APPENDIX A

2017 WL 3833210
Only the Westlaw citation is currently available.

Court of Chancery of Delaware.

EAGLE FORCE HOLDINGS, LLC, a Delaware limited liability company, and EF Investments, LLC, a Delaware limited liability company, Plaintiffs,
v.
Stanley V. CAMPBELL, Defendant.

C.A. No. 10803-VCMR
|
Submitted: August 28, 2017
|
Decided: September 1, 2017

Attorneys and Law Firms

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MEMORANDUM OPINION

MONTGOMERY-REEVES, Vice Chancellor.

In 2013, Richard Kay and Stanley Campbell decided to form a business venture to market certain

medical diagnosis and prescription technology that Campbell had developed. The parties outlined the principal terms of the investment through two letter agreements in November 2013 and April 2014. Under the principal terms, Kay and Campbell would form a new limited liability company of which they would each be 50% members. Campbell would contribute the stock of EagleForce Associates, Inc., a Virginia corporation, ("EagleForce Associates") and the membership interests of EagleForce Health, LLC, a Virginia limited liability company, ("EagleForce Health") along with certain other intellectual property. Kay would contribute cash. For many months, the parties negotiated several key terms of the transaction documents for the new venture. In the meantime, Kay contributed cash to EagleForce Associates without a formal agreement in place in order to keep the company afloat.

On August 28, 2014, Kay and Campbell signed the transaction documents, which included an operating agreement for Eagle Force Holdings, LLC, a Delaware limited liability company, ("Eagle Force Holdings") and a contribution agreement. The parties dispute what occurred at the August 28 meeting. Plaintiffs assert that the parties formed binding contracts at the August 28 meeting. Campbell contends that his signature was meant to indicate receipt of the latest drafts of the agreements but not to manifest his assent to their terms. Campbell also argues that the transaction documents lack certain essential terms on which the parties had not yet come to agreement, including representations regarding Campbell's ownership of

the intellectual property, stock of EagleForce Associates, and membership interests of EagleForce Health.

After a fact-intensive inquiry, this Court holds in this post-trial opinion that the transaction documents do not represent an enforceable contract because the parties failed to come to agreement on certain terms that the parties regarded as essential. The only basis for this Court's personal jurisdiction over the defendant is consent through forum selection clauses in the contribution agreement and the limited liability company agreement. Because Campbell is not bound by the forum selection clauses, this case is dismissed for lack of personal jurisdiction.

I. BACKGROUND

The facts in this opinion are my findings based on the parties' stipulations, 152 trial exhibits, including deposition transcripts, and the testimony of ten witnesses presented at a five-day trial before this Court that began on February 6, 2017. Additionally, the Court considers Campbell's testimony and the documentary evidence presented at the evidentiary hearings that this Court held on August 31, 2016, September 8, 2016, May 5, 2017, and August 28, 2017. I grant the evidence the weight and credibility that I find it deserves.[1]

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[1] Citations to testimony presented at trial are in the form "Tr. # (X)" with "X" representing the name of the speaker. After being identified initially, individuals are referenced herein by their surnames without regard to formal titles such as "Dr." No disrespect is intended. Exhibits are cited as "JX #." Unless

A. Parties and Relevant Non-Parties

Richard Kay is a businessman and investor in the Washington, DC metropolitan area. Since 2005, Kay has owned a government contracting company called Sentrillion with other partners.[2] Kay also controls Plaintiff EF Investments, LLC, a Delaware limited liability company ("EF Investments").

Defendant Stanley Campbell controls EagleForce Associates and EagleForce Health. EagleForce Associates is a start-up company that Campbell intended to use to market a pharmaceutical software system called PADRE.[3] 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 law.[4]

Plaintiff Eagle Force Holdings is a Delaware limited liability company created by Kay to serve as the holding company for the operating EagleForce businesses. The Amended and Restated Limited Liability Company Agreement of Eagle Force Holdings (the "LLC Agreement") contemplates that Campbell and EF Investments will each own 50% of the membership interests in Eagle Force Holdings.[5] The Contribution

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otherwise indicated, citations to the parties' briefs are to post-trial briefs, and citations to the oral argument transcript refer to the post-trial oral argument.

[2] Tr. 18 (Offit).

[3] *Id.* at 775 (Campbell).

[4] *Id.* at 766.

[5] *See* JX 79.

and Assignment Agreement that Kay and Campbell began to negotiate (the "Contribution Agreement," together with the LLC Agreement, the "Transaction Documents") contemplates that EagleForce Associates and EagleForce Health will be subsidiaries of Eagle Force Holdings.[6]

Donald Rogers is an attorney who represented Campbell through key parts of his negotiations with Kay.[7]

Theodore Offit is an attorney who represented Kay in the negotiations with Campbell.[8]

Said S. Salah is the Vice President of Finance and CFO of EagleForce Associates.[9] From January 2016 until July 2017, he lived overseas and tapered off his services to EagleForce Associates.[10]

General John W. Morgan III is a Senior Vice President of EagleForce Associates and EagleForce Health.[11]

Christopher Cresswell is the General Manager of EagleForce Health.[12]

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[6] JX 78.

[7] Tr. 817-18 (Rogers).

[8] *See id.* at 19 (Offit).

[9] *Id.* at 1086 (Salah).

[10] *Id.*; Aug. 28, 2017 Hr'g Tr. 27.

[11] Tr. 1166 (Morgan).

[12] May 5, 2017 Hr'g Ex. 6.

Jashuva Variganti is an employee of EagleForce Associates.[13]

Katrina Powers is an employee of Sentrilion.[14]

B. Facts

Campbell first met Kay through a mutual friend in 2005 or 2006 when Campbell was seeking an investor for an earlier iteration of EagleForce Associates.[15] Kay did not invest in the earlier EagleForce venture, but in 2009, Campbell approached Kay again about investing in a bomb detection technology.[16] Those negotiations also did not lead to a deal.

In January 2013, Campbell needed capital to market his PADRE technology through EagleForce Associates. Before approaching Kay again, Campbell met Said Salah who had experience with government contracting.[17] Campbell hired him to work with EagleForce 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."[18] The only goal mentioned in

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[13] Tr. 716 (Variganti).

[14] *Id.* at 246-47 (Powers).

[15] *Id.* at 768 (Campbell).

[16] *Id.* at 770-71.

[17] *Id.* at 1094 (Salah).

[18] May 5, 2017 Hr'g Ex. 6.

the employment agreement is to "generate prorated new business sales of at least $6.0 million over the next two years."[19] The agreement states that Salah is eligible to earn 2.5% of the equity of EagleForce Associates.[20] Salah also loaned money to EagleForce Associates and deferred collection of his salary to provide EagleForce Associates with cash needed for its operations.[21] In the same month, Salah's brother, Haney Salah, signed an employment agreement to become the Chief Medical Officer of EagleForce Associates. His employment agreement contains the same eligibility requirements for equity participation, but Haney is entitled to 1.5% of the EagleForce Associates equity upon satisfying those requirements.[22]

Campbell signed Salah's employment agreement, and Salah testified that Kay also saw the agreement and was aware of his claim to equity in EagleForce Associates.[23]

1. The November 2013 letter agreement

In or around November 2013, Campbell approached Kay about investing in EagleForce Associates for the purpose of marketing the PADRE software.[24] EagleForce Associates recently had been

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[19] *Id.*

[20] Tr. 1093-94 (Salah); May 5, 2017 Hr'g Ex. 6.

[21] Tr. 1091, 1094-95 (Salah).

[22] May 5, 2017 Hr'g Ex. 6; Tr. 1097 (Salah).

[23] Tr. 1094 (Salah).

[24] *Id.* at 774-75 (Campbell).

denied a government contract, and Campbell believed that with adequate capitalization, EagleForce Associates would be more attractive as a government contractor.[25]

Kay was interested in investing in EagleForce Associates, and on November 27, 2013, Campbell and Kay signed a letter agreement dated November 15, 2013.[26] Kay's lawyers at the law firm Offit Kurman drafted an initial version of the November letter agreement, but Campbell and Kay independently made changes to it themselves before signing.[27] The November letter agreement contemplates that Campbell and Kay "will form a new LLC entity and/or a series of industry specific LLC's [sic] verticals in Virginia."[28] Campbell's contribution "will be PADRE source code and patents,"[29] and Kay's contribution will 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.[30] The November letter agreement states that "[t]he company will be able to state that it has both the technology and intellectual property rights for all software and applications."[31] It further provides that both Campbell and Kay will own 50% of the new LLC and that they will "never dilute

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[25] *Id.* at 774.

[26] JX 1.

[27] Tr. 131 (Offit).

[28] JX 1, ¶ 2.

[29] *Id.* ¶ 7.

[30] *Id.* ¶ 6.

[31] *Id.* ¶ 7.

[their combined stake to] less than 50.1% together in order to maintain control. They will also agree that their vote will always be uniformly tied as a single vote thus protecting [Campbell] from complete loss of control."[32] Further, Campbell will be entitled to a priority return of $1.8 million before Kay receives a distribution.[33]

Under the November letter agreement, both Campbell and Kay would be involved in managing the new LLC and "will confer on all business and marketing related activities as well as all capital needs."[34] The new LLC's board will have two Campbell designees, two Kay designees, and a fifth member upon which Kay and Campbell will agree.[35] All of the material terms of the November letter agreement were subject to due diligence.[36]

2. The April 2014 letter agreement

After executing the November 2013 agreement, Kay and Campbell continued to negotiate. On March 17, 2014, Kay filed a certificate of formation for Eagle Force Holdings in Delaware.[37] At that time, Kay did not tell Campbell he had formed the Eagle Force Holdings entity; nor did he inform Campbell that the entity was

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[32] *Id.* ¶ 5.

[33] *Id.* ¶ 10.

[34] *Id.* ¶ 4.

[35] *Id.* ¶ 11.

[36] *Id.* ¶¶ 6, 8, 10.

[37] JX 7.

established in Delaware rather than Virginia, as the November letter agreement stated.[38] But on April 4, 2014, Kay and Campbell signed an amendment to the November letter agreement, which stated "[b]y April 21 it is anticipated that a new LLC will be formed to serve as a parent entity ('Holdco') for Eagle Force Associates, Inc. and the recently formed Eagle Force Health Solutions, LLC. . . ."[39]

Kay and Campbell signed the April 4, 2014 letter agreement without counsel present.[40] The April letter agreement "amends the letter agreement that [Campbell and Kay] executed on November 27, 2013 that was dated as of November 15, 2013."[41] The April letter agreement maintained that Campbell and Kay would share management responsibilities and confer regarding marketing and capital needs.[42] But it also further defined Campbell's and Kay's roles in the anticipated parent company, referred to as "Holdco." The April letter agreement stated that

> [Campbell] will have primary responsibility over all information technology, product development, R & D, and customer service and maintenance, in each case subject to an annual budget approved by the Holdco board. [Kay] will have primary responsibility over financial matters, personnel/HR, and

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[38] Tr. 991-92 (Campbell).

[39] JX 12, ¶ 2.

[40] Tr. 380-81 (Kay).

[41] JX 12.

[42] *Id.* ¶ 4

> management of outside accounting, legal, tax and other advisors and consultants as well as all other matters relating to the operation of the business of Holdco and its subsidiaries and will consult with [Campbell] on all decisions affecting these functions.[43]

The April letter agreement contemplated that Campbell would remain entitled to a priority return of his capital,[44] 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.[45] The parties referred to the more defined spheres of management responsibility in the anticipated 50-50 partnership as "swim lanes."[46]

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."[47] The April letter agreement provides that "[Campbell] will, at execution of the Holdco LLC operating agreement, make customary representations to [Kay] regarding Holdco's free and clear right, title and interest to 100% of such Stanley referenced IP. . . ."[48] "Stanley IP" is defined in the letter agreement as "all software and source code . . . invented, developed or

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[43] *Id.* ¶ 3.

[44] *Id.* ¶ 10.

[45] *Id.* ¶ 5.

[46] Tr. 319 (Kay).

[47] JX 1, ¶ 8; JX 12, ¶ 8.

[48] JX 12, ¶ 7.

created, directly or indirectly, by [Campbell], in whole or in part, alone or in conjunction with others (including specifically Eagle Force Associates, Inc.. . . ."[49]

Recognizing that Kay and Campbell had not yet agreed to a "Holdco" operating agreement, the April letter agreement provides that Kay will advance $500,000 to Eagle Force Holdings upon the execution of the letter agreement. And "[t]his $500,000 will be evidenced by a demand promissory note issued to [Kay] by Eagle Force Associates, Inc. and Eagle Force Health Solutions, LLC, jointly and severally. . . ."[50] The evidence does not show that Kay received such a note until July 7, 2014, as discussed below. The April letter agreement also contemplates that once Kay and Campbell agree to the "Holdco" LLC agreement, Kay will contribute an additional $1,800,000 to equal the value of Campbell's intellectual property, $2,300,000.[51] Also at that time, Campbell will receive a $500,000 distribution from "Holdco" for his personal use.[52]

3. The EagleForce businesses hire Cresswell and Morgan

In May 2014, EagleForce Health entered an employment agreement with Christopher Cresswell under which Cresswell became General Manager of

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[49] *Id.*

[50] *Id.* ¶ 6.

[51] *Id.*

[52] *Id.*

EagleForce Health.[53] 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.[54]

Cresswell testified that he understood that his agreement provided him with a right to 5% of the equity of EagleForce Health but that the equity would be expressed as SARs for tax purposes.[55] Cresswell had not seen a SARs plan but testified that Kay told him that his equity would take the form of SARs.[56]

In the same month, EagleForce Associates and EagleForce Health hired General John W. Morgan III as a Senior Vice President. Morgan's employment agreement provides that he is

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[53] May 5, 2017 Hr'g Ex. 6.

[54] *Id.*

[55] Tr. 652 (Cresswell).

[56] *Id.* at 653.

> 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. . . . SAR's will vest based on both tenure and contribution/revenue achievements. Any sale of EagleForce prior to the 3 year vesting shall result in 100% of [Morgan's] shares automatically vesting provided [that Morgan is] still employed by EagleForce or Terminated without "Cause."[57]

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.

4. Kay becomes involved in the EagleForce Associates business

As Kay was conducting due diligence on the EagleForce Associates business, he continued to provide funding to EagleForce Associates[58] and became involved in certain aspects of the day-to-day operations of the company. For example, Kay suggested that Melinda Walker be hired as a secretary at EagleForce Associates.[59] She was paid $75,000 per year, which concerned Campbell because it was a higher salary than

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[57] May 5, 2017 Hr'g Ex. 6.

[58] JX 106.

[59] Tr. 436 (Kay).

most EagleForce Associates employees earned at the time.[60] Additionally, in October 2014, Katrina Powers, a Sentrillion employee, and Jashuva Variganti, an EagleForce Associates employee, established a new account at Paychex, a payroll service, for the EagleForce Associates payroll to which Campbell did not have access.[61]

As Kay became more involved in EagleForce Associates, Kay and Campbell's relationship began to sour. In an April 30, 2014 email exchange, Kay advised Campbell that Bryan Ackerman, Sentrillion's General Counsel, would be involved in all contracts into which EagleForce Associates entered. Campbell, in contrast, wanted Salah to have a greater role. He 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."[62] Kay responded referring to the November and April letter agreements and stating, "[m]y position is we are signed partners. . . ."[63] Additionally, Kay began to speak with EagleForce Associates employees about embarrassing aspects of Campbell's past. For example, at some point between March and August of 2014, Kay met with Cresswell at a country club in Potomac, Maryland and told Cresswell that Campbell had previously

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[60] *Id.* at 917-19 (Campbell).

[61] *Id.* at 739-40 (Variganti); *id.* at 949-50 (Campbell).

[62] JX 130.

[63] *Id.*

committed fraud.[64] And Kay did not get along personally with certain EagleForce employees, particularly Salah.[65]

5. Campbell and Kay begin to negotiate the LLC Agreement and the Contribution Agreement

Despite the fact that Kay and Campbell's relationship had become strained, they began to negotiate the LLC Agreement for Eagle Force Holdings – which mirrored the structure of the "Holdco" entity referenced in the April 2014 letter agreement – and the Contribution Agreement. In addition to Offit Kurman, Kay engaged Latham & Watkins to advise him on investing in the EagleForce business. Michael Schlesinger of Latham & Watkins advised Campbell that he should retain his own counsel,[66] and in or around April 2014, Campbell retained Donald Rogers with the Schulman Rogers law firm.[67]

On May 13, 2014, Latham & Watkins presented a draft Contribution Agreement and a draft LLC Agreement for Eagle Force Holdings to Campbell.[68] The LLC Agreement referred to the March 17, 2014 certificate of formation for Eagle Force Holdings that was filed in

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[64] Tr. 656-59 (Cresswell).

[65] *Id.* at 1087-88 (Salah); *id.* at 1174 (Morgan).

[66] Tr. 795 (Campbell).

[67] *Id.* at 817 (Rogers).

[68] JX 14; JX 15.

Delaware.[69] Campbell, thus, was aware that Kay formed Eagle Force Holdings in Delaware at least by May 13, 2014. The agreement included a forum selection clause consenting to personal jurisdiction in the Delaware courts and an arbitration clause.[70] 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.[71]

On June 30, 2014, Rogers sent revised drafts of the LLC Agreement and the Contribution Agreement to Offit.[72] 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.[73] It also added a protection against dilution for Campbell arising from any additional capital contributions until such contributions exceed $5.5 million.[74] And the June 30 draft added the requirement that for the Eagle Force Holdings board to act, Campbell and Kay both must vote in favor of the board action.[75]

Also on June 30, 2014, Campbell received an email from Kay that Campbell believed contained a racial

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[69] JX 15 Recitals.

[70] *Id.* art. XII.

[71] *Id.* § 5.1.

[72] JX 17.

[73] JX 18, § 3.2.1; JX 19, § 5.1.2.

[74] JX 18, § 3.2.

[75] *Id.* § 4.1.3.

slur.[76] Kay maintains that the word was a typographical error.[77] I need not find what the email was intended to say because I consider it only for the fact that Campbell had reservations about Kay's character, and from Campbell's perspective, his personal relationship with Kay continued to deteriorate. Whether such reservations were justified has no bearing on this case. Despite Campbell's reservations, he continued his business relationship with Kay; EagleForce Associates continued to receive funding from Kay; and the parties continued to negotiate the Transaction Documents.

6. 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 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."[78]

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.[79] Offit believed that at the beginning of the meeting, three primary issues remained to be negotiated. First, the parties had not come to agreement on

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[76] JX 16.

[77] Tr. 444 (Kay).

[78] JX 24.

[79] Tr. 476 (Kay).

the scope of the intellectual property that Campbell would contribute and the extent of the representation Campbell would make regarding his ownership of the intellectual property and any third-party infringement.[80] Second, because Campbell believed that the EagleForce business required $7.8 million in cash to be successful, and Kay planned to contribute only $2.3 million, the parties had to negotiate how Kay and Campbell's interests would be diluted by an additional $5.5 million investment.[81] Third, the structure of the Eagle Force Holdings board of directors needed to be decided. The parties had not yet agreed whether Kay and Campbell would be the only directors or whether a third director would be elected to break deadlock between the parties.[82]

The July 7 meeting went late into the night, and the parties resolved the three issues that Offit understood to be outstanding. As to the scope of the intellectual property Campbell would contribute, the parties agreed that he would contribute all of the intellectual property he had created that was related to the EagleForce business.[83] They agreed that Campbell and Kay would not be diluted at the Eagle Force Holdings level but that they would attempt to raise the additional $5.5 million in capital by selling up to 20% of the equity

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[80] *Id.* at 62 (Offit).

[81] *Id.* at 63; *see* JX 18, § 3.2 (Schulman Rogers June 30, 2014 draft LLC Agreement).

[82] Tr. 63 (Offit).

[83] *Id.* at 64-66; *see* JX 42, Sched. 2.2(b) (Schulman Rogers July 14, 2014 draft Contribution Agreement).

of each subsidiary of Eagle Force Holdings.[84] And they agreed that Campbell and Kay would be the sole directors of Eagle Force Holdings, but the subsidiaries would have a three-person board with an additional independent director.[85] While those issues were resolved at the July 7 meeting,[86] a substantial new issue arose. During that meeting, Offit discovered for the first time that Campbell had previously filed for bankruptcy, which made Offit concerned about Campbell's title to the property he was planning to contribute to Eagle Force Holdings.[87] The next day, Offit discovered through consultation with a bankruptcy attorney at his firm that debt had been discharged in Campbell's bankruptcy and that Campbell had not listed the PADRE intellectual property as an asset on the schedules to his bankruptcy petition.[88] Kay's counsel wanted Campbell to reopen his bankruptcy and amend the petition to include the intellectual property that had previously been omitted.[89] At trial, Campbell testified that he did not want to reopen his bankruptcy after he learned that having two bankruptcy proceedings on his record might make future investors uncomfortable with his participation in EagleForce management.[90]

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[84] Tr. 64-66 (Offit).

[85] *Id.* at 64-66; *see* JX 30, § 4.1.8 (Schulman Rogers July 9, 2014 draft LLC Agreement).

[86] Tr. 63-64 (Offit).

[87] *Id.* at 70.

[88] *Id.* at 73; JX 32.

[89] Tr. 79 (Offit).

[90] *Id.* at 995-96 (Campbell).

At the end of the July 7 meeting, Kay and Campbell signed signature pages, which their attorneys kept in escrow and planned to exchange when Kay and Campbell came to agreement.[91] The purpose of the signature pages was to avoid the need to reconvene to sign the Contribution Agreement and the LLC Agreement.[92] At the July 7 meeting, no one discussed whether the attorneys' exchange of the signature pages constituted the only means by which they could come to agreement on this deal.[93] Kay testified that he did not believe that an exchange of the signature pages was the only way the parties could form a binding agreement.[94]

Also on July 7, Campbell signed an EagleForce Associates note payable to Kay for the $700,000 that Kay had contributed to EagleForce Associates because Kay and Campbell had not yet agreed to an operating agreement for Eagle Force Holdings.[95] Kay and Campbell agreed that the note would be canceled if they were able to reach agreement on the Transaction Documents.[96]

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[91] *Id.* at 68 (Offit); JX 115.

[92] Tr. 68 (Offit).

[93] *Id.* at 69; *id.* at 827 (Rogers).

[94] Tr. 482-83 (Kay).

[95] JX 34; JX 35.

[96] JX 25.

7. 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.[97] And 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.[98]

On July 9, 2014, Campbell also sent an email to Morgan announcing that EagleForce Associates and EagleForce Health had taken on Kay as their "first Partner."[99] Morgan responded congratulating both Kay and Campbell and copying several EagleForce employees.[100] The same day, Campbell held a meeting at EagleForce Associates's offices with all of the office staff to introduce them to Kay.[101]

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]."[102] Presumably, Kay was referring to the

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[97] JX 28.

[98] JX 29.

[99] JX 33. Campbell testified that he did not send this email but that Melinda Walker sent it from his email account without his permission. Tr. 941-42 (Campbell). Regardless, this email does not alter the weight of the evidence.

[100] JX 33.

[101] Tr. 1188-89 (Morgan).

[102] JX 43.

November and April letter agreements. Kay and Campbell then met without their lawyers and discussed open issues. On July 25, 2014, Campbell sent an email to Rogers, Offit, and Kay informing the lawyers of what Campbell and Kay had discussed. In part, Campbell wrote, "[a]s for the Issue related to Bankruptcy—I don't think I have much of an issue . . . what we discussed and agreed is that we will pay any amount owed. I will change that to the point that we will pay any amount under $10,000."[103]

But the bankruptcy issue was not actually resolved. On August 5, 2014,[104] Campbell, Kay, Rogers, and Offit met to attempt to agree on outstanding issues. Campbell testified that Kay and Offit would not drop the bankruptcy issue[105] because they were concerned about Campbell's title to his intellectual property. To indicate that Campbell was not willing to reopen his bankruptcy, he walked out of the meeting. He testified, "I made it clear I wasn't doing that. And the only way I could make it any clearer was to leave."[106] When asked about the circumstances of that meeting, Rogers testified "[i]t may not have been clear to me, but . . . I believe we were discussing . . . the issue of the board of directors, the SARs, and the bankruptcy."[107]

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[103] JX 46.

[104] Tr. 80 (Offit).

[105] *Id.* at 808 (Campbell).

[106] *Id.*

[107] *Id.* at 820-21 (Rogers).

On or around August 6, 2014, Kay and Campbell both signed a handwritten sheet of paper that stated, "Campbell has rights to approve new investment."[108] Offit sent an email to Rogers to clarify what Kay meant in agreeing to the handwritten note. He wrote, "[Campbell] told [Kay] he needed to be involved in all capital raise decisions. [Kay] is obviously in agreement on [Campbell's] need to be involved in capital raise matters, but [Campbell] cannot have a blocking right or veto right. The 3 person board needs to approve capital raise matters."[109]

On or before August 14, 2014, Kay and Campbell met and discussed thirteen issues on which they came to agreement. Kay handwrote[110] the thirteen points on a sheet of paper that he scanned and sent to Campbell.[111] The list of thirteen points contemplated that any new equity capital would be raised by issuing up to 17% of the equity of the Eagle Force Holdings subsidiaries, not through issuing equity of Eagle Force Holdings.[112] Eagle Force 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.[113] The list stated that Campbell cannot lose his salary or be fired. Further, the list provides that Campbell has no veto on

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[108] JX 54.

[109] *Id.*

[110] Tr. 345 (Kay).

[111] JX 56.

[112] *Id.*

[113] *Id.*

new investors but that the subsidiaries will have three-person boards with Mitchell Johnson as the third person.[114] 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]."[115] 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."[116]

On August 19, 2014, Rogers, 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.[117] For example, it included a veto right for Campbell with regard to new investors by requiring that "for any additional capital contribution that has been requested or accepted by a majority of the members of the board of directors or board of managers (as applicable) of a Subsidiary, Campbell must approve the terms and conditions of such additional capital contribution."[118] Rogers's August 19 draft did incorporate some of Kay's requests, however. For example, Rogers's August 19 version of the Contribution Agreement included for the first time a provision requiring that Kay

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] JX 59.

[118] *Id.* § 4.1.8(a).

fund an escrow to pay any claims by Campbell's former creditors and that Campbell take the steps necessary to reopen his bankruptcy.[119]

On August 22, 2014, Campbell sent an email to Kay, Rogers, and Offit stating that on the bankruptcy issue, he and Kay were each willing to commit up to $5,000 to retain Campbell's personal bankruptcy lawyer and resolve the issue of his title to the intellectual property.[120] If that did not resolve the issue, Campbell agreed that out of the $500,000 distribution he would take at closing, he would "retain up to $250,000 in an attorney escrow of [his] choice for a period not to exceed 6 months."[121] Campbell was willing to set aside funds to pay any creditor claims, but he did not want to reopen a bankruptcy proceeding.

Another issue that remained open in the negotiations at the end of August was how to handle the equity rights of certain EagleForce Associates employees, including Salah, Salah's brother Haney, Cresswell, and Morgan.[122] Offit proposed that the EagleForce Associates 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

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[119] JX 57; JX 58; JX 60; Tr. 894 (Rogers).

[120] JX 66.

[121] *Id.*

[122] JX 67.

which you presently participate."[123] The evidence does not show that either Campbell or Kay approached the EagleForce Associates employees to resolve this issue, and as of October 2014, both Kay and Campbell wanted the other to deal with the SARs issue.[124] 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. . . ."[125] 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 EagleForce Associates or EagleForce Holdings.[126] In Rogers's August 19 draft, he bolded and bracketed Offit's additions and noted "[CAMPBELL] CANNOT GUARANTEE THIS. WE NEED TO DISCUSS."[127] I find that 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.

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[123] JX 72.

[124] JX 92.

[125] JX 52, § 4.3(b); JX 58, § 4.3(b); JX 78, § 4.3(b).

[126] JX 50, §§ 4.3(d), 4.3(e).

[127] JX 58, §§ 4.3(d), 4.3(e).

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."[128] 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."[129]

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."[130] Schedule 2.2(b) listed the intellectual property that Campbell planned to contribute.[131] But the other schedules remained incomplete. The August 27 version

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[128] JX 68.

[129] JX 71, § 3.1.

[130] *Id.* Recital D.

[131] *Id.* Sched. 2.2(b).

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. . . ."[132] Sections 4.20(d) and 4.20(f) make clear that Schedule 3.5 includes all of Campbell's intellectual property license agreements.[133] But Schedule 3.5 is blank.[134] 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."[135] But Schedule 4.3(a) is blank except for one line of bracketed text, which states, "[Also describe SARS Plan]."[136] 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. . . ."[137] Schedule 4.12(c) is also blank.[138]

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[132] *Id.* § 3.5.

[133] *Id.* §§ 4.20(d), 4.20(f).

[134] *Id.* Sched. 3.5.

[135] *Id.* § 4.3(a).

[136] *Id.* Sched. 4.3(a).

[137] *Id.* § 4.12(c).

[138] *Id.* Sched. 4.12(c).

