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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' REPLY BRIEF

Date: December 28, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

PRELIMINARY STATEMENT

The agreements the Chancery Court found to be unenforceable in this case were fully-formed, detailed, independent, comprehensive business agreements – the Contribution Agreement ("Contribution Agreement") and the Amended and Restated Limited Liability Company Agreement ("Amended LLC Agreement") (collectively the "Transaction Documents") – that were extensively negotiated over many months by both the parties and their respective counsel, culminating in the parties executing them in each other's presence on August 28, 2014. Following execution, Plaintiffs, Eagle Force Holdings, LLC ("Holdings") and EF Investments, LLC ("Investments"), through Richard Kay ("Kay") performed, contributing over $1.985 million to enable Defendant Stanley Campbell's ("Campbell") existing start-up companies, EagleForce Associates, LLC ("Associates") and EagleForce Health, LLC ("Health") (collectively "Targeted Companies") to develop. However, Campbell failed and refused to contribute those subsidiaries to Holdings, which was to be owned 50/50 by Investments and Campbell. The Chancery Court's Opinion goes to great lengths to find a way to not enforce the Transaction Documents, finding that terms are missing or not complete and that the parties did not finish negotiating the terms of the deal.

There are no essential terms missing from the Contribution Agreement (the focus of the Chancery Court's decision), only certain schedules described in the

agreement that Campbell was to provide at Closing. The schedules on which the Chancery Court focused its opinion are not trivial matters, but are *not material* to the structure of the deal, the consideration paid, or the expressed intent of the parties to bind themselves. In fact, the text of the Contribution Agreement sets forth the contents of the schedules, so there is no dispute as to what the schedules would contain. The most substantive matter raised by the Chancery Court as "unresolved" was the terms of a stock appreciation rights ("SARs") plan for key employees, which the Transaction Documents make clear will be governed by a separate agreement, not in the Contribution Agreement. The only flaw found by the Chancery Court as to the Amended LLC Agreement is simply that it is part of the same transaction as the Contribution Agreement.

As explained herein and in Appellants' Opening Brief ("Opn.Br."), both the Contribution Agreement and the Amended LLC Agreement were completely negotiated as to all material terms and are independent, fully-drafted, executed agreements, which the Chancery Court should have ruled were binding and enforceable against Campbell. Neither the Chancery Court nor Campbell have identified any term of these agreements where it would be necessary for the court to create a term because the language of the agreements was ambiguous.

The Chancery Court's ruling sets an unrealistic and excessively high bar for creating an enforceable contract that serves only to invite efforts to unfairly avoid

contractual obligations while accepting the other side's performance, as Defendant Campbell did here. The law does not require contracts to be drafted perfectly to be enforceable. The Chancery Court's ruling that negotiations were not complete does not promote predictable and efficient contract making, but rather serves to paralyze efforts for business partners to proceed because there are always matters for them to "negotiate" even after the transaction documents are final and in effect. For the reasons set forth herein and in Plaintiffs' Opening Brief, this Court should reverse and remand the decision of the Chancery Court, enforcing the Transaction Documents.

ARGUMENT

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

A. Campbell Ignored the Legal Standard for Determining Whether the Contribution Agreement Was Enforceable

The Answering Brief completely failed to address the legal standard applied by the Chancery Court in determining whether an enforceable contract exists. To determine the enforceability of the Contribution Agreement, the Chancery Court applied the three-part test articulated in *Estate of Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010): "a valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration." Op.45 (citing *Osborn*, 991 A.2d at 1158).

Osborn cited *Carlson v. Hallinan*, 925 A.2d 506, 524 (Del. Ch. 2006), which in turn, cited several Pennsylvania decisions applying the same three-part test. Prior to *Carlson*, Chancery Court decisions such as *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095 (Del. Ch. 1986), and *Ramone v. Lang*, 2006 Del. Ch. LEXIS 71 (Del. Ch. Apr. 3, 2006), addressed the issue with a less defined standard. Consequently, Delaware cases decided before *Osborn* that analyze whether a contract is enforceable must be read closely to determine which of the three *Osborn* factors were being considered.

By ignoring the three-part test, Campbell improperly shifted the focus to the intent of the parties, even though the Chancery Court did not find intent of the parties was a basis not to enforce the Contribution Agreement. Instead, as reflected in the Chancery Courts' Opinion, the basis for finding the agreements unenforceable was that "The Transaction Documents Lack Terms that Were Essential to the Parties' Bargain." Op.47, heading B.

1. The Chancery Court Based Its Decision Solely on Its Conclusion that the Terms of the Contribution Agreement are Indefinite

The Chancery Court based its conclusion that the Contribution Agreement is unenforceable solely on the second-prong of the *Osborn* test–that "the terms of the contract must be sufficiently definite." Op.45 (quoting *Osborn*, 991 A.2d at 1158). The other two parts of the *Osborn* test–intent to be bound and exchange of consideration–were not discussed in the Chancery Court Opinion, nor did the Chancery Court conclude that they were lacking.[1]

[1] At trial, Campbell strenuously argued that he did not intend to be bound when he and Kay together executed the Transaction Documents on August 28; however, the Chancery Court's Opinion gave no credence to that argument.

