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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF APPELLEE STANLEY V. CAMPBELL

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Dated: December 13, 2017

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NATURE AND STAGE OF THE PROCEEDING

Plaintiffs-below/Plaintiffs Eagle Force Holdings, LLC and EF Investments, LLC filed the present action against defendant Stanley V. Campbell on March 17, 2015. Plaintiffs filed a First Amended Complaint on June 5, 2015. On June 19, 2015, Mr. Campbell filed a Motion to Dismiss the First Amended Complaint,

On July 9, 2015, the Court made oral rulings on Plaintiffs' Motion for Interim Relief, which rulings were entered in a written Order on July 23, 2015.

On December 16, 2016, the Court of Chancery denied Plaintiffs' Motion for Summary Judgment, finding that there was a material dispute of fact as to whether or not Campbell's signing of the Transaction Documents created binding agreements. *Eagle Force Holdings, LLC v. Campbell*, C.A. No. 10803-VCMR (Del. Ch. Dec. 12, 2016) (attached hereto as Exhibit A).

Trial was held February 6-10, 2017. After post-trial briefing and oral argument, the Court of Chancery issued its Memorandum Opinion in favor of Campbell and dismissing the action for lack of personal jurisdiction on September 1, 2017. *Eagle Force Associates, LLC v. Campbell*, 2017 WL 3833210 (Del. Ch. Sept. 1, 2017) ("Opinion" or "Op.").

Plaintiffs filed a Notice of Appeal on Sept. 28, 2017. This is the Answering Brief on Appeal of Defendant-below/Appellee Stanley V. Campbell.

RESPONSE TO SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly considered extrinsic evidence to determine whether a binding contract had been formed. After reviewing the surrounding circumstances, the trial court determined that the evidence showed that the parties never came to a final resolution about the nature and quality of the consideration Campbell was contributing as part of the transaction, thereby rendering the agreements materially incomplete and unenforceable.

2. Denied. The Transaction Documents were related to the same subject matter, cross-referenced one another and expressly identified the two documents as the entire agreement, and had no independent purpose. As such, the Court of Chancery properly read the two Transaction Documents as one. As there was no final meeting of the minds as to consideration, the Transaction Documents did not justify personal jurisdiction over Campbell.

3. Denied. Campbell signed a letter agreement in Virginia which expressly stated that Virginia law governs the relationship of the parties until the parties executed an operating agreement. That never occurred. As such, the creation of a Delaware LLC without the prior knowledge and consent of Campbell cannot subject him to personal jurisdiction without violating due process.

STATEMENT OF FACTS[1]

1. The Parties.

Richard Kay is a businessman and investor in the Washington, DC metropolitan area. (Op. at *1).

Defendant-below/Appellee Stanley Campbell owns EagleForce Associates, Inc. ("Associates") and EagleForce Health ("Health"). Associates is a start-up company that Campbell intended to use to market a pharmaceutical software system called PADRE. PADRE aggregates medical information about patients to assist in determining which medications to prescribe to those patients. It also monitors pharmaceutical sales for compliance with federal anti-kickback laws. (Op. at *2).

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[1] Since Plaintiffs have not challenged the factual determinations on appeal, citation will be simply to the Memorandum Opinion, which in turn cites to the evidence upon which the trial court relief. *See Holdeman v. Devine ,* 572 F.3d 1190, 1195 & n.2 (10th Cir. 2005) (when an appellant does not challenge the factual determinations of a trial court, the appellate court accepts those findings as articulated by the lower court). Elsewhere, where Campbell asserts facts not discussed by the trial court or where such evidence in included in Plaintiffs' Appendix, he will cite to the record.

Plaintiffs' Appendix is cited to herein as "A-___." Specific pages and lines of testimony referenced herein are cited to as "[Appendix Number] - [Transcript Page Number: Line(s)].

Plaintiff-below/Appellant Eagle Force Holdings, LLC ("Holdings") is a Delaware limited liability company created by Kay to serve as the holding company for the operating EagleForce businesses. (*Id.*)

Plaintiff-below/Appellant EF Investments, LLC is a vehicle created by Kay.

2. Campbell Offers the Salahs Equity Participation.

In January 2013, Campbell needed capital to market his PADRE technology through Associates. Campbell met Said Salah, who had experience with government contracting. Campbell hired him to work with Associates, and in May 2013, Salah and Campbell negotiated an employment agreement for Salah. Under Salah's employment agreement, he is "eligible to earn equity participation by demonstrating a sustained ability to attain specific sales, operations, and management goals." The only goal mentioned in the employment agreement is to "generate prorated new business sales of at least $6.0 million over the next two years." The agreement states that Salah is eligible to earn 2.5% of the equity of Associates. Salah also loaned money to Associates and deferred collection of his salary to provide Associates with cash needed for its operations. (*Id.* at *2; A-226-29).

In the same month, Salah's brother, Hany Salah, signed an employment agreement to become the Chief Medical Officer of Associates. His employment agreement contains the same eligibility requirements for equity participation, but

Hany is entitled to 1.5% of the Associates equity upon satisfying those requirements. (*Id.* at *2; A-226-29).

Campbell signed the Salehs' employment agreements, and Said testified that Kay also saw his agreement and was aware of his claim to equity in Associates. (*Id.* at *3; A-2128 - 1092:17-1094:13).

3. Kay and the November 2013 Letter Agreement.

In or around November 2013, Campbell approached Kay, whom he knew from previous attempts to do business together, about investing in Associates for the purpose of marketing the PADRE software. Kay was interested, and on November 27, 2013, Campbell and Kay signed a letter agreement in Virginia dated November 15, 2013. (*Id*. at *3; A-45-46, 1922 - 773:9 - 774:3).

The November letter agreement contemplated that Campbell and Kay "will form a new LLC entity and/or a series of industry specific LLC's [sic] verticals in Virginia." Campbell's contribution would be the PADRE source code and patents, and Kay's contribution would be at least $1.8 million in cash with the goal of raising $7.8 million in total financing to be contributed by either Kay or a mutually agreed upon investor. It further provided that both Campbell and Kay would own 50% of the new LLC and that they would "never dilute [their combined stake to] less than 50.1% together in order to maintain control. They [would] also agree that their vote will

always be uniformly tied as a single vote thus protecting [Campbell] from complete loss of control." Further, Campbell would be entitled to a priority return of $1.8 million before Kay receives a distribution. (A-45-46).

Under the November letter agreement, both Campbell and Kay would be involved in managing the new LLC and would "confer on all business and marketing related activities as well as all capital needs." (*Id.*).

After executing the November 2013 agreement, Kay and Campbell continued to negotiate. On March 17, 2014, Kay filed a certificate of formation for Holdings in Delaware, without Campbell's prior knowledge or consent. (A-47-49, 1728 - 359:9-360:14, 2135-36 - 1122:10-1123:2, 2143 - 1152:16-21, 2161 - 1223:1-11).

4. The April 2014 Letter Agreement.

On April 4, 2014, Kay and Campbell signed another letter agreement. (A-50-53). That agreement "amend[ed] the letter agreement that [Campbell and Kay] executed on November 27, 2013 that was dated as of November 15, 2013." The April 2014 Letter Agreement maintained that Campbell and Kay would share management responsibilities and confer "on all business and marketing related activities as well as capital needs". (Op. at *3-4; A-50-53).

The April 2014 Letter Agreement also provided that Campbell would remain entitled to a priority return of his capital, 50% ownership of "Holdco," and Kay's

agreement that Kay and Campbell together would not be diluted below 51% of "Holdco," a slightly higher threshold than the 50.1% in the November letter agreement. (*Id.*).

Both the November 2013 and the April 2014 Letter Agreements contemplated that Campbell and Kay would sign an operating agreement for the new LLC "Holdco." (Op. at *4; A-45-53).