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."[139] And that term 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."[140] 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 EagleForce Associates and EagleForce Health;[141] Schedule 4.9 is supposed to list all real property leases, subleases, or licenses to which EagleForce Associates or EagleForce Health is a party;[142] and Schedule 4.15(a) is meant to set forth any pending legal proceedings involving EagleForce Associates, EagleForce Health, or their affiliates, including Campbell.[143] All of those schedules are blank.

The version of the Contribution Agreement that Offit sent with his August 27 email stated "OK DRAFT 8-26-14" on the first page.[144] The version of the LLC Agreement that he sent did not have that notation, but

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[139] *Id.* Ex. A.

[140] *Id.*

[141] *Id.* § 4.6.

[142] *Id.* § 4.9.

[143] *Id.* § 4.15(a).

[144] JX 71.

the LLC Agreement was an exhibit to the Contribution Agreement.[145] Rogers was out of town when Offit sent the August 27 draft Transaction Documents, and Offit received his out-of-office reply.[146]

8. The events of August 28, 2014

On August 28, 2014, Kay and Campbell once again met without their lawyers. Kay and Campbell both testified that Kay came to EagleForce Associates's offices with Katrina Powers for the purpose of having Campbell and Kay sign the Transaction Documents.[147] Campbell was busy when they arrived but met with them briefly.[148] Because Campbell had to finish meeting with EagleForce developers, Kay and Powers left to go to a restaurant five minutes away.[149] 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 Sentrillion general counsel, with Campbell on copy.[150] Campbell replied asking Cresswell not to "forward this information outside of the company until I have had a chance to review."[151] Kay responded, "[w]hat are you talking about outside the company? We just

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[145] JX 73; JX 71, Ex. B.

[146] JX 74.

[147] Tr. 329 (Kay); Tr. 988 (Campbell); Tr. 267 (Powers).

[148] Tr. 329-30 (Kay).

[149] *Id.* at 330.

[150] JX 75.

[151] *Id.*

talk [sic] 3 minutes ago. I will handle my swim lane."[152] About ten minutes later, Kay wrote "1) Bryan is inside not outside. 2) For the record I will handle all NDA contacts."[153] 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."[154] 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."[155] 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?"[156]

At around 7:00 p.m., Kay and Powers returned to the EagleForce 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.[157] Campbell testified that before the signing, Kay told him that Rogers and Offit "were done" with the agreements.[158] Campbell

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[152] *Id.*

[153] *Id.*

[154] JX 76.

[155] *Id.*

[156] *Id.*

[157] Tr. 294-95 (Powers); Tr. 332-35 (Kay).

[158] Tr. 977 (Campbell).

testified that he tried to call Rogers but was unable to reach him because Rogers was out of the office.[159] He testified that Kay tried to call Offit but was also not able to reach him.[160] Kay, in contrast, testified that he did not call Offit or make any representations about Campbell's lawyer.[161]

After Kay and Campbell signed the agreements, Campbell walked around his desk and embraced Kay and Powers.[162]

9. 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.[163] 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."[164]

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[159] *Id.*

[160] *Id.* at 978.

[161] *Id.* at 334 (Kay).

[162] *Id.* at 240 (Powers); *id.* at 332 (Kay). Kay and Powers testified that Campbell hugged each of them after signing the Transaction Documents. Campbell testified at trial that instead of a hug, he gave Kay a dap handshake. *Id.* at 988 (Campbell).

[163] JX 80.

[164] *Id.*

On September 9, after Rogers returned from vacation, he sent revised drafts of the Contribution Agreement and the LLC Agreement to Offit.[165] Rogers did not know that Kay and Campbell had signed the documents at that time,[166] 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.[167] 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 EagleForce Associates and EagleForce Health employees had executed releases or (2) that neither Salah, Salah's family members, nor Cresswell had any legal or equitable interest in EagleForce Associates or EagleForce Health.[168] Rogers 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

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[165] JX 83.

[166] Tr. 827 (Rogers).

[167] *Id.* at 831.

[168] JX 84, §§ 4.3(d), 4.3(e).

> granted to understand the ultimate impact on [Campbell].[169]

Second, Rogers stated that financial representations in the Contribution Agreement regarding the status of EagleForce Associates and EagleForce 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.[170] As to the LLC Agreement, Rogers removed the provision governing how Mitchell Johnson's successor as the third director on the subsidiary boards would be chosen.[171] And Rogers added a provision requiring that Campbell and Kay always vote in favor of increasing Campbell's salary to be commensurate with similarly situated officers of similar companies.[172] The record does not indicate that Campbell had previously demanded that his salary be increased to reflect industry standards.

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."[173] Campbell stated that Kay's staff had access to

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[169] *Id.* § 4.3(d).

[170] JX 83.

[171] JX 86, § 4.1.8.

[172] *Id.* § 4.1.8(b).

[173] JX 88.

all of the information required to create a balance sheet and income statement.[174] Kay responded asking for clarification and wrote, "[w]e need to complete the paperwork so I can fully fund."[175]

Offit, Rogers, Kay, and Campbell had a conference call on September 17 to discuss Rogers's proposed changes to the August 28 agreements.[176] Offit testified that Kay stated on the call that he was willing to discuss potential amendments to the agreements but was not willing to rescind and re-execute them.[177] But Rogers did not remember the contents of that call.[178]

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.[179] 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."[180] Kay responded on October 8, stating in part, "[w]e have signed our agreements and are awaiting the exhibits. [Offit] told me that [Rogers]

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[174] *Id.*

[175] *Id.*

[176] Tr. 106 (Offit).

[177] *Id.*

[178] *Id.* at 855-56 (Rogers).

[179] JX 91.

[180] *Id.*

has 2 open issues" related to the boards of directors of the subsidiaries and the SARs program.[181] Campbell did not respond to the October 8 email.[182]

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."[183] 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."[184]

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."[185] 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."[186] 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

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[181] *Id.*

[182] *Id.*

[183] JX 92.

[184] *Id.*

[185] JX 93.

[186] *Id.*

Bankruptcy be withdrawn from consideration/requirement."[187]

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.[188] Kay nevertheless continued to fund the EagleForce Associates payroll into February 2015.[189]

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.[190]

On March 17, 2015, Eagle Force Holdings and EF Investments filed this lawsuit to enforce the August 28 Contribution Agreement and LLC Agreement.

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[187] *Id.*

[188] JX 97.

[189] JX 106.

[190] JX 103.

C. This Litigation

Plaintiffs filed the original complaint in this case on March 17, 2015 and the First Amended Complaint—the operative complaint—on June 5, 2015 (the "Complaint"). Vice Chancellor Parsons entered an interim relief order on July 23, 2015 (the "Order"). The Order is designed to give EF Investments regular access to information regarding EagleForce Associates and EagleForce Health during the pendency of this litigation. Under the Order, Campbell must notify Plaintiffs ten days before either EagleForce Associates or EagleForce Health enters certain transactions, and Plaintiffs have a right to object in writing. If Plaintiffs object, Campbell cannot engage in a transaction covered by the Order without an order of this Court. The most expansive advanced notice provision of the Order requires ten business days' advanced notice for any transaction or series of transactions with a single person over $5,000 in value in the aggregate. Any such advanced notice must include the text "**NOTICE TO PLAINTIFFS OF PROPOSED ACTION BY DEFENDANT**" in bold type under paragraph 4 of the Order. Further, the Order requires regular reports regarding the EagleForce Associates and EagleForce Health businesses. The reports include weekly reports describing all sales or distribution leads regarding the Disputed IP, weekly bank statements, weekly accounts receivable and payable reports, and payroll statements every two weeks.

On May 27, 2016, Plaintiffs moved to hold Campbell in contempt for violations of the Order. The Court

held an evidentiary hearing on the motion for contempt on August 31, 2016. At the end of that day, the Court ordered the parties to return the next day to complete the hearing. Plaintiffs' attorneys appeared on September 1, 2016, but Defendant did not appear. The Court rescheduled the remainder of the hearing for September 8, 2016 and completed the hearing that day. At the September 8, 2016 hearing, the Court held that Campbell failed to provide Plaintiffs with advanced notice before withdrawing approximately $100,000 in accrued unreimbursed expenses from EagleForce Associates and paying approximately $38,000 in vendor fees. On December 15, 2016, the Court ordered Campbell to pay Plaintiffs' attorneys' fees for their September 1, 2016 appearance at this Court when Campbell did not appear as a partial remedy for Campbell's contempt. The Court deferred any further remedy until after the trial in this case in part because the question of this Court's jurisdiction over Campbell remained undecided. Campbell was ordered to pay that portion of Plaintiffs' attorneys' fees on or before December 23, 2016. Campbell deposited a check for the attorneys' fees into Kay's personal bank account on December 27, 2016, the business day after December 23, 2016.[191]

Beginning on February 6, 2017, this Court held a five-day trial in this case. On March 6, 2017, Plaintiffs filed a supplemental motion to hold Campbell in

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[191] Letter to the Court from David Finger, *Eagle Force Hldgs. LLC v. Campbell*, C.A. No. 10803-VCMR, Ex. E (Del. Ch. Jan. 10, 2017).

contempt for additional violations of the interim relief order. The parties filed post-trial opening briefs on March 29, 2017. In connection with Campbell's opening post-trial brief, he also filed a motion to amend the pleadings to conform to the evidence submitted at trial with respect to the defenses of unilateral and mutual mistake. The parties filed post-trial answering briefs on April 7, 2017. On May 5, 2017, the Court heard post-trial oral argument and held an evidentiary hearing on Plaintiffs' supplemental motion to hold Campbell in further contempt of the interim relief order. On May 24, 2017, Plaintiffs filed a second supplemental motion to hold Campbell in contempt for an additional alleged violation of the Order. This Court held an additional evidentiary hearing on Plaintiffs' second supplemental motion for contempt on August 28, 2017. This post-trial opinion also resolves all outstanding motions in this case.

II. ANALYSIS

Plaintiffs' Complaint alleges claims for breach of contract and breach of fiduciary duty. Plaintiffs seek an order requiring Campbell to specifically perform his obligations under the Transaction Documents and granting monetary damages to Plaintiffs. In the alternative, Plaintiffs assert claims for fraud and unjust enrichment. Campbell is a resident of Virginia, and he has objected to the personal jurisdiction of this Court throughout these proceedings. In this unusual case, a full trial was necessary to resolve the question of personal jurisdiction because whether Campbell

consented to personal jurisdiction in Delaware depends on whether Campbell is bound by the Transaction Documents.[192]

A. Standards of Review for Contract Formation

Plaintiffs have the burden of establishing by a preponderance of the evidence that Campbell is bound by the Transaction Documents and, thus, is subject to personal jurisdiction in Delaware.[193] "Proof by a preponderance of the evidence means proof that something is more likely than not. 'By implication, the preponderance of the evidence standard also means that if the evidence is in equipoise, Plaintiffs lose.' "[194]

To enforce the Delaware forum selection clause, Plaintiffs must prove that they formed a valid contract with Campbell.[195] It is well-settled Delaware law that "a valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the

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[192] *Eagle Force Hldgs., LLC v. Campbell*, C.A. No. 10803-VCP, at 48-49 (Del. Ch. July 9, 2015) (TRANSCRIPT).

[193] *Revolution Retail Sys., LLC v. Sentinel Techs., Inc.*, 2015 WL 6611601, at *9 (Del. Ch. Oct. 30, 2015).

[194] *Id.* (quoting *2009 Caiola Family Tr. v. PWA, LLC*, 2015 WL 6007596, at *12 (Del. Ch. Oct. 14, 2015)).

[195] The parties raise the question of which jurisdiction's law applies to this case, but they do not brief the choice of law issue. The briefing relies heavily on Delaware law, and neither of the parties asserts that the law of Delaware is in conflict with the law of any other jurisdiction whose law may apply. The Court, thus, will apply Delaware law to all issues addressed in this opinion.

contract are sufficiently definite, and (3) the parties exchange legal consideration."[196] "To determine whether a contract was formed, the court must examine the parties' objective manifestation of assent, not their subjective understanding."[197] "If terms are left open or uncertain, this tends to demonstrate that an offer and acceptance did not occur."[198]

Chancellor Allen held in *Leeds v. First Allied Connecticut Corp.* that "[i]t is when all of the terms that the parties themselves regard as important have been negotiated that a contract is formed."[199] Under Delaware's objective theory of contract law, the Court must determine "whether agreements reached were meant to address all of the terms that a reasonable negotiator should have understood that the other party intended to address as important."[200] "Agreements made along

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[196] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

[197] *Trexler v. Billingsley*, 2017 WL 2665059, at *3 (Del. June 21, 2017).

[198] *Ramone v. Lang*, 2006 WL 905347, at *11 (Del. Ch. Apr. 3, 2006).

[199] *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1101 (Del. Ch. 1986); *see also CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *15 (Del. Ch. Apr. 21, 2015) ("[A]n enforceable contract must contain all material terms of the agreement and material provisions that are indefinite will not be enforced." (quoting *Gallagher v. E.I. DuPont De Nemours & Co.*, 2010 WL 1854131, at *3 (Del. Super. Ct. Apr. 30, 2010)) (internal quotation marks omitted)).

[200] *Leeds*, 521 A.2d at 1102; *see also Gillenardo v. Connor Broad. Del. Co.*, 1999 WL 1240837, at *4-5 (Del. Super. Ct. Oct. 27, 1999).

the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative. Negotiation of complex, multi-faceted commercial transactions could hardly proceed in any other way."[201] To conduct such an analysis, courts review "all of the surrounding circumstances, including the course and substance of the negotiations, prior dealings between the parties, customary practices in the trade or business involved and the formality and completeness of the document (if there is a document) that is asserted as culminating and concluding the negotiations."[202] "Until it is reasonable to conclude, in light of all of these surrounding circumstances, that all of the points that the parties themselves regard as essential have been expressly or . . . implicitly resolved, the parties have not finished their negotiations and have not formed a contract."[203] "Thus, determination of whether a binding contract was entered into will depend on the materiality of the outstanding issues in the draft agreement and the circumstances of the negotiations."[204]

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[201] *Leeds*, 521 A.2d at 1102.

[202] *Id.*

[203] *Id.*; *see also J.W. Childs Equity P'rs, L.P. v. Paragon Steakhouse Restaurants, Inc.*, 1998 WL 812405, at *4 (Del. Ch. Nov. 6, 1998) (finding that a letter agreement to sell at least 60 parcels of real property that listed only 17 sites in exhibit A was not a contract to sell property).

[204] *Greetham v. Sogima L-A Manager, LLC*, 2008 WL 4767722, at *15 (Del. Ch. Nov. 3, 2008).

B. The Transaction Documents Lack Terms that Were Essential to the Parties' Bargain

Campbell asserts that certain material terms are missing from the Transaction Documents, showing that the parties never came to agreement and rendering the Transaction Documents unenforceable. In particular, Campbell argues that the closing date, all schedules to the Transaction Documents except for Schedule 2.2(b), definitions of the terms "Insurance Claim" and "IP Disclosure Schedule," and aggregate dollar figures for certain representations are missing from the Transaction Documents.[205]

1. Kay and Campbell failed to agree on terms regarding the consideration to be exchanged

Campbell's primary obligation under the text of the Contribution Agreement would be to contribute the stock of EagleForce Associates, the membership interests of EagleForce Health, certain intellectual property related to the EagleForce businesses, and certain contractual rights and obligations. The precise scope of that consideration was to be captured in Sections 2.2 and 3.5 of the Contribution Agreement and Schedules 2.2(b), 3.5, 4.3(a), and 4.12(c). But those portions of the Transaction Documents are either blank or inconsistent with the reality of which Campbell, Kay, Offit, and Rogers were aware.

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[205] Def.'s Pre-Trial Br. 13-20.

Section 2.2(a) of the Contribution Agreement states that part of Campbell's contribution shall be "all right, title and interest in the Targeted Companies Securities, such that, after such contribution, the Company shall hold all of the Targeted Companies Securities."[206] Section 4.3(a) of the Contribution Agreement provides that "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."[207] But Schedule 4.3(a) is blank except for the bracketed text "[Also describe SARS Plan]."[208] Thus, the schedule that was meant to list an important part of the consideration Campbell would provide under the agreement is incomplete.

The objective evidence of the course of the parties' negotiations shows that whether Campbell owns all of the equity in EagleForce Health and EagleForce Associates is not clear. Salah, Salah's brother Haney, Cresswell, and Morgan all have employment agreements that give them some form of equity in the EagleForce businesses.[209] Throughout the negotiation of the Transaction Documents, Kay and Offit were concerned about

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[206] JX 78, § 2.2(a).

[207] *Id.* § 4.3(a).

[208] JX 79, Sched. 4.3(a).

[209] May 5, 2017 Hr'g Ex. 6.

employee claims for some of the equity of EagleForce Associates or EagleForce Health. And the evidence shows that Kay knew of at least Salah's and Cresswell's claims to EagleForce Health and EagleForce Associates equity.[210] Kay and Campbell's list of thirteen points recognized the problem of the SARs program and began to develop a solution under which Campbell and Kay would each retain equal control,[211] but that was never incorporated into the Transaction Documents. Instead, Offit included representations from Campbell in the Transaction Documents that Campbell had obtained releases from Cresswell, Morgan, and five other EagleForce employees related to their revenue sharing or profit sharing plans and that neither Salah, Salah's family, nor Cresswell had any interest in the EagleForce businesses. But Campbell never agreed to those representations.[212] To the contrary, in Rogers's August 19 draft, Rogers commented below the representation, "[CAMPBELL] CANNOT GUARANTEE THIS. WE NEED TO DISCUSS."[213] Rogers's comment was removed in Offit's August 27 version, which Kay and Campbell signed on August 28 while Rogers was out of town and unreachable.[214]

Even after the August 28 signing, Kay, Campbell, Offit, and Rogers knew they had not come to agreement on the employee claims for equity and the SARs

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[210] Tr. 653 (Cresswell); Tr. 1094 (Salah).

[211] JX 56.

[212] JX 50, §§ 4.3(d), 4.3(e).

[213] JX 58, § 4.3(d).

[214] JX 78, § 4.3(d).

plan. In the September 9 version of the Transaction Documents that Rogers sent post-signing, Rogers again commented that Campbell could not agree to the representation regarding the employee releases, stating:

> 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].[215]

And Rogers included additional questions about the SARs Plan in his September 9 cover email.[216] As such, both Kay and Campbell recognized that Campbell likely does not own 100% of the equity of EagleForce Associates and EagleForce Health, and Campbell had not obtained releases related to any employees' potential ownership of equity in the EagleForce businesses. Despite this knowledge, they did not come to agreement on terms that addressed the reality.

Further, Section 4.12(c) of the Contribution Agreement states that "[e]xcept as set forth on Schedule 4.12(c), neither the execution and delivery of this

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[215] JX 84, § 4.3(d).

[216] JX 83.

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. . . ."[217] Cresswell and Morgan appear to have SARs rights under their employment agreements that automatically vest upon a sale or change of control,[218] and Kay knew of that fact at least as to Cresswell's SARs.[219] But regardless, schedule 4.12(c) is blank.[220]

Kay and Campbell also did not reach agreement on which contracts Campbell would assign to Eagle Force Holdings as another part of the consideration in this proposed deal. The Contribution Agreement that the parties signed 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. . . ."[221] Sections 4.20(d) and 4.20(f) make clear that Schedule 3.5 includes all of Campbell's intellectual property license agreements.[222] But Schedule 3.5 also is blank. Campbell's intellectual property listed in Schedule 2.2(b) is the only portion of Campbell's consideration outlined in the Transaction Documents on which the parties appear to have completed negotiations. Absent definite terms regarding the remainder of the property to be

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[217] JX 78 § 4.12(c).

[218] May 5, 2017 Hr'g Ex. 6.

[219] JX 84, § 4.3(d); Tr. 653 (Cresswell).

[220] JX 79, Sched. 4.12(c).

[221] JX 78, § 3.5.

[222] *Id.* §§ 4.20(d), 4.20(f).

contributed, I find that Campbell and Kay did not come to agreement on the consideration that Campbell would provide in the Transaction Documents.

The precise consideration to be exchanged between Campbell and Eagle Force Holdings was highly material to the parties here. Presumably, the consideration that Campbell would provide to Eagle Force Holdings would directly affect the number of units or the size of the capital account Eagle Force Holdings would provide to Campbell. And division of the equity in Eagle Force Holdings was extremely important to Campbell and Kay. From the beginning of Campbell and Kay's negotiations, they communicated to each other that it was very important that they both be 50% owners of the ultimate holding company. The November 2013 letter agreement provides that both Campbell and Kay would own 50% of the new LLC, and they agreed "to never dilute [their stakes to] less than 50.1% together in order to maintain control. They will also agree that their vote will always be uniformly tied as a single vote thus protecting [Campbell] from complete loss of control."[223] Similarly, the April 2014 letter agreement also contemplated that Campbell would own 50% of "Holdco," and 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.[224]

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[223] JX 1, ¶ 5.

[224] JX 12, ¶ 5.

At the July 7, 2014 meeting at Rogers's office that went late into the night, the parties resolved that Eagle Force Holdings would not issue new equity capital for the additional $5.5 million they wanted to raise. This would allow Campbell and Kay to retain equal control of the entire EagleForce business.[225] Instead, the subsidiaries would issue equity in exchange for new capital, but Eagle Force Holdings would retain 80% control of the subsidiaries.[226] That term was reiterated in the handwritten list of thirteen points to which Campbell and Kay agreed without their lawyers present.[227]

Additionally, on August 28, 2014, approximately one hour before Kay and Campbell signed the Transaction Documents, they exchanged emails that highlight how important it was to both of them that Kay and Campbell both have equal control. Cresswell sent a non-disclosure agreement to Kay and Bryan Ackerman, the Sentrillion general counsel, with Campbell on copy.[228] Campbell replied asking Cresswell not to "forward this information outside of the company until I have had a chance to review."[229] Kay responded, "[w]hat are you talking about outside the company? We just talk [sic] 3 minutes ago. I will handle my swim lane."[230] About ten minutes later, Kay wrote "1) Bryan is inside

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[225] Tr. 64-66 (Offit).

[226] *Id.*

[227] JX 56.

[228] JX 75.

[229] *Id.*

[230] *Id.*

not outside. 2) For the record I will handle all NDA contacts."[231] 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."[232] 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."[233] Thus, just before signing, Campbell reiterated that he and Kay must be equal partners. And Kay's emails show that equal control was a material term to Kay as well.[234]

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[231] *Id.*

[232] JX 76.

[233] *Id.*

[234] Campbell and Kay were concerned about loss of control and dilution in part because they did not trust one another. *See* Tr. 803 (Campbell). On April 30, 2014, 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." JX 130. And during the spring or summer of 2014, Kay met with Cresswell at a country club in Potomac, Maryland and told Cresswell that Campbell had previously committed fraud. Tr. 656-59 (Cresswell). Further, on June 30, 2014, Campbell received an email from Kay with what Campbell believed to be a racial slur. JX 16. Kay was also particularly concerned about Salah's equity in the EagleForce businesses because he did not work well with Salah. Tr. 1087-88 (Salah); *id.* at 1174 (Morgan). Kay made clear in the handwritten list of thirteen points 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]." JX 56.

Campbell and Kay planned for Kay to contribute $2,300,000 in cash because $2,300,000 was the value of Campbell's anticipated contribution.[235] To the extent Campbell's actual contribution was less than originally contemplated, the negotiating parties would have to confront the issue of how the precise assets Campbell contributes to Eagle Force Holdings would affect the number of units Eagle Force Holdings issues to Campbell—and, in turn, which party obtains control over Eagle Force Holdings. Campbell and Kay acknowledged this reality both before and after the signing.[236] As such, the objective circumstances of the parties' negotiating history show that Sections 2.2(a) and 3.5 of the Contribution Agreement and Schedules 4.3(a) and 4.12(c)—which would have listed Campbell's holdings in EagleForce Associates and EagleForce Health, any Cresswell, Morgan, or Said or Haney Salah holdings in those companies, and any holdings associated with the SARs Plan—and Schedule 3.5—which would have listed the contract rights and liabilities Campbell planned to contribute—related to terms that the parties considered essential and on which they had not completed negotiations.[237]

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[235] JX 12, ¶ 6.

[236] JX 56; JX 84, § 4.3(d).

[237] *J.W. Childs Equity P'rs, L.P. v. Paragon Steakhouse Restaurants, Inc.*, 1998 WL 812405, at *3 (Del. Ch. Nov. 6, 1998); RESTATEMENT (SECOND) OF CONTRACTS § 33 (AM. LAW INST. 1981) ("The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.").

Plaintiffs contend that Campbell was obligated to provide the schedules. They are referenced as the Campbell Disclosure Schedules in the Contribution Agreement.[238] And that term 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."[239] But the parties were still negotiating on Schedules 3.5, 4.3(a), and 4.12(c). And the evidence indicates that Kay and Campbell had not agreed on who would create certain of the schedules. While both Campbell and Kay appear to have worked slowly, or in some cases not at all, on the Transaction Documents schedules other than Schedule 2.2(b), the evidence does not indicate that they agreed to complete the Transaction Documents without those schedules.[240]

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[238] JX 78, Ex. A.

[239] *Id.*

[240] This opinion does not address whether Campbell and Kay entered a binding contract (such as the letter agreements) that lacks a Delaware forum selection clause because the Court does not have jurisdiction to reach that question. It also does not address any other theory of liability that may arise from Kay and Campbell's relationship.

2. The parties did not assent to the terms of the LLC Agreement separately from the Contribution Agreement

As to the LLC Agreement, the evidence shows that Kay and Campbell did not agree to the terms of the LLC Agreement separately from the closely related terms of the Contribution Agreement. From the beginning of Campbell and Kay's discussions, the two parties sought to combine resources to market the PADRE technology through a well capitalized business.[241] As early as the November 2013 letter agreement, Campbell and Kay wanted to form a new limited liability company in connection with that business venture.[242] And the Transaction Documents that Kay and Campbell signed on the same day repeatedly reference one another,[243] indicating that neither agreement was designed to stand alone. The Contribution Agreement that Kay and Campbell signed states, "[a]t the Closing, the Company, Campbell and EFI shall enter into and deliver the Company LLC Agreement in the form of Exhibit B."[244] Exhibit B to the Contribution Agreement is a placeholder for the LLC Agreement.[245] Unlike the Contribution Agreement, the LLC Agreement that Campbell and Kay signed does not say "OK DRAFT 8-26-14" on the cover page,[246] which suggests that the

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[241] Tr. 774 (Campbell); JX 1.

[242] JX 1, ¶¶ 7-8.

[243] JX 78, Recital C, § 2.3; JX 79, § 3.2.1.

[244] JX 78, § 3.4.

[245] *Id.* Ex. B.

[246] *Compare* JX 78, *with* JX 79.

cover page to the Contribution Agreement was considered the cover page to the Transaction Documents as a whole, and the LLC Agreement was an exhibit. And many of the blank schedules to the Contribution Agreement are actually attached to the LLC Agreement.[247] Further, no one asserts that Campbell and Kay intended to enter into the LLC Agreement separate and apart from a Contribution Agreement.[248] Rather, "the parties intended these two Agreements to operate as two halves of the same business transaction."[249] Thus, the LLC Agreement and the Contribution Agreement rise and fall together. Kay and Campbell did not intend to bind themselves to the written terms in the Transaction Documents, and this Court does not have personal jurisdiction over Campbell through his consent.

C. Absent Campbell's Consent, This Court Lacks Personal Jurisdiction over Campbell

Without Campbell's consent, this Court cannot exercise personal jurisdiction over Campbell. Plaintiffs do not argue that Campbell is subject to personal jurisdiction in Delaware pursuant to the Delaware long-

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[247] *See* JX 79 (including Schedules 4.3(a) and 4.12(c)).

[248] *See* Tr. 5; Pls.' Opening Br. This does not mean that Campbell and Kay did not form a business entity. It simply means they had not completed negotiations on the Transaction Documents, which include the LLC Agreement.

[249] *E.I. DuPont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1115 (Del. 1985).

arm statute. They do contend that Campbell became a member and manager of Eagle Force Holdings by executing the April 2014 letter agreement and, thus, impliedly consented to personal jurisdiction in Delaware under Section 18-109(a) of the Delaware Limited Liability Company Act.[250] The April 2014 letter agreement "amends the letter agreement that [Campbell and Kay] executed on November 27, 2013 that was dated as of November 15, 2013."[251] The November 2013 letter agreement states that Campbell and Kay "will form a new LLC entity and/or a series of industry specific LLC's [sic] verticals in Virginia."[252] And the April 2014 letter agreement states that "a new LLC will be formed to serve as a parent entity ('Holdco')"[253] without any mention of Delaware. Instead, it states, "[t]his letter agreement is legally binding upon the parties and shall be governed by the laws of the State of Virginia."[254] Further, at the time of the April 2014 letter agreement, Campbell did not know that Kay had formed Eagle Force Holdings in Delaware.[255] The only agreements that mention a Delaware limited liability company are the Transaction Documents, which are missing material terms and, thus, are not enforceable. The April letter agreement does not serve as implied consent to jurisdiction in Delaware.

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[250] 6 *Del. C.* § 18-109(a).

[251] JX 12.

[252] JX 1, ¶ 2.