The Chancery Court found objective circumstances that demonstrated the parties' intent to be bound including that Kay visited Campbell's office on August 28 specifically "for the purpose of having Campbell and Kay sign the Transaction Documents," and that "both Campbell and Kay signed the versions of the LLC Agreement and Contribution Agreement that Offit had sent by email." Op.33-34. Additionally, the undisputed testimony demonstrated that Kay paid, and Campbell accepted, in excess of $1,985,287 in reliance on Campbell's having executed the

2. A Court Must *Not* Look Beyond the Agreement to Determine if the Material Terms Are Sufficiently Definite Unless it First Finds Those Terms Ambiguous

It is improper for a court to look beyond the four-corners of an agreement to determine if the material terms are sufficiently definite, unless those terms are ambiguous. *Osborn*, 991 A.2d at 1159. The contract formation question in *Osborn*, like the present case, was whether terms of the contract were sufficiently definite to be enforced without the court having to create terms that the parties themselves did not agree upon. This inquiry takes place under the objective theory of contracts, and as such, focuses on the plain meaning of the actual terms of the contract read as a whole. *Id*. at 1159-60.

In *Osborn*, this Court found that in considering whether contract terms were sufficiently definite the Chancery Court correctly used the objective standard of contract interpretation and correctly read the contract in its entirety to give effect to

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Transaction Documents. A1104-1105; A1912.TrT.Variganti.733/22-736/22; A2141-2142.TrT.Salah.1145/14-1147/6.

As in *Osborn*, "the face of the contract manifests the parties' intent to bind one another contractually [and] [b]oth parties signed the contract…" objectively manifesting an intent to be bound. 991 A.2d at 1158. Subjective intent is not to be considered. Op.45 (citing *Trexler v. Billingsley*, 2017 WL 2665059, at *3 (Del. Ch. Apr. 3, 2017)).

The third-prong – exchange of consideration – has never been disputed. The undisputed evidence showed that Kay paid, and Campbell accepted, in excess of $1,985,287 in exchange for Campbell's promises contained in the Contribution Agreement. The *Osborn* court found that payment in exchange for the other party's promise to convey property satisfies this prong. 991 A.2d at 1158.

all of its terms and provisions; however, the Chancery Court "incorrectly found that the contract [was] ambiguous" and thus improperly looked beyond the four-corners of the agreement. *Id*. at 1159. The court must first analyze the terms in the contract, in its entirety, and correctly find that the words used are susceptible to "multiple and different interpretations," before the surrounding circumstances may be considered. *Id*. at 1160. The *Osborn* court cautioned that ambiguity cannot be based on "an unreasonable interpretation [which] produces an absurd result or one that no reasonable person would have accepted when entering into the contract." *Id*.

The evaluation of whether the parties objectively manifested an intent to be bound (the first-prong) is different than determining whether the agreement to be enforced is sufficiently definite (the second-prong). The intent question is "factual in nature" and thus considers all the surrounding circumstances. The question of whether the agreement is sufficiently definite is "a legal conclusion" which focuses on whether the language of the agreement is sufficiently definite to be enforced. *See American Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 585, 585 (3d Cir. 2009) (citing *Channel Home Ctrs. v. Grossman*, 795 F.2d 291, 298-99 (3d Cir. 1986)).[2] This distinction is particularly clear in *American Eagle*, which applied the

[2] The three-part test articulated in *Osborn* is taken from a line of cases applying Pennsylvania law. *Osborn*, 991 A.2d at 1158, n.12 (citing *Carlson*, 925 A.2d at

same three-part test later adopted by *Osborn*. *Id.* There, the Third Circuit freely considered extrinsic evidence as to the first-prong to conclude that the parties intended to be bound, *id.* at 582-85, but restricted its analysis of whether "the terms are sufficiently definite to be specifically enforced" to the words of the agreement itself. *Id*. at 585-86. The error in the Chancery Court's analysis, which Campbell's brief exacerbated, is that the Chancery Court utilized a "first-prong" analysis to address a "second-prong" issue.

3. The Chancery Court Misapplied *Osborn* By Failing to Limit Its Review to the Words of the Contribution Agreement

Unlike Campbell, the Chancery Court at least identified the relevant standard for the determining if the contract terms are sufficiently definite. However, the Chancery Court completely overlooked the first step in that analysis – looking at the words of the agreement by themselves to determine if the terms agreed to by the parties are sufficiently definite to be enforced. Instead, the Chancery Court began its analysis by considering all the surrounding circumstances. Op.46. The Chancery Court's error appears to stem from improperly interpreting the *Leeds* and *Ramone* cases, both of which were decided prior to this Court's adoption of the three-part test articulated in *Osborn*. As a result, the Chancery Court intermingled its evaluation of what *Osborn*

524). Delaware has only applied the three-part test since *Osborn* in 2010, and as such, Pennsylvania cases articulating the test are particularly instructive.

subsequently identified as the first-prong (intent to be bound) with second-prong evaluation (sufficiently definite contract terms).

For example, in *Leeds*, the question was "whether a reasonable man would, based upon the 'objective manifestation of assent' and all the surrounding circumstances, conclude that the parties *intended to be bound* by contract." 521 A.2d at 1101 (emphasis added). The Chancery Court quoted *Leeds* for the proposition that the court should look at "all of these surrounding circumstances" in determining if the parties had "finished their negotiations" and "formed a contract," Op.46-47 (quoting *Leeds*, 521 A.2d at 1102). However, that statement from *Leeds* was in the context of what would now be considered a first-prong evaluation (intent to be bound), which the Chancery Court did not address in this case.