Recognizing that Kay and Campbell had not yet agreed to a "Holdco" operating agreement, the April 2014 Letter Agreement provided that Kay would advance $500,000 to Eagle Force Holdings upon the execution of the letter agreement, which would be evidenced by a demand promissory note issued to Kay by Associates and Health, jointly and severally. Kay received such a note on July 7. The April letter agreement also contemplated that once Kay and Campbell agree to the "Holdco" LLC agreement, Kay would contribute an additional $1,800,000 to equal the value of Campbell's intellectual property, $2,300,000. Also at that time, Campbell would receive a $500,000 distribution from "Holdco" for his personal use. (*Id.*).

5. The EagleForce Businesses Hire Gen. Morgan and Mr. Cresswell.

In April, 2014, Associates and Health hired Lt. General John W. Morgan III, a former NATO Commander, as a Senior Vice President. (A-2146, 1166:5-22). Morgan's employment agreement provides that he is "eligible for equity participation

in EagleForce Associates, Inc. Stock Appreciation Rights (SAR's) plan. [Morgan] will be eligible to earn equity participation as granted by the Board of Directors in the amount of 300,000 SAR's (150,000 each) valued [sic] one dollar ($1) per SAR...." (Op. at *5; A-2224-25).

In May 2014, Health entered an employment agreement with Christopher Cresswell under which Cresswell became General Manager. Cresswell's employment agreement provides that he is

> eligible for equity participation in EagleForce [Health] Stock Appreciation Rights (SAR's) plan. [Cresswell] will be eligible to earn equity participation as granted by the Board of Directors in the amount of 5% non-voting interest in the company of which 2.5% will be authorized and not issued on execution of this agreement and the remaining 2.5% shall vest equally based on tenure on a prorated basis over the next 3 years. Any outstanding unauthorized SARs shall automatically vest for any change in control or termination without cause.

(A-2231-32).

Cresswell testified that he understood that his agreement provided him with a right to 5% of the equity of Health but Kay told him that the equity would be expressed as SARs "to avoid a tax liability." (A-1891-92, 651:15-654:2).

As such, Cresswell and Morgan were both entitled to immediate vesting of any SARs they had been granted upon a sale or change of control of the EagleForce businesses.

6. Kay Inserts Himself Into Associates' Business.

As Kay was conducting due diligence on the EagleForce business, he continued to provide funding to Associates. His increased involvement in certain aspects of the day-to-day operations of the company caused stress among the staff, who found themselves subjected to words and conduct of Kay at the offices that were abusive, demeaning, divisive, racist and sexist. (Op. at *5; A-1892-93, 655:1-657:23, 1908-09, 719:18-721:5, 1911, 729:10-20, 2054-55, 926:9-930:17, 931:11-932:16. 2127-28, 1088:11-1091:9, 2135-36, 1120:16-21, 2148. 1174:4-1181-10, 2150, 1181:14-1182:9).

Kay's behavior toward Campbell also contributed to a breakdown of their relationship. Kay would shout at Campbell and treat Campbell in a way that Campbell considered demeaning. Kay also sent Campbell a text message, presumably meant for others, which included a word Campbell deemed to be a mis-spelled racial slur. (Op. at *6; A-2061-64, 955:10-961:1, 2180, 1301:9-14).

In an April 30, 2014 email exchange, Campbell wrote to Kay, "I am no longer enjoying coming to work. I do not think this will work. Please tell me what I owe you and how we can move forward independently." Kay responded referring to the November and April letter agreements and stating, "[m]y position is we are signed partners ...." (Op. at *5).

Notwithstanding this, Campbell, now with his own counsel, began to negotiate the terms of the Transaction Documents with Kay (Op. at *6), hoping that a resolution of that would improve relationships.

On May 13, 2014, Latham & Watkins, representing Kay, presented to Campbell drafts of two documents: (i) a draft Contribution Agreement (the "Contribution Agreement"), and (ii) a draft Operating Agreement for Holdings (the "Operating Agreement"). The two documents are referred to herein collectively as the "Transaction Documents." The draft Operating Agreement included a forum selection clause consenting to personal jurisdiction in Delaware and an arbitration clause. The Latham & Watkins May 13, 2014 draft also included a first priority return of capital for any contributions made after the date of the LLC Agreement. (WL Op. at *6; A-57-150).

On June 30, 2014, Rogers sent revised drafts of the LLC Agreement and the Contribution Agreement to Offit. The drafts included several notes indicating that certain points needed to be discussed, such as the distribution waterfall and the structure of Campbell's contribution of intellectual property. It also added a protection against dilution for Campbell arising from any additional capital contributions until such contributions exceed $5.5 million. And the June 30 draft

added the requirement that for the Holdings board to act, Campbell and Kay both must vote in favor of the board action. (Op. at *6).

7. The July 7, 2014 Meeting.

On July 3, 2014, Offit sent Rogers an email confirming a meeting on July 7, 2014 at Rogers's office to further negotiate the Transaction Documents. Offit expressed his and Kay's concern that the negotiations were proceeding slowly, and Rogers responded that "[f]or the benefit of everyone, let's make Monday [July 7] the day we agree on all terms." (Op. at *6).

On July 7, 2014, Kay, Campbell, and their counsel met at Rogers's office to negotiate the unsettled terms of the Contribution Agreement and the LLC Agreement. The meeting went late into the night, and the parties resolved several outstanding issues. (Op. at 6-7).

At the end of the July 7 meeting, Kay and Campbell signed signature pages, which Rogers held in escrow and planned to deliver when Kay and Campbell came to a final agreement. The purpose of the signature pages was to avoid the need to reconvene to sign the Contribution Agreement and the LLC Agreement after all of the outstanding issues were resolved to both sides' satisfaction. (Op. at *7).

8. Kay and Campbell Continue to Negotiate.

On July 8, 2014, Offit sent Rogers a list of changes to the Contribution Agreement based on the July 7 discussion. An associate at Rogers's firm sent a redlined draft of the LLC Agreement to Offit and Kay on July 9, 2014 incorporating the negotiated terms from the July 7 meeting. (*Id*.).

On July 9, 2014, an email from Campbell's email account was sent to Morgan announcing that Associates and Health had taken on Kay as their "first Partner."[2] Morgan responded congratulating both Kay and Campbell and copying several employees. The same day, Campbell held a meeting at Associates's offices with all of the office staff to introduce them to Kay. (*Id*.).

Throughout July 2014, Kay and Campbell continued to negotiate, and on July 22, 2014, Kay sent an email to Campbell stating, "I am hearing that you may be trying to change the deal and we now may not be consistent understanding based on our agreemnt [sic]." Presumably, Kay was referring to the November and April letter agreements. Kay and Campbell then met without their lawyers and discussed open issues. (*Id.*).

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[2] Campbell denied that he had sent the email, and instead it was sent from his account without his permission. (Op. at *7 n.99; A-2057-58).

On August 5, 2014, Campbell, Kay, Rogers, and Offit met again to attempt to agree on outstanding issues. On or before August 14, 2014, Kay and Campbell met and discussed thirteen outstanding issues on which they came to agreement. Kay handwrote the thirteen points on a sheet of paper that he scanned and sent to Campbell. The list of thirteen points contemplated that any new equity capital would be raised by issuing up to 17% of the equity of the Holdings subsidiaries, not through issuing equity of Holdings. Holdings would own 80% of the subsidiaries' equity, and the remaining 3% would be used for a new employee SARS program – the details of which were still to be determined. The list stated that Campbell cannot lose his salary or be fired. Another one of the thirteen points provided that "[Salah] will be entitled to SAR only if [Campbell] wants to give non-voting equity. It is from his side. [Salah] not a CFO. [Kay] is not obligated at all for [Salah]." The other issues on the list were operational level issues such as "[Campbell] & [Kay] will talk daily on big issues," and "[Kay] & [Campbell] agree we will push Chris Cresswell to close first 3 deals ASAP." (Op. at *8; A-151-53).

On August 19, 2014, Campbell's attorney sent revised versions of the Transaction Documents. The August 19 versions that Rogers circulated back tracked on some of Campbell's concessions in the thirteen-point list. (*Id.*; A-154-373).