[253] JX 12, ¶ 2.

[254] *Id.* ¶ 18.

[255] Tr. 991-92 (Campbell).

Plaintiffs also assert that Campbell actively participated in the management of a Delaware limited liability company and, thus, impliedly consented to personal jurisdiction in Delaware. The facts proven at trial, however, indicate that Campbell managed only EagleForce Associates, a Virginia corporation, and EagleForce Health, a Virginia limited liability company. The record does not show that Campbell ever managed Eagle Force Holdings or any other Delaware entity. As such, Campbell is not subject to personal jurisdiction under Section 18-109.

D. Campbell's Motion to Conform the Pleadings to the Evidence is Moot

Campbell also has moved under Court of Chancery Rule 15(b) to conform the pleadings to the evidence presented at trial by adding the defenses of unilateral and mutual mistake to his answer. But because this Court does not enforce the Transaction Documents, the motion is moot.

E. The Interim Relief Order Does Not Bind Campbell

Plaintiffs' three motions for contempt allege that Campbell violated the interim relief order. "A party petitioning for a finding of contempt bears the burden to show contempt by clear and convincing evidence; the burden then shifts to the contemnors to show why they

were unable to comply with the order."[256] "To establish civil contempt, [the petitioning party] must demonstrate that the [contemnors] violated an order of this Court of which they had notice and by which they were bound."[257]

> The party charged [with contempt] is always at liberty to defend his disregard of the court's order by showing that the order was void for lack of jurisdiction. In a contempt proceeding based upon the violation of an injunction, the only legitimate inquiry to be made by the court is whether or not it had jurisdiction of the parties and of the subject matter. Subject to this limitation the court will not listen to an excuse for the contemptuous action based upon an argument that the order in question was imperfect or erroneous. No person may with impunity disregard an order of the court having jurisdiction over the subject matter and of the parties.[258]

Because this Court lacks personal jurisdiction over Campbell, he was not bound by the Order and cannot have committed contempt by violating the Order. Plaintiffs' motions for contempt are denied.

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[256] *TR Inv'rs, LLC v. Genger*, 2009 WL 4696062, at *15 (Del. Ch. Dec. 9, 2009).

[257] *Id.* (quoting *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997)) (internal quotation marks omitted).

[258] *Mayer v. Mayer*, 132 A.2d 617, 621 (Del. 1957), *quoted in Cohen v. State ex rel. Stewart*, 89 A.3d 65, 90 n.115 (Del. 2014).

III. CONCLUSION

For the reasons stated herein, this Court lacks personal jurisdiction over Stanley Campbell, and the Complaint is dismissed. Defendant's motion to conform the pleadings to the evidence is denied as moot. Plaintiffs' motions for contempt are denied.

IT IS SO ORDERED.

APPENDIX B

187 A.3d 1209
Supreme Court of Delaware.

EAGLE FORCE HOLDINGS, LLC, and
EF Investments, LLC, Plaintiffs Below, Appellants,
v.
Stanley V. CAMPBELL, Defendant Below, Appellee.

No. 399, 2017
|
Submitted: March 7, 2018
|
Decided: May 24, 2018

Court Below: Court of Chancery of the State of Delaware, C.A. No. 10803–VCMR

Upon appeal from the Court of Chancery. **REVERSED** and **REMANDED**.

Attorneys and Law Firms

Frank E. Noyes, II, Esquire, Offit Kurman, P.A., Wilmington, Delaware. Of Counsel: Harold M. Walter, Esquire, Baltimore, Maryland, for Appellants.

David L. Finger, Esquire, Finger and Slanina, LLC, Wilmington, Delaware, for Appellee.

Before STRINE, Chief Justice, VALIHURA, VAUGHN, SEITZ, and TRAYNOR, Justices, constituting the Court en Banc.

Opinion

VALIHURA, Justice, for the Majority:

One of the first things first-year law students learn in their basic contracts course is that, in general, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."[1] In other words, there must be a "meeting of the minds" that there is a contract supported by consideration. However, in the context of real life disputes, the basic elements are not always as straightforward as they might appear in the hornbooks. This case presents such a situation, where determining something as seemingly simple as whether a contract was formed proves a challenging endeavor.

After months of negotiations, the parties here signed versions of two transaction agreements: a limited liability company agreement, and a contribution and assignment agreement. However, a serious question exists as to whether the parties intended to be bound by these signed documents. And whether there exists a valid, binding contract implicates the other main issue raised on appeal—namely, whether this

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[1] Restatement (Second) of Contracts § 17 (1981) [hereinafter Restatement].

Court can exercise jurisdiction over the defendant. If at least one of these transaction documents is a valid, independently enforceable contract, then this Court has jurisdiction via a forum selection clause favoring Delaware. If neither document is independently enforceable, and if earlier agreements do not provide another means of exercising jurisdiction over the defendant, then Delaware courts lack personal jurisdiction over the defendant, and the plaintiffs' claims for breach of contract, unjust enrichment, and other causes of action against the defendant were properly dismissed.

In this unusual case, after numerous evidentiary hearings, a five-day trial, and several motions for contempt—proceedings spanning more than two years—the Court of Chancery determined that neither transaction document is enforceable. As a result, the Court of Chancery dismissed the case for lack of personal jurisdiction, even after finding one of the parties in contempt of its status quo order.

In *Osborn ex rel. Osborn v. Kemp*,[2] this Court set forth the elements of a valid, enforceable contract. We explained that "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."[3]

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[2] 991 A.2d 1153 (Del. 2010).

[3] *Id.* at 1158.

The trial court did not apply this test in this case. Though it mentioned the *Osborn* test, the trial court primarily relied on *Leeds*,[4] a Court of Chancery opinion that addresses the enforceability of letters of intent and provides that "determination of whether a binding contract was entered into will depend on the materiality of the outstanding issues in the draft agreement and the circumstances of the negotiations."[5] Applying *Leeds*, the trial court found that the agreement was not sufficiently definite due to a lack of agreement on certain material terms, primarily the consideration to be exchanged. Although this could be viewed as an implicit finding that the parties could never have intended to be bound, we believe that there is force in appellants' contention that the parties' intent to be bound requires a separate factual finding.

In this case, there is evidence within the four corners of the documents and other powerful, contemporaneous evidence, including the execution of the agreements, that suggests the parties intended to be bound. But we acknowledge that there is also evidence that cuts the other way. Given that this is a question of fact, we remand to the Court of Chancery to make such a finding.

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[4] *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095 (Del. Ch. 1986).

[5] *Eagle Force Holdings, LLC v. Campbell* (*Trial Op.*), 2017 WL 3833210, at *14 (Del. Ch. Sept. 1, 2017) (quoting *Greetham v. Sogima L-A Manager, LLC*, 2008 WL 4767722, at *15 (Del. Ch. Nov. 3, 2008) (citing *Leeds*, 521 A.2d at 1101-02)).

Osborn's second inquiry, *i.e.*, whether the contract's terms are sufficiently definite, is largely a question of law. We believe that the agreements sufficiently address all issues identified by the trial court as material to the parties—including the consideration to be exchanged. We remand because, although we conclude that the second and third *Osborn* prongs are satisfied, we recognize that the trial court's conclusions as to the parties' intent to be bound impact the analysis and ultimate determination as to whether a contract has been formed.[6]

If either document is enforceable, then the forum selection provisions are also enforceable. And, for reasons discussed below, we also find that the Court of Chancery erred in finding that its jurisdiction to enforce the previously issued contempt order depended on the enforceability of the transaction documents. It has jurisdiction to enforce its order regardless of the transaction documents' enforceability.

Thus, we REVERSE the Court of Chancery's decision and REMAND this case with instructions to the trial court to reconsider the evidence and make a finding on the parties' intent to be bound to each transaction document in accordance with the framework set forth in *Osborn* and guidance included in this opinion. We also REVERSE and REMAND to the Court of Chancery to enforce its contempt order, and so even if, on remand, the Court of Chancery adheres to its

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[6] The parties do not dispute the third prong of the *Osborn* analysis—namely, whether there was sufficient consideration.

earlier conclusion that the transaction documents are unenforceable, it will need to decide the other contempt allegations pending in that court.

I.

Defendant-appellee Stanley Campbell is the creator of PADRE, a software system that aggregates medical information about patients to help physicians determine the appropriate medications to prescribe.[7] He founded EagleForce Associates, Inc. ("Associates"), a Virginia Corporation, to develop and market PADRE. In November 2013, Associates had just been denied a government contract, and Campbell reasoned that it would have a better chance of succeeding if it were better capitalized.[8] Perhaps even more pressing, the company also needed funding to stay afloat.[9] It had no revenue.[10]

In seeking the much-needed capitalization, Campbell approached Richard Kay, a businessman and investor based in the Washington, D.C., area whom he

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[7] This narrative relies on the facts as found by the Court of Chancery and cites to its Memorandum Opinion (*Trial Op.*). Where other facts are referenced, citations are to the record (including to the Appendix to Appellants' Opening Brief, as indicated by page numbers beginning with the letter "A").

[8] *Trial Op.*, 2017 WL 3833210, at *3.

[9] *Id.* at *2.

[10] *Id.*; Chris Cresswell Trial Testimony (Feb. 8, 2017), at A1900 [hereinafter Cresswell Testimony]; Jashuva Variganti Trial Testimony (Feb. 8, 2017), at A1911 [hereinafter Variganti Testimony].

had asked to invest in the company once before.[11] This time Kay agreed. To keep Associates operational, and without a written agreement obligating him to do so, Kay provided it funding through EF Investments LLC, a Delaware LLC.

Campbell and Kay sketched out their vision for their venture in a letter agreement dated November 15, 2013.[12] They planned to form "a new LLC entity and/or a series of industry specific LLC's [sic] verticals in Virginia."[13] Campbell was to contribute to the venture his "PADRE source code and patents" (as described in the agreement), and Kay was to contribute $1.8 million in cash—"the amount stated by [Campbell] that he contributed to the effort so far. . . ."[14] They would "each own 50% of the new companies" and agreed "to never dilute less than 50.1% together in order to maintain control." They also promised to vote their shares as a block and to "confer on all business and marketing related activities as well as all capital needs."[15]

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[11] *Trial Op.*, 2017 WL 3833210, at *2-3.

[12] *Id.* at *1, *3 ("Kay's lawyers at the law firm Offit Kurman drafted an initial version of the November letter agreement, but Campbell and Kay independently made changes to it themselves before signing."); November 2013 Letter Agreement (Nov. 15, 2013) (signed Nov. 27, 2013), at A45-46 [hereinafter November Letter Agreement].

[13] *Trial Op.*, 2017 WL 3833210, at *3 (quoting November Letter Agreement, *supra* note 12, at A45).

[14] November Letter Agreement, *supra* note 12, at A45.

[15] *Trial Op.*, 2017 WL 3833210, at *3 (quoting November Letter Agreement, *supra* note 12, at A45).

Diligence progressed through the winter and, in early April 2014, the parties signed a new letter agreement (the "April Letter Agreement") that "amends" the November letter and "provides binding terms and conditions for [Campbell] and [Kay] to proceed with this venture."[16] The April Letter Agreement envisioned that "a new LLC will be formed to serve as a parent entity ('Holdco') for [Associates] and the recently formed EagleForce Health Solutions, LLC," and that "ownership shall consist of [Campbell] and [Kay] only with equal rights to them or their heirs."[17] The agreement provided that, aside from Associates and EagleForce Health Solutions LLC ("EF Health"),[18] "[a]dditional new wholly owned Holdco subsidiaries shall be formed for each subsequent area of opportunity, such as online gambling, identity and cybersecurity, that Holdco elects to pursue."[19] We refer to Associates and EF Health collectively as the "Targeted

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[16] April 2014 Letter Agreement (Apr. 4, 2014), at A50 [hereinafter April Letter Agreement].

[17] *Id.* at A50.

[18] The trial court opinion does not explain the difference between EagleForce Health Solutions, LLC, as used in the April Letter Agreement, and EagleForce Health, LLC, a Virginia limited liability company that, along with Associates, is described as one of the "Targeted Companies" in the Contribution Agreement discussed *infra*. The trial court also does not explain when each of these entities were formed other than quoting to the April Letter Agreement's reference to EagleForce Health Solutions as "recently formed." *Trial Op.*, 2017 WL 3833210, at *3. We refer to both EagleForce Health Solutions, LLC, and EagleForce Health, LLC, as "EF Health."

[19] April Letter Agreement, *supra* note 16, at A50.

Companies," the "subsidiaries," and "EagleForce" in this opinion.

The April Letter Agreement reiterated that Campbell and Kay would each own 50% of Holdco directly, and 50% of the wholly owned subsidiaries, Associates and EF Health, indirectly through Holdco.[20] And it confirmed that Campbell and Kay would never dilute their ownership "less than 51% together in order to maintain joint control," and that "their vote will always be uniformly tied as a single vote thus protecting each of them from complete loss of control."[21]

To obtain his 50% ownership interest in Holdco, Campbell would contribute all intellectual property and licensing agreements related to PADRE. The agreement estimated that this property was worth $2.3 million.[22] For his part, Kay would advance $500,000 to Holdco upon the execution of the letter agreement (evidenced by a demand promissory note that Associates and EF Health would issue jointly and severally to Kay) and contribute an additional $1,800,000 to Holdco—for a total of $2.3 million—once they agreed on an LLC operating agreement, which they promised to sign at a future date.[23] The April Letter Agreement provided that Campbell would receive a $500,000

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[20] *Id.* at A51.

[21] *Id.*

[22] *See Trial Op.*, 2017 WL 3833210, at *4; April Letter Agreement, *supra* note 16, at A51.

[23] *Trial Op.*, 2017 WL 3833210, at *4.

distribution from Holdco for his personal use upon signing an operating agreement.[24]

In the meantime, absent a formal LLC operating agreement, the April Letter Agreement further delineated the management responsibilities of the two partners outlined in the November letter into two "swim lanes," as the parties described them.[25] Campbell was to serve as a "member, President and Chairman of the 3 member Holdco Board,"[26] and his lane included "primary responsibility over all information technology, product development, R & D, and customer service and maintenance, in each case subject to an annual budget approved by the Holdco board."[27] Further, Kay was to serve as a member and CEO of Holdco, and his swim lane included "primary responsibility over financial matters, personnel/HR, and management of outside accounting, legal, tax and other advisors and consultants as well as all other matters relating to the operation of the business of Holdco and its subsidiaries. . . ." But the agreement also specified that Kay "will consult with [Campbell] on all decisions affecting these functions."[28]

The Court of Chancery observed that, soon after the signing of the April Letter Agreement, "[a]s Kay became more involved in EagleForce Associates, Kay and

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[24] *Id.*

[25] *Id.*

[26] April Letter Agreement, *supra* note 16, at A50.

[27] *Trial Op.*, 2017 WL 3833210, at *4.

[28] *Id.*

Campbell's relationship began to sour."[29] For example, Kay told a new employee that Campbell had previously committed fraud, and Kay "did not get along with certain EagleForce employees. . . ."[30]

Nonetheless, the parties began negotiating a Contribution Agreement and LLC Agreement (collectively the "Transaction Documents") to consummate their transaction.[31] At the advice of Kay's counsel, Michael Schlesinger of Latham & Watkins, Campbell sought separate representation and enlisted Donald Rogers of the Shulman Rogers firm. On May 13, Latham sent Rogers a draft LLC Agreement that referred to the holding company as Eagle Force Holdings LLC ("Holdings" or the "Company"), a Delaware LLC, and indicated that it had been formed on March 17, 2014—*before* the signing of the April Letter Agreement.[32] Thus, the Court of Chancery observed that Campbell "was aware that Kay [had] formed Eagle Force Holdings in Delaware at least by May 13, 2014," the day he

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[29] *Id.* at *5.

[30] *Id.*

[31] *Id.* at *6.

[32] *Id.* Specifically, the draft LLC Agreement indicated that it was to govern "Eagle Force Holdings, LLC, a Delaware limited liability company," which was formed "under the Delaware Limited Liability Company Act by the filing of a Certificate of Formation with the Secretary of State of the State of Delaware on March 17, 2014." Draft LLC Agreement (May 13, 2014), at A99. The draft also indicated that its execution would amend the Original LLC Agreement, which consisted of an agreement executed on March 17, 2014, and the April Letter Agreement. *See id.*

received the draft LLC Agreement from Latham.[33] This draft of the LLC Agreement also included a forum selection clause whereby the parties were to consent to personal jurisdiction in Delaware and an arbitration clause.[34]

Negotiations and diligence continued through the spring and early summer, and the parties met with counsel on July 7 to attempt to resolve some outstanding issues, such as the precise scope of the intellectual property that Campbell would contribute to Holdings, and Campbell's belief that, to succeed, the company needed $7.8 million in capital, which was $5.5 million more than Kay's planned $2.3 million contribution.[35] As summarized in the trial court opinion, Campbell and Kay determined that Campbell would "contribute all of the intellectual property he had created that was related to the EagleForce business" and that, to avoid diluting Campbell and Kay at the Holdings level, they would raise the additional $5.5 million in capital by selling up to 20% of the equity of each of the subsidiary Targeted Companies, Associates and EF Health.[36]

But there was a new hitch: Kay's attorney, Theodore Offit of Offit Kurman, P.A., discovered that Campbell had previously filed for bankruptcy, and Campbell had failed to list PADRE's intellectual property on the schedules of his bankruptcy petition. This revelation

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[33] *Trial Op.*, 2017 WL 3833210, at *6.

[34] *Id.*

[35] *Id.*

[36] *Id.* at *7.

raised doubts about Campbell's title to the intellectual property that he planned to contribute to Holdings. Offit urged Campbell to reopen his bankruptcy to amend the petition to include the missing intellectual property. But Campbell feared that two bankruptcies on his record would lead future EagleForce investors to question his competency to serve in company management.

Campbell and Kay each signed signature pages for their attorneys to keep in escrow and trade upon consummation of the deal—one possible means of avoiding future logistical hassle had they been forced to collect signature pages later. Campbell also signed a note payable to Kay by Associates for the $700,000 that Kay had already contributed to Associates given that they had not yet agreed on an operating agreement for Holdings. Campbell and Kay further agreed that Campbell would cancel the note once the Transaction Documents were finalized.

The parties continued to negotiate and exchange drafts of the Transaction Documents through the late spring and summer, and Kay kept extending capital to the company to keep it afloat. But he decided to stop around August 1, 2014.[37] The move ratcheted up the pressure on Campbell to finalize the deal given that EagleForce still lacked sales revenue and needed funds to pay its employees. Campbell missed the company's rent for both July and August and borrowed $50,000

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[37] *See* Summary List of Kay Monetary Contributions on behalf of EagleForce (July 16, 2015), at 1104.

from his wife to meet the company's August 7 payroll obligations.[38]

But the issues of Campbell's title to the intellectual property and his resistance to reopening the bankruptcy were proving to be sticking points. At one meeting among the parties and counsel, on August 5, Campbell walked out of discussions to "ma[ke] clear" that he would not reopen the bankruptcy, according to his testimony.[39]

By August 14, Campbell and Kay had resolved certain other outstanding issues, and they summarized their discussion in a handwritten list of thirteen points of agreement (the "Thirteen–Points List"). For example, they agreed that the company would raise capital by issuing up to 17% of the capital of each of Holdings' subsidiaries. Given that Holdings would own 80% of the subsidiaries' equity, the remaining 3% would be allocated to a new stock appreciation rights plan (the "SARS Plan") for employees as incentive compensation.

The employment contracts of several employees of the subsidiaries contemplated participation in a SARS plan, and the future of these rights had been

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[38] *See* Transcript of Katrina Powers Trial Testimony (Feb. 6, 2017), at A1667-68; Bank Statements for Eagleforce Associates Washington First Checking Account # 4141 (showing outgoing payments to ADP on 08/07/14 that were returned the following day for insufficient funds; incoming wire from Cheryl R. Campbell for $50,000.00 on 08/08/14); Transcript of Stanley Campbell Deposition Testimony (Aug. 19, 2016), at A1358-59.

[39] *Trial Op.*, 2017 WL 3833210, at *8.

complicating negotiations. For example, the employment agreement of one existing Associates employee, Vice President of Finance and CFO Said S. Salah, provided that he was entitled to 2.5% of Associates' equity if it achieved "prorated new business sales of at least $6.0 million over the next two years."[40] But the Thirteen–Points List provided that Salah "will be entitled to SAR [sic] only if [Campbell] wants to give non-voting equity," that it would be "from his side," and that Kay "is not obligated at all" for Salah's rights.[41]

EF Health's General Manager, Christopher Cresswell, and Associates' Senior Vice President, Lieutenant General John W. Morgan III, also had employment agreements entitling them to participate in a SARS plan at their respective subsidiaries. And, of particular concern, as the Court of Chancery noted, "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."[42]

According to the Thirteen–Points List, Campbell also agreed to relinquish any right to veto new

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[40] *Id.* at *2. The Court of Chancery cited to an exhibit to the May 5, 2017 hearing on Plaintiffs' motion for contempt and post-trial oral argument. Thus, it relied on evidence that was never introduced at trial. *See id.* at *2, *2 n.18 (quoting and citing Employment Letter for Said Salah (May 13, 2013; signed by Salah May 15, 2013), at A2229) [hereinafter, collectively with the employment agreements for Lieutenant General John W. Morgan III, Dr. Hany Salah, and Christopher Creswell, at A2224-31, the "Employment Letters"].

[41] *Trial Op.*, 2017 WL 3833210, at *8.

[42] *Id.* at *5.

investors and that each of the subsidiaries would have three-person boards, composed of Campbell, Kay, and a third person (initially Mitchell Johnson).[43] The drafts that Campbell's attorney, Rogers, circulated on August 19 included certain of the changes outlined in the Thirteen–Points List, but "back tracked on some of Campbell's concessions," such as by giving Campbell a veto right on new investors.[44] Nonetheless, the drafts were responsive to certain of Kay's requests, such as that the contribution agreement include a provision requiring that Campbell take the steps to reopen his bankruptcy, and a provision requiring Kay to fund an escrow account to pay claims by Campbell's former creditors.[45]

Campbell followed up with an email to Kay and the parties' lawyers in which he stated that Kay and Campbell had agreed to commit up to $5,000 each to retain Campbell's personal bankruptcy lawyer to attempt to determine his title to the intellectual property and, if such efforts failed, that Campbell would contribute $250,000 of the $500,000 distribution that he was to receive at closing to "an attorney escrow of [his] choice for a period not to exceed 6 months."[46] The Court of Chancery summarized that "Campbell was willing

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[43] *Id.* at *8; Thirteen-Points List (Aug. 14, 2014), at A152.

[44] *Trial Op.*, 2017 WL 3833210, at *8.

[45] *Id.*

[46] *Id.* at *9 (quoting E-mail from Campbell to Offit and Rogers and copying Kay (Aug. 22. 2014), at A381).

to set aside funds to pay any creditor claims, but he did not want to reopen a bankruptcy proceeding."[47]

Further, the parties had still not determined how to address the SARS granted to certain other EagleForce employees in their employment agreements. Kay's attorney, Offit, initially suggested that these employees be asked to waive their rights for the promise of "new and better defined executive incentive benefits."[48] Accordingly, Offit drafted representations from Campbell that the relevant employees "had executed releases for any profit sharing plan" and lacked "any legal or equitable ownership interest in EagleForce Associates or EagleForce Holdings."[49] But the trial court found that "[t]he evidence does not show that either Campbell or Kay approached the EagleForce Associates employees to resolve this issue."[50] Thus, in his August 19 revised draft, Rogers bolded and bracketed the representations concerning the releases and noted that "[CAMPBELL] CANNOT GUARANTEE THIS. WE NEED TO DISCUSS."[51] The trial court also found that Kay and Offit both knew that, as of August 19, Associates had not yet secured releases from its employees.[52]

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

Nonetheless, after a few follow-up conversations, Rogers sent an e-mail to Kay, Offit, and Campbell on August 25 in which he stated:

> Based on the resolution of the 'big issues', [sic] I believe we should be able to finalize the document within the next few days.
>
> Also, I would like to have the opportunity to talk to you about the documentation of the SAR plan and the offer letters. No major issue. Just want to make certain that there is total clarity on what is being offered to employees.[53]

Offit replied with another round of revisions to the Transaction Documents on August 27. His cover email to Campbell and Rogers stated, "Please confirm your acceptance of the terms of these agreements. Please commence preparation of schedules needed for closing."[54] The attached document was marked in the upper-right-hand corner "OK [Offit Kurman] Draft 8-26-14," and the spaces for the "Execution Date" on the cover page and in the first paragraph were left blank.

Articles II and III listed the events to occur at "Closing," defined as occurring "not before each of the actions and deliveries [of consideration] described in Sections 3.2 through 3.5 have been taken or made (as the case may be)," and as taking place "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

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[53] E-mail from Rogers to Offit and copying Campbell and Kay (Aug. 25, 2015), at A382.

[54] *Trial Op.*, 2017 WL 3833210, at *9.

time and place as the Parties may agree upon in writing."[55]

Importantly, Section 2.2 provided, in unequivocal terms, that Campbell was to contribute *all* the subsidiaries' equity and *all* of his relevant intellectual property:

> At the Closing, Campbell shall contribute, transfer, assign, convey and deliver to the Company, absolutely and unconditionally, and free and clear of all Encumbrances (the "Campbell Contribution"):
>
> > (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; and
> >
> > (b) *all* right, title and interest in and to <u>any and all</u> Intellectual Property owned in whole or in part by Campbell and which is used or related to, or which can be used or related to: Health; Identity Management; Cyber Security, including, but not limited to, the government data bases obtained by Campbell through contact with the Social Security Administration, Medicare and Medicaid, which [sic] (collectively, the <u>Transferred IP</u>), which

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[55] *Id.*; Executed Contribution and Assignment Agreement by and between Eagle Force Holdings, LLC, a Delaware limited liability company, and Stanley V. Campbell (Aug. 28, 2014), § 3.1, at A666 [hereinafter Executed Contribution Agreement].

> Intellectual Property is set forth on Schedule 2.2(b) attached hereto. . . .[56]

Schedule 2.2(b) provided a detailed list of such property defined as "Transferred IP."[57] The Contribution Agreement also provided that, at Closing, "Campbell shall deliver verification that he has reopened his previous bankruptcy proceeding. . . ."[58] In return, Holdings would "issue to Campbell the number of Class A Units set forth opposite [Campbell's] name on Schedule 2.3 hereto (the 'Equity Consideration Schedule'). . . ."[59] However, the Equity Consideration Schedule was not attached.

Aside from Schedule 2.2(b) listing the Transferred IP, none of the other schedules was completed.[60]

Many of the incomplete or blank schedules were supposed to provide details concerning Campbell's representations and warranties in Article IV.

According to the trial court, 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 other than its subheading, "Assumed Agreements."[61]

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[56] *Id.* §§ 2.2(a) and (b), at A665 (italicized emphases added).

[57] *Id.* § 2.2(b), at A710-14.

[58] *Id.* § 3.2(c), at A666.

[59] *Id.* § 2.3, at A665.

[60] *Trial Op.*, 2017 WL 3833210, at *9.

[61] *Id.*; Executed Contribution Agreement, *supra* note 55, Schedule 3.5, at A715.

Section 4.3(a) posits that "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."[62] But Schedule 4.3 (including 4.3(a)) is incomplete. It only includes the subheading "Capitalization Table" and the bracketed text "[Also describe SARS Plan]."[63] Nonetheless, the SARS Plan is defined elsewhere, in Exhibit A, as "mean[ing] the existing stock appreciation rights plan currently in effect which is described in Schedule 4.3(b)." But both sides agree in this appeal that there was no "SARS Plan."[64]

Section 4.3 (entitled, "Capitalization") makes certain additional representations. Importantly, Section 4.3(e) states that "Campbell is the true and lawful owner of all the Targeted Companies Securities set forth opposite his name on Schedule 4.3(a), which constitute all of the issued and outstanding Targeted Companies Securities, and has full capacity, power and authority to surrender the Targeted Companies

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[62] *Trial Op.*, 2017 WL 3833210, at *9; Executed Contribution Agreement, *supra* note 55, § 4.3(a), at A670.

[63] Executed Contribution Agreement, *supra* note 55, Schedule 4.3(a), at A773. Both sides agree that, whatever a SAR was supposed to be, it was not "equity." *See* Appellants' Opening Br. at 39-41; Appellee's Answering Br. at 42 n.13 (noting that "Campbell testified that SARS are not literally equity").

[64] *See* Appellants' Opening Br. at 16, 43; Appellee's Answering Br. at 41-42.

Securities for exchange pursuant to the terms of this Agreement, free and clear of any Encumbrances, and such Targeted Companies Securities are not subject to any adverse claims."[65] Other representations, such as in Section 4.3(b), state, "[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. . . ."[66] Section 4.3(d) further represents and warrants that "[t]he revenue sharing plans and/or profit sharing plans for Chris Creswell [and other listed employees including John Morgan] . . . have been eliminated without continuing liability to any Targeted Company, and each of the foregoing persons has given the appropriate Targeted Company a legally binding release from any further liability for such plans."[67] Similarly, subsection (e) also states that "[n]either Chris Creswell, Said Saleh nor any member of the

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[65] Executed Contribution Agreement, *supra* note 55, § 4.3(e), at A671.

