreement from Kay's counsel. Op.16; A98-150. That first version of the Amended LLC Agreement and every

subsequent version exchanged between the parties and counsel, including the version executed by Campbell, identified Holdings as "a Delaware limited liability company" that was formed "under the Delaware Limited Liability Company Act by the filing of a Certificate of formation with the Secretary of State of Delaware on March 17, 2014." A99. Throughout three months of intense negotiations and multiple drafts of the agreement, there is no evidence that Campbell ever questioned that provision or took issue with fact that Holdings was formed in Delaware. Campbell never objected to his appointment as a member and manager of a Delaware LLC and he never took any steps to renounce his member and management status. Campbell's August 28 signature on the Amended LLC Agreement is definitive evidence that he consented to being a member and manager of a Delaware LLC. Even if the Amended LLC Agreement is itself unenforceable, Campbell's course of conduct culminating in his signature on that document serves as an unmistakable endorsement of his member and manager status in the Delaware LLC.

The court pointed out that the April 2014 Letter Agreement is silent as to the place where the Holdings would be formed. Op.60. The court then considered extrinsic evidence in the form of the earlier, non-binding November 2013 Letter of Intent which stated a (non-binding) intention to form the entity in Virginia. Yet the court ignored the extrinsic evidence that Campbell never objected to Holdings

being a Delaware LLC even after he became aware of that fact by May 13, 2014. The court rejected the evidence of Campbell's knowledge and its demonstration of his intent simply on the basis of finding the later Transaction Documents are unenforceable. Op.60-61. The non-binding November 2013 Letter of Intent was also by definition unenforceable, and yet the court was willing to consider it and found it to be persuasive evidence that Campbell did not intend to be associated with Holdings if it was a Delaware entity. If the court can glean intent from an earlier unenforceable agreement, there is no reason to justify ignoring a later, more detailed agreement which Campbell signed knowing that the LLC it governed was formed in Delaware and that he had become a member and manager in it.

3. The Chancery Court Failed to Correctly Apply 6 Del. Code §18-109(a)

Delaware imposes personal jurisdiction over anyone who has been appointed as a manager (or through "material participation in management" becomes the functional equivalent of a manager) of a Delaware LLC. 6 Del. Code §18-109(a). The Delaware statute which describes "Management of limited liability company" provides:

> Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members…

6 Del. Code §18-402.

The April 2014 Letter Agreement, which functions as a LLC agreement until superseded (A53¶18), provides that management of Holdings is vested in a board of directors and specifically in Campbell and Kay (in their capacities as board members and/or as officers). *Fla. R&D Fund Investors, LLC v. Fla. BOCA/Deerfield R&D Investors, LLC*, 2013 Del Ch. LEXIS 216, *23 (Del. Ch. Aug. 30, 2013) (LLC agreement which provides for a board of directors has vested management, as that term is defined in §18-109(a)(i), in the directors). Alternatively, in the absence of a designation of managers in the LLC agreement, the default provided by 6 Del. Code §18-402 is that management is vested in "members" in proportion to their ownership interest. *Id*. Campbell was a 50% owner/member of Holdings pursuant to the April 2014 Letter Agreement and is thus a 50% manager. A51,¶7. Either way, Campbell is deemed to have consented to personal jurisdiction for purposes of this litigation. 6 Del. Code §109(a).

The Opinion's discussion of "active participation in the management of a Delaware [LLC]" (Op.61) is only one part of the basis upon which an individual can give implied consent to personal jurisdiction in Delaware. Section 18-109(a) applies to either "a manager fixed under the operative LLC agreement or a 'person who participates materially in the management of the [LLC].'" *Hartsel v. Vanguard Group, Inc*., 2011 Del. Ch. LEXIS 89, *29 (Del. Ch. June 15, 2011. The statute's use of the disjunctive "or" makes clear that it applies to a person

appointed as a manager under the LLC agreement without regard to whether that person participates materially in management. The April 2014 Letter Agreement fixed Campbell as a manager and member of an LLC that was formed in Delaware and although he had numerous opportunities to object or correct that appointment, he never did so. The Opinion failed to apply this aspect of the statute to the present facts.

Pursuant to the April 2014 Letter Agreement, Campbell agreed to become a manager and member of Holdings, which he knew or came to know to be a Delaware LLC. By not objecting to the appointment for months after he learned of it, and further, by executing the Amended LLC Agreement with full knowledge of the Delaware situs of Holdings, Campbell endorsed his appointment as its manager and member, thereby consenting to personal jurisdiction in Delaware. Those facts are sufficient to establish personal jurisdiction even if the Amended LLC Agreement is not enforceable.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court reverse the decision of the Court of Chancery and find that Campbell is subject to personal jurisdiction in this case in Delaware and that each of the Transaction Documents is in all respects, a binding and enforceable agreement. Plaintiffs further request this Court to remand with directions that the Chancery Court make subsequent rulings and grant appropriate relief in accord with the reversal, including specific performance and re-imposition of the Preliminary Relief Order.

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