An important issue that remained open in the negotiations at the end of August was how to handle the equity rights of certain Associates employees, including Salah, Salah's brother Hany, Cresswell and Morgan (the "Third-Party Claimants"). Offit proposed that those employees with SARS or rights to equity be asked to relinquish their rights by signing a waiver and that they be told that "[a]s part of the reorganization, we will be developing new and better defined executive incentive benefits that will replace the commission program and/or stock appreciation rights (SARS) plan in which you presently participate." The evidence does not show that either Campbell or Kay approached the Third-Party Claimants to resolve this issue, and as of October 2014, both Kay and Campbell wanted the other to deal with the SARS issue. (Op. at *9; A-607, 1085-86).

In the July 22, 2014 draft of the Contribution Agreement, Offit included a specific reference to the SARS plan through adding Campbell's representation that "[e]xcept for the SARS Plan, there are no outstanding options, warrants, calls, profit sharing rights, bonus plan rights, rights of conversion or other rights, agreements, arrangements or commitments relating to Targeted Companies Securities ...." Offit also added in the July 22 draft representations that (1) Cresswell, Morgan, and five other EagleForce Associates employees had executed releases for any profit sharing plan, and (2) neither Salah, Cresswell, nor any member of Salah's family have any

legal or equitable ownership interest in Associates or Holdings. In Rogers's August 19 draft, he bolded and bracketed Offit's additions and noted "[CAMPBELL] CANNOT GUARANTEE THIS. WE NEED TO DISCUSS." Thus, at least as of August 19, Offit and Kay were both aware of the fact that EagleForce Associates had not received releases from the SARS holders. (Op. at *9; A-272-73).

On August 27, Offit sent another round of revisions to the LLC Agreement and the Contribution Agreement to Rogers, Kay and Campbell with a cover email stating "[p]lease confirm your acceptance of the terms of these agreements. Please commence preparation of schedules needed for closing." The date on the front of and in the first paragraph of the draft Contribution Agreement remained blank in the August 27 version. And Section 3.1 of the agreement stated, "the closing of the Transactions (the 'Closing') shall be held at the office of the Company, commencing at 10:00am local time on the date hereof (the 'Closing Date') or at such other time and place as the Parties may agree upon in writing." (Op. at *9; A-385-604).

The draft Contribution Agreement referenced schedules that supplemented the representations and warranties in the agreement and that listed the property Campbell was to contribute. And the draft stated in the recitals that "[t]he parties hereto desire to set forth certain representations, warranties, and covenants made by each to the others as an inducement to the consummation of such transactions, upon the terms

and subject to the conditions set forth herein." Schedule 2.2(b) listed the intellectual property that Campbell planned to contribute. But the other schedules remained incomplete. The August 27 version of the Contribution Agreement states, "Campbell shall assign to the Company, and the Company shall be obligated to assume, and shall assume, those agreements set forth on Schedule 3.5 attached hereto ...." Sections 4.20(d) and 4.20(f) make clear that Schedule 3.5 includes all of Campbell's intellectual property license agreements. But Schedule 3.5 is blank. The agreement also states, "Schedule 4.3(a) sets forth, as of the date hereof, (i) the number and class of authorized securities for each Targeted Company, (ii) the number and class of Targeted Companies Securities for each Targeted Company and (iii) the number and class of Targeted Companies Securities held of record by Campbell for each Targeted Company." But Schedule 4.3(a) is blank except for one line of bracketed text, which states, "[Also describe SARS Plan]." Section 4.12(c) of the August 27, 2014 Contribution Agreement states, "[e]xcept as set forth on Schedule 4.12(c), neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby, ... will ... accelerate the vesting, funding or time of payment of any compensation, equity award or other benefit ...." Schedule 4.12(c) is also blank. (Op. at *9; A-524-604).

Many of Campbell's representations, warranties, and covenants related to the EagleForce businesses reference schedules that also are blank. The draft Contribution Agreement refers to the "Campbell Disclosure Schedules." That phrase is defined as "the schedules prepared and delivered by Campbell for and to the Company and dated as of the Execution Date which modify (by setting forth exceptions to) the representations and warranties contained herein and set forth certain other information called for by this Agreement." But none of those schedules were ever completed. For example, Schedule 4.6 is supposed to list any contractual liabilities outside the ordinary course of business for Associates and Health; Schedule 4.9 is supposed to list all real property leases, subleases, or licenses to which Associates or Health is a party; and Schedule 4.15(a) is meant to set forth any pending legal proceedings involving Associates, Health, or their affiliates, including Campbell. All of those schedules are blank. (Op. at *10; A-524-604).

The version of the Contribution Agreement that Offit sent with his August 27 email stated "OK DRAFT 8–26–14" on the first page. The version of the LLC Agreement that he sent did not have that notation, but the LLC Agreement was an exhibit to the Contribution Agreement. Rogers was out of town when Offit sent the August 27 draft Transaction Documents, and Offit received his automated out-of-office email reply. (WL Op. at *10, A-524-604.).

9. The Events of August 28, 2014.

The August 28 meeting was a significant issue at trial. On that day Kay and Campbell once again met without their lawyers. Kay and Campbell both testified that Kay came to Associates's offices with his assistant, Ms. Powers, with the intention of having Campbell and Kay sign the Transaction Documents. Campbell was busy when they arrived but met with them briefly. Because Campbell had to finish a meeting with developers, Kay and Powers left to go to a restaurant five minutes away. While Kay and Powers were at the restaurant, Kay and Campbell sent several emails to each other. First, Cresswell sent a non-disclosure agreement to Kay and Bryan Ackerman, the general counsel for Kay's company, Sentrillon, with Campbell on copy. Campbell replied asking Cresswell not to "forward this information outside of the company until I have had a chance to review." Kay responded, "[w]hat are you talking about outside the company? We just talk [sic] minutes ago. I will handle my swim lane." About ten minutes later, Kay wrote "1) Bryan is inside not outside. 2) For the record I will handle all NDA contacts." In reference to earlier emails regarding the NDA, Campbell wrote to Kay, "[a]s you can see I am not on the mail routing and this is a bit troubling. Only you can make these folks know that we are equal partners." Kay replied, "[e]veryone knows we are equal .... Please clarify w[ith] Chris and Bryan that NDA are in buss lane [sic] and Rick will handle. And send me the

signed document if you want to go forward." Around the same time, Cresswell sent an email strategizing about how to "win" the Special Olympics as a client. Kay responded only to Campbell, stating "[s]orry can't do anything until the agreement documents you have are signed. Did you sign?" (Op. at *10).

At around 7:00 p.m., Kay and Powers returned to Associates' offices. Kay, Powers, and Campbell met for only a few minutes, and both Kay and Campbell signed the versions of the LLC Agreement and the Contribution Agreement that Offit had sent by email on August 27, 2014. Campbell testified that before the signing, Kay told him that Rogers and Offit "were done" with the agreements, that Kay had "rolled over" on Campbell's remaining issues, and that their lawyers had signed off on the Transaction Documents. Campbell called Rogers to confirm what Kay was saying, but could not get reach Rogers, who was on a trip. Campbell asked Kay to contact Offit, so that Offit could confirm to Campbell was Kay was saying. Campbell relied on Offit to tell the truth. Kay stepped outside Campbell's office, appearing to be calling Offit. Kay returned and said he could not get hold of Offit. (Op. at *10; A-2065-67 - 973:7-979:18).

At that point Kay asked Campbell to sign the Transaction Documents to acknowledge receipt of the latest drafts, just as he had done previously when multiple

drafts had been exchanged. In the previous ten days there had been approximately four different drafts circulating. (A-2066-67 - 976:17-20).

Kay and Campbell both testified that there was no discussion at that meeting between Campbell and Kay about any of the specific terms of the Transaction Documents. (A-1741 - 410:1-3, 2066 - 976:17-977:1).