[66] *Id.* § 4.3(b), at A670; *see also id.* § 4.3(d), at A671 ("Except for the SARS plan, there are (i) no rights, agreements, arrangements or commitments relating to the Targeted Companies Securities to which any Targeted Company is a party, or by which it is bound, obligating any Targeted Company to repurchase, redeem or otherwise acquire any issued and outstanding shares of Targeted Companies Securities. . . .").

[67] *Id.* § 4.3(d), at A671.

family of Said Saleh have any legal or equitable ownership interest in any Targeted Companies Securities."[68]

There are several additional blank schedules. Section 4.12(c) provides that, "[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. . . ."[69] Schedule 4.12(c) is blank aside from its subheading, "Effect of Transaction on Certain Payments."[70] Similarly, Schedules 4.6 ("Liabilities of Targeted Companies"),[71] 4.9 ("Real Property Leases and Licenses"),[72] and 4.15(a) ("Certain Proceedings and Orders"),[73] among others, are also left blank.

Section 8.4(a) provides that "[t]his Agreement, together with the exhibits and schedules hereto (including the Campbell Disclosure Schedules, Schedules 8.3 and 8.4 and the other Transaction Documents referred to herein), constitutes the entire agreement among the parties pertaining to the subject matter hereof and

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[68] *Id.* § 4.3(e), at A671 (misspelling Cresswell's and Salah's last names).

[69] *Trial Op.*, 2017 WL 3833210, at *9; Executed Contribution Agreement, *supra* note 55, § 4.12(c), at A675.

[70] Executed Contribution Agreement, *supra* note 55, Schedule 4.12(c), at A780.

[71] *Id.* Schedule 4.6, at A775.

[72] *Id.* Schedule 4.9, at A776.

[73] *Id.* Schedule 4.15(a), at A784.

supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties."[74] However, Section 8.4(b) specified that any provision could be waived or modified "if, and only if," signed by both parties or, for waiver, the party against whom the waiver was to be effective.[75] Despite the reference to Schedules 8.3 and 8.4, these schedules do not appear in the signed version.

The term "Campbell Disclosure Schedules" 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."[76]

The Agreement's choice of law provision selected Delaware law,[77] and its forum selection clause provided that "any suit, action or other legal proceeding arising out of this Agreement may be brought in the United States District Court for Delaware or, if such court does not have jurisdiction or will not accept jurisdiction, in any court of general jurisdiction in the City of Wilmington, Delaware. . . ."[78] The parties "irrevocably

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[74] *Id.* § 8.4(a), at A696.

[75] *Id.* § 8.4(b), at A696.

[76] *Trial Op.*, 2017 WL 3833210, at *10; Executed Contribution Agreement, *supra* note 55, Exhibit A, at A700.

[77] Executed Contribution Agreement, *supra* note 55, § 8.3, at A695.

[78] *Id.* § 8.9(b), at A697.

consent[ed] to the service of any process or pleading by any method permitted under Delaware law."[79] The Agreement also included a severability provision.[80]

The signed Amended and Restated LLC Agreement (the "LLC Agreement") noted that it was amending and restating the "Original LLC Agreement," which was dated March 17, 2014, and amended in April 2014.[81] This new, signed LLC Agreement specified that Campbell and Kay shall be the sole members of the initial Board of Managers.[82] It also designated Campbell as initial Chairman of the Board of Managers and President. The Agreement provided that the Chairman "shall work with the President and Chief Executive Officer as to matters relating to the Company's business."[83] The LLC Agreement also named Campbell as President with the management responsibilities resembling his "swim lane" as articulated in the April Letter Agreement.[84] Meanwhile, Kay was appointed Chief Executive Officer, but the LLC

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[79] *Id.* § 8.9(a), at A697.

[80] *Id.* § 8.7, at A696.

[81] Executed Amended and Restated Limited Liability Company Agreement of Eagle Force Holdings LLC (dated as of Aug. 25, 2014, and executed Aug. 28, 2014), at 719 [hereinafter Executed LLC Agreement]. The part of the Original LLC Agreement dated as of March 17, 2014, does not appear to be in the record before us, unless it is referring to the Certificate of Formation of that date. *See* Eagle Force Holdings, LLC Certificate of Formation (Mar. 17, 2014), at A47-49.

[82] *Id.* § 4.1.1, at A729.

[83] *Id.* § 4.4.2, at A734.

[84] *Id.* § 4.4.3, at A735.

Agreement now provided that Kay "may act independently of, and without being required to consult with, all other officers of the Company, including the President," with respect to each of certain designated areas.[85] Further, Section 3.2 describes the capital contributions of the parties and states that they are set forth in Schedule A. That schedule shows their initial capital account balances, a fifty-fifty split of all of Holdings' issued and outstanding Class A Units: 50,000,000 units for EF Investments, LLC (Kay's investment vehicle), and 50,000,000 units for Campbell.[86]

Like the Contribution Agreement, the LLC Agreement also included choice of law and forum selection clauses specifying that Delaware law governs and that the parties consented to the exclusive jurisdiction of state and federal courts sitting in Delaware "for the purpose of any action, claim, cause of action or suit (in contract, tort or otherwise), inquiry, proceeding or investigation arising out of or based upon this Agreement or relating to the subject matter hereof"[87]—a broader range of actions than the class of actions covered by the Contribution Agreement's forum selection clause.

Moreover, the LLC Agreement states in Section 13.1 that "[t]his Agreement," which was defined as the LLC Agreement itself, "contains the entire contract

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[85] *Id.* § 4.4.4, at A735.

[86] *Id.* § 3.2, at A722; *id.*, Schedule A, at A770.

[87] *Id.* §§ 12.1, 12.2, at A752.

among the Members as to the subject matter *hereof*."[88] In contrast, Section 13.10 with the subheading "Complete Agreement" states that "[t]his Agreement, together with its 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* and supersede all prior written or oral understandings among such parties."[89] The LLC Agreement also has a severability clause that provides, in part, that, "[i]f any provision of this Agreement is determined by a court to be invalid or unenforceable, that determination shall not affect the other provisions hereof, each of which shall be construed and enforced as if the invalid or unenforceable portion were not contained herein."[90]

The next day, August 28, at around 7:00 p.m., Campbell and Kay met at Associates' offices without their lawyers. At trial, Campbell testified that Kay had assured him that the attorneys "were done" reviewing the agreements, but Kay disputed that characterization.[91] Campbell tried to call his attorney, Rogers, but he could not reach him as he was away from the office. Campbell testified that Kay also tried to call his counsel, Offit, but was not able to reach him either. But Kay also disputed that he tried to call Offit.

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[88] *Id.* §§ 13.1, at A755 (emphasis added).

[89] *Id.* §§ 13.10, at A757 (emphasis added).

[90] *Id.* § 13.4, at A756.

[91] *Trial Op.*, 2017 WL 3833210, at *10.

At this meeting on August 28, both parties signed each of the Transaction Documents circulated on August 27 with the terms described above.[92] Katrina Powers, the CFO of one of Kay's companies, Sentrillion, witnessed the signing. And the Court of Chancery found that, "[a]fter Kay and Campbell signed the agreements, Campbell walked around his desk and embraced Kay and Powers."[93] However, the Court of Chancery noted that the parties dispute whether the embrace was a "hug" or a "dap handshake."[94]

Rogers returned from vacation unaware that the parties had signed the Transaction Documents and believing negotiations were ongoing. Thus, on September 9, he circulated proposed edits and comments to the Transaction Documents.[95] Following Section 4.3(d) of the Contribution Agreement, the representation concerning the SARS releases from employees, Rogers commented:

> 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)

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[92] The Transaction Documents included the draft of the Contribution Agreement that was marked "OK [*i.e.*, Offit Kurman] DRAFT 8-26-14." *Id.*

[93] *Id.* at *11.

[94] *Id.* at *11 n.162 (noting that Kay and Powers testified that Campbell hugged both of them, and Campbell testified that he gave Kay a "dap handshake").

[95] *Id.* at *11.

> 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].[96]

Rogers also stated in his cover email that he anticipated having difficulty representing the financial health of the companies given that only Kay had the financial information for the past six months.[97]

Yet the parties continued negotiating over additional revisions that month, including during a conference call among Campbell, Kay, and their attorneys on September 17. According to the trial court's opinion, "Offit testified that Kay stated on the call that he was willing to discuss potential amendments to the agreements but was not willing to rescind and re-execute them. But Rogers did not remember the contents of that call."[98]

By late October, the parties had still not closed the deal. Kay wrote to Offit, Campbell, and Rogers, asking

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[96] *Id.* Rogers later testified that he made no material changes to the Transaction Documents in his September 9 drafts, and that his comment concerning the SARS Plan excerpted above did not propose edits to the document itself as he confirmed, "[a] SARs plan would be a separate agreement, yes." Donald Rogers Trial Testimony (Feb. 9, 2017), at A2047.

[97] *Trial Op.*, 2017 WL 3833210, at *11; E-mail from Rogers to Offit, copying Campbell and Kay and attaching revised Transaction Documents (Sept. 9, 2014), at A799.

[98] *Trial Op.*, 2017 WL 3833210, at *12.

"[w]hat else can we do together to get this done. I understand we have signed the deal but need the exhibits."[99] But Campbell retorted "[t]he signatures on the drafts did not represent the completed document which remains not completed given the two or three remaining items."[100]

Kay countered on November 19 by reiterating his view that the signed Transaction Documents were binding contracts that obligated Campbell to complete the steps for Closing. He argued that Campbell was in breach because he refused to assign ownership of his intellectual property to Holdings and reopen his bankruptcy, among other things.[101] Yet, despite the dispute between Campbell and Kay, Kay continued to fund EagleForce's payroll obligation until early February 2015.[102] By that point, Kay had contributed at least $1,983,491.00 to EagleForce.[103]

That month, February 2015, EagleForce achieved its first sales revenue ever—$700,000 from PSKW,

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[99] *Id.*

[100] *Id.*

[101] *See id.*; E-mail from Offit to Campbell and Rogers, and copying Kay (Nov. 19, 2015), at A1096 (writing to Campbell: "You are contractually obligated to: (i) deliver the schedules to the Contribution Agreement, (ii) reopen of [sic] your bankruptcy case, (iii) assign of [sic] ownership of all your IP to EagleForce Holdings LLC, and (iv) assign ownership of EagleForce Associates, Inc. and EagleForce Health, LLC to EagleForce Holdings, LLC.").

[102] *Trial Op.*, 2017 WL 3833210, at *12.

[103] *See* Summary List of Kay Monetary Contributions on behalf of Eagle Force (July 16, 2015), at A1104-05.

LLC.[104] Thus, with an alternative base of operating cash in hand, Campbell moved to cut ties with Kay. And, on February 18, 2015, he wrote to Kay and the attorneys:

> [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.[105]

Kay responded the following morning:

> Your email is totally untrue, misleading[,] and the EF investment money has never been a loan[.] You know that as does everyone. I am 50 percent owner and will continue to operate in that role.[106]

On March 17, 2015, Holdings and Kay's investment vehicle, EF Investments, LLC ("Plaintiffs") filed the first complaint in this action against Campbell seeking specific performance requiring Campbell to close the transaction and immediate injunctive relief directing Campbell to comply with his obligations

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[104] Cresswell Testimony, *supra* note 10, at A1900; Variganti Testimony, *supra* note 10, at A1917-18.

[105] *Trial Op.*, 2017 WL 3833210, at *13; E-mail from Campbell to Kay (Feb. 18, 2015), at A1100.

[106] E-mail from Kay to Campbell (Feb. 19, 2015), at A1100.

under the Transaction Documents.[107] The suit also sought money damages for breach of contract, unjust enrichment, and breach of fiduciary duty, among other causes of action (seven total, later amended to nine total with the First Amended Complaint).[108] On May 7, Plaintiffs also moved for emergency interim relief, seeking an order temporarily restraining Campbell "from refusing to provide information concerning the operations and finances of [Holdings] and the Targeted Companies" and refusing to identify any other contracts that he may have entered into on behalf of these companies, and otherwise upholding the status quo.[109]

Campbell immediately disputed that the Court of Chancery had personal jurisdiction over him.[110] The Vice Chancellor suggested at a conference among the parties that Plaintiffs' pleadings on the existence of a Delaware LLC agreement sufficed to confer personal jurisdiction for the purposes of determining the appropriateness of interim relief.[111] At a subsequent hearing

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[107] Complaint (March 17, 2015), ¶¶ 30, 38, 61. The First Amended Complaint (the operative complaint) was filed on June 5, 2015. *See* First Amended Complaint (June 5, 2015), available via File & Serve*Xpress*.

[108] *Id.* ¶ 74.

[109] Brief in Support of Motion of Plaintiffs Eagle Force Holdings, LLC and EF Investments, LLC for Interim Emergency Relief Pursuant to Ct. Ch. R.65(b) (May 7, 2015), at 25, available via File & Serve*Xpress*.

[110] *See* Motion for a More Definite Statement and To Dismiss and/or Stay the Complaint (Apr. 27, 2015), available via File & Serve*Xpress*.

[111] Transcript of Scheduling Conference (May 15, 2017), at 16-17, available via File & Serve*Xpress*.

on the motion for interim emergency relief, on July 9, 2017, the Vice Chancellor observed, "I don't think the Court's going to be able to resolve whether there is or isn't personal jurisdiction without resolving whether there were or were not agreements reached between these parties."[112] Thus, he stated that "[a]ll issues as far as the personal jurisdiction are preserved and they may come up in a summary judgment context or some sort of thing like that that the Court will have enough before it."[113]

At the July 9 hearing on the request for interim relief, the court ruled that, although Plaintiffs could not satisfy the mandatory preliminary injunction standard, they could satisfy "the normal preliminary injunction standard with respect to their request for information and blocking rights" as Plaintiffs had a "reasonable probability of success on the merits."[114] The court reasoned that, "[a]lthough Campbell disputes the effect of his signature, it cannot be disputed that plaintiffs have submitted signed copies of the transaction documents." And the Vice Chancellor added, "[s]imilarly, the record also supports an inference that, for at least some period of time, Kay actively was involved in the management of the Eagle Force businesses, which favors plaintiffs' argument that

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[112] Transcript of Oral Argument on Plaintiffs' Renewed Motion for Interim Emergency Relief and Rulings of the Court (July 9, 2015), at 48, available via File & Serve*Xpress*.

[113] *Id.* at 49.

[114] *Id.* at 71.

there was an agreement as to the existence and nature of the Holdings LLC."[115]

The court also stated:

> Finally, and importantly, Kay formed Holdings as a Delaware LLC, and plaintiffs purportedly have paid over $2 million to Campbell, Health, or Associates, and that is a course of action which appears designed to follow through on the transaction contemplated by the April letter agreement and the allegedly memorialized version of that in the transaction document.
>
> Under Delaware law, an LLC agreement is designed "to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." Such agreements can be "written, oral or implied" under 6 Delaware Code Section 18-101(7). Which side ultimately will prevail at trial currently is unclear, but I am comfortable concluding on the current record that plaintiffs have demonstrated a reasonable probability of success on the merits.[116]

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[115] *Id.* at 72.

[116] *Id.* at 72-73. At oral argument before this Court, Campbell's counsel stated that Campbell has not returned any of the money contributed by Kay, but that Campbell is "willing to" do so "with interest," over a "payout period," and "perhaps even possibly" with "an exit bonus." Oral Argument at 29:59-30:27, https://livestream.com/accounts/5969852/events/8091956/videos/171199929 [hereinafter Oral Argument].

Thus, on July 23, 2015, the court granted Plaintiffs' requested status quo order (the "Order"), providing them access to information concerning the Targeted Companies while litigation was pending.[117] The Order also required Campbell to give Plaintiffs ten days advance notice of any transaction subject to the Order and mandated that any transaction that Plaintiffs objected to in writing could not proceed without court approval.[118]

On May 27, 2016, while proceedings were pending before the trial court, Plaintiffs moved for sanctions and to hold Campbell in contempt for violating the Order. [119] The Court of Chancery (with another Vice Chancellor succeeding the retiring prior presiding Vice Chancellor in this matter) held an evidentiary hearing on August 31, 2016, and Campbell appeared in court and testified.[120] But Campbell failed to show up the next day as directed by the trial court. The court ultimately found Campbell in contempt for failing to give

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[117] *Trial Op.*, 2017 WL 3833210, at *13. The Order also directed Associates and EF Health to provide Plaintiffs with weekly reports of all sales or distribution leads concerning the Transferred IP (referenced in § 2.2(b)), weekly bank statements, weekly statements of accounts receivable and accounts payable, and biweekly payroll statements annotated with explanations for any changes, among other information. *Id.*; Order Granting Plaintiffs' Petition for Interim Relief Pursuant to Ct. Ch. R. 65(b) (July 23, 2015), available File & Serve*Xpress* [hereinafter Status Quo Order].

[118] *Trial Op.*, 2017 WL 3833210, at *13; Status Quo Order, *supra* note 117, at 4-8.

[119] *Trial Op.*, 2017 WL 3833210, at *13.

[120] *Id.*

Plaintiffs the required advance notice before withdrawing approximately $100,000 in accrued unreimbursed expenses from Associates and paying $38,000 in vendor fees. However, the court delayed determining the remedy until after it resolved whether it had personal jurisdiction over Campbell. Still, it did require Campbell to reimburse Plaintiffs on or before December 23, 2016, for Plaintiffs' attorneys' fees of $4,639.00 for the day that Campbell refused to show up in court.[121] Campbell did not deposit the funds until the business day following the deadline, December 27.[122]

The Court of Chancery held a five-day trial in February 2017. Then, on March 6, 2017, Plaintiffs filed a supplemental motion for contempt against Campbell for an additional alleged violation of the Order.[123] And Plaintiffs filed yet another motion for contempt on May 24, 2017, in which they alleged yet another violation of the Court's Order.[124] The court held evidentiary hearings on both supplemental motions for contempt, and Campbell testified at each.[125] But the court delayed its rulings until its decision on personal jurisdiction.[126]

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[121] *Id.*; Order Awarding Partial Remedy for Defendant's Contempt (Dec. 15, 2016), at 2, available via File&Serve*Xpress*.

[122] *Trial Op.*, 2017 WL 3833210, at *13.

[123] *Id.* at *14.

[124] *Id.*

[125] The second contempt hearing was held on August 28, 2017, just a few days before the court issued its post-trial opinion.

[126] *Id.*

The trial court issued its post-trial opinion on September 1, 2017. It found that the court lacked personal jurisdiction over Campbell for three reasons. First, it determined that the Contribution Agreement was not a binding contract because the parties failed to agree on the consideration to be exchanged and, thus, it deemed its forum selection provision favoring Delaware to be unenforceable. Second, it believed that the parties failed to agree to the terms of the LLC Agreement separate and apart from the Contribution Agreement and, thus, it similarly found the forum selection provision in the LLC Agreement unenforceable. Third, the Court of Chancery determined that Campbell was not subject to personal jurisdiction via Section 18–109 of the Delaware Limited Liability Company Act, which provides for the implied consent to personal jurisdiction of all persons *named* as a manager or who *act* as a manager of a Delaware LLC.[127] The Court of Chancery observed that the Plaintiffs did not contend that Campbell became a manager of Holdings by executing the April Letter Agreement. And it concluded that "[t]he record does not show that Campbell ever managed Eagle Force Holdings or any other Delaware entity"[128]—just Associates and EF Health, which are Virginia entities.[129] Thus, the trial court deemed Section 18-109 inapplicable. And, finally, because the court

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[127] *Id.* at *19. In light of our decision to remand on the other issues, we do not reach the issue of whether Campbell was subject to jurisdiction by virtue of 6 *Del. C.* § 18-109(a).

[128] *Id.*

[129] *Id.*

decided that it lacked personal jurisdiction over Campbell, it held that its prior contempt orders were unenforceable and that it could not decide the pending contempt motion.

Appellants dispute each of the Court of Chancery's conclusions in this appeal.

II.

Given that the trial court found it lacked personal jurisdiction over Campbell, the precise question in this appeal is whether there exists any basis for Delaware courts to exercise personal jurisdiction over Campbell. The existence of personal jurisdiction is a mixed question of fact and law.[130] We review the trial court's factual determinations for clear error and its legal rulings *de novo*.[131]

When evaluating whether plaintiffs have met their burden of showing a basis for jurisdiction over a nonresident defendant,[132] Delaware courts invoke a "two-prong" test.[133] First, we consider whether a statute

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[130] *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004).

[131] *Osborn*, 991 A.2d at 1158.

[132] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005) ("A plaintiff bears the burden of showing a basis for a trial court's exercise of jurisdiction over a nonresident defendant."). At trial, Plaintiffs did not argue that Campbell was subject to personal jurisdiction pursuant to Delaware's Long Arm Statute. *Trial Op.*, 2017 WL 3833210, at *19.

[133] *AeroGlobal*, 871 A.2d at 438.

such as Delaware's Long Arm Statute, 10 *Del. C.* § 3104, authorizes service of process on the defendant.[134] Second, we evaluate whether the plaintiff has shown that subjecting the defendant to jurisdiction in Delaware does not violate the Due Process Clause of the Fourteenth Amendment.[135] Compliance with Due Process is satisfied via "the so-called 'minimum contacts' requirement" because, when a nonresident defendant has sufficient minimum contacts with Delaware, that nonresident "should 'reasonably anticipate' being required to defend itself in Delaware's courts."[136] Where a party commits to the jurisdiction of a particular court or forum by contract,[137] such as through a forum selection clause, a "minimum contacts" analysis is not required as it should clearly anticipate being required to litigate in that forum.[138]

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[134] *Id.*

[135] *Id.*

[136] *Id.* at 438, 440.

[137] *See Sternberg v. O'Neil*, 550 A.2d 1105, 1109 n. 4 (Del.1988) ("A party may submit to a given court's jurisdiction by contractual consent."), *overruled on other grounds by Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016); *Mobile Diagnostic Grp. Holdings, LLC v. Suer*, 972 A.2d 799, 809 n.47 (Del. Ch. 2009) ("[T]o the extent that a party wants to ensure that it can sue a nonresident in Delaware based on a contract signed by the nonresident outside of this State, it can bargain for consent to jurisdiction in the contract.").

[138] *See Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 381 (Del. 2013) ("Where the parties to the forum selection clause have consented freely and knowingly to the court's exercise of jurisdiction, the clause is sufficient to confer personal jurisdiction on a court."); *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008) ("If a party properly consents

Here, both Transaction Documents contain forum selection clauses favoring Delaware. This state's courts could also potentially have jurisdiction under Section 18-109 of the LLC Act, which provides for the implied consent to jurisdiction by anyone listed as a manager of a Delaware LLC, given that Campbell is listed as a manager in the LLC Agreement.

Although we defer to the Court of Chancery's factual findings after its careful review of the evidence in these complicated proceedings,[139] we REVERSE and REMAND. We hold that the trial court erred by failing to make a critical finding on the parties' intent to be bound, and in its implicit determination that the terms are not sufficiently definite. In addition, we hold that the trial court erred in its determination that it lacked jurisdiction to enforce its findings that Campbell violated the court's status quo order.[140]

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to personal jurisdiction by contract, a minimum contacts analysis is not required.").

[139] *See Osborn*, 991 A.2d at 1158 ("We review a trial judge's factual findings for clear error.").

[140] *Id.* ("We review questions of law and interpret contracts *de novo*."). It is arguable that Virginia law should apply given that the contract was formed in Virginia and the parties' relationship centered there. *See Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017) ("Delaware follows the *Second Restatement*'s 'most significant relationship' analysis when considering choice of law in contract disputes.") Though Campbell's answering brief suggests Virginia law could apply, it does not assert a position concerning which law should govern, and it does not argue that there are significant differences between Virginia's and Delaware's laws of contracts. *See* Appellee's Answering Br. at 28-29 ("[W]here the Court applies Virginia law

Our reasoning follows.

A. The Contribution Agreement

Under *Osborn*, a valid contract exists when (1) the parties intended that the instrument would bind them, demonstrated at least in part by its inclusion of all material terms; (2) these terms are sufficiently definite; and (3) the putative agreement is supported by legal consideration.[141]

1. Intent to Be Bound

The first prong of *Osborn* is whether "the parties intended that the contract would bind them."[142] This question looks to the parties' intent as to the contract as a whole, rather than analyzing whether the parties possess the requisite intent to be bound to each particular term. "Under Delaware law, 'overt manifestation

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(the locus of all activity relating to the negotiation and creation of the Transaction Documents) or Delaware law, extrinsic evidence is admissible to show that the Transaction Documents never became operative."). We apply Delaware law, as did the Court of Chancery. *See Trial Op.*, 2017 WL 3833210, at *14 n.195.

[141] *See Osborn*, 991 A.2d at 1158-59.

[142] *Id.* at 1158; *see also* 2 Richard A. Lord & Samuel Williston, *Williston on Contracts* § 6:1 (4th ed.) [hereinafter *Williston*] ("Acceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain. An offer to contract is a proposal in the form of an express or implied promise to exchange a promise or an act for a specified return promise or act of another, and it is therefore obvious that the latter's assent is necessary in order to complete the transaction.").

of assent—not subjective intent—controls the formation of a contract.'"[143] As such, in applying this objective test for determining whether the parties intended to be bound, the court reviews the evidence that the parties communicated to each other up until the time that the contract was signed—*i.e.*, their words and actions—including the putative contract itself.[144] And, where the putative contract is in the form of a signed writing, that document generally offers the most powerful and persuasive evidence of the parties' intent to be bound.[145] However, Delaware courts have

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[143] *Black Horse Capital, LP v. Xstelos Holdings, Inc.*, 2014 WL 5025926, at *12 (Del. Ch. Sept. 30, 2014) (quoting *Indus. Am., Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971)); *see also* 2 *Williston*, *supra* note 142, at § 6:3 ("[S]ince the formation of informal contracts depends not upon an actual subjective meeting of the minds, but instead upon outward, objective manifestations of assent, an actual intention to accept is unimportant except in those situations when the acts or words of the offeree are ambiguous.").

[144] *Black Horse*, 2014 WL 5025926, at *12 ("Whether both of the parties manifested an intent to be bound 'is to be determined objectively based upon their expressed words and deeds as manifested at the time rather than by their after-the-fact professed subjective intent.'" (quoting *Debbs v. Berman*, 1986 WL 1243, at *7 (Del. Ch. Jan. 29, 1986))); *see also* Restatement, *supra* note 1, at § 50 cmt. c. (acceptance of an offer "may be made in words or other symbols of assent, or it may be implied from conduct, other than acts of performance, provided only that it is in a form invited or required by the offer.").

[145] *See Seiler v. Levitz Furniture Co. of E. Region*, 367 A.2d 999, 1005 (Del. 1976) ("We have no doubt that the parties intended to be bound by what is written in the April 30 Agreement. No other conclusion is reasonably possible from the plain words which they used to state their commitment to each other."); *Osborn*, 991 A.2d at 1158-59 (declining to look beyond the face of

also said that, in resolving this issue of fact,[146] the court may consider evidence of the parties' prior or contemporaneous agreements and negotiations in evaluating whether the parties intended to be bound by the agreement.[147]

We also said in *Osborn* that "a contract must contain all material terms in order to be enforceable."[148] Chancellor Allen similarly observed in *Leeds* that, "[u]ntil it is reasonable to conclude, in light of all of the[ ] surrounding circumstances, that all of the points that the parties themselves regard as essential have been expressly or (through prior practice or commercial custom) implicitly resolved, the parties have not finished their negotiations and have not formed a contract."[149] Though *Leeds* concerned a letter of intent, common sense suggests that parties to a sophisticated commercial agreement, let alone any agreement, would not intend to be bound by an agreement that does not *address* all terms that they considered material

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the document in determining whether the parties intended to be bound by it); *see also infra* note 153.

[146] *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006) ("Determining the intent of the parties is a question of fact.").

[147] *See Black Horse*, 2014 WL 5025926, at *12 ("[C]ourts in Delaware look for 'objective, contemporaneous evidence indicat[ing] that the parties have reached an agreement,' whether that be in the parties' spoken words or writings." (quoting *Debbs*, 1986 WL 1243, at *7)).

[148] *Osborn*, 991 A.2d at 1159 (quoting *Ramone v. Lang*, 2006 WL 905347 (Del. Ch. Apr. 3, 2006)).

[149] *Leeds*, 521 A.2d at 1102.

and essential to that agreement—a different inquiry than whether these terms are sufficiently definite. As such, all essential or material terms must be agreed upon before a court can find that the parties intended to be bound by it and, thus, enforce an agreement as a binding contract.[150] What terms are material is determined on a case-by-case basis, depending on the subject matter of the agreement and on the contemporaneous evidence of what terms the parties considered essential.[151]

Here, the Court of Chancery found that "the precise consideration to be exchanged between Campbell and Eagle Force Holdings was highly material to the parties here."[152] The Contribution Agreement addresses the consideration to be exchanged. The only dispute is whether the terms relating to that consideration are sufficiently definite—a subject we address under the second prong of the *Osborn* test.