In *Ramone*, the court found that the party responding to the initial offer "did not manifest objective assent" and "never reached a complete meeting of the minds on all material terms," 2006 Del. Ch. LEXIS 71 at *36 (intent to be bound), but also that the parties "never agreed on all the material terms" (terms not sufficiently definite). *Id*. at *37. From that discussion in *Ramone*, the Chancery Court in this case extracted a statement intermingling the two different issues, even though the Chancery Court in the present case was only addressing second-prong deficiencies. Op.45-46 ("if terms are left open or uncertain, this tends to demonstrate that an

offer and acceptance did not occur") (quoting *Ramone*, 2006 Del. Ch. LEXIS 71 at *38-39).

The Chancery Court also failed to recognize the factual difference in cases dealing with an exchange of offers and acceptance, such as *Leeds* and *Ramone*, as opposed to this case, where the contract terms are in a fully-formed and negotiated agreement. In offer-acceptance cases, the question is whether all the terms in the acceptance match the terms in the offer, and if not, are the areas of agreement sufficient to cover everything the parties consider to be material. *See Leeds*, 521 A.2d at 1102-03 (evaluating initial proposal from one party that was countersigned by the other party); *Ramone*, 2006 Del. Ch. LEXIS 71, at *36-37 (evaluating e-mail that conditionally accepted proposal); *Trexler*, 2017 WL 2665059, at *3 (evaluating whether the points of agreement in an e-mail exchange were sufficient to establish that the parties "intended that the contract would bind them").

The present case is not an offer and acceptance dispute. The parties each executed the same document. There is no dispute about which terms were covered in the Contribution Agreement and which terms were not. The question is whether the terms that were included were sufficiently definite to be enforceable. In that context, there is no reason to look beyond the four-corners of the agreement to see if there are other terms that should have been included, such as for example, terms about the SARs plan. Yet, in discussing the applicable standard, the Chancery

Court quoted *Ramone* for the proposition that "if terms are left open or uncertain, this tends to demonstrate that an offer and acceptance did not occur," Op.45 (quoting *Ramone*, 2006 Del. Ch. LEXIS 71, at *38-39), and quoted *Leeds* for the proposition that the court should consider "all the surrounding circumstances" to determine whether "all of the points that the parties themselves regard as essential have been expressly or . . . implicitly resolved" to determine if they have "formed a contract." Op. 46-47 (quoting *Leeds*, 521 A.2d at 1102).

4. Campbell's Answering Brief Failed to Acknowledge the *Osborn* Standard or Apply it Correctly

Campbell's Answering Brief ignored *Osborn* completely, and as a result, intermingled the broader "intent to be bound" analysis with the narrower test of whether the terms are "sufficiently definite." While Campbell did not cite *Ramone* or *Osborn* in his Answering Brief, the brief exhibits intermingling of factors. For example, Campbell cited *Wilson v. Wilson*, 1993 Del. LEXIS 365 (Del. Sept. 22, 1993), which involved an offer contained in a letter that the other party contended he accepted in a responsive letter. *Id.* at *2-3. The court found that the acceptance did not match all the items contained in the offer and therefore there was not a meeting of the minds (no intent to be bound). *Id.* at *5.

Likewise, Campbell relied on *Otto v. Gore*, 45 A.3d 120 (Del. 2012), for the proposition that a court can consider extrinsic evidence without first finding that the contract terms are ambiguous. *Otto* (while not actually citing *Osborn*) dealt

only with the question of whether the parties intended to be bound (the first-prong): "Extrinsic evidence, however, is properly considered to determine the issue of *intent to create a trust*." *Id.* at 131 (quoted at Ans.Br.29).

As noted, the Chancery Court did not base its decision on intent to create a contract, but rather, only on whether "the terms of the contract [were] sufficiently definite to be enforceable." Op.47-59. Campbell's reliance on cases applying the "intent to be bound" standard is inapposite.

To the extent Campbell would have this Court expand *Otto* to permit consideration of extrinsic evidence to assess whether contract terms are sufficiently definite, that extension of *Otto* directly conflicts with *Osborn*. Campbell's discussion of extrinsic evidence concerning Campbell's contribution obligation should be ignored unless this Court first concludes that the terms describing Campbell's contribution obligation are ambiguous on their face. Plaintiffs submit that they are not. [3]

B. The Contract Terms at Issue Are Not Ambiguous Therefore No Extrinsic Evidence Should Be Considered

Contrary to the dictates of *Osborn* and its related cases, both the Chancery Court and the Answering Brief immediately proceeded to review the surrounding

[3] Contrary to the assertion in footnote 5 of Campbell's Brief, the contract interpretation cases cited in pages 24-26 of the Opening Brief are appropriate authority since the second-prong of the Osborn test involves an ordinary application of contract interpretation principles.

circumstances without first reviewing the terms of the Contribution Agreement. Campbell's brief exploited the Chancery Court's intermingling of the *Osborn* factors as providing *carte blanche* for broad consideration of circumstances even though the Contribution Agreement terms are not ambiguous. If the Chancery Court had restricted itself to focusing on the clear terms of the Agreement, it would have concluded that there were no material terms left to negotiate and the Contribution Agreement is sufficiently definite on its face to be enforced.