The signature pages were on top of each pile. Campbell signed them without reading them. He felt secure in signing the documents because (i) the documents read "draft" on the front pages, (ii) he had a history of signing drafts presented by Kay to denote the current version as the negotiation process went along, and (iii) he was aware that the effective signature pages were held in escrow by Rogers. (A-2069 - 986:20-987:23, 2131 - 1104:6-1106:17).[3]

Kay denied Campbell's testimony of the facts and took the position that the Campbell invited Kay over to "sign and get this done," and testified that the purpose of the meeting was to sign the Transaction Documents and create binding agreements (notwithstanding that counsel was not present, counsel had not signed off on the latest draft, the meeting lasted only a few minutes and there was no discussion of the outstanding terms and issues other than Kay's saying he "rolled over" (which Kay

[3] Kay testified that he gave no thought at that meeting to the escrowed signature pages. (A-1743 - 418:21-419-28).

denied saying), Kay had no recollection of discussing the draft with his lawyer or Sentrillion's general counsel before going to see Campbell and did not review the drafts himself in any detail, and did not discuss the substance of the Transaction Documents at that meeting). (A-1737 - 396:7-17, 1740 - 406:19-407-14 , 1741-43, 409:23-410:19).

10. The Aftermath of the August 28 Signing.

On August 31, 2014, Kay and Campbell had breakfast with Said Salah and discussed his involvement in the EagleForce businesses going forward, but they did not resolve the SARS issue. And after the meeting, on September 2, Salah wrote in an email to Kay and Campbell, "I congratulate both of you on your commitments in forging this partnership, and thank you again for recognizing the unwavering commitments I have displayed towards the success of EagleForce." (Op. at *11).

On September 9, after Rogers returned from vacation, he sent revised drafts of the Contribution Agreement and the LLC Agreement to Offit. Rogers did not know that Kay and Campbell had signed the documents at that time, and Offit never told Rogers that the escrow agreement for the signature pages was no longer in effect because Kay and Campbell had signed the agreements. In his September 9 email, Rogers noted two outstanding issues related to the Contribution Agreement. First, the new SARS plan remained undefined, and Rogers reiterated that Campbell could not

represent (1) that certain Associates and Health employees had executed releases or (2) that neither Salah, Salah's family members, nor Cresswell had any legal or equitable interest in Associates or Health. (Op. at *11; A-799-1075).

Rogers further commented as follows:

> THERE IS STILL MUCH THAT NEEDS TO BE CLARIFIED HERE: (1) We are not confident that we have all of the SAR Plan offers; (2) Burden of the SARS should not be solely on [Campbell] because [Kay] authored it; (3) Chris Cresswell's offer was developed by [Kay]; (4) There was a discussion about the company taking responsibility for the SARS up to a certain level. We need to understand what percentage of SARS was originally granted to understand the ultimate impact on [Campbell].

(Op. at *11; A-809).

Second, Rogers stated that financial representations in the Contribution Agreement regarding the status of Associates and Health would be "quite difficult to complete" because Rogers had no financial information regarding the companies and believed that Kay had that information for the previous six months. (Op. at *11; A-799- 80).

In September 2014, Kay and Campbell continued to discuss the missing aspects to their agreement. On September 16, 2014, Campbell provided certain EagleForce billing information to Kay in an email and wrote, "[a]ttached is the invoice and summary related to outstanding billings as required from me related to closing."

Campbell stated that Kay's staff had access to all of the information required to create a balance sheet and income statement. Kay responded asking for clarification and wrote, "[w]e need to complete the paperwork so I can fully fund." (Op. at *12; A-1076-79).

On October 7, 2014, Kay sent an email to Jashuva Variganti and Campbell asking whether Variganti had distributed the paychecks issued October 6 to the EagleForce Associates employees and asking that if they had not been distributed that the checks be returned to Kay for him to distribute. Campbell responded, requesting that Kay avoid communicating with the EagleForce staff and stating, "we remain un-closed and this opportunity still does not have the remaining elements in agreement." Kay responded on October 8, stating in part, "[w]e have signed our agreements and are awaiting the exhibits. [Offit] told me that [Rogers] has 2 open issues" related to the boards of directors of the subsidiaries and the SARS program. Campbell did not respond to the October 8 email. (Op. at *12; A-1083-84).

Negotiations stalled for much of the rest of October 2014. On October 15, Rogers sent an email to Offit stating, "[i]t seems that the 'stall' in getting this deal done is clearly the modification to Said's and his brother's deal. We can argue over all the reasons as to why this isn't happening, but the fact is that [Kay] wants [Campbell] to deal with it, [Campbell] wants [Kay] to deal with it and, as a result,

nothing is happening." Offit did not respond until October 21 when he wrote, "Rick is away. I have a call into Rick and I'm looking for an update." (Op. at *12; A-1085-86).

On October 28, Kay emailed Campbell, Rogers and Offit stating, "[w]hat else can we do together to get this done. I understand we have signed the deal but need the exhibits." Campbell responded, stating in part, "[t]he signatures on the drafts did not represent the completed document which remains not completed given the two or three remaining items." He also wrote, "I have closed/settled the only item that the Bankruptcy Atty indicated could cause any issue ... I would ask that the responsibility for me to re-open the Bankruptcy be withdrawn from consideration/requirement." (Op. at *12; A-1087).

In November 2014, Kay and Campbell's relationship became more contentious, as Kay and Offit took the position that the August 28 Transaction Documents were binding contracts and that Campbell was in breach by failing to contribute his intellectual property and reopen his bankruptcy. Kay nevertheless continued to fund the EagleForce Associates payroll into February 2015. (Op. at *12; A-1096-99, 1104-05).

Finally, on February 18, 2015, Campbell sent an email to Offit, Rogers, Kay, and Cresswell stating as follows:

> [W]e have reached an impass [sic] that we are unable to resolve. I would respectfully request that the atty's get together to discuss the means and methods for us to close this matter and allow us to move on. We have booked the funding as a loan and will proceed with amending the existing documentation in a means that is reasonable for us both.

(Op. at *13; A-1100-01).

This litigation ensued.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT THE TRANSACTION DOCUMENTS WERE UNENFORCEABLE BECAUSE NEGOTIATIONS REGARDING CONSIDERATION HAD NOT BEEN COMPLETED.

A. QUESTIONS PRESENTED.

1. Did the Court of Chancery err in relying on extrinsic evidence to determine whether a binding agreement had come into existence? Plaintiffs raised this issue for the first time in one sentence their Post-Trial Answering Brief. (D.I. 216 at 35).

2. Did the parties create a binding contract where there remained outstanding issues still being negotiated as to the consideration Campbell was to provide, including issues as to third-party claims to equity, which issue the parties themselves treated as material? Campbell agrees that Plaintiffs properly preserved the issue and incorporates by reference their citations to the record.

B. SCOPE OF REVIEW.

Contract formation is a question of intent, which is an issue of fact. *Universal Products Co. v. Emerson*, 179 A. 387, 394 (Del. 1935). This Court defers to the factual findings of the Court of Chancery if they are sufficiently supported by the

record and are the product of an orderly and logical deductive process. *Biolase, Inc. v. Oracle Partners, L.P.*, 97 A.3d 1029, 1035 (Del. 2014).

Whether a missing contract term is material is a mixed question of law and fact. To the extent that the determination rests on findings of fact, this Court defers to the findings of the Court of Chancery if they are supported by the evidence and are the product of a logical deductive process. This Court reviews questions of law *de novo*. *USA Cable v. World Wrestling Federation Entertainment, Inc*., 766 A.2d 462, 468 (Del. 2000).

C. THE COURT BELOW PROPERLY CONSIDERED EXTRINSIC EVIDENCE IN DETERMINING WHETHER THERE WAS AN ENFORCEABLE AGREEMENT.

Plaintiffs claim as legal error the fact that the Court of Chancery considered extrinsic evidence in determining whether a contract had been formed. (Plaintiffs' Opening Brief ("AOB") at 26).[4] Plaintiffs' argument is based on a fundamental misunderstanding of the parol evidence rule.

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[4] At trial, Plaintiffs themselves introduced extrinsic evidence in the form earlier drafts of agreements, emails and testimony regarding the circumstances surrounding the signing of the Transaction Documents. Plaintiffs point to the same extrinsic evidence in their appeal. As such, Plaintiffs cannot claim prejudice and their argument on this issue on appeal should be deemed waived. *Socket Telecom, LLC v. Public Service Commission, Missouri*, 2009 WL 10671528 at *9 (W.D. Mo. Dec. 1, 2009) (party waived objection based on parol evidence rule by introducing its own extrinsic evidence).