Regarding the parties' intent to be bound, we observe that Professor Williston has stated that a signature "naturally indicates assent, at least in the absence

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[150] *See, e.g.*, *Osborn*, 991 A.2d at 1159.

[151] *See Leeds*, 521 A.2d at 1097 ("[O]ur task is to determine the factual setting in which the document that is here claimed to constitute a contract was negotiated and executed and to decide the factual question whether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms that the parties themselves regarded as essential and thus that that agreement concluded the negotiations and formed a contract.").

[152] *Trial Op.*, 2017 WL 3833210, at *16.

of an invalidating cause such as fraud, duress, mutual mistake, or unconscionability. . . ."[153] In *Osborn* itself, the signatures of both parties and the notarization of the written agreement provided enough evidence to show that the parties intended to be bound by it.[154] Here, both parties signed the Contribution Agreement.[155] That is strong evidence that the parties intended to be bound by it.[156] Moreover, Campbell and Kay's embrace after signing suggests the parties' reconciliation (however fleeting) and the consummation of

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[153] Williston, *supra* note 142, at § 6:44; *see also Hough Assocs., Inc. v. Hill*, 2007 WL 148751, at *14 (Del. Ch. Jan. 17, 2007), ("The parties' signatures on the Non-Competition Agreement after nearly six months review, and in the absence of any colorable claim of coercion, manifest mutual assent."), *judgment entered*, (Del. Ch. Jan. 23, 2007); *Kirkwood Motors, Inc. v. Conomon*, 2001 WL 112054, at *2 (Del. Super. Ct. Feb. 5, 2001) ("By reducing the agreement to writing, Kirkwood was demonstrating its intent to be bound by its terms. By signing the agreement, the Conomons were also indicating their intent to be bound by its terms."); *Comolli v. Huntington Learning Ctrs., Inc.*, 683 Fed.Appx. 27, 29 (2d Cir. 2017) (observing that the parties, "in printing their names below the 'Very Truly yours' valediction, 'objective[ly] manifest[ed]' their intent to be bound. Whatever the meaning of the Disputed Signature Line, it would be unreasonable for a person printing her name below the valediction to believe that she was not agreeing to the substance of the release." (quoting *Brown Bros. Elec. Contractors, Inc. v. Beam Const. Corp.*, 41 N.Y.2d 397, 393 N.Y.S.2d 350, 361 N.E.2d 999, 1001 (1977))).

[154] *See Osborn*, 991 A.2d at 1158-59 ("The face of this contract manifests the parties' intent to bind one another contractually."); *see also*, *e.g.*, *Schulz v. U.S. Boxing Ass'n*, 105 F.3d 127, 136 (3d Cir. 1997) ("[T]he signatures manifested an intention to be bound by these rules.").

[155] *Trial Op.*, 2017 WL 3833210, at *1.

[156] *See supra* note 153.

a deal, offering additional objective manifestation that the parties intended to be bound by the Transaction Documents.

But we acknowledge that there is evidence that cuts the other way (for example, the "DRAFT" notation and blank schedules). On remand, the trial court should weigh the evidence and make a finding on the parties' intent to be bound by the Contribution Agreement.[157]

2. The Essential Terms of the Contribution Agreement Are Sufficiently Definite

The second question under *Osborn* is whether the putative contract's material terms are sufficiently

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[157] We note that even Campbell's counsel at oral argument agreed that the trial court had not made a finding as to the first prong of the *Osborn* test and suggested that, if this Court were to reverse on that basis, that it remand the case for the court to make a finding. *See* Oral Argument, *supra* note 116, at 23:20-23:36, 24:40-25:02. We agree. Although the Court of Chancery's opinion does state that "Kay and Campbell did not intend to bind themselves to the written terms in the Transaction Documents," *Trial Op.*, 2017 WL 3833210, at *18, for the reasons discussed in this opinion, we do not read this sentence as a finding of fact sufficient to satisfy *Osborn*'s first prong. Among other things, the trial court conflated the analysis under *Osborn* and based its decision largely on its conclusion that the consideration to be exchanged was not sufficiently definite—largely due to the SARS issues. *See id.* at *16 ("Absent definite terms regarding the remainder of the property to be contributed, I find that Campbell and Kay did not come to agreement on the consideration that Campbell would provide in the Transaction Documents.").

definite.[158] This is mostly, if not entirely, a question of law.[159] Though this Court has not articulated a precise standard for what qualifies as sufficiently definite, several of our trial courts have followed the test from Restatement (Second) of Contracts § 33(2), which suggests that terms are sufficiently definite if they "provide a basis for determining the existence of a breach and for giving an appropriate remedy."[160] We adopt this

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[158] *Osborn*, 991 A.2d at 1158; *see also Scarborough v. State*, 945 A.2d 1103, 1112 (Del. 2008) ("As every first year law student learns, one of the central tenets of contract law is that a contract must be reasonably definite in its terms to be enforceable."); 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, 1-4 *Corbin on Contracts* § 4.1 (1993) [hereinafter *Corbin*] ("A court cannot enforce a contract unless it can determine what it is.")

[159] *See Osborn*, 991 A.2d at 1158-61 (applying *de novo* review when evaluating whether the contract was sufficiently definite); *see also Reynolds v. Univ. of Pennsylvania*, 483 Fed.Appx. 726, 735 (3d Cir. 2012) ("[U]nder Pennsylvania law the issue of whether the terms are sufficiently definite to be enforced is a question of law. (citing *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 585 (3d Cir. 2009))).

[160] *See Carteret Bancorp, Inc. v. Home Grp., Inc.*, 1988 WL 3010, at *9 (Del. Ch. Jan. 13, 1988) (citing Restatement, *supra* note 1, § 33(2)); *Bryant v. Way*, 2011 WL 2163606, at *4 (Del. Super. Ct. May 25, 2011) ("[T]he Court will deny the existence of a contract only if the terms 'are so vague that a Court cannot determine the existence of a breach.'" (quoting *Cont'l. Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1230 (Del. Ch. 2000)); *Cont'l Ins.*, 750 A.2d at 1230 ("Where terms in an agreement are so vague that a Court cannot determine the existence of a breach, then the parties have not reached a meeting of the minds, and a Court should deny the existence of the alleged agreement." (citing *Haft v. Dart Grp. Corp.*, 877 F.Supp. 896, 906 (D. Del. 1995))); *Indep. Cellular Tele., Inc. v. Barker*, 1997 WL 153816, at *4 (Del. Ch. Mar. 21, 1997) ("The material terms of a contract will be deemed fatally vague or indefinite if they fail to provide a

test. A contract is sufficiently definite and certain to be enforceable if the court can—based upon the agreement's terms and applying proper rules of construction and principles of equity—ascertain what the parties have agreed to do. Indeed, as Corbin has stated, "[i]f the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left."[161]

The Court of Chancery determined that "the precise consideration to be exchanged between Campbell and Eagle Force Holdings was highly material to the parties here."[162] But the trial court believed that the parties failed to agree on "precise scope" of this consideration: several terms were "either blank or inconsistent with the reality of which Campbell, Kay, Offit,

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reasonable standard for determining whether a breach has occurred and the appropriate remedy." (citing Restatement, *supra* note 1, § 33(2))); *Litle v. Waters*, 1992 WL 25758, at *6 (Del. Ch. Feb. 11, 1992) ("The material terms are uncertain where they fail to provide a reasonable basis for determining the existence of a breach and for giving the appropriate remedy." (citing Restatement, *supra* note 1, at § 33(2)); *see also Corbin*, *supra* note 158, § 4.1 (The parties "must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are.").

[161] *Corbin*, *supra* note 158, § 4.1.

[162] *Trial Op.*, 2017 WL 3833210, at *16.

and Rogers were aware."[163] We disagree. Accepting the Court of Chancery's factual finding that the consideration to be exchanged was material to the parties' agreement, the text of the executed Contribution Agreement is sufficiently definite. It allows us to ascertain not only the consideration, but also what should happen in the event that Campbell could not actually deliver his specified amounts and provides a means of enforcement if one party proved incapable of performing as promised.

At the very beginning, in the recitals, the Contribution Agreement articulates the consideration to be exchanged. These recitals summarize that Campbell was to contribute to the Company *all* his rights in the Transferred IP and Targeted Companies Securities, as those terms are defined, and that, in return, Campbell was to receive Class A Units constituting half of all issued and outstanding Class A Units at the time of his contribution.[164] The terms of the Contribution Agreement reiterate this statement of the consideration to be exchanged.

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[163] *Id.* at *15.

[164] Executed Contribution Agreement, *supra* note 55, Recitals, at A664 (noting, among other things, that "[t]he parties hereto intend that the contribution to the Company by Campbell of the Targeted Companies Securities and the Transferred IP shall be treated as Campbell's capital contribution to the Company in exchange for which Campbell shall receive Class A Units comprising 50% of the issued and outstanding Class A Units at such time."); *see also* Executed LLC Agreement, *supra* note 81, Schedule A, at A770.

For example, Section 2.2(b) specifies that Campbell was to contribute "all right, title and interest in and to any and all Intellectual Property owned in whole or in part by Campbell and which is used or related to, or which can be used or related to: Health; Identity Management; Cybersecurity," and other specified issues.[165] The agreement refers to this intellectual property as the "Transferred IP."[166] As the Court of Chancery acknowledged, Sections 4.20(d) and 4.20(f) "make clear that Schedule 3.5 includes all of Campbell's intellectual property license agreements."[167] Yet the trial court noted that Schedule 3.5 is blank and, as such, concluded that the parties "did not reach agreement on which contracts Campbell would assign to Eagle Force Holdings as another part of the consideration in this proposed deal."[168] The text of the agreement defines which contracts should be delivered as *all* means *all*. Campbell's obligations were clear without the schedules: he had to contribute the licensing agreements for *all* the Transferred IP, and the text of the executed agreement leaves no doubt about the IP

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[165] Executed Contribution Agreement, *supra* note 55, § 2.2(b), at A665.

[166] *Id.*

[167] *Trial Op.*, 2017 WL 3833210, at *16. This observation is confirmed elsewhere in the agreement. Section 3.5 reiterates that, at Closing, "Campbell shall assign to the Company . . . those agreements set forth on Schedule 3.5 attached hereto (collectively, the 'Assumed Agreements')." Executed Contribution Agreement, *supra* note 55, § 3.5, at A668. A footnote to that sentence states that "Schedule 3.5 should include any of Campbell's licenses to Intellectual Property." *Id.* § 3.5 n.2, at A668.

[168] *Trial Op.*, 2017 WL 3833210, at *16.

consideration to be exchanged. In addition, the trial court found that the parties had resolved the scope of the intellectual property that Campbell would contribute.[169]

Section 2.2(a) of the Contribution Agreement similarly provides that Campbell shall contribute "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. . . ."[170] "Targeted Companies Securities" are defined as "the ownership interests (and rights to acquire ownership interests) of the Targeted Companies set forth in Schedule 4.3(a)."[171] In Section 4.3(e), Campbell represents and warrants that the Targeted Companies Securities listed opposite his name on Schedule 4.3(a) "constitute all of the issued and outstanding Targeted Companies Securities. . . ."[172] Hence, Campbell had to contribute all the Targeted Companies Securities, which were equivalent to the securities next to his name on Schedule 4.3(a). Schedule 4.3(a) included the header "Capitalization," and then, as the Court of Chancery observed, it was left "blank except for the

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[169] *Id.* at *7 ("As to the scope of the intellectual property Campbell would contribute, the parties agreed that he would contribute all of the intellectual property he had created that was related to the EagleForce business.").

[170] Executed Contribution Agreement, *supra* note 55, § 2.2, at A665.

[171] *Id.* Exhibit A, at A705.

[172] *Id.* § 4.3(e), at A671.

bracketed text '[Also describe SARS Plan],' "[173] where it seems subsection 4.3(b) was supposed to appear.[174] Thus, the trial court concluded that "the schedule that was meant to list an important part of the consideration Campbell would provide under the agreement is incomplete,"[175] contributing to the court's view that the parties failed to form a contract. However, Schedule 4.3(a) is not necessary for determining Campbell's contribution: Campbell had to contribute "*all* right, title, and interest" in these securities.[176] Given that *all* means *all*, additional clarification from Section 4.3(a) similarly is not essential.

Nonetheless, the trial court believed and emphasized that "[t]he objective evidence of the course of the parties' negotiations shows that whether Campbell owns all of the equity in EagleForce Health and

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[173] *Trial Op.*, 2017 WL 3833210, at *15.

[174] SARS Plan is defined as "the existing stock appreciation rights plan currently in effect which is described in Schedule 4.3(b)." Executed Contribution Agreement, *supra* note 55, Exhibit A, at A704.

[175] *Trial Op.*, 2017 WL 3833210, at *15.

[176] Executed Contribution Agreement, *supra* note 55, § 2.2(a), at A665 (emphasis added). Further, Section 3.3(a)(i) confirms that, to effectuate this contribution, at Closing, "Campbell shall deliver to the Company the Surrender Documents and Surrendered Securities." *Id.* § 3.3(a)(i), at A667. "Surrender Documents" means "a letter of transmittal surrender form regarding the surrender of Targeted Companies Securities which shall be in form and substance reasonably satisfactory to Campbell and the Company." *Id.* Exhibit A, at A705. Further, "Surrendered Securities" is defined as "(a) certificates representing the Targeted Companies Securities, and (b) assignments and assumptions of interests in Targeted Companies Securities, as applicable." *Id.*

EagleForce Associates is not clear,"[177] given that the employment agreements of certain employees at the subsidiaries purported to provide for SARS.[178] We conclude, however, that Section 2.2 is not ambiguous. It is clear that Campbell promised to deliver all the Targeted Companies Securities. Further, the trial court's finding that "Kay, Campbell, Offit, and Rogers knew [that Kay and Campbell] had not come to agreement on the employee claims for equity and the SARs plan"[179] is based on post-signing extrinsic evidence. Even Campbell acknowledges that "[t]he 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 representations about "waivers of third-party equity claims."[180] The possibility that Campbell could not

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[177] *Trial Op.*, 2017 WL 3833210, at *15 ("Throughout the negotiation of the Transaction Documents, Kay and Offit were concerned about employee claims for some of the equity of EagleForce Associates or EagleForce Health.").

[178] *See also* Employment Letters, *supra* note 40, at A2224-31. Plaintiffs' counsel raises an important issue: whether it was even proper for the trial court to factor these letters into its opinion given that they were never introduced into evidence at trial. *See* Oral Argument, *supra* note 116, at 03:10-03:30 ("There's an evidentiary problem that we raised, and that is that the SARS letters were not introduced at trial. They were actually introduced at a contempt hearing following trial, for a completely different purpose. And, therefore, our position is that the Chancery Court should not have considered them because they were not introduced in evidence at trial.").

[179] *Trial Op.*, 2017 WL 3833210, at *16.

[180] Appellee's Answering Br. at 32 n. 7. The Court of Chancery looked to evidence after the documents had been signed—from *after* the time of execution—and then used an apparent

deliver all of the Targeted Companies Securities is based upon the hypothetical scenario that claims arising from the Employment Letters (which were never introduced as evidence at trial) would be asserted, and ultimately prove successful.[181] Instead, the question at hand is whether the terms of the agreement itself were sufficiently definite so as to provide a basis for determining a breach. We conclude that the terms of the Contribution Agreement are sufficiently definite.

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misalignment between one party's post-execution view and the text of the executed document to find that the terms of the executed document must not have been sufficiently definite. This is a form of "after-the-fact professed subjective intent" that our courts typically refuse to consider. *See, e.g.*, *Sarissa Capital Domestic Fund LP v. Innoviva, Inc.*, 2017 WL 6209597, at *21 (Del. Ch. Dec. 8, 2017), *judgment entered*, (Del. Ch. Dec. 20, 2017).

[181] Even Campbell's Answering Brief refers to SARS as "potential employee claims to equity." Appellee's Answering Br. at 31. The record is woefully undeveloped as to what a "SAR" was meant to be, let alone whether it could have any potential impact on capitalization at the Holdings level, and we question the trial court's basis for its conclusion that it was not clear whether Campbell owned all of the subsidiaries' equity. For one, Plaintiffs' counsel explained at oral argument before this court that the existing SARS offers did not encompass equity ownership. *See* Oral Argument, *supra* note 116, at 5:18-5:19 ("What [a SAR] didn't mean was ownership. Everybody agrees on that. Mr. Campbell agreed on that. Mr. Campbell's counsel, deal counsel, agreed on that. Mr. Kay understood that. And Mr. Kay's deal counsel agreed on that. So, to the extent the court was questioning whether Mr. Campbell owned 100% of the company, the SARS have nothing to do with it because Ownership is different than a right to a payment based on appreciation of the stock value. That's what a SAR is. They're non-voting. You don't own any part of the company. You have a right to a payment, a bonus."). Campbell's attorney did not refute that characterization.

In addition to promising to deliver all of the Targeted Companies Securities, Campbell represented and warranted that "Campbell is the true and lawful owner of the Targeted Companies Securities set forth opposite his name on Schedule 4.3(a), which constitute *all* of the issued and outstanding Targeted Companies Securities, and has full capacity, power and authority to surrender the Targeted Companies Securities for exchange pursuant to the terms of this Agreement, free and clear of any Encumbrances, and such Targeted Companies Securities are not subject to any adverse claims."[182] And Campbell further represented and warranted that "[n]either Chris Creswell, Said Saleh nor any member of the family of Said Saleh have any legal or equitable ownership interest in any Targeted Companies Securities."[183] Similarly, Campbell additionally represented and warranted that "[t]he revenue sharing plans and/or profit sharing plans for Chris Creswell [and other listed employees] . . . have been eliminated without continuing liability to any Targeted Company, and each of the foregoing persons has given the appropriate Targeted Company a legally binding release from any further liability for such plans."[184] Thus, even if Campbell could not deliver all

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[182] Executed Contribution Agreement, *supra* note 55, § 4.3(e), at A671 (emphasis added).

[183] *Id.*

[184] *Id.* § 4.3(d), at A671. Similarly, Section 4.12(c) of the Contribution Agreement represented and warranted that, "[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

the Targeted Companies Securities as promised, in addition to claims for breach of contract, Kay and the Company had possible recourse through actions for possible breaches via the warranty and/or indemnification provisions.[185] But, again, the possibility that

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or time of payment of any compensation, equity award or other benefit. . . ." *Id.* § 4.12(c), at A675. Kay knew that at least Creswell's employment agreement stated that his SARS rights vest upon a sale or change of control. *Trial Op.*, 2017 WL 3833210, at *15. But Schedule 4.12(c) was blank. Executed Contribution Agreement, *supra* note 55, Schedule 4.12(c), at A780. Regardless, Kay had obtained Campbell's representation and warranty that the "revenue sharing plans and/or profit sharing plans for Chris Creswell" and other employees, including John Morgan "have been eliminated without continuing liability to any Targeted Company. . . ." *Id.* § 4.3(d), at A671.

[185] We acknowledge the debate over whether a party can recover on a breach of warranty claim where the parties know that, at signing, certain of them were not true. Campbell argues that reliance is required, but we have not yet resolved this interesting question. *See Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 n.8 (Del. 2000) (noting that the Court did not need to decide whether detrimental reliance is an element of a claim for a breach of warranty because that issue was not squarely at issue in the case). And we observe that a majority of states have followed the New York Court of Appeals' decision in *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 554 N.Y.S.2d 449, 553 N.E.2d 997 (1990), which holds that traditional reliance is not required to recover for breach of an express warranty: the only "reliance" required is that the express warranty is part of the bargain between the parties. *Id.*, 554 N.Y.S.2d 449, 553 N.E.2d at 1001 ("This view of 'reliance'—i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties—reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract."); *see also See* Tina L. Stark, *Nonbinding Opinion*, Bus. Law Today, Jan.-Feb. 2006, at https://apps.americanbar.org/buslaw/blt/2006-01-02/nonbindingopinion.html ("Since the *CBS*

Campbell might not perform is a different question than the definiteness of the putative contract's terms.

Further, assuming that SARS entailed some form of equity ownership and that successful claims were made, the Contribution Agreement includes a provision that articulates how Holdings was to provide for such claims without impacting the equal and shared ownership of Holdings that Campbell and Kay so desired.[186] Section 5.7 of the LLC Agreement, which was integrated into the Contribution Agreement and thus considered part of the agreement,[187] provides:

> At such time as the Board of Managers shall determine, but in no event later than after the Company shall receive its first contract in

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case was decided, the majority of states have followed New York."). We need not decide this interesting issue because such claims are not before the court.

Further, Article IV, the "Representations and Warranties of Campbell," begins by stating that "Campbell hereby represents and warrants to the Company that the following representations and warranties are, as of the Execution Date, *and will be, as of the Closing Date, true and correct*." Executed Contribution Agreement, *supra* note 55, Article IV, at A668 (emphasis added). Thus, even though the parties apparently appreciated that the "reality" of not having signed releases in hand did not comport with certain representations at the time of execution, it appears the parties were willing to overlook any problem at signing and allow Campbell to strive to obtain any necessary releases by Closing.

[186] *Trial Op.*, 2017 WL 3833210, at *16 ("From the beginning of Campbell and Kay's negotiations, they communicated to each other that it was very important that they both be 50% owners of the ultimate holding company.").

[187] *See* Executed Contribution Agreement, *supra* note 55, § 8.4(a), at 695-96.

> respect of its business, the Company, the Board of Managers and its officers, and the managers, directors and officers, if any, of each of the Company's Subsidiaries, as the case may be, shall take all actions as are necessary to set aside (i) three percent (3%) of the equity in each of the Company's Subsidiaries, which equity shall be reserved for a stock appreciation rights plan, and (ii) seventeen percent (17%) of the equity in each of the Company's Subsidiaries, which equity shall be reserved for investors, key employees or other persons that the Board of Managers shall so determine in its sole discretion.[188]

As noted above, the record is woefully undeveloped as to what a "SAR" was intended to be, let alone whether it could have any potential impact on capitalization at the Holdings level.[189] We are reluctant to find

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[188] Executed LLC Agreement, *supra* note 81, § 5.7, at A739. The inclusion of this provision seems to contradict the trial court's conclusion that "Kay and Campbell's list of thirteen points recognized the problem of the SARs program and began to develop a solution under which Campbell and Kay would each retain equal control, but that was never incorporated into the Transaction Documents." *See Trial Op.*, 2017 WL 3833210, at *15. In addition, Section 5.7 first appeared in Rogers' August 19 draft of the LLC Agreement, the first draft circulated following the Thirteen-Points List of August 14. *See* Rogers' LLC Agreement Redline (Aug. 19, 2019), § 5.7, at A339-40.

[189] *See, e.g.*, Oral Argument, *supra* note 116, at 4:38-5:22 (Kay's Counsel: "I'm not sure that anybody understands what those letters were offering to Mr. Creswell or Mr. Morgan because, as I said, there was no plan. So, our position is and was, and what Mr. Campbell agreed to was, he would obtain releases from those people and tell them that once the corporation, the subsidiaries, were owned by the holding company, a new SARS

that the agreements fail for lack of definiteness based upon speculation that claims might be asserted; that, if asserted, they will be successful; and that, if successful, they will exceed the amounts set aside in Section 5.7. If all of that comes to pass, it appears that the representations, warranty, and indemnification provisions will be at issue. Facially, these provisions address what the representations and warranties are, and what happens in the event of a breach. Whether they reasonably could be relied upon under circumstances then presented is a question for another day.[190] We are satisfied that the provisions contained in the Contribution Agreement provide a basis for determining the existence of a breach and for giving an appropriate remedy. Thus, they are sufficiently definite.

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plan would be introduced, and that they would be offered SARS or whatever was available in that plan, but that the existing offer was in a non-existent plan, so what did it mean? What it didn't mean was ownership. We know that. Everybody agrees on that."); *id.* at 8:34-9:05 (Kay's Counsel: "As far as Mr. Creswell and Mr. Morgan, as Your Honor points out, you can't make heads or tails of what it means. What kind of a claim could they make? Mr. Morgan comes in and says, 'I have 150,000 of something. I don't know what it is.' So the idea was we were going to clean that up by obtaining releases from these folks, and then we were going to produce a SARS plan and offer it to them and it would make sense. That never happened.").

[190] We note Corbin's word of caution: "The courts must take cognizance of the fact that the argument that a particular agreement is too indefinite to constitute a contract frequently is an afterthought excuse for attacking an agreement that failed for reasons other than the indefiniteness." *Corbin*, *supra* note 158, § 4.1.

3. The Contribution Agreement Is Backed by Legal Consideration

The last requirement for a valid contract is the existence of legal consideration. The parties do not dispute that legal consideration exists.

If, on remand, the court determines that the *Osborn* test is satisfied, then the Contribution Agreement is enforceable, and the court has personal jurisdiction via the forum selection provision favoring Delaware.

B. On Remand, the Court of Chancery Should Reconsider Its Determination that the LLC Agreement is Unenforceable

If the Court of Chancery determines that the Contribution Agreement is indeed enforceable, then the trial court's basis for finding the LLC Agreement unenforceable falls away. But if it determines that the Contribution Agreement is not enforceable, then it should examine the LLC Agreement under the *Osborn* framework, including making a finding on the parties' intention to be bound, with the guidance offered above and below.

The trial court had determined, based on its review of extrinsic evidence, that "the parties intended these two Agreements to operate as two halves of the same business transaction,"[191] and thus found that

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[191] *Trial Op*., 2017 WL 3833210, at *18 (quoting *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114-15 (Del. 1985)).

they "rise and fall together."[192] To the extent that the court's conclusion was based on our decision in *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*,[193] we urge it to reexamine that conclusion, as *Shell* speaks more to the *interpretation* of the contracts at issue there—and not the court's evaluation of the parties' intent to be bound.[194]

Like the Contribution Agreement, the four corners of the LLC Agreement suggest a strong intent to be bound at the time of signing. For one, in addition to the signatures of the parties and the LLC Agreement's express statement that each member "intend[s] to be

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[192] *Id.*

[193] 498 A.2d 1108 (Del. 1985).

[194] *Trial Op.*, 2017 WL 3833210, at *18. In *Shell*, the plaintiff DuPont had a contract with the defendant Shell that barred sublicenses, and the Court had to determine whether a contractual arrangement between Shell and a wholly-owned subsidiary of the Union Carbide Company constituted a single "sublicense" that thus breached Shell-DuPont contract. 498 A.2d at 1110, 1115. This Court noted that the "interrelatedness" of the two Shell-Carbide agreements that were part of this contractual arrangement—including that Shell's obligations under one were contingent on Carbide's performance under the other—"ma[de] it clear that the two parties intended these two Agreements to operate as two halves of the same business transaction" and, thus, the Court *interpreted* the two documents as one. *Id.* We held that, "[w]here two agreements are executed on the same day and are coordinated to the degree outlined above [as indicated in the opinion], in essence, they form one contract and must be examined as such." *Id. Shell* did not hold that one of the contracts was only enforceable if the other one was also enforceable and, therefore, has no bearing on the enforceability of the LLC Agreement.

legally bound" by the document,[195] the LLC Agreement provides that they entered into the agreement, in part, "to amend and restate the Original LLC Agreement in its entirety. . . ."[196] The fact that the Original LLC Agreement preceded any such contribution agreement additionally underscores that the parties intended to be bound by the LLC Agreement independent of the validity of any other document: it amended and restated a preexisting agreement that stood on its own in the past and could do so in the future. Further, the recitals also suggest that the LLC Agreement had different "material" or essential provisions than the Contribution Agreement as it was meant to serve a different purpose: govern the members' relationships among themselves and clarify the Company's operating structure. The recitals state that the parties entered into this LLC Agreement in order to:

> amend and restate the Original LLC Agreement in its entirety in order to delineate the rights and obligations of the Members and to provide for, among other things, (a) the management of the business and affairs of the Company, (b) the allocation among the Members of the profits and losses of the Company, (c) the respective rights and obligations of the parties to each other with respect to the Company and (d) the addition of Persons (other than EFI) listed on Schedule A attached

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[195] Executed LLC Agreement, *supra* note 81, Background, at A719.

[196] *Id.*

> hereto as additional members of the Company, all as permitted under the Act.[197]

The inclusion of provisions addressing these topics is strong evidence that the LLC Agreement included all material terms.

The LLC Agreement also states in Section 13.1 that "[t]his Agreement . . . contains the entire contract among the Members as to the *subject matter hereof*,"[198] indicating that the LLC Agreement is a completely integrated document and accordingly emphasizing its independence.

The Severability Clause confirms the LLC Agreement's lack of dependence on any other contract or any particular provision within it by indicating that, if any provision of the LLC Agreement is deemed invalid or unenforceable, the contract should be construed as if the invalid parts were excised and all other portions remain enforceable.[199]

On remand, as with the Contribution Agreement, the Court of Chancery should revisit the evidence and make an express finding on the parties' intent to be bound by the LLC Agreement. In this context, it is important to consider the General Assembly's statement

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[197] *Id.*

[198] *Id.* § 13.1, at A755 (emphasis added).