1. Section 2.2(a) of the Contribution Agreement Unambiguously Stated that Campbell Was Obligated to Contribute All Ownership of the Targeted Companies

There is no dispute about the scope of Campbell's contribution obligation. Both the Opinion, Op.48, and the Answering Brief, Ans.Br.31, acknowledge that the Contribution Agreement obligates Campbell to contribute all the ownweship of the Targeted Companies. Yet, contrary to this acknowledgement, the Chancery Court concluded that the parties "did not come to terms" on the details of the scope of Campbell's obligation to contribute ownership of these companies to Holdings because of some hypothetical ambiguities. Op.51. The Answering Brief tried to defend that finding, citing Campbell's own failure to complete certain schedules to the Contribution Agreement. Ans.Br.34-35.

a. Campbell's Failure to Complete Schedule 4.3(a) Did Not Create Ambiguity or Evidence Incomplete Negotiations

Plaintiffs asserted that Campbell's failure to attach Schedule 4.3(a) to the Contribution Agreement (a list of issued securities in the Targeted Companies) prior to execution of the agreement did not create an ambiguity as to Campbell's contribution obligation or indicate that negotiations were incomplete. Opn.Br.28-30. In response, Campbell attempted to create ambiguity by claiming that the reference to "all right, title and interest in" the Targeted Companies "could refer either to all equity as to which Campbell has an undisputed claim or to all equity irrespective of such claims . . . ." Ans.Br.35, fn.8 (citing A683). The implication is that only the list of securities called for in Schedule 4.3(a) could clear up the ambiguity that Campbell hypothesizes.[4]

The language in §2.2(a) of the executed Contribution Agreement precludes Campbell's alternative interpretation that the schedule is limited to securities "to which Campbell has an undisputed claim":

> At Closing, Campbell shall contribute . . . and deliver to the Company, absolutely and unconditionally, and free and clear of all Encumbrances (the "Campbell Contribution"):

[4] There is no evidence in the record that any written certificates were issued memorializing Campbell's ownership in the Targeted Companies. Without any such certificates, there would be nothing to list in Schedule 4.3(a), making Campbell's entire argument moot.

> (a) all right, title and interest in and to the Targeted Companies Securities, *such that, after such contribution, the Company shall hold all of the Targeted Companies Securities*. . . .”

A665 (emphasis added). This language unequivocally states the parties' intent. After "Campbell's Contribution," Holdings would hold *all of the securities of the Targeted Companies*, clarifying that "all" refers to "all of the securities of the Target Companies" not just all the securities "as to which Campbell has an undisputed claim." This language precludes any possible ambiguity as to the scope of Campbell's contribution obligation.

Campbell's argument is also misleading in that the citation for the language he quotes is to §4.20(a), "Transferred IP," A683, *not* §2.2, A665, or §4.3(a), A670, which relate to ownership of the Targeted Companies. Section 4.20(a) describes Campbell's representation and warranty that he "owns all right, title and interest in and to all *Transferred IP*. . . ." A683 (emphasis added). Section 4.20(a) is not one of the contract provisions that the Chancery Court found to be incomplete. To the contrary, the Chancery Court acknowledged that the description of Campbell's obligation to contribute all of the Transferred IP was unambiguous. Op.52.

In a footnote, Campbell cited two cases for the proposition that the word "all" as used in those agreements created ambiguity. However, those cases only serve to support Plaintiffs' position that there is no ambiguity. First, Campbell quoted from a very old New York decision, *Pipe & Contractors Supply Co.*,

Mason & Hanger Co., 168 N.Y.S. 740, 741 (N.Y.A.D. 1918). That court actually reached the opposite conclusion from that asserted by Campbell. *Pipe* held that the trial court erred in considering parol evidence to vary terms in the written contract. *Id.* at 742. The contract for the sale of pipe contained the phrase "all the good second-hand pipe" at a particular location. *Id*. at 741. The court wrote: "The word 'all' is not in itself ambiguous." *Id.* at 741-42. While a party can "supply parts of a contract that are omitted, the rule is that the contract [terms] sought to be supplied must be consistent with that written. . . ." *Id*. In the present case, Campbell's attempt to modify "all" as it related to securities of the Targeted Companies failed because, *inter alia*, any parol evidence (if it existed) that would support Campbell's alternative interpretation would be inconsistent with the existing language of the agreement.

Campbell also cited *Jobim v. Songs of Universal*, 732 F. Supp. 2d 407, 416 (S.D.N.Y. 2010), interpreting the phrase "all money earned" in the territory, which could mean either net of expenses or gross. In that case, the ambiguity lay more with the term "earned" than with the word "all," and it was the phrase "earned in the territory" that the court found to be ambiguous, not the word "all." *Id*. Unlike the agreement in *Jobim*, the Contribution Agreement here is not ambiguous.

The fact that Campbell refused to provide Schedule 4.3(a) as required by the Contribution Agreement does not render the Contribution Agreement

unenforceable. A party's breach of their own contractual obligation does not make the contract unenforceable. In his brief, Campbell acknowledged that the text of §4.3(a) identified what was to appear on the schedule, Ans.Br.16, 34, so there was nothing to negotiate, just an obligation by Campbell that he failed to fulfil. The parties never actively negotiated Campbell's contribution of the entire ownership of the Targeted Companies. It was an unchanged element of the transaction throughout the entire nine-months of discussions between the parties (November 2013 to August 2014). A1379-1387.

The Contribution Agreement provided that Campbell was to complete the "Campbell Disclosure Schedules" which "modify (by setting forth exceptions to) the representations and warranties contained herein . . . ." A700 (Contribution Agreement, Exhibit A "Definitions"). Campbell has not explained how his failure to provide the list of the securities issued by the Targeted Companies requires the court to supply a term that the parties did not agree upon or evidences anything to still be negotiated.

b. The Transaction Documents were Sufficiently Definite Despite the Contemplated Existence of a SARs Plan

Campbell argued that the potential existence of SARs claims by employees of Associates or Health (extrinsic evidence) demonstrates that the Transaction Documents are insufficiently definite which shows that the parties had not finished

negotiations. Ans.Br.35-36. The Transaction Documents contained clear and definite references to the SARs plan and any alleged claims thereunder without the need to look to extrinsic evidence. Campbell claimed that the resolution of the SARs issue "was never finalized and incorporated into the Transaction Documents." Ans.Br.31. Campbell also argued that the Contribution Agreement included "no terms setting how the third-party claims would affect the equity interests of Campbell and Kay. . . ." Ans.Br.42. These arguments are wrong and misleading.