The parol evidence rule provides that where the document is clear and unambiguous on its face, the Court may not rely on extrinsic evidence to interpret, vary or contradict its terms, but is limited to the four-corners of the document. *Otto v. Gore*, 45 A.3d 120, 131 (Del. 2012). The issue here, however, is contract formation, not interpretation.

The parol evidence rule presupposes the existence of a complete and enforceable contract, *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402, 408 (3rd Cir. 1981); 30 Am. Jur. 2d, *Evidence*, §1035, and so "if the issue is as to the validity or legality of the contract, the rule, by its very terms, has no application, and extrinsic evidence is admitted to determine that issue, whether such evidence tends to establish the validity or invalidity of the contract in question." *Id.*[5]

Consequently, whether the Court applies Virginia law (the locus of all activity relating to the negotiation and creation of the Transaction Documents) or Delaware

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[5] In none of the cases cited by Plaintiffs regarding the use of extrinsic evidence was there any dispute over whether or not a binding contract had been created. *See Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co.,* 616 A.2d 354 (Del. 2014) (issue was interpretation of section of insurance policy, not whether section was unenforceable because the policy was not a valid contract); *GMG Capital, LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776 (Del. 2012) (issue was whether agreement was ambiguous, not whether it was unenforceable); *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228 (Del. 1997) (issue was the proper interpretation of an indemnification provision as it was to apply to product liability claims, not whether such provision was invalid because a contract had not been formed).

law, extrinsic evidence is admissible to show that the Transaction Documents never became operative. *Otto*, 45 A.3d at 131 ("Generally, courts cannot consider extrinsic evidence relating to the meaning of specific terms in a written trust instrument to interpret those terms. Extrinsic evidence, however, is properly considered to determine the issue of intent to create a trust. This subtle difference is critical to our holding. Extrinsic evidence may relate either to whether the trust has been formed or to the meaning of specific terms. The former use of extrinsic evidence is permitted; the latter is prohibited where the trust language is clear and unambiguous," footnotes omitted); *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 2015 WL 6455367 at *15 (Del. Ch. Oct. 26, 2015), *aff'd in part, rev'd in part on other grounds*, 151 A.3d 450 (Del. 2016); *Hynansky v. Vietri*, 2003 WL 21976031 at *2-3 (Del. Ch. Aug. 7, 2003); *Caplan v. Stant,* 154 S.E.2d 121, 124 (Va. 1967) ("It is well settled that such evidence which relates to the formation or existence of a contract between the parties is not in violation of the parol evidence rule. The parol evidence rule prohibits the introduction of extrinsic evidence to vary the terms of a written instrument. It does not exclude evidence as to whether a valid contract has been made or entered into between the parties, which is one of the principal issues in the present case"); *Clark v. Miller,* 138 S.E. 556, 558 (Va. 1927). *See also Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625, 629 (Del. 1968) (holding that under

Illinois law evidence of surrounding circumstances is admissible in determining whether or not there was an enforceable agreement).

Consequently, courts can and do look at surrounding circumstances in determining whether a contract was formed. *Leeds v. First Allied Connecticut Corp*., 521 A.2d 1095, 1101-02 (Del. Ch. 1986).[6] Negotiations are not deemed completed and a contract is not deemed formed until the surrounding circumstances show that "all of the points that the parties themselves regard as essential have been expressly or ... implicitly resolved...." *Wilson v. Wilson*, 1993 WL 385111 at *2 (Del. Sept. 2, 1993), *disposition reported at* 633 A.2d 372 (Del. 1993) (TABLE) (citing *Leeds*, 521 A.2d at 1102).

D. THE EVIDENCE SHOWED THAT THERE WAS NO FINAL AGREEMENT.

The Court of Chancery held that no contract had been formed because the parties failed to agree on final terms regarding the consideration to be exchanged.

In looking at the objective evidence, the trial court found that:

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[6] Plaintiffs attempt to distinguish *Leeds* on the ground that the documentation in that case involved a one-page letter of intent whereas this case involved months of negotiations and documents of over 100 pages. (AOB 25). Plaintiffs make no effort to explain why this distinction makes a difference. While the size of the Transaction Documents may be evidence of their complexity, it is not evidence of the intent of the parties to be bound by them. A heavily negotiated agreement of many pages can be as incomplete as a minimally negotiated one of a single page, and Plaintiffs do not show otherwise.

- Campbell's primary contractual obligation would be to contribute the stock of Associates along with intellectual property and contract rights and obligations, the latter of which were not identified in schedules that formed part of the Transaction Documents;

- Schedule 4.3(c) was to include a statement of Campbell's equity in Associates and Health, but was left blank. As the trial court found, "the schedule that was meant to list an important part of the consideration Campbell would provide under the agreement is incomplete";

- Certain employees had contracts which gave them claims to some form of equity interest in Associates or Health;

- Throughout negotiations Kay and Campbell were aware of these potential employee claims to equity, which claims made Kay and his lawyer concerned;

- Kay and Campbell, recognizing the problem of the equity claims, began developing a solution to the equity issue, but that solution was never finalized and incorporated into the Transaction Documents;

- Instead, counsel for Kay attempted to add to the Transaction Documents a representation that Campbell had obtained releases from employees with equity

interests and/or profit-sharing interests and that those employees had no interest in Eagleforce business, but Campbell never agreed to that term;

- Even after the signing of the Transaction Documents, "Kay, Campbell, Offit, and Rogers knew that [Kay and Campbell] had not come to an agreement on the employee claims for equity and the SARS plan."[7]

- Schedule 4.12(c) of the Contribution Agreement protected against acceleration of vesting, funding or of any equity award or other benefit. Kay knew at least of Cresswell's claim to equity, yet Schedule 4.12(c), which was to set forth the effect of the transaction on equity awards or other benefits, which would include the claims of employees to equity, is blank; and

- Schedule 3.5 of the Contribution Agreement, which is to identify what contracts are assigned under the Transaction Documents, is blank, indicating no agreement as to the contracts to be assigned.

(Op. at *16-18).

The Court of Chancery held that the consideration to be exchanged was "highly material to the parties here." Consideration is, of course, essential to a valid contract.

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[7] The trial court reached this conclusion from evidence that, on September 9, 2017 (post-signing), Rogers had notified Offit of a number of unresolved issues relating to the SARS, and re-emphasized that Campbell could not agree to the representation about waivers of third-party equity claims.

See New Castle County v. Mayor and Council of New Castle, 372 A.2d 188, 191 (Del. 1977). Plaintiffs have not contested that conclusion.

Plaintiffs do not dispute the accuracy of the factual findings, only the conclusions derived therefrom. It is settled law that, for there to be an enforceable contract, the terms must be clear and definite. *Scarborough v. State*, 945 A.2d 1103, 1112 (Del. 2008); *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1186 (Del. Ch. 2009).

The Transaction Documents required specific consideration which necessarily required resolution of any potential claims to that consideration. The parties were all aware of the need for a resolution of the third-party claims, and expected that to be included in the Transaction Documents, as evidenced by the existence of Section 4.3(b) & (d) (referring to the SARS plan) and proposed (but empty) Schedule 4.3.

E. THE ABSENCE OF SCHEDULES, INCLUDING THOSE RELATING TO THE QUALITY AND TYPE OF CONSIDERATION CAMPBELL WAS TO CONTRIBUTE, IS EVIDENCE OF INCOMPLETE NEGOTIATIONS.

In attempting to introduce the parol evidence rule into this case, Plaintiffs argue that the Court of Chancery improperly used extrinsic evidence to create a contractual ambiguity. Plaintiffs also ask the Court to look at individual parts of the Contribution Agreement and determine that they did not create an ambiguity. This is unnecessary, as there is no discussion anywhere in the Opinion about the existence of any

ambiguity or using extrinsic evidence to resolve any such ambiguity. That is an artificial construct manufactured by Plaintiffs to attempt to create a claim of legal error. However, as noted above, the parol evidence rule does not apply to issues of contract formation.