[199] *See id.* § 13.4, at A756 ("If any provision of this Agreement is determined by a court to be invalid or unenforceable, that determination shall not affect the other provisions hereof, each of which shall be construed and enforced as if the invalid or unenforceable portion were not contained herein.").

that "[i]t is the policy of [the LLC Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."[200] Given that the parties do not contend before this Court that any terms of the LLC Agreement are not sufficiently definite or that the LLC Agreement is not supported by legal consideration, we conclude that these two prongs are satisfied.

C. Delaware Courts Retain Jurisdiction to Punish Violations of their Contempt Orders

After presiding over two hearings on the contempt motions, the trial court determined that, because it found that it lacked personal jurisdiction over Campbell, it could not hold Campbell in contempt and impose sanctions for his violations of its status quo order. This Court has not squarely addressed whether the Court of Chancery may impose sanctions on a defendant for violating its status quo order if the court ultimately finds that it lacks personal jurisdiction over the defendant.

The Court of Chancery cited this Court's decision in *Mayer v. Mayer*,[201] in support of its conclusion that, because it lacked personal jurisdiction over Campbell, it could not enforce its prior contempt orders.[202] In *Mayer*, a man who was denied a divorce by the

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[200] 6 *Del. C.* § 18-1101(b); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291-92 (Del. 1999).

[201] 132 A.2d 617 (Del. 1957).

[202] *Trial Op.*, 2017 WL 3833210, at *19.

Superior Court in Delaware sold his property in Delaware and moved with all his belongings to Nevada.[203] Soon after settling out West, he filed for divorce in Nevada on the grounds that he had been living apart from his wife for three years—a reason that provided grounds for divorce in Nevada, but not in Delaware. In the meantime, his wife in Delaware sought and obtained an order from the Court of Chancery restraining the husband from continuing with his divorce action in Nevada. The husband's Nevada counsel received the order, but the husband ignored the order and completed the Nevada divorce and remarried. The wife then sought to hold the husband in contempt for violating the Delaware court's order, and the husband appeared specially in the Court of Chancery to move to dismiss the wife's complaint for contempt of the court order for lack of personal jurisdiction, among other reasons. The Court of Chancery granted the husband's motion, and this Court affirmed. In doing so, this Court observed:

> The party charged [with contempt] is always at liberty to defend his disregard of the court's order by showing that the order was void for lack of jurisdiction. In a contempt proceeding based upon the violation of an injunction, the only legitimate inquiry to be made by the court is whether or not it had jurisdiction of the parties and of the subject matter. Subject to this limitation the court will not listen to an excuse for the contemptuous action based

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[203] *Mayer*, 132 A.2d at 618.

> upon an argument that the order in question was imperfect or erroneous. No person may with impunity disregard an order of the court having jurisdiction over the subject matter and of the parties.[204]

In *Mayer*, the Court made the only legitimate inquiry—whether it had jurisdiction over the husband *when* it issued its order restraining the Nevada divorce—and this Court agreed with the husband that the Delaware court lacked jurisdiction over him *at the time the court issued the order*.[205] Further, the husband *was not* before the court when the Court of Chancery issued its order. The husband's only appearance before the court was a special appearance to contest personal jurisdiction. And there was never any finding of contempt given the court's determination that it lacked jurisdiction at the outset.

By contrast, in this case, the Court of Chancery issued its status quo order while the defendant was *before the court*, as other proceedings were pending. Several courts have noted that courts may hold proceedings to determine whether it has jurisdiction over a given action and, while doing so, impose orders to preserve the status quo pending the outcome of the proceedings. Indeed, in *R & R Capital LLC v. Merritt*,[206] a decision affirmed by this Court, the Court of

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[204] *Id.* at 621, *quoted in Cohen v. State ex rel. Stewart*, 89 A.3d 65, 90 n.115 (Del. 2014), and *Trial Op.*, 2017 WL 3833210, at *19.

[205] *Mayer*, 132 A.2d at 621.

[206] 2013 WL 1008593 (Del. Ch. Mar. 15, 2013), *aff'd*, 69 A.3d 371 (Del. 2013).

Chancery determined that it "has the power to grant ancillary injunctive relief to protect its jurisdiction over (and the parties entitlement to a meaningful adjudication of their rights in) the property or other matter that is subject of the action."[207] Those orders would be meaningless absent the power to enforce them.[208]

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[207] 2013 WL 1008593, at *8 (quoting *E.I. Du Pont de Nemours & Co. v. HEM Research, Inc.*, 576 A.2d 635, 639 (Del. Ch. 1989)).

[208] 12 A.L.R. 2d 1059 § 6 (1950) ("[A] court possesses the power of hearing and determining the question of its jurisdiction, and may while so doing, require the parties to preserve the status of the subject matter, and may punish for contempt disobedience of its temporary restraining order." (citing *Pitcock v. State*, 91 Ark. 527, 121 S.W. 742, 744-45 (1909))); *see also United States v. United Mine Workers of Am.*, 330 U.S. 258, 293, 67 S.Ct. 677, 91 L.Ed. 884 (1947) ("[T]he District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt."); *Hayes v. Towles*, 95 Idaho 208, 506 P.2d 105, 109 (1973) ("In general, a court has the power to order the preservation of the status quo while it determines its own authority to grant relief, and the violation of a restraining order issued for that purpose may be punished as criminal contempt, even if the court subsequently determines that it is without jurisdiction to grant the ultimate relief requested."); *Ohio Contractors Ass'n v. Local 894 of Int'l Hod Carriers', Bldg. & C. L. Union of Am.*, 108 Ohio App. 395, 162 N.E.2d 155, 160 (1959) ("[T]he trial court, whether it ultimately determines that it has or does not have jurisdiction upon a consideration of the merits of the case, did have authority to issue the temporary restraining order and the temporary injunction; that it likewise had the power and legal authority to punish for contempt those parties who flagrantly flouted its order prior to a determination of the jurisdictional question upon a consideration of the case on its merits.").

Moreover, some courts have found that, while a party may contest a contempt order for lack of personal jurisdiction, as the defendant did in *Mayer*, the party waives that right if it voluntarily decides to contest the *merits* of the claim that it violated a court order, regardless of whether that order was validly issued.[209] Campbell did so here as he contested the merits of the court's order. We hold that, when a Delaware court issues a status quo order pending its adjudication of questions concerning its own jurisdiction, it may punish violations of those orders with contempt and for sanctions, no matter whether it ultimately finds that it lacked jurisdiction.

III.

We reverse the trial court's determination that it lacked personal jurisdiction over Campbell and the corollary finding that it could not impose sanctions for contempt. And we otherwise remand this case to the Court of Chancery for proceedings consistent with this opinion.

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[209] 17 C.J.S. Contempt § 104 ("A voluntary appearance in a contempt proceeding ordinarily confers jurisdiction of the person of the defendant."); *see also id.* § 133 ("[A] voluntary appearance may result in a waiver of defects or irregularities in the commencement of the proceedings, except as to matters affecting jurisdiction of the subject matter.").

STRINE, Chief Justice, joined by VAUGHN, Justice, concurring in part and dissenting in part:

I join in the Majority's decision finding that Campbell cannot escape responsibility for contempt. Having exercised the privilege to litigate before our Court of Chancery, he was bound to honor its orders relating to his behavior, and he cannot escape responsibility for his non-compliance by claiming that he was only before the court to contest the question of personal jurisdiction.

I part company to some extent from the Majority's learned and careful consideration of the Court of Chancery's decision that the August 28th draft Contribution Agreement (the "Draft Contribution Agreement") was not enforceable because it failed to contain certain material terms. Like my friends in the Majority, I agree that the Court of Chancery's analysis tended to blend two issues relevant to formation: whether the parties intended to be bound by the contract and whether the contract contained sufficiently definite terms.[1] These elements are related but distinct. In some ways, the Court of Chancery's decision can be read as based on this chain of reasoning: i) when one reads the Draft Contribution Agreement on its face, it looks markedly different than what one would expect of a final contract; ii) aside from glaring gaps like the date of closing

[1] *See Eagle Force Holdings, LLC v. Campbell*, 2017 WL 3833210, at *14 (Del. Ch. Sept. 1, 2017) (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)).

and the date of signing,[2] those gaps also included the absence of key schedules addressing critical issues like the capital structure of the company's operating subsidiaries;[3] iii) when one looks to the parol evidence on those gaps, one finds that the parties had not reached closure on them, and that there were fundamental disagreements about risk allocation regarding them;[4] iv) even more, the parol evidence revealed that certain material terms in the written document were inconsistent with the objective reality as understood by both Kay and Campbell;[5] v) therefore, this could not have been intended to be a final contract; and vi) thus the parties did not mean to be bound to the Draft Contribution Agreement on August 28th when they both put their signature on it.

Although the Court of Chancery appears to have determined that "Kay and Campbell did not intend to bind themselves to the terms of the Transaction Documents,"[6] it did not make a clear finding that it was basing its refusal to enforce the Draft Contribution Agreement on that ground. Instead, the trial court more clearly based its ruling on the related point that Kay and Campbell had not reached agreement on terms of the Draft Contribution Agreement they considered essential,[7] and it never, as the Majority rightly

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[2] *Id.* at *9.

[3] *Id.*

[4] *Id.* at *15-18.

[5] *Id.* at *16.

[6] *Id.* at *18.

[7] *Id.* at *17.

finds,[8] resolved the specific fact question of whether Campbell's signature signaled his intention to be bound, as Kay argues, or was just a signal that the parties were making progress toward the goal of a final agreement, as Campbell argues.[9]

In this situation, I agree with the Majority that it would have been preferable for the Court of Chancery to have isolated the first factor of the *Osborn* test and decided whether it believed Campbell or Kay as to this point.[10] Although I do not think that trial courts are obliged to cover every *Osborn* factor in every case, especially if it is obvious that one of the factors can be applied efficiently to fairly resolve the case, I understand why the Majority views that as advisable here, given the unusual nature of the facts. Arguably, if Campbell intended to be bound, then one should just read any gaps in the Draft Contribution Agreement against him, when he signed a document that, on issues that the Court of Chancery found unresolved when looking at the parol evidence, tended to be highly unfavorable to him, if one ignores those gaps and the parol evidence, and solely focuses on the language of the Draft Contribution Agreement.

But to the extent that Kay obtained a representation and warranty from Campbell that Campbell was the sole owner of the Targeted Companies, as

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[8] Majority Op. at ___—___.

[9] *Eagle Force Holdings*, 2017 WL 3833210, at *1.

[10] Majority Op. at ___—___.

suggested by the Majority,[11] the evidence supports the Court of Chancery's finding that Kay knew that the representation was false as of the time of the supposed agreement.[12] Both sides knew that several subsidiary employees had viable claims to what seems to be a form of equity. Thus, Kay and Campbell were still trying to get rescission agreements from Cresswell, whose five percent equity in EagleForce Health was to be expressed as SARS;[13] Morgan, who was eligible for SARS in EagleForce Associates;[14] Said Salah, who testified that he has two and a half percent equity in EagleForce Associates and whose employment letter does not refer to SARS;[15] and Hany Salah, whose employment letter gave him one and a half percent equity in EagleForce Associates and does not refer to SARS.[16]

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[11] *Id.* at ___—___.

[12] *See* App. to Opening Br. at A1645 (Cross Examination of Ted Offit) (explaining that his client, Kay, knew that Cresswell and Salah had potential equity claims, and that Kay and Campbell intended to secure a waiver substituting SARS for those potential claims, but had not yet done so).

[13] *See id.* at A1891 (Direct Examination of Christopher Cresswell) (explaining that his employment offer letter gave him five percent equity expressed as SARS to avoid tax liability).

[14] *Id.* at A2225 (Employment Offer Letter of General John Morgan) (offering "equity participation . . . in the amount of 300,000 SAR's (150,000 each) valued one dollar ($1) per SAR").

[15] *Id.* at A2128 (Direct Examination of Said Salah) (explaining that Kay knew his employment letter offered equity because Kay reviewed the letter during due diligence and discussed it with him).

[16] *Id.* at A2227 (Employment Offer Letter of Dr. Hany Salah).

Despite the close nature of the case and my respect for the Majority's analysis, I would nonetheless affirm given the trial evidence buttressing the Court of Chancery's ultimate conclusions. In my view, our law permits the Court of Chancery to consider parol evidence in determining whether the parties formed a contract.[17] That is the position of the Restatement (Second) of Contracts,[18] and of Chancellor Allen's learned

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[17] *See Hynansky v. Vietri*, 2003 WL 21976031, at *3 (Del. Ch. Aug. 7, 2003) ("In order for the parol evidence rule to apply in all its splendor, one must first present a 'fully integrated agreement.' " (quoting *Taylor v. Jones*, 2002 WL 31926612, at *3 (Del. Ch. Dec. 17, 2002))); 11 Williston on Contracts § 33:15 (4th ed. 2017) ("[W]hat determines whether a writing is an integration is the memorialization of the agreement in writing coupled with an intention that the writing completely embody the contract between the parties. When that occurs, the fact of integration triggers the parol evidence rule."); *Addy v. Piedmonte*, C.A. No. 3571-VCP, 2009 WL 707641 (Del. Ch. Mar. 18, 2009) (explaining that extrinsic evidence may be used to determine if a contract is completely or partially integrated).

[18] Restatement (Second) of Contracts § 214 (Am. Law. Inst. 1981) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish (a) that the writing is or is not an integrated agreement; (b) that the integrated agreement, if any, is completely or partially integrated. . . ."); *id.* § 214 cmt. a ("Writings do not prove themselves; ordinarily, if there is dispute, there must be testimony that there was a signature or other manifestation of assent. The preliminary determination is made in accordance with all relevant evidence, including the circumstances in which the writing was made or adopted."); 11 Williston on Contracts § 33:17 (4th ed. 2017) ("The questions whether an integration is intended and whether any integration is partial or total are distinct from and preliminary to the application of the parol evidence rule. . . .").

analysis in *Leeds v. First Allied Connecticut Corporation*,[19] a decision that the Court of Chancery has applied many times for over a quarter-century and forms a more established part of our jurisprudence than our recent decision in *Osborn*, which appears to have borrowed a test from an intermediate appellate court in one of our neighboring states that was cited by the Court of Chancery when applying that state's law to a contract claim.[20] I consider *Leeds* a learned and solid articulation of Delaware contract law, as has our Court of Chancery.[21]

Given the unusual looking nature of the Draft Contribution Agreement, and its many odd omissions involving important subjects,[22] the Court of Chancery was justified in considering parol evidence for another reason. The Draft Contribution Agreement was

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[19] 521 A.2d 1095 (Del. Ch. 1986).

[20] *Osborn*, 991 A.2d at 1158 (citing *Carlson v. Hallinan*, 925 A.2d 506, 524 (Del. Ch. 2006)); *Carlson*, 925 A.2d at 522 n.95 (applying Pennsylvania law).

[21] *E.g.*, *Greetham v. Sogima L-A Manager LLC*, C.A. No. 2084-VCL, 2008 WL 4767722, at *15 (Del. Ch. Nov. 3, 2008) (Lamb, V.C.); *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1285 (Del. Ch. 2004) (Chandler, C.).

[22] *See, e.g.*, App. to Opening Br. at A683 ("OK DRAFT 8-26-14"); *id.* ("Dated as of August [•], 2014"); *id.* at A664 ("dated as of July [•], 2014"); *id.* at A666 ("Campbell shall deliver verification that he has reopened his previous bankruptcy proceeding **[NOTE: TO BE IDENTIFIED]**."); *id.* at A671 (noting in a footnote that the provision related to Campbell's ownership of the Targeted Companies Securities "may be revised to include Schedule 4.3(b) if there are any options or warrants outstanding"); *id.* at A702 ("['IP Disclosure Schedule' shall mean [•].]").

unclear as to key issues, like the capitalization of the key operating subsidiaries, because key text that the agreement's terms called for, such as critical schedules,[23] were absent.[24] When the Court of Chancery examined the parol evidence, it made findings of fact that support its conclusion that the Draft Contribution Agreement's omissions were evidence of missing material terms.[25]

Despite Kay's assertion that he had flat out won on all issues and those issues were resolved in his favor by the Draft Contribution Agreement, the parol evidence supports the Court of Chancery's contrary finding. As of August 28th, the parties still had not worked out the key issue of how to address the written agreements that Kay knew existed that gave key employees of the subsidiaries a right to what looked like equity.[26] The Draft Contribution Agreement contained objective

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[23] *Eagle Force Holdings*, 2017 WL 3833210, at *9-10 (identifying as incomplete Schedule 3.5, listing Campbell's intellectual property license agreements; Schedule 4.3(a), listing the capitalization of the Targeted Companies; Schedule 4.12(c), listing equity awards affected by the transaction; Schedule 4.6, listing certain contractual liabilities of the Targeted Companies; Schedule 4.9, listing all leases, subleases, or licenses to which the Targeted Companies are party; and Schedule 4.15(a), listing pending legal proceedings involving the Targeted Companies).

[24] *See* App. to Opening Br. at A668 (Signed Contribution Agreement) ("Campbell hereby represents and warrants . . . that the following representations and warranties are, as of the Execution Date, and will be, as of the Closing Date, true and correct.").

[25] *Eagle Force Holdings*, 2017 WL 3833210, at *15-18.

[26] *Id.* at *15.

statements about those written agreements that were inconsistent with them, or at least in such tension as to create material ambiguity.[27] And the parol evidence supports the Court of Chancery's finding that the parties had not agreed whether Campbell owned all of the equity of the Targeted Companies in light of the unresolved employee agreements that appeared to give "some form of equity" to certain employees.[28] As to this point, I respectfully part company from the Majority's conclusion that the Campbell Disclosure Schedules were immaterial and redundant. To my mind, the Court of Chancery was justified in concluding otherwise because the purpose of the Campbell Disclosure Schedules was, in part, to "modify *(by setting forth exceptions to)* the representations and warranties" in the Contribution Agreement.[29]

Likewise, although the Draft Contribution Agreement required Campbell to reopen his bankruptcy proceeding, the Court of Chancery found that the parties were still haggling over that issue and the issue of how to allocate the risk that creditors of Campbell could complain that he had not listed his intellectual property relevant to Eagle Force as an asset in his bankruptcy.[30] For these reasons, I would defer to the Court

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[27] *Id.*

[28] *Id.* at *15-16.

[29] App. to Opening Br. at A700 (Signed Contribution Agreement) (emphasis added).

[30] *Eagle Force Holdings*, 2017 WL 3833210, at *7-12 (describing the evolution of the bankruptcy issue from the time it surfaced in July 2014 through November 2014, when Kay alleged that

of Chancery's determination that because "all of the points that the parties themselves regard[ed] as essential" were not "expressly or . . . implicitly resolved," most particularly, the capitalization of the two operating subsidiaries and the effect the subsidiaries' capitalization would have on Kay and Campbell's respective ownership of Eagle Force Holdings, Kay and Campbell "ha[d] not finished their negotiations and ha[d] not formed a contract."[31]

In other words, although I agree with the Majority that the Court of Chancery's consideration of two related issues was perhaps less than ideal, the record supports the trial court's related conclusions that the Draft Contribution Agreement was both: i) not sufficiently definite,[32] and ii) not intended to be a final agreement.[33] Like my colleague, Justice Vaughn, in

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Campbell's failure to reopen his bankruptcy proceeding constituted a breach of the August 28th documents).

[31] *Leeds*, 521 A.2d at 1102; *Eagle Force Holdings*, 2017 WL 3833210, at *1, 17.

[32] *Leeds*, 521 A.2d at 1097 (identifying as the test of contract formation "whether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement [the parties] reached constituted agreement on all of the terms that the parties themselves regarded as essential and thus that that agreement concluded the negotiations and formed a contract."); *Osborn*, 991 A.2d at 1158 ("A valid contract exists when . . . (2) the terms of the contract are sufficiently definite. . . .").

[33] *Leeds*, 521 A.2d at 1097 ("It is elementary that determination of the question whether a contract has been formed essentially turns upon a determination whether the parties to an alleged contract intended to bind themselves contractually. A court determining if such intention has been manifested,

whose opinion I join, I would therefore defer to the trial court's fact findings and affirm.

I also note that the facts that supported the Court of Chancery's determination that the parties did not reach agreement on material terms also bear importantly on whether Kay can obtain any remedy, other than a return of the capital he risked in the course of trying to forge an agreement with Campbell, plus a fair rate of interest. Specific performance involves a mandatory injunction and a correspondingly high confidence that the Court knows the specific terms it is ordering to be enforced.[34] That sort of confidence would, for the reasons discussed by the Court of Chancery, be difficult to muster. An order of specific performance would have to specify who owned what, the very issue that the Court of Chancery had a

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however, does not attempt to determine the subjective state of mind of either party, but, rather, determines this question of fact from the overt acts and statements of the parties.") (internal citation omitted); *Osborn*, 991 A.2d at 1158 ("A valid contract exists when (1) the parties intended that the contract would bind them. . . .").

[34] *See Osborn*, 991 A.2d at 1159 (" '[A] contract must contain all material terms in order to be enforceable, and specific performance will only be granted when an agreement is clear and definite and a court does not need to supply essential contract terms.' " (quoting *Ramone v. Lang*, No. Civ.A. 1592-N, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006))); *Minnesota Invco of RSA No. 7, Inc. v. Midwest Wireless Holdings LLC*, 903 A.2d 786, 793 (Del. Ch. 2006) (" 'Specific performance is a matter of grace that rests in the sound discretion of the court.' Under Delaware law, a party seeking the equitable remedy of specific performance must prove the existence and terms of an enforceable contract by clear and convincing evidence.") (internal citation omitted).

reasoned basis to conclude had not been determined as of August 28th.

Not only that, in deciding whether specific performance is warranted, the interests of others affected by the ruling are to be considered,[35] and it would seem to invite harm to employees and creditors of Eagle Force to issue a remedy that would result in an immediate deadlock between two people who are so adverse.[36] An order of specific performance would likely lead to amended or new pleadings turning this breach of contract case into a follow-on dissolution proceeding.[37]

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[35] *See In re IBP Shareholders Litig.*, 789 A.2d 14, 82-83 (Del. Ch. 2001) (considering the effect of a compulsory merger on the companies' employees in light of the parties' conduct during litigation that suggested they cannot work together); *Bernard Personnel Consultants, Inc. v. Mazarella*, Civ.A. No. 11660, 1990 WL 124969, at *3 (Del. Ch. Aug. 28, 1990) (Allen, C.) (noting that "the request for specific performance raises other issues that do not focus upon the time of contracting, but upon the time of enforcement" related to "the traditional concern of a court of equity that its special processes not be used in a way that unjustifiably increases human suffering").

[36] App. to Opening Br. at 1746 (Cross Examination of Richard Kay) (stating that he would not want to cause any harm to employees); *see also id.* at A1906 (Cross Examination of Christopher Cresswell) (stating that his willingness to continue working for Eagle Force under Kay and Campbell depends on the equity component of his compensation).

[37] *Compare id.* at 1745-46 (Cross Examination of Richard Kay) (suggesting he may be able to work with Campbell), *with id.* at A2061-64, 2180 (Direct Examination of Stanley V. Campbell) (describing events over the course of his dealings with Kay that made him wary of entering a business relationship with Kay, including Kay's use of what he believed to be a racial slur).

And, as the Majority acknowledges,[38] the Court of Chancery had a basis to find that key provisions of the Draft Contribution Agreement signed on August 28th were at odds with objective reality as Kay understood it. Thus, to the extent Kay is seeking damages because Campbell supposedly made promises that were false, there is doubt that he can then turn around and sue because what he knew to be false remained so. Venerable Delaware law casts doubt on Kay's ability to do so,[39] and a provision of the Draft Contribution Agreement also appears to limit his ability to recover in contract anything other than "in the aggregate . . . the sum of (i) the capital contributed to the Company by Campbell, and (ii) Campbell's pro rata share of Company profits which have not been distributed to Campbell" absent a finding of fraud, intentional misrepresentation, or willful misconduct.[40]

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[38] *See* Majority Op. at ___ n.185 (acknowledging that the parties "appreciated that the 'reality' of not having signed releases" was inconsistent with the representations and warranties in the Contribution Agreement).

[39] *Clough v. Cook*, 87 A. 1017, 1018 (Del. Ch. 1913) (a party who signs a contract with knowledge that a representation is false may not later claim reliance on it).

[40] App. to Opening Br. at A693 (Signed Contribution Agreement). As to this point, Kay is arguably on stronger ground to recover his invested capital as reliance damages for a claim for promissory estoppel or unjust enrichment, than if the August 28th draft Contribution Agreement is binding. *See Ramone*, 2006 WL 905347, at *14 ("Promissory estoppel involves 'informal promises for which there was no bargained-for exchange but which may be enforceable because of antecedent factors that caused them to be made or because of subsequent action that they caused to be taken in reliance.' The purpose of the promissory estoppel

For all these reasons, I would defer to the judgment of our Court of Chancery on the issue of formation in this unusual case. One hopes that before the parties engage in remand proceedings of great expense, they exhale and consider a sensible solution so that they can move on, with Kay receiving fair compensation for his investments, but without harming themselves or others by continuing a bitter battle over whether they should be declared to have had a brief, loveless marriage, only to then commence immediate divorce proceedings.

VAUGHN, Justice, joined by STRINE, Chief Justice, concurring in part and dissenting in part:

It appears to me that the issue before the Vice–Chancellor was whether the parties had come to a meeting of the minds on all material terms of the contract, not whether agreed upon terms were sufficiently definite to be enforced. I see her analysis as going to the first prong of *Osborn*, that is, whether the parties intended to be bound. After carefully considering the evidence, she concluded that the Transaction Documents lacked agreement on material terms that were essential to the parties' bargain. Such terms included

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doctrine is to prevent injustice.") (internal citations omitted); *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) ("Unjust enrichment is 'the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.' ") (internal citations omitted).

the precise scope of the consideration to be contributed by Campbell, the equity holdings in the Targeted Companies, the status of employee claims, and what contracts Campbell would assign to Eagle Force Holdings. She further found that the parties continued to negotiate on these issues, that the parties had not agreed on who would create certain of the schedules, and that the parties did not intend to complete the Transaction Documents without completion of the blank schedules. She further found that the parties did not assent to the terms of the LLC agreement separately from the Contribution Agreement. Finally, at the end of her analysis, she found that "Kay and Campbell did not intend to bind themselves to the written terms in the Transaction Documents. . . ."[1] I am satisfied there is evidence to support these findings, and that they should receive the deference normally given to the trial court's findings of fact. I would affirm the Vice–Chancellor's determination that no contract was formed for the reasons assigned by her.

I agree with the Majority's analysis and conclusion that the Court of Chancery may punish violations of its orders in this case even if it ultimately determines that it does not have jurisdiction over Campbell.

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[1] *Eagle Force Holdings, LLC v. Campbell*, 2017 WL 3833210 (Del. Ch. Sept. 1, 2017).

APPENDIX C

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

EAGLE FORCE HOLDINGS, LLC, and EF INVESTMENTS, LLC, Plaintiffs, v. STANLEY V. CAMPBELL, Defendant.	)	C.A. No. 10803-VCMR

ORDER GRANTING PLAINTIFFS' THREE MOTIONS FOR CONTEMPT

(Filed Apr. 23, 2019)

WHEREAS, Plaintiffs Eagle Force Holdings, LLC, and EF Investments, LLC filed this action on March 17, 2015;

WHEREAS, on July 23, 2015, this Court entered the Order Granting Plaintiffs' Petition for Interim Relief (the "Order"),

WHEREAS, on May 27, 2016, Plaintiffs filed their Motion to Hold Defendant in Contempt for Violations of the Order (the "First Motion");

WHEREAS, on August 31, 2016, and September 8, 2016, this Court held two evidentiary hearings related to the First Motion;

WHEREAS, on March 6, 2017, Plaintiffs filed their Supplemental Motion to Hold Defendant in Contempt for Violations of the Order (the "Second Motion");

WHEREAS, on May 5, 2017, this Court held an evidentiary hearing related to the Second Motion;

WHEREAS, on May 24, 2017, Plaintiffs filed their Second Supplemental Motion to Hold Defendant in Contempt for Violations of the Order (the "Third Motion"; together with the First and Second Motions, the "Motions");

WHEREAS, on July 27, 2017, Plaintiffs filed a letter to supplement their Third Motion (the "July 2017 Letter");

WHEREAS, on August 28, 2017 this Court held an evidentiary hearing related to the Third Motion;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. The Court has reviewed the parties' briefs, supporting submissions, and the applicable law.

2. The Motions are GRANTED.

3. "To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it." *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009) (citing *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997;)). The purpose of civil contempt is twofold—"to coerce compliance with the order being violated, and to remedy injury suffered by other parties

as a result of the contumacious behavior." *Id.* (citing *Del. State Bar Ass'n v. Alexander*, 386 A.2d 652, 665 (Del. 1978)). Use of this remedy is at the discretion of the Court. *Id.* (citing *Dickerson v. Castle, 1991* WL 208467, at * 3 (Del. Ch. Oct. 15, 1991)). "The violation 'must not be a mere technical one, but must constitute a failure to obey the Court in a meaningful way.'" *Id.* (quoting *Dickerson*, 1991 WL 208467, at *4). The Court will consider good faith efforts to comply with the order or to remedy the consequences of non-compliance even when there has been a violation. *Id.*

4. Paragraph 3.F of the Order requires Defendant Stanley V. Campbell to "provide Plaintiffs with written notice and disclosure . . . at least ten business days . . . prior to" "[a]ny action transferring, encumbering, pledging, loaning, or otherwise disposing, directly or indirectly, of any asset of [Eagle Force Holdings, LLC], [EagleForce Health, LLC], or [EagleForce Associates, Inc.] . . . with an aggregate value in excess of $5,000.00 (aggregate meaning an action or series of actions with a single or related entities or individuals)."