Section 5.7 of the executed Amended LLC Agreement contained a sufficiently definite treatment of the SARs plan to permit enforcement of both of the Transaction Documents. That section provided that three-percent of the equity in each of the Targeted Companies would be set aside and reserved for funding a SARs plan.[5] A739. The parties agreed to this term and Campbell's own counsel incorporated it into the August 19, 2014 version of the Amended LLC Agreement (A339-340). That provision remained unchanged in the executed Amended LLC Agreement. (A739). Thus, Campbell's statement that the resolution of the SARs issue "was never finalized and incorporated into the Transaction Documents,"

[5] In addition, another 17% could be used for other investors and key employees. The "equity" rights allegedly granted in the employment letters of Cresswell and Morgan are expressly identified as participation in a (non-equity) SARs plan, A2225, A2231, and so are expressly addressed in §5.7.

Ans.Br.31, is completely wrong. While the separate SARs plan itself was not created, the Transaction Documents' provision for a later SARs plan was final and specific. Further, Campbell cited no evidence that the SARs plan was required in order for the Transaction Documents to be enforceable. Such plans are often adopted long after a business has been in operation. The references to a SARs plan in the Contribution Agreement – §4.3(b), §4.12 and Schedule 4.3(a) – all refer to a SARs plan as a separate document, thus confirming that any SARs plan was not intended to be "incorporated" into the Transaction Documents.

While the Chancery Court noted that Campbell's lawyer continued to comment about a SARs plan on September 9, 2014, Op.50-51, he testified that this was an issue that would be addressed outside the Transaction Documents. A2047.TrT-Rogers.900/10-14. Like Campbell, the Chancery Court cited no evidence and makes no finding that the SARs plan was going to be part of the Transaction Documents.

Campbell argued that "there was no certainty as to what the Third-Party Claimants [SARs participants] were to receive, or how that would affect the equity interests of Kay and Campbell." Ans.Br.43. This contention ignores the undisputed fact that §5.7 of the Amended LLC Agreement contains a very specific reference, inserted by Campbell's counsel, providing that up to three-percent of the equity in each of the subsidiaries would be set aside for use in connection with a

SARs plan. *See* A339-340 (Campbell's August 19, 2014 revision of the Amended LLC Agreement); A739 (executed Amended LLC Agreement).[6] That reference is unambiguous and is sufficiently definite on the issue of the SARs plan to make the Transaction Documents enforceable on their face.

Throughout his brief, when Campbell referred to SARs rights, he intentionally referred to them as "equity interest" or "equity participation" rather than SARs, Ans.Br.42-43, despite the fact that Campbell's lawyer understood them not to involve actual equity, A2032.TrT-Rogers.840/24-841/18, and that Campbell himself "testified that SARs are not literally equity." Ans.Br.42,n.13. Campbell's statements that the SARs plan could "affect the equity interests of Campbell and Kay," are misleading, since there is no dispute that any SARs rights would be at the subsidiary level (where Kay clearly had no equity) not in Holdings. At the parent level, as the executed Transaction Documents are written, neither Campbell's nor Kay's equity interests in Holdings would be affected by the contemplated SARs plan, because the Contribution Agreement called for Associates to be contributed in total to Holdings. Campbell's attempt to create a distinction between "equity interests" and "SARs" is unavailing because there is no

[6] The reference in §5.7 does not create any ambiguity or inconsistency with Campbell's status as owner of 100% of the subsidiaries, since §5.7 is referring to a future event: "[T]he Company, the Board of Managers, and its officers . . . shall take all actions as are necessary to set aside (i) three-percent (3%) of the equity of each of the Company's Subsidiaries . . ." A739.

"equity interest" at issue. Even Campbell is unwilling to directly assert that an employee's "equity interests" means ownership. Not surprisingly, Campbell did not attempt to support the Chancery Court's conclusion that "both Kay and Campbell recognized that Campbell likely does not own 100% of the equity in [the Targeted Companies]…" Op.51. Instead, he attempted to confuse the situation for his benefit.

c. Intrinsic and Extrinsic Evidence Demonstrates that Campbell Agreed to Obtain Releases from SARs Participants

The Chancery Court's conclusion that Campbell never agreed to the representations that he would obtain releases from SARs participants was without support and is contrary to the plain terms of the Contribution Agreement that Campbell signed. Opn.Br.41-44. Even if extrinsic evidence was considered, as Plaintiff's Opening Brief noted, the written exchanges between the parties and counsel in the days leading up to execution of the Transaction Documents demonstrated that there was no dispute about who would obtain releases from Campbell's employees. Opn.Br.42-43. The Answering Brief failed to identify any evidence to indicate that, prior to execution of the agreements, there was a dispute about who would obtain the releases. Campbell's entire argument on this point is the following vague conclusory statement: "the trial court looked at the surrounding circumstances, including the 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." Ans.Br.43 (footnote omitted). Campbell did not specify any particular "surrounding circumstances" he believes the Chancery Court relied upon, and he offered no analysis of his own in support of the Chancery Court's finding. *Id.*