Thus, the issue is whether, when considering all of the surrounding circumstances, the omissions identified by the Court of Chancery lead to the reasonable conclusion that negotiations were incomplete. They do.

1. Incomplete Schedules Are Evidence of Incomplete Negotiations.

Plaintiffs first argue that the incomplete schedules do not show incomplete negotiations because the contents of those schedules can be found within the body of the Transaction Documents. This begs the questions (i) how one is supposed to go hunting for that information, and (ii) why have schedules and insist on their being completed if the information is in the body of the document?

The facts are that although Section 4.3(a) identifies what information about equity ownership is intended to appear in Schedule 4.3(a), including the SARS plan (A-670-71), there is no Schedule 4.3(a) in the Contribution Agreement (*see* A-717-18), although a blank one appears in the LLC Operating Agreement (A-773) without a corresponding Section 4.3. (*See* A-733).

Moreover, the undisputed evidence at trial is that Plaintiffs were insistent that the schedules be completed, both before and after the Transaction Documents were signed. Thus, the evidence shows Plaintiffs considered the schedules to be more than ministerial.

2. The Existence of Known and Unresolved Third-Party Claims to Equity Evidences the Incomplete Nature of the Transaction Documents.

Plaintiffs next argue that the issue of third-party equity claims is irrelevant because Campbell agreed to turn over all right, title and interest in the EagleForce entities. However, one cannot transfer "all right, title and interest in" (A-683) that which one does not own, or that which one owns subject to an inchoate right of divestment.[8] Kay were had actual prior notice of the existence of the Third-Party

[8] Even applying Plaintiffs' preferred "ambiguity" mode of analysis , the reference to "all right, title and interest" could refer either to all equity as to which Campbell has an undisputed claim or to all equity irrespective of such claims, thus permitting parol evidence to clarify the ambiguity. *See Jobim v. Songs of Universal, Inc.,*732 F.Supp.2d 407, 416 (S.D.N.Y. 2010) ("The phrase 'all monies earned,' however, is ambiguous. It may entitle Plaintiffs to fifty percent of money earned by Universal's foreign affiliates ('at source'), but it may also entitle Plaintiffs only to a percentage of monies earned by Universal after fees have been paid ('net receipts')"); *Pipe & Contractors' Supply Co. v. Mason & Hanger Co.*, 168 N.Y.S. 740, 741 (N.Y.A.D. 1918) (an offer to purchase "all the good secondhand pipe" deemed ambiguous, as "[i]t certainly cannot mean the sale of all the secondhand pipe in the world. It might mean the sale of all the secondhand pipe belonging to the defendant, or it might mean all the secondhand pipe in a certain location, and to that extent I think the defendant would have the right to

(continued...)

Claimants, and sought to find a way to address those claims. Kay made it clear that he wanted (initially) an equal equity split with Campbell. Resolution of that issue was clearly necessary and material.

Plaintiffs attempt to downplay the materiality of the omission by pointing out that if any third-party claims succeeded Kay could sue Campbell for breach of warranty. Indeed, Offit, counsel for Kay, testified that Campbell would be liable for a breach of warranty, and any diminution of equity would come out of Campbell's equity interest, notwithstanding that Kay knew at the time about the third-party claims. (A-1645 - 153:19-23). Offit was wrong. If a party signs a contract with knowledge that a representation is false, that party may not claim reliance on it. *Clough v. Cook*, 87 A. 1017, 1018 (Del. Ch. 1913). *See also White Sewing Mach. Co. v. Gilmore Furniture Co.*, 105 S.E. 134, 138-39 (Va. 1920) (to avoid liability, a seller needs to show that the buyer knew that the representation was false). Where there is no reliance, there is no basis for a claim of breach of warranty. *MicroStrategy, Inc. v. Acacia Research Corp*., 2010 WL 5550455 at *10 (Del. Ch. Dec. 30, 2010).

[8](...continued)
supplement the agreement by showing the facts and circumstances, and even showing by parol evidence the particular pipe involved").

3. The Failure to Identify and Schedule Assumed Agreements Evidences Incomplete Negotiations.

In addition to the equity interest omission, the trial court noted that the failure to list assumed agreements in Schedule 3.5 further showed that the parties did not come to a final agreement regarding the consideration Campbell was to provide in the Transaction Documents. Section 3.5 of the Contribution Agreement required listing of all agreements Campbell was contributing as part of the transaction. Presumably, this section was not intended to be superfluous.

Plaintiffs argue that Schedule 3.5 was limited to intellectual property. (AOB 31). However, there is nothing, in either the four corners of the Transaction Documents, specifically Section 3.5 of the Contribution Agreement and the title of Schedule 3.5 ("Assumed Agreements") or the extrinsic evidence indicating that Schedule 3.5 was to be limited to IP agreements. Were that intended to be the case, much of Section 3.5 would be superfluous. Able counsel knew how to limit Section 3.5 to IP if that was intended. The Section refers to potentially assuming agreements with third parties. Sections 3.5(a) and (b) speak to obtaining consents, which is not limited to consents from Campbell.

The failure to list assumed agreements in Schedule 3.5, including third-party agreements, and Plaintiffs' failure to prove at trial that the parties both understood

that no other agreements were contemplated, is further evidence that the parties had not concluded their negotiations as to the nature of the consideration to be provided by Campbell.

4. Schedule 4.12(c): Acceleration of Equity Awards.

Section 4.12(c) provides, among other things, that, except as set forth in Schedule 4.12(c), the transaction does not accelerate vesting of any equity award.[9] Thus, this section affects the right of existing third-party claimants to equity.[10] Yet Schedule 4.12(c) is blank. This means either that (i) by implication, any third-party claims to equity have been accelerated (and it is doubtful that Kay intended that conclusion), or (ii) the absence of the Schedule further evidences the fact that there

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[9] Plaintiffs erroneously focus on the language of Section 4.12(c) referring to acceleration of payment of compensation, instead of the relevant language referring to acceleration of equity awards.

[10] Plaintiffs object to the trial court's reliance on employment agreements which included equity rights. (AOB 33 n.6). Plaintiffs did not file a motion to reconsider or to reopen the record to address those employment agreements, nor do they explain what sort of evidence they would have submitted to counter the fact of those agreements. As such, this argument should be deemed waived as it was not preserved below. In any event, there was testimony at trial about the employment agreements and the provisions awarding equity, and Kay's knowledge of them, which the trial court could accept as credible. (A-1891-92, 652:3-654:9, 2128-29, 1093-1097:10).

was no resolution as to the claims of third-parties to equity, a necessary component of establishing the consideration Plaintiffs were to receive.[11]

5. The Trial Court Did Not Impose a Condition Precedent to the Effectiveness of the Transaction Documents. The Law Did.

Plaintiffs claim that the trial court made completion of the schedules a condition precedent to effectiveness of the Transaction Documents. (AOB 34). Of course, the trial court did no such thing. The trial court simply looked at the omissions in the Schedules as part of the surrounding circumstances which, in tandem with the evidence of other surrounding circumstances set forth in the Opinion, led to the conclusion that the parties had not reached a final agreement on the nature and quality of the consideration Campbell was to provide.

The only "condition precedent" was the one imposed by law that surrounding circumstances must show that essential terms have been expressly or implicitly resolved. *Wilson*, slip op. at *2. The surrounding circumstances here show that they were not.

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[11] Plaintiffs note that Campbell was tasked with completing the schedules, that he asked Kay for help, but Kay was not obligated to do so. (AOB 36). If Kay wanted a finished agreement, he could have volunteered to complete the Schedules. His unwillingness to do so and his tolerance of the delay, and then finally claiming that the Transaction Documents are binding without the schedules, further evidence that he did not truly deem there to be a final agreement.

F. THERE WERE NO JUDICIAL ADMISSIONS.

Plaintiffs next argue that trial court ignored a judicial admission in Campbell's Answer that Campbell "owned 100% of the Targeted Companies." (AOB 38). The trial court did not ignore any judicial admission because there was no judicial admission.