5. Plaintiffs allege in their First Motion that Campbell violated the Order by taking $143,592.86 from EagleForce Associates, Inc. ("EagleForce Associates"), for his own personal use without the required notice, including payments to third parties related to Campbell's litigation expenses. Plaintiffs also allege that Campbell's violations include his failure to provide specific information about EagleForce Associates and EagleForce Health, LLC (collectively, the

"Companies"), as required by the Order. Br. Supp. Pls.' First Motion 4-5, May 27, 2016.

6. Plaintiffs allege in their Second Motion that Campbell violated the Order by paying himself $38,683.94 from EagleForce Associates' funds without providing the required notice to Plaintiffs. Br. Supp. Pls.' Second Motion 4, Mar. 6, 2017. Plaintiffs also allege that Campbell inappropriately used a debit card of one of the Companies to pay personal expenses. *Id.* at 8-9.

7. Plaintiffs allege in their Third Motion that Campbell violated the Order by paying himself an additional $26,985.79 from EagleForce Associates' funds. *See* Pls.' Third Mot. ¶¶ 7-8, May 24, 2017. Plaintiffs also allege that Campbell violated the Order when he failed to provide "proper notice" of these payments. *Id.* ¶ 11.

8. Plaintiffs allege multiple violations of the Order in their July 2017 Letter.

a. Plaintiffs allege that Campbell's re-hiring of Said Salah, an employee of EagleForce Associates, without notice to Plaintiffs violated Paragraph 3.H of the Order. July 2017 Letter ¶ 4. Paragraph 3.H requires notice before "[Miring of any senior management employee or strategic employee."

b. Plaintiffs also allege that Campbell violated the Order by paying himself $4,626.01 from EagleForce Associates' funds without providing notice to Plaintiffs. *Id.* ¶ 1.

c. Plaintiffs further allege that Campbell made excessive payments to other EagleForce Associates employees in violation of Paragraphs 3.F, 3.H, and 3.J of the Order. *Id.* ¶¶ 3, 5-6.

d. Finally, Plaintiffs complain that instead of giving notice to Plaintiffs of future payments, Campbell places the agreed-upon notice language at the top of accounts payable and accounts receivable reports without indicating which amounts he in fact intends to pay. Such notice, Plaintiffs contend, is meaningless and avoids the purpose of the Order. *Id.* at 1-2.

9. At the time of the conduct described above, the Order bound Campbell. The Order names Campbell explicitly and sets out the actions Campbell must take or refrain from taking.

10. Campbell had notice of the Order. As a party to this litigation, Campbell received notice of the Order when the Court entered it. In fact, before the Court entered the Order, Campbell had submitted a proposed order, and that proposed order included the language of Paragraph 3.F. Def.'s Proposed Order Granting Pl.'s Pet. Interim Relief ¶ 2.E, July 17, 2015.

11. Campbell does not dispute that he caused the transactions to occur. For some transactions, Campbell provided no notice to Plaintiffs, and he argues that these transactions were in the ordinary course of business. Def.'s Answering Br. Opp'n First Mot. 9-10, June 10, 2016. The Order, however, does not provide any exception for transactions in the ordinary course of business.

12. For other transactions, including when Campbell paid commissions to employees of EagleForce Associates, he testified that he had provided notice to Plaintiffs. Hr'g Tr. 37, Aug. 28, 2018. Specifically, Campbell noticed the entire accounts payable report without indicating what he actually planned to pay that period. *E.g.*, July 2017 Letter Ex. B. This procedure does not provide meaningful notice to Plaintiffs. Giving notice of all possible payments without indicating which payments Campbell actually intends to make prevents Plaintiffs from determining whether they wish to object to the payments, as Paragraph 5 of the Order permits. To serve the purpose of the Order, Campbell must give meaningful notice for each payment he actually intends to make where Paragraph 3 of the Order applies. The transactions at issue fall under the purview of Paragraph 3.F, and Campbell failed to provide meaningful notice to Plaintiffs. Therefore, these transactions, both the payments for which Campbell provided no notice whatsoever and the payments for which he provided no meaningful notice, violate the Order. And, Campbell has not identified any efforts to comply or remedy these violations that would justify denial of the Motions.

13. Plaintiffs also complain that Campbell violated Paragraph 3.H of the Order by re-hiring Said Salah, an employee of EagleForce Associates. July 2017 Letter 114. Salah explained in his testimony during the evidentiary hearing that his employment with EagleForce Associates never terminated and that any confusion results from a temporary reduction in

Salah's responsibilities while he was living outside the United States. Hr'g Tr. 20-27, Aug. 28, 2018. Campbell's testimony supports this explanation. *Id.* at 35-36. Campbell's and Salah's testimonies suggest that Campbell did not violate Paragraph 3.H. Plaintiffs, however, may not have had to complain had Campbell fully complied with Paragraph 2.C, which requires that Campbell provide to Plaintiffs the Companies' payroll statements "with an annotation or alternatively, a document, explaining any changes in status or pay for any employee." An annotation explaining Salah's return to full duties may have prevented Plaintiffs' complaint. Campbell's failure to fully comply with Paragraph 2.0 is a violation of the Order.

14. Plaintiffs seek a variety of remedies for Campbell's violations of the Order:

e. disgorgement of the funds Campbell paid to himself ($213,886.80);

f. an award of attorneys' fees ($148,830.50);

g. interest on both the funds and the attorneys' fees;

h. a requirement that Campbell must provide regular, detailed reports concerning business activities (beyond the reports the Order requires);

i. a requirement that Campbell participate in monthly conference calls to address Plaintiffs' questions regarding business activities;

j. a detailed order providing for the management of the Companies with disputes to be

resolved by a Court-appointed neutral certified public accountant;

k. the appointment of Plaintiffs' financial representative to act as a second signatory on all bank accounts; and

l. suspension of the Companies' debit card.

15. Plaintiffs further request that this Court schedule a hearing date to address any future violation of the Order and that if Campbell fails to repay the disgorged funds, attorneys' fees, and interest, this Court order a reduction in Campbell's proportionate interest in Eagle Force Holdings, LLC.

16. Because the purpose of civil contempt is to encourage compliance by the parties with all applicable orders, I award those remedies necessary to address this purpose and reject, at this time, the remaining remedies Plaintiffs seek. I order that, within twenty days from the date of this order, Campbell disgorge to EagleForce Associates $213,886.80 (which reflects only payments to Campbell or for Campbell's personal use) and pay to Plaintiffs their attorneys' fees in the amount of $148,830.50, which Plaintiffs incurred in bringing these Motions.

17. I am not convinced that these payments alone address Campbell's repeated violations (Plaintiffs have complained of over twenty-five separate violations), including payments to third parties, his failure to comply with reporting requirements of the Order, and his misuse of the debit card. These repeated violations lead me to conclude that oversight is

necessary to remedy past violations and facilitate future compliance.

18. One proven tool for addressing a party's repeated failure to comply with an order of this Court is to appoint an agent of the Court to provide assistance. In a treatise focusing on receivers, Professor Clark recognizes that a receiver can be appointed "either for the purpose of carrying the judgment into effect, or for the preservation of the property until judgment shall be executed." 1 Ralph Ewing Clark, *The Law and Practice of Receivers* § 240, at 349 (3d ed. 1959). In his treatise on remedies, Professor Dobbs observes that "a master might be appointed to monitor the execution of and compliance with a complex decree and report to the court if the defendant fails to comply." 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 1.4, at 20 (2d ed. 1993). Courts have developed oversight mechanisms "grounded on recognized equitable powers of the courts," such as receivers, custodians, and monitors. Robert E. Buckholz, Jr. et al., *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 789 (1978). Courts that have ordered oversight mechanisms have cited many factors to justify their use. One factor is a significant risk of noncompliance. Campbell's conduct to date demonstrates that this factor is present here. Greater oversight is, therefore, warranted. "Court appointed agents are identified by a variety of terms—monitor, master, master hearing officer, human rights committee, ombudsman, administrator, advisory committee." Elizabeth Montgomery, Comment, *Force and Will: An Exploration of the Use of*

Special Masters to Implement Judicial Decrees, 52 U. Colo. L. Rev. 105, 105 (1980). The critical question, however, is not what the role is called; it is the nature of the charge and the powers it carries.

19. I appoint an independent third-party facilitator to serve at Plaintiffs' expense, with potential reimbursement to Plaintiffs pending the outcome of this litigation. I appoint the facilitator as an officer of the Court empowered to monitor compliance with applicable orders but without the power to enforce an order directly. With regard to financial transactions, the facilitator will serve as a second signatory on all relevant bank accounts. With regard to the notice provisions of any order, the facilitator will observe the parties' activities and elicit cooperation in settling technical problems which would otherwise require judicial hearing and decision. I encourage the facilitator to evaluate the parties' conduct objectively, provide suggestions to the parties, and facilitate the resolution of potential violations. If the facilitator believes that a party is not complying with an order and the facilitator's efforts to persuade have failed, the facilitator will be free to communicate with the Court, and the Court may take action.

20. Both Campbell and the Plaintiffs shall copy the facilitator in real time on all written communications. The parties also shall allow the facilitator to participate in any other communication between the parties, whether in person, telephonic, or otherwise.

21. If the parties have a dispute regarding the provisions of an order, then they will present the dispute first to the facilitator so that the facilitator can attempt to resolve the dispute. If those efforts are unsuccessful, then the parties may present their concern to the Court by motion. After briefing, the facilitator will provide the Court with a recommendation regarding the proper outcome.

22. Within five days of this order, Plaintiffs and Campbell shall each submit names of three disinterested and independent individuals who are qualified and willing to serve as the facilitator. The submissions shall include the candidates' curricula vitae and qualifications. Within five days after submission, Campbell may submit objections to any of Plaintiffs' proposed candidates and *vice versa*. The Court will then make a determination and enter a separate order appointing the facilitator and outlining more specifically the facilitator's duties.

/s/ Tamika Montgomery-Reeves
Vice Chancellor
Dated: April 23, 2019

APPENDIX D

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EAGLE FORCE HOLDINGS, LLC, and EF INVESTMENTS, LLC, Plaintiffs, v. STANLEY V. CAMPBELL, Defendant.	)	C.A. No. 10803-VCMR

ORDER ADDRESSING PLAINTIFFS' MOTIONS FOR CONTEMPT

(Filed Apr. 23, 2019)

WHEREAS, Plaintiffs Eagle Force Holdings, LLC, and EF Investments, LLC filed this action on March 17, 2015;

WHEREAS, on July 23, 2015, this Court entered the Order Granting Plaintiffs' Petition for Interim Relief (the "Order"),

WHEREAS, the Order remained in effect "pending the conclusion of this action or further order of this Court" (Order ¶ 8.);

WHEREAS, Plaintiffs filed previous motions for civil contempt on May 27, 2016, March 6, 2017, and May 24, 2017, for Defendant Stanley V. Campbell's violations of the Order, including payment to himself

from the funds of EagleForce Associates, Inc. without proper notice to the Plaintiffs;

WHEREAS, this Court held, and Campbell testified at, evidentiary hearings related to the previous motions for civil contempt on August 31, 2016, September 8, 2016, May 5, 2017, and August 28, 2017;

WHEREAS, on September 1, 2017, this Court issued a post-trial Memorandum Opinion (the "Memorandum Opinion") dismissing this action;

WHEREAS, Plaintiffs appealed the Memorandum Opinion, and on May 24, 2018, the Supreme Court of Delaware reversed the Memorandum Opinion and remanded this action to this Court;

WHEREAS, on September 14, 2018, Plaintiffs filed their Motion for Contempt – Seeking Order Directing Campbell to Return Funds Taken from EagleForce Associates, Inc. During Appeal Period (the "Motion");

WHEREAS, on December 13, 2018, this Court heard arguments related to the Motion;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. The Court has reviewed the parties' briefs, supporting submissions, and the applicable law.

2. "To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it." *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009) (citing *Arbitrium (Cayman Islands) Handels AG v. Johnston, 1997* WL 589030, at *3 (Del.

Ch. Sept. 17, 1997)). The purpose of civil contempt is twofold—"to coerce compliance with the order being violated, and to remedy injury suffered by other parties as a result of the contumacious behavior." *Id.* (citing *Del. State Bar Ass'n v. Alexander*, 386 A.2d 652, 665 (Del. 1978)). Use of this remedy is at the discretion of the Court. *Id.* (citing *Dickerson v. Castle*, 1991 WL 208467, at *3 (Del. Ch. Oct. 15, 1991)). "The violation 'must not be a mere technical one, but must constitute a failure to obey the Court in a meaningful way.'" *Id.* (quoting *Dickerson*, 1991 WL 208467, at *4). The Court will consider good faith efforts to comply with the order or to remedy the consequences of non-compliance even when there has been a violation. *Id.*

3. Paragraph 3.F of the Order requires Campbell to "provide Plaintiffs with written notice and disclosure . . . at least ten business days . . . prior to" "[a]ny action transferring, encumbering, pledging, loaning, or otherwise disposing, directly or indirectly, of any asset of [Eagle Force Holdings, LLC], [EagleForce Health, LLC] or [EagleForce Associates, Inc.] . . . with an aggregate value in excess of $5,000.00 (aggregate meaning an action or series of actions with a single or related entities or individuals)."

4. Plaintiffs allege that "[b]etween September 5, 2017 and April 11, 2018, Campbell made nine payments [from EagleForce Associates, Inc.'s funds] to himself and his wife totaling $1,853,558.47" in violation of the Order. Pls.' Opening Br. 5. They seek disgorgement of those payments and reimbursement of their attorneys' fees. *Id.* at 22. Campbell argues that

he was not bound by the Order during this period because the Memorandum Opinion concluded this action and dissolved the Order. Def.'s Opp'n Br. ¶ 18.

5. "[T]he effect of a general and unqualified reversal . . . of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered." 5 C.J. S. *Appeal and Error* § 1126, Westlaw (database updated Mar. 2019).

6. The Order bound Campbell during the appeal period because the Delaware Supreme Court's reversal of the Memorandum Opinion nullified the Memorandum Opinion. By making payments to himself and to his wife during the appeal period, Campbell took the risk that the Supreme Court may reverse the Memorandum Opinion, which it ultimately did.

7. The parties shall confer and inform the Court within seven days whether they require an evidentiary hearing in this matter.

/s/ Tamika Montkomerv-Reeves
Vice Chancellor
Dated: April 23, 2019

APPENDIX E

[SEAL]

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

EAGLE FORCE HOLDINGS, LLC, and EF INVESTMENTS, LLC, Plaintiffs, v. STANLEY V. CAMPBELL, Defendant.	)	C.A. No. 10803-VCMR

ORDER RESOLVING PLAINTIFFS' MOTION FOR CONTEMPT

(Filed May 17, 2019)

WHEREAS, Plaintiffs Eagle Force Holdings, LLC, and EF Investments, LLC, filed this action on March 17, 2015;

WHEREAS, on July 23, 2015, this Court entered the Order Granting

Plaintiffs' Petition for Interim Relief (the "Order");

WHEREAS, on September 1, 2017, this Court issued a post-trial

Memorandum Opinion (the "Memorandum Opinion") dismissing this action;

WHEREAS, Plaintiffs appealed the Memorandum Opinion, and on May 24, 2018, the Supreme Court of

Delaware reversed the Memorandum Opinion and remanded this action to this Court;

WHEREAS, on September 14, 2018, Plaintiffs filed their Motion for Contempt – Seeking Order Directing Campbell to Return Funds Taken from EagleForce Associates, Inc. During Appeal Period (the "Motion");

WHEREAS, on December 13, 2018, this Court heard arguments related to the Motion;

WHEREAS, on April 23, 2019, this Court issued the Order Addressing Plaintiffs' Motion for Contempt;

WHEREAS, on May 10, 2019, this Court granted the parties' Stipulation and Proposed Order That No Hearing Is Required for Plaintiffs' Fourth Contempt Motion (the "Stipulated Order");

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. The Court has reviewed the parties' briefs, supporting submissions, and the applicable law.

2. "To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it." *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009) (citing *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997)).

3. The April 23, 2019 Order held that Campbell was bound by the Order during the appeal period.

4. In the Stipulated Order, Campbell waives his due process right to an evidentiary hearing to contest whether Campbell had notice of the Order and whether he violated the Order.

5. In the Stipulated Order, Campbell agrees that he must return $1,097,558.47 to EagleForce Associates, Inc.

6. Campbell shall disgorge to EagleForce Associates, Inc. $1,097,558.47 within twenty days from the date of this order.

/s/ Tamika Montkomerv-Reeves
Vice Chancellor
Dated: May 17, 2019

APPENDIX F

2019 WL 4072124
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

EAGLE FORCE HOLDINGS, LLC, and EF Investments, LLC, Plaintiffs,
v.
Stanley V. CAMPBELL, Defendant.

C.A. No. 10803-VCMR
|
Date Submitted: January 25, 2019
|
Date Decided: August 29, 2019

Attorneys and Law Firms

Frank E. Noyes, II, OFFIT KURMAN, P.A., Wilmington, Delaware; Harold M. Walter and Angela D. Pallozzi, OFFIT KURMAN, P.A., Baltimore, Maryland; Attorneys for Plaintiffs.

David L. Finger, FINGER & SLANINA, LLC, Wilmington, Delaware, Attorney for Defendant.

MEMORANDUM OPINION

MONTGOMERY-REEVES, Vice Chancellor.

In 2013, Richard Kay and Stanley Campbell decided to form a business venture to market medical

diagnosis and prescription technology that Campbell had developed. The parties outlined the principal terms of the investment through two letter agreements in November 2013 and April 2014. Under the principal terms, Kay and Campbell would form a new limited liability company and each would be a fifty-percent member. Campbell would contribute the stock of EagleForce Associates, Inc. ("EagleForce Associates"), a Virginia corporation, and the membership interest of EagleForce Health, LLC ("EagleForce Health," together with EagleForce Associates, "EagleForce"), a Virginia limited liability company, along with intellectual property. Kay would contribute cash. For many months after April 2014, the parties negotiated several key terms of the transaction documents for the new venture. In the meantime, Kay contributed cash to EagleForce Associates. Campbell executed a promissory note for these contributions with the agreement that Kay would cancel the note when they closed the deal on the new venture.

On August 28, 2014, Kay and Campbell signed the transaction documents, which included an operating agreement for Eagle Force Holdings, LLC ("Eagle Force Holdings"), a Delaware limited liability company, and a contribution agreement. The parties dispute what occurred at the August 28 meeting. Plaintiffs assert that the parties formed binding contracts at the August 28 meeting. Campbell contends that he signed to acknowledge receipt of the latest drafts of the agreements but not to manifest his intent to be bound by the agreements.

In this opinion, I hold that Campbell's conduct and communications with Kay before and during the signing of the transaction documents do not constitute an overt manifestation of assent to be bound by the documents. Thus, the contribution agreement and the operating agreement are not enforceable. Further, because Campbell is not bound by the agreements' forum selection clauses and because Plaintiffs fail to identify any other applicable basis for personal jurisdiction, I dismiss the remainder of the claims for lack of personal jurisdiction.

I. PROCEDURAL HISTORY

Plaintiffs filed the original complaint in this case on March 17, 2015, and the First Amended Complaint—the operative complaint—on June 5, 2015 (the "Complaint"). Beginning on February 6, 2017, this Court held a five-day trial in this case. This Court issued its post-trial opinion on September 1, 2017.[1]

In that opinion, this Court outlined the standard for determining whether a valid contract exists, citing *Osborn ex rel. Osborn v. Kemp*.[2] That test requires that "(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

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[1] *Eagle Force Hldgs., LLC v. Campbell* (*Trial Op.*), 2017 WL 3833210 (Del. Ch. Sept. 1, 2017).

[2] *Id.* at *14.

consideration."[3] "To determine whether a contract was formed, the court must examine the parties' objective manifestation of assent, not their subjective understanding."[4] "If terms are left open or uncertain, this tends to demonstrate that an offer and acceptance did not occur."[5] "It is when all of the terms that the parties themselves regard as important have been negotiated that a contract is formed."[6]

In determining whether the parties possessed the requisite intent that the transaction documents would bind them, this Court relied on *Leeds v. First Allied Connecticut Corp.* and evaluated the parties' objective manifestation of assent, focusing on "whether agreements reached were meant to address all of the terms that a reasonable negotiator should have understood that the other party intended to address as important."[7] "Agreements made along the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative. Negotiation of complex, multi-faceted commercial

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[3] *Id.* (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)).

[4] *Id.* (*Trexler v. Billingsley*, 166 A.3d 101, 2017 WL 2665059, at *3 (Del. June 21, 2017) (TABLE)).

[5] *Id.* (*Ramone v. Lang*, 2006 WL 905347, at *11 (Del. Ch. Apr. 3, 2006)).

[6] *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1101 (Del. Ch. 1986) (citing 1 *Corbin on Contracts* § 29, at 87-88 (1963); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 261 (2d Cir. 1984)).

[7] *Trial Op.*, 2017 WL 3833210, at *14 (quoting *Leeds*, 521 A.2d at 1102).

transactions could hardly proceed in any other way."[8] To conduct such an analysis, courts review "all of the surrounding circumstances, including the course and substance of the negotiations, prior dealings between the parties, customary practices in the trade or business involved and the formality and completeness of the document (if there is a document) that is asserted as culminating and concluding the negotiations."[9] "Thus, determination of whether a binding contract was entered into . . . depend[ed] on the materiality of the outstanding issues in the draft agreement and the circumstances of the negotiations."[10]

Using the analytical framework of *Osborn* and *Leeds*, this Court held that the contribution agreement "[l]ack[ed] [t]erms that [w]ere [e]ssential to the [p]arties' [b]argain," and the parties, therefore, "did not intend to bind themselves to the written terms" in the contribution agreement.[11] This Court concluded that "the parties intended [the contribution agreement and the operating agreement] to operate as two halves of the same business transaction," and thus, the agreements "rise and fall together."[12] For that reason, this Court held that the parties did not intend to bind themselves to the written terms of the operating

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[8] *Id.* (quoting *Leeds*, 521 A.2d at 1102).

[9] *Id.* (quoting *Leeds*, 521 A.2d at 1102).

[10] *Id.* (quoting *Greetham v. Sogima L-A Manager, LLC*, 2008 WL 4767722, at *15 (Del. Ch. Nov. 3, 2008)).

[11] *Id.* at *14, *18.

[12] *Id.* at *18 (quoting *E.I. DuPont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1115 (Del. 1985)).

agreement.[13] As such, neither document was an enforceable contract.

Because the documents were not enforceable, the forum selection clauses in the documents subjecting Campbell to this Court's personal jurisdiction were not binding on Campbell.[14] This Court further held that Plaintiffs failed to identify any alternative basis for personal jurisdiction over Campbell.[15] Without the ability to exercise personal jurisdiction over the defendant, this Court dismissed the remaining claims in this matter.[16]

Plaintiffs appealed the decision.[17] On May 24, 2018, the Supreme Court reversed the decision and remanded with instructions and guidance.[18]

First, the Supreme Court instructs that this Court make an express "finding on the parties' intent to be bound to each transaction document in accordance with the framework set forth in *Osborn* and guidance included" in its opinion.[19] In making these findings, this Court may consider only "evidence that the parties communicated to each other up until the time the

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[13] *Id.*

[14] *See id.*

[15] *See id.* at *19.

[16] *See id.*

[17] Notice of Appeal, *Eagle Force Hldgs., LLC v. Campbell*, No. 399,2017 (Del. Sept. 28, 2017).

[18] *Eagle Force Hldgs., LLC v. Campbell* (*Supr. Ct. Op.*), 187 A.3d 1209 (Del. 2018).

[19] *Id.* at 1213.

contract was signed."[20] The evidence that may be considered includes "the parties' prior or contemporaneous agreements and negotiations."[21] The Supreme Court's guidance prohibits consideration of post-signing evidence.[22] Additionally, the Supreme Court instructs that "a signed writing . . . generally offers the most powerful and persuasive evidence of the parties' intent to be bound."[23]

Second, the Supreme Court instructs that the parties' intent to be bound be considered separately for the contribution agreement and for the operating agreement.[24]

Consistent with that guidance, on remand, this Court considers whether the parties possessed the requisite intent to be bound by either the contribution agreement or the operating agreement. The evidence that may be considered is limited to the conduct of the parties during the period they negotiated the agreements and when they signed the agreements. This Court considers only that evidence that the parties communicated to each other up until the time the parties signed the documents. Any post-signing evidence included below serves only to prevent confusion for the

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[20] *Id.* at 1229-30 (citing *Black Horse Capital, LP v. Xstelos Hldgs., Inc.*, 2014 WL 5025926, at *12 (Del. Ch. Sept. 30, 2014)).

[21] *Id.* at 1230 (citing *Black Horse*, 2014 WL 5025926, at *12).

[22] *See id.* at 1229-30, 1235 n.180.

[23] *Id.* at 1230 (citing *Seiler v. Levitz Furniture Co. of E. Region*, 367 A.2d 999, 1005 (Del. 1976); *Osborn*, 991 A.2d at 1158-59).

[24] *Id.* at 1238.

reader. Also, because the Supreme Court's analysis suggests that both transaction documents address all terms material to the parties,[25] this Court does not examine the materiality of the terms of the agreements, or lack thereof.

II. FACTUAL BACKGROUND

The facts in this opinion are my findings based on the parties' stipulations, 152 trial exhibits, including deposition transcripts, and the testimony of ten witnesses presented at a five-day trial before this Court that began on February 6, 2017.[26]

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[25] *See id.* at 1231 ("Here, the Court of Chancery found that 'the precise consideration to be exchanged between Campbell and Eagle Force Holdings was highly material to the parties here.' The Contribution Agreement addresses the consideration to be exchanged. The only dispute is whether the terms relating to that consideration are sufficiently definite – a subject we address under the second prong of the *Osborn* test." (footnote omitted)); *id.* at 1239 ("The inclusion of provisions addressing these topics is strong evidence that the LLC Agreement included all material terms.").

[26] Citations to the trial transcript are in the form "Tr. # (X)" with "X" representing the surname of the speaker. Joint trial exhibits are cited as "JX #." Facts drawn from the Joint Pretrial Stipulation and Order are cited as "PTO ¶ #." Unless otherwise indicated, citations to the parties' briefs are to their post-remand briefs. After initially identifying individuals, I reference surnames without honorifics or regard to formal honorifics such as "Doctor." I intend no disrespect.

A. Parties and Relevant Non-Parties

1. Plaintiff EF Investments, LLC, and Richard Kay

Kay is a businessman and investor in the Washington, D.C., metropolitan area.[27] Since 2005, Kay has owned a government contracting company called Sentrillion with other partners.[28] Kay also controls Plaintiff EF Investments, LLC ("EF Investments"), a Delaware limited liability company.[29]

2. Plaintiff Eagle Force Holdings

Kay created Eagle Force Holdings, a Delaware limited liability company, to serve as the holding company for EagleForce subsidiaries.[30] The Amended and Restated Limited Liability Company Agreement of Eagle Force Holdings, LLC (the "LLC Agreement") contemplates that Campbell and EF Investments will each own fifty percent of the membership interests in Eagle Force Holdings.[31] The Contribution and Assignment Agreement (the "Contribution Agreement," together with the LLC Agreement, the "Transaction Documents") contemplates that EagleForce Associates

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[27] Tr. 310:2-4, 354:22-355:2 (Kay).

[28] Tr. 18:8-23 (Offit).

[29] PTO ¶¶ 3-4.

[30] PTO ¶ 3; *see* JX 12 ¶ 2.

[31] *See* JX 79 § 3.2.1.

and EagleForce Health will become subsidiaries of Eagle Force Holdings.[32]

3. Defendant Stanley Campbell

Campbell controls EagleForce Associates and Eagle Force Health.[33] EagleForce Associates is a start-up company that Campbell intended to use to market a pharmaceutical software system called PADRE.[34] PADRE aggregates medical information about patients to assist in determining patients' prescriptions.[35] It also monitors pharmaceutical sales for compliance with federal law.[36]

4. Attorneys

Donald Rogers is an attorney from the Schulman Rogers law firm who represented Campbell through key parts of his negotiations with Kay.[37]

Theodore Offit is an attorney from the law firm Offit Kurman who represented Kay in the negotiations with Campbell.[38]

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[32] JX 78 Recitals.

[33] *See* PTO ¶ 5.

[34] Tr. 775:1-17 (Campbell).

[35] Tr. 765:15-766:10 (Campbell).

[36] *See* Tr. 766:16-20 (Campbell).

[37] Tr. 817:3-4, 818:1-13 (Rogers).