Under the second-prong of the Osborn test, any such "back and forth" is irrelevant, because under the terms of the Contribution Agreement, the obligation to obtain such releases is contained in §4.3(d), which is a "Campbell Disclosure Schedule" as defined in the agreement. A671,700. Further, as demonstrated in Plaintiffs' brief, the Chancery Court opinion did not mention or otherwise indicate that it had taken into account any of the back and forth communications which occurred between August 19 and 27, 2014. Opn.Br.42-43. Moreover, once the parties agreed to set aside three-percent of the equity in the Targeted Companies specifically for SARs (A739, Amended LLC Agreement §5.7), Kay's and Campbell's interests, in so far as obtaining releases from potential SARs claimants, were aligned in that they would both benefit if releases were obtained.[7]

[7] In connection with his argument on the SARs releases, Campbell asserted in a footnote that the closing date is a material term, Ans.Br.44,n.14, but the Chancery Court did not find that the closing date was a missing material term.

d. Campbell's Judicial Admission that he Owns 100% of the Targeted Companies Precluded a Contrary Position By the Chancery Court and Campbell

Campbell's ownership is addressed in unambiguous terms in the Contribution Agreement. However, even if it was necessary to look beyond the terms of the Contribution Agreement, there is no basis in the record for the Chancery Court's conclusion that Campbell believed that he "likely does not own 100% of the equity" in the Targeted Companies, because that fact is established by Campbell's judicial admission that he is the sole owner of the Targeted Companies. Opn.Br.38-39. Campbell's argument that "there was no judicial admission" because the word "or" is presumed equivocal is incorrect.[8] Ans.Br.41.

Campbell's admission in his Amended Answer is governed by Chancery Court Rule 8(b), which requires that a party responding to an averment in a complaint "specify so much of it as is true and material and shall deny only the remainder." *Id.* If Campbell intended to respond to the averment that "Campbell solely owns ***or*** controls, directly or indirectly . . . the 'Targeted Companies'. . ." by

[8] Campbell relied on *In re Teleglobe Communications Corp. v. BCE, Inc.*, 493 A.2d 241, 257 (Del. 2008). In *Teleglobe*, the alleged judicial admissions were representations made by counsel to a bankruptcy court in a prior case, which the court concluded were equivocal and appeared "more like a statement of a legal theory or position than a statement about an issue of fact." *Id*. at 377. In contrast to *Teleglobe*, Campbell's admission here is an unequivocal statement of fact (not legal theory) made in a pleading (an Answer, not in a statement of counsel) in this case (not in a prior matter).

claiming that he controls the Targeted Companies, but does not solely own them, he was obligated by the rule to admit part and deny part (as he did for many other averments). By admitting this averment without qualification, Campbell admitted that he both solely owns **and** controls the Targeted Companies. In the Joint Pretrial Stipulation and Order, Campbell stipulated that "at least prior to April 4, 2014 the parties agree that Campbell was the sole owner of Associates and Health." A1364 (Stip.5). As such, these issues were removed from dispute for the trial.

Campbell's position on this point is surprising because he does not actually dispute that he owns 100% of the Targeted Companies, or that a judicial admission to that effect would be wrong. He appears to be raising this as a mere hypothetical ambiguity in order to support the Chancery Court's erroneous finding that he did not believe he owned 100% of the Targeted Companies.[9]

[9] In Campbell's sworn responses to Interrogatories, he unequivocally stated that he was the sole owner of the Targeted Companies and the Transferred IP. These Interrogatory Responses were not introduced at trial, nor was testimony on this issue elicited at trial, because Campbell's Answer unequivocally admitted that he was the sole owner of the Targeted Companies. It was not until the Chancery Court issued its decision that it became clear that the Chancery Court was either unaware of the admission of 100% ownership or somehow believed it was not binding. If this Court is prepared to entertain Campbell's unsupported contradictory assertion, Plaintiffs should be entitled to supplement the record to include Campbell's sworn responses. Campbell's Responses to Interrogatories will be the subject of a Motion to Supplement the Record.

2. Campbell's Failure to Complete Schedule 3.5 Does Not Evidence Incomplete Negotiations

Campbell's Answering Brief offered absolutely no evidence (intrinsic or extrinsic) to support the conclusion that Campbell's failure to complete Schedule 3.5 (Assumed Agreements) evidenced incomplete negotiations. Ans.Br.37-38. Plaintiffs incorporate the discussion of this schedule from their Opening Brief at 31-32.

Campbell criticized Plaintiffs' Brief for referring to Schedule 3.5 as containing only IP license agreements, however, it is the Contribution Agreement that identifies those as the relevant agreements in a footnote to §3.5, A668. Notably, however, Campbell never identified what other agreement should be listed in that schedule. Thus, his assertion that his failure to complete the schedule was material, and demonstrated incomplete negotiations, is completely hypothetical. As of August 28, 2014, when the Transaction Documents were executed, the Targeted Companies were start-ups that had no clients, no revenue, and only at-will employees. Again, Campbell and the Chancery Court have resorted to the suggestion that there could be hypothetical agreements to assign in order to manufacture hypothetical incomplete negotiations.

Campbell also failed to address how the absence of the schedule of assumed agreements makes the Contribution Agreement insufficiently definite. The Targeted Companies were functioning entities and since they themselves were

being contributed to Holdings, there was no need for such agreements to be assumed by Holdings. Opn.Br.31-32. To the extent there were any such agreements, they are not listed in Article II of the Contribution Agreement which sets forth Campbell's "Contribution of Assets." Thus, an incomplete or blank Schedule 3.5 was not actually material to the overall agreement of the parties.