To constitute a judicial admission, the statement has to be clear and unequivocal. *AT&T Corp. v. Lillis*, 953 A.2d 241, 257 (Del. 2008). The sentence which Campbell admitted in paragraph five of the Amended Complaint states, in pertinent part: "Campbell solely owns ***or*** controls, directly or indirectly...the 'Targeted Companies'...." (A-1320, emphasis added). A statement in the alternative is not deemed unequivocal such that it is a binding judicial admission. *In re Teleglobe Communications Corp.*, 493 F.3d 345, 377 (3rd Cir. 2007) (statement referring to consultation with officers of entity *or* its subsidiaries not an unequivocal statement constituting a judicial admission).

G. THE TRIAL COURT WAS NOT CONFUSED ABOUT SARS.

Plaintiffs argue that the trial court confused SARS with ownership. That is incorrect. The trial court noted the distinction, stating that "[e]ven after the August 28 signing, Kay, Campbell, Offit and Rogers knew they had not come to an agreement on the employee claims for equity *and* the SARS plan." (Op. at *16, italics added).

The offers of employment for Morgan and Cresswell referred to SARS, but also referred to the SARS as "equity participation." (A-2224-25, 2230-21).[12] The offers of employment for the Salahs offered equity participation without reference to SARS. (A-2226-29).

In any event, Plaintiffs miss the point. The Salahs were offered equity, not SARS. Morgan and Cresswell were offered "equity" in the form of SARS. At best, this created an ambiguity. There was no SARS plan stating exactly what Cresswell and Morgan would actually be getting, or explaining why it did or did not constitute "equity," as referred to in the offer letters.[13] Moreover, there were no terms setting how the third-party claims would affect the equity interests of Campbell and Kay (the latter insisting that any provision of equity interests come out of Campbell's half, and

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[12] Cresswell testified that he did not understand what SARS meant, and that he expected to get 5% equity, and would not agree to anything until he saw in writing what he would actually be getting, although he understood that there would be no voting rights. (A-1891-92). Cresswell also offered uncontradicted testimony that Kay told him that he would receive 5% equity, but that for tax purposes it would be characterized as SARS. (*Id.*). If it was equity, that would subject Kay to fiduciary obligations to Cresswell and Morgan.

[13] Although Kay's transaction attorney testified as to what SARS are supposed to be, and Campbell testified that SARS are not literally equity, there was no evidence that this was explained to any of the Third-Party Claimants, who are not lawyers. Kay did not explain that to Cresswell, but rather indicated that it would be equity but called SARS for tax reasons. Moreover, Kay's transaction counsel testified that one who had SARS would be compensated according to the terms of the SARS agreement, of which there was none. (A-1653).

not be equally diluted). No waivers were obtained nor was there any certainty that waivers could be obtained. As a consequence, there was no certainty as to what the Third-Party Claimants were to receive, or how that would affect the equity interests of Kay and Campbell. The totality of the circumstances permitted the trial court to conclude, as it did, that a final contract had not been negotiated.

H. THE TRIAL COURT UNDERSTOOD THE RELEASE ISSUE.

Plaintiffs argue that the trial court improperly concluded that Campbell did not have to agree to obtain releases from the third-party claimants because he signed the Transaction Documents in which he represented that he would obtain the releases. (AOB 41-42). This is circular reasoning which requires the assumption that the Transaction Documents are valid and binding.

In looking at whether or not the parties had completed negotiations on the issue of consideration, the trial court looked at the surrounding circumstances, including back and forth as to the issues involving third-party claims, and determined that this issue, in conjunction with the others, showed that there was no final resolution as to what was the consideration.[14]

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[14] Plaintiffs argue that the fact that the Campbell did not have releases at the time of signing does not mean anything, because in the Contribution Agreement he represents that he will have the releases as of the closing date. (AOB 43, citing A-668). The cover page of the Contribution Agreement says

(continued...)

I. PLAINTIFFS' "PUBLIC POLICY" ARGUMENT FAILS.

Finally, Plaintiffs make a "policy" argument that there would be "substantial insecurity" amongst businesspeople if an "executed 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." (AOB 49). This, however, is a gross misrepresentation of what the trial court did..

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[14](...continued)
"Dated as of August [], 2014." On page 2, the first paragraph begins "This CONTRIBUTION AND ASSIGNMENT AGREEMENT (this 'Agreement'), dated as of July [ ], 2014 (the 'Execution Date')…." The signature page states that "each of the parties hereto as caused this Agreement to be duly executed on its behalf…as of the day and year first set forth above." (Italics added). But there is no day identified.

The significance of this omission is shown at ¶3.1 of the Contribution Agreement, which states, in pertinent part that "the closing of the Transactions (the 'Closing') shall be held at the office of the Company, commencing at 10:00 a.m. local time on the date hereof (the 'Closing Date') or at such other time and place as the Parties may agree upon in writing." (Italics added). Thus, the "Closing Date" is, initially, "the date hereof," meaning the date of the Contribution Agreement. *Capital Ventures Intern. v. Verenium Corp.*, 2011 WL 70227 at *5 (S.D.N.Y. Jan. 4, 2011) (where closing date is "the date hereof," the "date hereof" is the date of the document containing that phrase). As there is no "date hereof," there is no "closing date."

The closing date is a material term. "It is hard to imagine a term more significant than the deadline by which [a party] must produce the agreed-upon consideration." *Vesta Investa, Inc. v. Harris*, 1999 WL 55649 at *3 (Minn. App. Feb. 9, 1999). The absence of a set closing date alone renders the document irredeemably incomplete.

The policy of Delaware is to enforce properly made contracts, but also to not to impose contractual obligations on those who have not completed their negotiations. The objective evidence in this case shows that the outstanding issues regarding consideration were known to the parties and negotiations on those issues continued even beyond the date of signing. This evidence lead to the reasonable conclusion that the parties had not finalized the crucial issue of what consideration Campbell was to provide. Absent that, there was no contract.

II. THE TRIAL COURT PROPERLY TREATED THE TRANSACTION DOCUMENTS AS ONE COLLECTIVE AGREEMENT.

A. QUESTION PRESENTED.

Did the Court of Chancery correctly determine that the Transaction Documents should be read together as one document as they were both related to the same subject matter, were cross-referenced in each of the documents, and had no independent purpose beyond the subject transaction?

Campbell agrees with Plaintiffs that they properly preserved this issue for appeal and incorporates by reference their citations to the record.

B. SCOPE OF REVIEW.

The construction of a document solely on the basis of its own terms is a question of law and reviewed *de novo. Belmont Condominium Ass'n, Inc. v. Geibel*, 74 A.3d 10, 31 (N.J. Super. A.D. 2013).

C. ARGUMENT.

Under Delaware and Virginia law, where two or more documents relate to the same subject matter, courts may treat the separate documents collectively as one document. *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114-15 (Del. 1985); *BAYPO Ltd. Partnership v. Technology JV, LP*, 940 A.2d 20, 27-28 (Del. Ch. 2007).

Plaintiffs attempt to distinguish *E.I. duPont de Nemours & Co. v. Shell Oil*, 498 A.2d 1108 (Del. 1985), by noting that each of the two agreements were dependent on the other. (AOB 51). Subsequent cases applying *E.I. duPont* have not interpreted it so strictly. For example, in *BAYPO Ltd. Partnership*, the Court of Chancery found that three documents which were signed the same day, which incorporated the other by reference, and which had no independent purpose outside of the overall transaction, demonstrated an intent to have the documents be read as one. 940 A.2d at 27-28. *See also Ashall Homes Ltd. v. ROK Entertainment Group Inc.,* 992 A.2d 1239, 1249-50 (Del. Ch. 2010).

Here, it is clear that the parties intended the Transaction Documents be part of one overall transaction. First and foremost, the Transaction Documents were created in furtherance of a specific deal. Neither has an independent purpose outside the transaction at issue in this case. There is no evidence that either of the parties would have entered into a deal with only one of the Transaction Documents.