3. Campbell's Failure to Complete Schedule 4.12(c) Does Not Impact His Contribution and Does Not Evidence Incomplete Negotiations

Campbell's Answering Brief offered absolutely no evidence (intrinsic or extrinsic) to support the conclusion that Campbell's failure to complete Schedule 4.12(c) makes the Contribution Agreement insufficiently definite. Ans.Br.38-39. Plaintiffs incorporate the discussion of this schedule from their Opening Brief at 32-34.

Campbell and the Chancery Court ignored the fact that §4.12(c) and its corresponding schedule are found in the section of the Contribution Agreement pertaining to "Employee Benefits," not ownership of the companies. As noted previously, §4.12(a) already expressly refers to the contemplated SARs plan. A674. The items Campbell was to list on Schedule 4.12(c) had nothing to do with his contribution or ownership or control (a fact Campbell attempts to obscure by using the term "equity" in reference to SARs). Ans.Br.38. All that Schedule 4.12(c) required was the names of employees who possibly had a claim that the

contribution of the Targeted Companies to Holdings would trigger some payment to them (which could include potential SARs participants). To the extent the alleged "equity" option of employees Cresswell and Morgan can be triggered by a sale or change in control, it does not impact Campbell's ownership because those rights are expressly identified as SARs rights. A2225, A2231. The alleged "equity" options of employees Said and Hany Salah are not subject to any trigger based on sale or change in control, and they expired on their own terms prior to being earned or vested. A2227, A2229. There was no negotiation necessary and, as set forth above, §5.7 of the Amended LLC Agreement provided a set-aside for funding payment of those SARs benefits, assuming they were not released and might be triggered by the contribution of the Targeted Companies to Holdings (which is not a sale).

The arguments Campbell made in this section make no sense. He argued that his failure to complete Schedule 4.12(c) means that "by implication, any third-party claims to equity have been accelerated. . . ." This does not follow. Inclusion or exclusion of any employee's name from Schedule 4.12(c) does not accelerate any such claims. The schedule provides Campbell with an opportunity to exclude certain claims from his representation and warranty that there are no claims that will be accelerated by consummation of the transaction. A700 (Contribution Agreement, Exhibit A "Definitions"). The schedule is purely for his benefit. His

failure to avail himself of excluding SARs claims from his representation and warranty is not evidence that negotiations are incomplete.

Next, Campbell argued that "the absence of the Schedule further evidences the fact that there was no resolution as to the claims of third-parties to equity, a necessary component of establishing the consideration Plaintiffs were to receive." Ans.Br.38-39. This also makes no sense. Listing an employee claim on Schedule 4.12(c) has no bearing on resolving that party's claim. It simply eliminates the inclusion of the claim in Campbell's representation and warranty that no such claims exist. Nor does listing the claim on the schedule have anything to do with "establishing the consideration Plaintiffs were to receive." Campbell's obligation is to contribute, *inter alia*, 100% ownership of the Targeted Companies. This schedule does not, and cannot change that obligation because it has nothing to do with Campbell's contribution obligation.

4. The Contribution Agreement Unambiguously Placed the Obligation to Prepare Schedules on Campbell

Campbell attempted to support the Chancery Court's statement that "the evidence indicates that Kay and Campbell had not agreed on who would create [the Schedules]" Op.57; Ans.Br.39, fn.11. Campbell acknowledged that the Contribution Agreement assigned to Campbell completion of the "Campbell Disclosure Schedules," which it defined to include each of the Schedules that the Chancery Court identified as material and missing. A700 (Contribution

Agreement, Exhibit A "Definitions"). But then Campbell argued that "if Kay wanted a finished agreement, he could have volunteered to complete the Schedules." *Id.* What is completely missing from Campbell's response is an explanation for why Campbell did not fulfill his obligation to complete the Schedules. Nor is there any attempt to state that Kay had any legal obligation to provide information within Campbell's purview about Campbell's business that benefits Campbell, which Campbell was contractually obligated to provide.

II. THE CHANCERY COURT ERRED IN FINDING THAT THE AMENDED LLC AGREEMENT WAS NOT SEPARATELY ENFORCEABLE

Plaintiffs demonstrated that the Chancery Court's reliance on *E.I. DuPont de Nemours & Co. v. Shell Oil Co*., 498 A.2d 1108, 1115 (Del. 1985), was misplaced because the facts here demonstrate that the Amended LLC Agreement was not dependent on the Contribution Agreement and would stand on its own as a fully-functional agreement even if the Targeted Companies were not contributed to Holdings. Opn.Br.51-57. In response, Campbell argued that the holding of *Shell Oil* permits a court to treat any two documents as one where they merely "relate to the same subject matter." Ans.Br.46. Such a reading would be contrary to well-settled rules of contract interpretation.

Campbell cited two cases in support of his interpretation of *Shell Oil*, neither of which support his position. Campbell incorrectly cited *BAYPO Ltd Partnership v. Technology JV, LP*, 940 A.2d 20 (Del. Ch. 2007) for the proposition that courts will treat "as one" documents which simply refer to each other and have no independent purpose. Ans.Br.47. The issue in *BAYPO* was whether a broad arbitration provision contained in a "Master Transaction Agreement" applied to disputes arising under a subsidiary licensing agreement which did not contain its own arbitration provision. The court held that because the subsidiary license agreement "expressly incorporates the provisions of the [Master Transaction

Agreement]" it was clear that the parties intended the arbitration provision to apply to the subsidiary agreements. *Id*. at 25. Here, the Amended LLC Agreement and Contribution Agreement are fully-formed and complete agreements (containing, *inter alia*, their own dispute resolutions clauses). The Amended LLC Agreement specifically does not incorporate the Contribution Agreement and does not intertwine its obligations with obligations contained in the Contribution Agreement. Opn.Br.51-57.