The Contribution Agreement expressly refers to the LLC Operating Agreement, incorporates it as Exhibit B (although left blank), and requires execution of the Operating Agreement as well as transfer of the assets that are the subject of the Contribution Agreement at closing. (A-664-68 ¶¶2.1, 2.3, 3.1-3.6). Section 8.4(a) states that the Contribution Agreement and the Operating Agreement and related

documents "constitute[] the entire agreement among the parties...." (A-696 ¶8.4(a)).

Similarly, the Operating Agreement provides that "[t]his Agreement, together with Schedules and any other document signed by the parties at or after the signing of this Agreement constitute the complete agreement between the parties concerning the subject matter in such documents...." (A-757 ¶13.10).[15] This is sufficient. *See In re Remington Park Owners Association, Inc*., 548 B.R. 108, 124 (Bankr. E.D. Va. 2016) (internal cross-references need not be explicit; it is sufficient if they are fairly traceable).

Section 3.2.1 of the Operating Agreement identifies the Contribution Agreement as the source of Campbell's capital contribution. (A-722). The Operating Agreement contemplates it and the Contribution Agreement as having the same date. (A765, defining the Contribution Agreement as being "of even date herewith...").

Further, numerous schedules identified in the Contribution Agreement are not part of the Contribution Agreement, but rather appear at the end of the Operating Agreement (with no corresponding reference to them in the Operating Agreement), including Schedules 4.3(a), 4.3(f), 4.6, 4.9, , 4.11(e), 4.12(a), 4.12(c), 4.12(d), 4.12(g),

[15] Reference to the terms of the Transaction Documents is not a concession that they are valid and binding, but merely that they are evidence of the parties' intent on this particular issue.

4.14(a), 4.15(a), 4.15(b), 4.16(a), 4.17(a). 4.17(b), 4.17(e), 4.18, 4.19, 4.23, 4.24, 4.25, 4.27, and 4.28.

The trial court reviewed the documents throughly, heard the testimony about them, gave the evidence they weight it deemed appropriate, considered their combined effect, and came to an orderly and logical conclusion. Plaintiffs' *post hoc* alternative explanations as to the evidence are unsupported in the evidentiary record (despite Kay's transaction lawyer being a witness at trial) and so are not properly before this Court on appeal.

III. THE COURT OF CHANCERY LACKED PERSONAL JURISDICTION OVER CAMPBELL FOR THE REMAINING CLAIMS.

A. QUESTION PRESENTED.

Did Campbell become subject to personal jurisdiction under 6 Del. C. §18-109(a) upon signing in Virginia the April 2014 Letter Agreement even though Campbell had no knowledge of any LLC being formed in Delaware at that time and no valid Operating Agreement ever came into existence?

Campbell filed a motion to dismiss for lack of personal jurisdiction (D.I. 42). In their pre-trial brief, Plaintiffs asserted that "under 6 Del. Code § 18-109, Campbell consented to jurisdiction when executing the April 2014 Letter Agreement." (D.I. 180 at 55). Similarly, in their post-trial answering brief Plaintiffs argued that "Campbell became subject to personal jurisdiction as soon as he signed the April 2014 letter agreement." (D.I. 216 at 44).

B. SCOPE OF REVIEW.

Whether a statute authorizes personal jurisdiction under an uncontradicted set of facts is reviewed *de novo*. *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004).

C. MERITS OF THE ARGUMENT.

The April 2014 Letter Agreement provides the response to Plaintiffs' argument:

> 18. This letter agreement is legally binding upon the parties and shall be governed by the laws of the State of Virginia. Until the Holdco LLC

> operating agreement referred to herein is executed by the parties, this letter agreement shall govern the conduct of business and the transactions and matters set out herein.

(A-53).

The term "executed" means "to bring (a legal document) into its final, legally enforceable form." Black's Law Dictionary 589 (7th ed. 1999). Thus, the parties agreed that their business affairs would be governed by Virginia law until such time as there was an enforceable operating agreement. As there is none, Virginia law controls. There is no carve-out for personal jurisdiction. The parties were free to place a condition precedent on the primacy of Delaware law, and their choice should be respected by this Court.

To find otherwise would be to violate due process under the facts of this case. The November 2013 Letter Agreement, negotiated and signed in Virginia, identified a series of actions that each side "will" perform,[16] including that "Richard and Stanley

[16] "[T]he word 'will,' is an 'auxiliary of the future tense with implication of intention or volition (thus distinguished from shall ....).' Oxford English Dictionary 134 (2d ed.1971)." *Heisel v. John Deere Const. & Forestry Co.*, 2008 WL 53232 at *9 (E.D. Mo. 2008).

will form a new LLC entity and/or[17] a series of industry specific LLC verticals in Virginia." (A-45-46).[18]

Notwithstanding those two items, on March 17, 2014, Kay incorporated Holdings in Delaware (not Virginia) without ever conferring with or notifying Campbell. (A-47-49).

The subsequent April 2014 Agreement, also negotiated and signed in Virginia "amend[ed] the letter agreement that [Kay and Campbell] executed on November 27, 2013...." [19] Even though Kay already caused the Delaware LLC to be formed before the date of signing, the April 2014 Agreement states that "[i]t is anticipated that a new LLC will be formed to serve as a parent entity ('Holdco')...."[20] (A50-53).

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[17] "'[A]nd/or' is an ambiguous phrase that usually means 'one or the other or both.' *See* Bryan A. Garner, Garner's Modern American Usage 45 (3d ed. 2009)." *Choice Escrow and Land Title, LLC v. BancorpSouth Bank*, 754 F.3d 611, 624 (8th Cir. 2014). *Accord Klecan v. Schmal*, 241 N.W.2d 529, 533 (Neb. 1976).

[18] Plaintiffs refer to the November 15 agreement as a "non-binding...Letter of Intent." (AOB 61). They never explain why it is non-binding.

[19] An amendment to an earlier agreement does not replace that earlier agreement. Rather, the parts of the earlier document that have not been modified in the later document remain effective. *Crown Coal & Coke Co. v. Powhatan Mid-Vol Coal Sales, L.L.C.*, 929 F.Supp.2d 460, 467 (W.D. Pa. 2013) (Pennsylvania law); *Application of Diesel Const. Co.,* 234 N.Y.S.2d 349, 360 (N.Y. Supr.1962) (statement in agreement that the parties wished to "amend" their previous agreement means that the earlier contract is not extinguished).

[20] The document referred to "Holdco" even though Kay had already (continued...)

Plaintiffs rely on Campbell's statement of intent to form an LLC in Virginia to argue that he knowingly and voluntarily submitted to the jurisdiction of Delaware as a member of an entity that was formed without his knowledge or permission and in spite of agreements that he be a participant in any such decision, including choosing the State of formation, which does not identify him in the Certificate of Formation, in which he has not engaged in any managerial acts, and from which he has not enjoyed or sought to enjoy the benefits of Delaware law. Not surprisingly, Plaintiffs offer no precedent for that position.

Campbell never voluntarily accepted membership in or management of Associates. Rather, Plaintiffs attempt to thrust it on him involuntarily on the basis of Kay's surreptitious conduct in violation of the letter agreements. Under these circumstances it cannot be said that Campbell could anticipate that he would be haled into a Delaware court on that basis. Simply put, this is not consent, implied or otherwise. As such, personal jurisdiction under this theory does not comport with due process. *See World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Plaintiffs make much of the claim that Campbell allegedly never objected to the formation of Eagle Force Associates, LLC (a claim flatly refuted by the evidence, A-

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[20](...continued)
secretly created the holding entity. It is a fair inference from this fact that at this point Kay had not told Campbell about incorporating in Delaware.

2070-71). However, for a waiver of the right to object, it must be shown that Campbell knew that if he did not object to Kay he would be subjecting himself to personal jurisdiction in Delaware. *See Pellaton v. Bank of N.Y.*, 592 A.2d 473, 476 (Del.1991) ("In order for a waiver to be knowing, voluntary and intelligent, it must be 'an intentional relinquishment or abandonment of a known right or privilege'"). Dragging someone to a foreign jurisdiction to litigate absent a knowing waiver violates due process.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant-below/Appellee Stanley V. Campbell respectfully requests that the Court affirm the decision of the Court of Chancery in all respects.

Respectfully submitted,

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