The other case Campbell cited, *Ashall Homes Ltd. v. ROK Entertainment Group, Inc.*, 992 A.2d 1239 (Del. Ch. 2010), involved interpreting and applying a forum selection clause in a Subscription Agreement. The court referred in *dicta* to a similar forum selection clause in a related Share Sale Agreement that was entirely consistent, to confirm that the forum selection clauses clearly represented the intent of the parties. *Id.* at 1250-51.

In addition, *BAYPO*, *Ashall Homes*, and *Shell Oil* all are all distinguishable in that the courts referred to one agreement in the context of enforcing or interpreting the other related agreement. Neither Campbell nor the Chancery Court have cited any cases that address whether the lack of enforceability of one agreement requires a separate but related agreement to be held unenforceable.

Campbell's contention that the Amended LLC Agreement had no independent purpose from the transaction, Ans.Br.47, is clearly wrong, as noted in

the Opening Brief at 51. Moreover, the Amended LLC Agreement executed on August 28 is an amendment and restatement of an earlier LLC Agreement, which itself was amended by the April 2014 Letter Agreement. A719. The fact that the Amended LLC Agreement is a restatement of an earlier existing LLC Operating Agreement means that it has an independent function and is not simply one-half of a transaction and further distinguishes it from the subsidiary agreements addressed in *BAYPO* and *Ashall Homes.*

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

The only basis for the Chancery Court rejecting jurisdiction under 6 Del. Code §18-109 was the Chancery Court's finding that when Campbell signed the April 2014 Letter Agreement, he was not aware that Holdings was formed in Delaware, and thus "[t]he April letter agreement does not serve as implied consent to jurisdiction in Delaware." Op.61. There was no finding by the Chancery Court (and no claim in the Answering Brief) that the lawsuit is insufficiently related to the business of Holdings to fall within §18-109, since it implicates the rights, duties, and obligations of Campbell.[10] Also, there was no finding (and no claim in the Answering Brief) that Campbell's defined status as a director under the April 2014 Letter Agreement is insufficient to qualify him as a "manager" under §18-109.

Courts interpreting §18-109 characterize it as a means of establishing "implied consent" to jurisdiction. *Assist Stock Mgmt.*, 753 A.2d at 978. Although the Chancery Court found that Campbell lacked knowledge that the LLC he agreed

[10] *See Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974, 978 n.18 (Del. Ch. 2000) (citations omitted) (finding jurisdiction under §18-109 "because plaintiffs' 'contract' based dispute concerns the 'rights, duties and obligations' of Rosheim and Watkins as managers of AIT - issues that are inextricably bound up in Delaware law and as to which Delaware has a strong interest in providing a forum for resolution").

to manage was created under Delaware law when he signed the April 2014 Letter Agreement, it also found that Campbell *obtained* that knowledge by May 13, 2014: "Campbell, thus, was aware that Kay formed Eagle Force Holdings in Delaware at least by May 13, 2014." Op.17 (noting this fact was clearly stated in the first page of the Amended LLC Agreement and in its forum selection clause). The only impediment to Campbell's implied consent under §18-109 was removed as of May 13, 2014.

If Campbell knew Holdings was formed in Delaware when he signed the April 2014 Letter Agreement, there never would have even been a question that under §18-109 he impliedly consented to personal jurisdiction in Delaware. Since Campbell obtained that knowledge a month later, there should be no basis to deny implied consent to jurisdiction thereafter. This is particularly so because throughout that period Campbell had legal counsel who carefully reviewed the document drafts and yet Campbell did nothing in the ensuing months to object to the creation of the entity pursuant to Delaware law. It was only after he was sued in Delaware that Campbell first claimed a lack of fondness for Delaware.

Although Campbell initially acknowledged that the standard under §18-109 is one of consent, Ans.Br.53, he then attempted to characterize the issue as one of waiver, arguing that waiver requires there to be an "intentional relinquishment or abandonment of a known right." Ans.Br.54 (citing *Pellaton v. Bank of NY*, 592

A.2d 473, 476 (Del. 1991)). However, even if §18-109 did require evidence sufficient to establish waiver, the evidence clearly exists in this case.

In *Pellaton*, this Court found there to be a waiver despite defendant's claim that he was not aware of a particular waiver provision in the agreement he signed. "Although he was not informed of the waiver, he had the opportunity to be fully informed of the nature of the transaction, of the documents he was signing, his two attorneys were present. There is nothing more that [BNY] could do to make sure that there was a knowing waiver in the confessed judgments in issue." *Id.* at 477.

Under that standard, Campbell's actions clearly establish waiver. As the Chancery Court noted, after May 13, 2014, when Campbell knew Holdings was a Delaware LLC, he was represented by counsel who continued to negotiate the Amended LLC Agreement (amendments to the April 2014Letter Agreement which stated it served as the Amended LLC Agreement until an amendment was agreed upon). Campbell continued to proceed in accord with the April 2014 Letter Agreement without ever questioning or objecting to the Delaware situs of Holdings.

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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4811-7746-1593, v. 9