[38] Tr. 17:4-7, 20:11-12, 20:17-22 (Offit).

5. Employees

Said Salah is the Vice President of Finance and CFO of EagleForce Associates.[39] From January 2016 until July 2017, he lived overseas and tapered off his services to EagleForce Associates.[40]

General John W. Morgan III is a Senior Vice President of EagleForce Associates and EagleForce Health.[41]

Christopher Cresswell is the head of Business Development of EagleForce Health.[42]

Katrina Powers is an employee of Sentrillion.[43]

B. Facts

Campbell and Kay first met in 2005 or 2006 through a mutual friend when Campbell was seeking an investor for an earlier iteration of EagleForce Associates.[44] Kay did not invest in Campbell's business then.[45]

In January 2013, Campbell needed capital to market his PADRE technology through EagleForce

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[39] Tr. 1086:2-8 (Salah).

[40] Tr. 1086:12-14 (Salah).

[41] Tr. 1166:1-10 (Morgan).

[42] JX 143, at 2; *see* Tr. 650:6-10 (Cresswell).

[43] Tr. 246:24-247:2 (Powers).

[44] Tr. 768:1-18 (Campbell).

[45] Tr. 768:22-23 (Campbell).

Associates.[46] Before approaching Kay again, Campbell met Salah, who had experience with government contracting.[47] In April or May 2013, Campbell hired Salah to work with EagleForce Associates.[48] Salah also loaned money to EagleForce Associates and deferred collection of his salary to provide EagleForce Associates with cash needed for its operations.[49]

1. The November 2013 Letter Agreement

Despite Salah's investment, Campbell believed that EagleForce Associates needed additional capitalization from investors to obtain government contracts.[50] Campbell approached Kay again in or around November 2013 to discuss Kay's potential investment in EagleForce Associates.[51]

On November 27, 2013, Campbell and Kay signed a letter agreement dated November 15, 2013 (the "November 2013 Letter Agreement").[52] Kay's lawyers[53] at

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[46] *See* Tr. 775:1-6, 926:1-3 (Campbell); Tr. 1094:1 (Salah).

[47] Tr. 1087:13-17, 1093:23-24 (Salah).

[48] Tr. 1094:1-4 (Salah).

[49] Tr. 926:1-3 (Campbell); Tr. 1091:17-22, 1094:19-1095:1 (Salah).

[50] Tr. 774:14-24 (Campbell).

[51] Tr. 774:6-9, 775:1-3 (Campbell).

[52] JX 1.

[53] At the time the parties signed the November 2013 Letter Agreement, Campbell believed that Offit Kurman represented both Kay and Campbell. Tr. 783:21-784:6, 794:23-795:9 (Campbell). Offit Kurman, in fact, represented only Kay, and Campbell had no attorney representation. Tr. 18:8-11, 19:22-24 (Offit).

the law firm Offit Kurman drafted an initial version of the November 2013 Letter Agreement, but Campbell and Kay made changes to it before signing.[54] The November 2013 Letter Agreement contemplated that Campbell and Kay would "form a new LLC entity and/or a series of industry specific LLC's [sic] verticals in Virginia."[55] Campbell would contribute "PADRE source code and patents,"[56] and Kay would contribute at least $1.8 million in cash with the goal of raising $7.8 million in total financing from either Kay or a mutually agreed-upon investor.[57]

Under the November 2013 Letter Agreement, both Campbell and Kay would manage the new LLC and "confer on all business and marketing related activities as well as all capital needs."[58] All of the material terms of the November 2013 Letter Agreement were subject to due diligence.[59]

2. The April 2014 Letter Agreement

After executing the November 2013 Letter Agreement, Kay and Campbell continued to negotiate.[60] On March 17, 2014, Kay filed a certificate of formation for

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[54] Tr. 131:3-8 (Offit).

[55] JX 1 ¶ 2.

[56] *Id.* ¶ 7.

[57] *Id.* ¶ 6.

[58] *Id.* ¶ 4.

[59] *Id.* ¶¶ 6, 8, 10.

[60] *See* Tr. 322:14-18 (Kay); Tr. 795:10-23 (Campbell).

Eagle Force Holdings in Delaware.[61] Kay did not tell Campbell he had formed the Eagle Force Holdings entity; nor did he inform Campbell that he created a Delaware entity, rather than a Virginia entity.[62] On April 4, 2014, Kay and Campbell signed an amendment to the November 2013 Letter Agreement (the "April 2014 Letter Agreement"), which stated "[b]y April 21 it is anticipated that a new LLC will be formed to serve as a parent entity ('Holdco') for Eagle Force [sic] Associates, Inc. and the recently formed Eagle Force Health Solutions, LLC. . . ."[63]

Kay and Campbell signed the April 4, 2014 Letter Agreement without counsel present.[64] The April 2014 Letter Agreement "amend[ed] the letter agreement that [Campbell and Kay] executed on November 27, 2013 that was dated as of November 15, 2013."[65] The April 2014 Letter Agreement maintained that Campbell and Kay would share management responsibilities and confer regarding marketing and capital needs.[66] It also further defined Campbell's and Kay's roles in the

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[61] JX 7.

[62] Tr. 991:3-993:24 (Campbell).

[63] JX 12 ¶ 2.

[64] Tr. 380:10-11 (Kay). At the time Kay and Campbell signed the April 2014 Letter Agreement, Campbell believed that Offit Kurman represented both Kay and Campbell. Tr. 783:21-784:6, 794:23-795:9 (Campbell). Campbell did not hire his own attorney until later in April or May 2014. Tr. 796:4-11 (Campbell); Tr. 817:22-24 (Rogers).

[65] JX 12, at 1.

[66] *Id.* ¶ 4.

anticipated parent company, referred to as "Holdco."[67] The April 2014 Letter Agreement stated that

> [Campbell] will have primary responsibility over all information technology, product development, R&D, and customer service and maintenance, in each case subject to an annual budget approved by the Holdco board. [Kay] will have primary responsibility over financial matters, personnel/HR, and management of outside accounting, legal, tax, and other advisors and consultants as well as all other matters relating to the operation of the business of Holdco and its subsidiaries and will consult with [Campbell] on all decisions affecting these functions.[68]

The parties referred to the more defined spheres of management responsibility in the anticipated fifty-fifty business venture as "swim lanes."[69]

Recognizing that Kay and Campbell had not yet completed negotiations nor finalized the necessary documents reflecting their new business venture, the April 2014 Letter Agreement provided that Kay would advance $500,000 to Eagle Force Holdings immediately upon the execution of the April 2014 Letter Agreement.[70] And "[t]his $500,000 [would] be evidenced by a demand promissory note issued to [Kay] by Eagle Force [sic] Associates, Inc. and Eagle Force

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[67] *See id.* ¶ 3.

[68] *Id.*

[69] Tr. 319:11-14 (Kay).

[70] JX 12 ¶ 6.

Health Solutions, LLC, jointly and severally. . . ."[71] The April 2014 Letter Agreement also contemplated that once Kay and Campbell finalized negotiations and completed the necessary transaction documents, Kay would contribute an additional $1,800,000 to equal the value of Campbell's intellectual property, $2,300,000.[72]

3. Negotiation of the LLC Agreement and the Contribution Agreement

After signing the April 2014 Letter Agreement, Kay continued due diligence on the EagleForce Associates business.[73] During this time, he provided funding to EagleForce Associates[74] and became involved in certain aspects of the day-to-day operations of the company.[75] Unfortunately, Kay's increased involvement in EagleForce Associates created tension and mistrust in Kay and Campbell's relationship, due in large part to their very different management styles and differing expectations of, involvement in, and control over the "swim lanes" identified in the April 2014 Letter Agreement.

As early as April 30, 2014, only two weeks after signing the April 2014 Letter Agreement, Kay expressed disappointment in Salah's contract-drafting skills and advised Campbell that Bryan Ackerman,

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[71] *Id.*

[72] *See id.*

[73] *See*, *e.g.*, JX 39.

[74] JX 106.

[75] *E.g.*, Tr. 192:15-193:11 (Powers).

Sentrillion's general counsel, would be involved in all contracts into which EagleForce Associates entered.[76] Campbell, however, valued Salah's contributions and experience and wanted Salah to have a greater role.[77] Campbell responded 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."[78] Kay responded, referring to the November 2013 and April 2014 Letter Agreements, "I hope you had a tough day and don't really want to get into a [sic] issue. My position is we are signed partners. . . ."[79]

Despite the fact that Kay and Campbell's relationship was becoming strained,[80] they began to negotiate the LLC Agreement for Eagle Force Holdings and the Contribution Agreement.[81] In addition to Offit Kurman, Kay engaged Latham & Watkins to advise him on investing in the EagleForce Associates business.[82] Campbell believed that Offit Kurman had been representing both Kay and Campbell together until Michael Schlesinger of Latham & Watkins advised Campbell that he should retain his own counsel.[83] In April or

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[76] JX 130, at 2.

[77] *See id.*; Tr. 797:7-16 (Campbell).

[78] JX 130, at 1.

[79] *Id.*

[80] *See*, *e.g.*, *id.*

[81] *See* JX 14; JX 15.

[82] Tr. 32:16-24 (Offit).

[83] Tr. 783:21-784:6, 794:23-795:9 (Campbell).

May 2014, Campbell retained his own attorney, Donald Rogers with the Schulman Rogers law firm.[84]

On May 13, 2014, Latham & Watkins presented a draft Contribution Agreement and a draft LLC Agreement for Eagle Force Holdings to Campbell.[85] Each agreement included a forum selection clause consenting to personal jurisdiction in the Delaware courts.[86] The LLC Agreement referred to the March 17, 2014 certificate of formation for Eagle Force Holdings in Delaware.[87] Campbell, thus, learned that Kay formed Eagle Force Holdings in Delaware at least by May 13, 2014.

Kay's involvement in the EagleForce businesses continued as Kay and Campbell negotiated the terms of the Transaction Documents. For example, in or about June 2014, Kay suggested that EagleForce Associates hire Melinda Walker as a secretary and pay her $75,000 per year.[88] This concerned Campbell because Walker's salary was higher than most EagleForce Associates employees' salaries at the time.[89]

On June 30, 2014, Rogers sent a revised draft of the LLC Agreement to Offit.[90] The draft included

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[84] Tr. 796:4-11 (Campbell); Tr. 817:22-24 (Rogers).

[85] JX 14; JX 15.

[86] JX 14 § 8.9(b); JX 15 § 12.2.

[87] JX 15 Recitals.

[88] Tr. 436:16-22 (Kay); Tr. 735:2-4 (Variganti); Tr. 917:19-21, 918:12-18 (Campbell).

[89] Tr. 919:6-10 (Campbell).

[90] JX 17.

several notes indicating that certain points needed to be discussed and resolved, such as the distribution waterfall and the structure of Campbell's contribution of intellectual property.[91]

Also on June 30, 2014, Campbell received an email from Kay that Campbell believed contained a racial slur.[92] This email caused Campbell to have reservations about Kay's character, and from Campbell's perspective, his personal relationship with Kay continued to deteriorate. Despite Campbell's reservations, he continued to pursue a business relationship with Kay; EagleForce Associates continued to receive funding from Kay; and the parties continued to negotiate the Transaction Documents.

4. 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 negotiate the Transaction Documents.[93] 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."[94]

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[91] *E.g.*, JX 18 §§ 3.2.1, 5.1.2.

[92] Tr. 1301:12 (Campbell); *see* JX 16. Kay maintains that the word was an error. Tr. 444:16-19 (Kay).

[93] JX 24, at 1.

[94] *Id.*

On July 7, 2014, Kay, Campbell, and their respective counsel met at Rogers's office to negotiate the unsettled terms of the Contribution Agreement and the LLC Agreement.[95] Offit believed that three primary issues remained to be negotiated:[96] (1) the scope of the intellectual property that Campbell would contribute and the extent of Campbell's representation regarding his ownership of the intellectual property and any third-party infringement;[97] (2) the mechanics for dilution of Kay's and Campbell's interests upon additional third-party investments;[98] and (3) the structure of the Eagle Force Holdings board of directors.[99]

The July 7 meeting went late into the night, and the parties resolved the three issues that Offit understood to be outstanding.[100] But a substantial new issue arose. During that meeting, Offit discovered for the first time that Campbell had previously filed for bankruptcy.[101] This discovery led to another point of contention between Kay and Campbell.

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[95] Tr. 61:8-23 (Offit).

[96] Tr. 61:24-62:4 (Offit).

[97] Tr. 62:4-18 (Offit).

[98] Tr. 62:19-63:6 (Offit); *see* JX 18 § 3.2.

[99] Tr. 63:7-13 (Offit).

[100] Tr. 63:16-66:9 (Offit). Also on July 7, Campbell signed an EagleForce Associates note payable to Kay for the $700,000 Kay had already contributed to EagleForce Associates. JX 34; JX 35. Kay and Campbell agreed that Kay would cancel the note if they were able to reach agreement on the Transaction Documents. JX 25, at 2.

[101] Tr. 69:16-70:20 (Offit).

On July 8, 2014, Offit sent Rogers a list of changes to the Contribution Agreement based on the July 7 discussion.[102] 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.[103]

On July 9, 2014, an email was sent from Campbell's email address to Morgan announcing that EagleForce Associates and EagleForce Health had taken on Kay as their "first Partner."[104] Morgan responded, congratulating both Kay and Campbell and copying several EagleForce employees.[105] The same day, Campbell held a meeting at EagleForce Associates' office with all of the office staff to announce Kay's involvement in the business.[106] Kay suggested that Campbell's wife attend the meeting, and Campbell arranged for his wife to participate by phone.[107] Campbell also arranged for Kay's wife to participate by phone.[108] Kay did not appreciate Campbell's gesture and sternly told Kay,

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[102] JX 28.

[103] JX 29.

[104] JX 33. Campbell testified that he did not send this email but that Melinda Walker sent it from his email account without his permission. Tr. 941:3-942:3 (Campbell). Regardless, this email does not alter the weight of the evidence.

[105] JX 33.

[106] Tr. 1188:17-1189:8 (Morgan).

[107] Tr. 937:9-10 (Campbell).

[108] Tr. 937:10-12 (Campbell).

"Don't ever do that again. My wife is not involved in my business, and don't ever do that again."[109]

5. Tensions between Kay and EagleForce employees

As Kay and Campbell continued negotiations, Kay became more involved in the EagleForce business and interfaced more with EagleForce employees. Through these interactions, the employees experienced a more aggressive, erratic, and disrespectful Kay. And, unfortunately, Salah and Morgan observed that this mistreatment often ran along lines of national origin.[110] The recipients of a disproportionate amount of Kay's alleged mistreatment included Marlena Henien, a degreed Egyptian woman who did opportunity research at EagleForce Associates;[111] Jashuva Variganti, an Indian man who has an MBA degree and is an administrative employee of EagleForce Associates assisting with expense and payroll processing;[112] and Salah, an Egyptian man who has an MBA degree and is the CFO for EagleForce Associates.[113] Kay treated Henien like a servant, rather than a valued employee.[114] He would throw money down on her desk and instruct her to run

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[109] Tr. 937:17-22 (Campbell).

[110] Tr. 1089:17-1090:3 (Salah); Tr. 1174:4-12 (Morgan).

[111] Tr. 918:23-24, 932:3-10 (Campbell); Tr. 1090:18-21 (Salah).

[112] Tr. 716:11-13, 717:9-14 (Variganti); Tr. 1090:9-16 (Salah).

[113] Tr. 1085:17-18, 1086:2-8, 1140:19-21 (Salah).

[114] *E.g.*, Tr. 931:18-932:1 (Campbell).

personal errands and do tasks inappropriate for her role at EagleForce Associates.[115]

Kay yelled at Variganti, telling Variganti, "If I [Kay] ask you to do something, you should—you should do [it]."[116] In addition to this statement, Kay behaved in a threatening manner. During one encounter, Kay stood an unusually short distance from Variganti while yelling at him.[117] Variganti testified that he felt threatened during this exchange with Kay.[118] Morgan observed Kay pinning Variganti against a cubicle partition.[119]

Kay treated Salah with the greatest deal of disdain. Kay condescended to Salah,[120] questioned to Salah's face why he was at EagleForce Associates,[121] questioned Salah's experience and competence,[122] and frequently yelled and cursed at him in front of Campbell.[123] Kay flatly said, "I just don't want him around."[124] Kay confessed to Morgan that he (Kay)

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[115] *Id.*

[116] Tr. 720:3-6 (Variganti).

[117] Tr. 720:16-21 (Variganti).

[118] Tr. 720:22-721:5 (Variganti).

[119] Tr. 1175:6-20 (Morgan).

[120] Tr. 926:19-24 (Campbell).

[121] Tr. 1088:10 (Salah).

[122] *See* Tr. 927:21-928:6 (Campbell).

[123] Tr. 926:23-24 (Campbell); Tr. 1088:16-24 (Salah).

[124] Tr. 928:6-7 (Campbell).

"can't work with somebody like [Salah]. [H]e's an Arab."[125]

Kay's behavior led to tensions in the office. Multiple employees voiced concerns about Kay's addition as a partner.[126] Morgan's concerns about Kay's behavior were so great that he (Morgan) told Campbell that he might quit if Campbell did not address Kay's behavior.[127]

Additionally, Kay did not limit his abuse to employees. He also became more aggressive toward Campbell. Kay shouted and cursed at Campbell within earshot of EagleForce employees during their disagreements.[128] Employees heard Kay yelling at Campbell even though the two men were in a closed conference room.[129]

Kay also began to speak negatively about Campbell to EagleForce employees. For example, Kay met with Cresswell at a country club in Potomac, Maryland, and told Cresswell that Campbell had a "shady past" and had previously committed fraud.[130]

Campbell grew more concerned but tried to see things from Kay's perspective, understanding that

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[125] Tr. 1174:10-12 (Morgan).

[126] *E.g.*, Tr. 921:13-20 (Campbell); Tr. 1174:16-18 (Morgan).

[127] Tr. 1180:21-1181:6 (Morgan).

[128] Tr. 722:9-15 (Variganti); Tr. 1089:7-16 (Salah); Tr. 1181:14-1182:9 (Morgan).

[129] Tr. 1089:7-13 (Salah).

[130] Tr. 656:4-657:23 (Cresswell).

Kay had invested money in the venture.[131] Thus, he continued to work toward the deal.[132] But Kay's mistreatment of Campbell and EagleForce Associates employees strained Kay and Campbell's relationship.[133]

6. Continued negotiations

Despite the building tension, Kay and Campbell continued to negotiate through July 2014.[134] But on July 22, 2014, Kay sent an email to Campbell saying, "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]."[135] Presumably, Kay was referring to the November 2013 and April 2014 Letter Agreements.

Near the end of July 2014, Kay and Campbell met without their lawyers to discuss open issues.[136] On July 25, 2014, Campbell sent an email to Rogers, Offit, and Kay informing the lawyers of what Campbell and Kay had discussed.[137] In part, Campbell wrote, "As for the Issue related to Bankruptcy—I don't think I have much of an issue . . . what we discussed and agreed is that we will pay any amount owed. I will change that

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[131] Tr. 802:1-3 (Campbell).

[132] Tr. 802:8-10 (Campbell).

[133] *See* Tr. 801:20-802:1 (Campbell).

[134] *See*, *e.g.*, JX 31; JX 39; JX 41.

[135] JX 43.

[136] *See* JX 46.

[137] *Id.*

to the point that we will pay any amount under $10,000."[138]

On August 5, 2014, Campbell, Kay, Rogers, and Offit met to attempt to agree on outstanding issues.[139] Campbell testified that Kay and Offit would not drop the bankruptcy issue[140] because they were concerned about Campbell's title to his intellectual property.[141] To indicate that Campbell was not willing to reopen his bankruptcy, he walked out of the meeting.[142] He testified, "[I] made it clear I wasn't doing that. And the only way I could make it any clearer was to leave."[143]

On or around August 6, 2014, both Kay and Campbell signed a handwritten sheet of paper that stated, "Campbell has rights to approve new investment."[144] Offit sent an email to Rogers to clarify what Kay meant in agreeing to the handwritten note.[145] He wrote, "[Campbell] told [Kay] he needed to be involved in all capital raise decisions. [Kay] is obviously in agreement on [Campbell's] need to be involved in capital raise matters, but [Campbell] cannot have a blocking right

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[138] *Id.*

[139] Tr. 80:19-22, 81:22-82:4 (Offit).

[140] Tr. 807:22-808:8 (Campbell).

[141] Tr. 821:5-11 (Rogers).

[142] *See* Tr. 808:9-24 (Campbell).

[143] Tr. 808:20-22 (Campbell).

[144] JX 54, at 4.

[145] *Id.* at 1.

or veto right. The 3 person board needs to approve capital raise matters."[146]

On or before August 14, 2014, Kay and Campbell met and discussed thirteen open issues.[147] Kay handwrote[148] their agreed-upon conclusions on a sheet of paper that he scanned and sent to Campbell.[149] The list of thirteen points addressed topics Kay and Campbell had been negotiating, such as new equity capital and Campbell's compensation.[150] The list also addressed operational 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."[151]

On August 19, 2014, Rogers, Campbell's attorney, sent revised versions of the Transaction Documents.[152] The August 19 versions that Rogers circulated backtracked on some of Campbell's concessions in the thirteen-point list.[153] Rogers's August 19 draft, however, incorporated some of Kay's requests.[154]

On August 22, 2014, Campbell sent an email to Kay, Rogers, and Offit stating that on the bankruptcy

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[146] *Id.*

[147] Tr. 346:2-18 (Kay).

[148] Tr. 345:16-22 (Kay).

[149] JX 56.

[150] *Id.* at 2.

[151] *Id.*

[152] JX 57.

[153] *See*, *e.g.*, JX 59 § 4.1.8(a).

[154] *See*, *e.g.*, JX 60 § 3.2(c).

issue, he and Kay were each willing to commit up to $5,000 to retain Campbell's personal bankruptcy lawyer and resolve the issue of his title to the intellectual property.[155] If that did not resolve the issue, Campbell agreed that out of the $500,000 distribution he would take at closing, he would "retain up to $250,000 in an attorney escrow of [his] choice for a period not to exceed 6 months."[156] Campbell was willing to set aside funds to pay any creditor claims, but he did not want to reopen a bankruptcy proceeding.[157]

On August 20, 2014, Campbell sent an email to Kay asking Kay to "refrain from any further disbursements to EagleForce until we have [an] executed agreement and established closing procedures."[158] In that same email, Campbell informed Kay that Campbell had been "seek[ing] other funding to meet the commitments of the company."[159] Kay refused to stop funding.[160] When Kay refused to stop funding, Campbell responded by refusing to cash his own paychecks.[161]

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, "Please confirm your acceptance of the

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[155] JX 66.

[156] *Id.*

[157] Tr. 809:3-4, 810:5-10, 810:18 (Campbell).

[158] JX 65, at 1.

[159] *Id.*

[160] *See* JX 106.

[161] Tr. 948:21-949:16 (Campbell).

terms of these agreements. Please commence preparation of schedules needed for closing."[162] The date on the front of and in the first paragraph of the draft Contribution Agreement remained blank in the August 27 version.[163] The missing date on the Contribution Agreement created an additional gap in the agreement because the closing date depended on the date of the agreement.[164]

The version of the Contribution Agreement that Offit sent with his August 27 email stated "OK [Offit Kurman] DRAFT 8-26-14" on the first page.[165] Although the last draft LLC Agreement had no such notation, the LLC Agreement was an exhibit to the Contribution Agreement.[166] Rogers was out of town when Offit sent the August 27 draft Transaction Documents,[167] and Offit received Rogers's automatic out-of-office reply.[168]

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[162] JX 68.

[163] JX 71, at 1-2.

[164] *Id.* § 3.1 ("[T]he 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.").

[165] *Id.* at 1.

[166] *See* JX 31 (without draft notation on cover page); JX 53 (same); JX 59 (same); JX 71 Ex. B; JX 73 (without draft notation on cover page).

[167] Tr. 828:15-17 (Rogers).

[168] JX 74.

Campbell testified that once or twice through these weeks of negotiating the Transaction Documents, "Kay . . . [brought] a draft document to [Campbell] and ask[ed] [him] to sign it."[169] Although Campbell did not produce any of these signed drafts as evidence of this course of conduct,[170] Salah corroborates his testimony, noting that it is "not the normal practice to sign drafts. But Mr. Kay wanted these drafts to be signed as being received."[171] Campbell claims he is unable to produce any signed drafts because they were stolen from his office, together with other documents.[172]

Throughout this entire period of negotiations, EagleForce Associates, still in its start-up phase, had limited sources of revenue[173] and relied on multiple funding sources to meet its financial obligations. Much of that funding came from Kay; between January 2014 and August 28, 2014, Kay contributed $841,213.[174] Others, including Salah and Kay's wife, invested in the EagleForce businesses or loaned them money.[175]

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[169] Tr. 915:12-22 (Campbell).

[170] Tr. 1277:2-8 (Campbell).

[171] Tr. 1105:10-23 (Salah).

[172] *See* Tr. 727:21-729:5 (Variganti); Tr. 923:8-924:21 (Campbell).

[173] Tr. 323:19-24 (Kay).

[174] *See* JX 106.

[175] Tr. 775:6-11, 926:1-3, 952:23-953:9 (Campbell).

Campbell also sought a loan from an investment banking company.[176]

7. The events of August 28, 2014

On August 28, 2014, Kay and Campbell met without their lawyers. Kay and Powers testified that Kay came to EagleForce Associates' offices with Powers to sign the Transaction Documents.[177] Campbell testified that he was unaware of Kay's purpose for the meeting.[178] Campbell was busy when they arrived but met with them briefly.[179] Because Campbell had to finish meeting with EagleForce developers, Kay and Powers left to go to a restaurant five minutes away.[180]

While Kay and Powers were at the restaurant, Kay and Campbell sent several emails to each other.[181] In the first email thread, Cresswell sent a non-disclosure agreement to Kay and Bryan Ackerman, Sentrillion's general counsel, copying Campbell.[182] Campbell replied, asking Cresswell not to "forward this information outside of the company until I have had a chance to review."[183] Kay responded, "What are you talking about outside the company? We just talk [sic] 3

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[176] Tr. 953:12-17 (Campbell).

[177] Tr. 287:8-19 (Powers); Tr. 329:7-11 (Kay).

[178] Tr. 973:10-974:5 (Campbell).

[179] Tr. 329:18-330:3 (Kay).

[180] Tr. 330:4-7 (Kay).

[181] *See* Tr. 330:20-23 (Kay); JX 75; JX 76.

[182] JX 75, at 2.

[183] *Id.* at 1.

minutes ago. I will handle my swim lane."[184] About ten minutes later, apparently without waiting for an answer from Campbell, Kay sent a second reply: "1). Bryan [Ackerman] is inside not outside 2). For the record I will handle all [NDA] contacts."[185] In reference to earlier emails regarding the NDA, Campbell wrote to Kay, "As 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."[186] Kay replied, "Everyone knows we are equal. . . . Please clarify w[ith] chris [sic] and Bryan that [NDA] are in [business] lane and rick [sic] will handle. and [sic] send me the signed document if you want to go forward."[187]

Around the same time, Cresswell sent an email strategizing about how to "win" the Special Olympics as a client.[188] Kay replied to only Campbell, stating "Sorry cant [sic] do anything until the agreement documents you have are signed. Did you sign. . . ."[189] Kay sent his final email shortly before returning to Campbell's office.[190] In that email, which was not a reply to Campbell's email, but instead a follow up from his

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[184] *Id.*

[185] *Id.* at 3.

[186] JX 76, at 3.

[187] *Id.*

[188] *Id.* at 2.

[189] *Id.*

[190] *Compare id.*, *with* Tr. 237:9-12 (Powers).

previous email, he wrote, "So what. This is getting really petty. . . . Have you send [sic] the signed doc?"[191]

At around 7:15 p.m., Kay and Powers returned to the EagleForce Associates offices.[192] 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, without reading the documents.[193] Campbell testified that before the signing, Kay told him that Rogers and Offit "were done" with the agreements.[194] Campbell testified that he tried to call Rogers but was unable to reach him.[195] He testified that Kay tried to call Offit but was also not able to reach him.[196] Kay, in contrast, testified that he did not call Offit or make any representations about Campbell's lawyer.[197]

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[191] JX 76, at 5.

[192] Tr. 237:9-12 (Powers).

[193] Tr. 294:16-295:6 (Powers); Tr. 331:18-333:7 (Kay).

[194] Tr. 976:23-977:5 (Campbell).

[195] Tr. 977:14-21 (Campbell).

[196] Tr. 977:22-978:8 (Campbell).

[197] Tr. 334:7-10, 334:15-20 (Kay). Plaintiffs argue that Kay and Campbell had a past practice of signing legally binding agreements without counsel present, pointing to the November 2013 and April 2014 Letter Agreements. Pls.' Opening Br. 28. Kay and Campbell had signed the November 2013 and April 2014 Letter Agreements without their attorneys present, but the circumstances surrounding the signing of those documents differs significantly. First, Campbell believed that Kay and Campbell were represented together by the same attorney at the time he signed the Letter Agreements, but he learned later that the law firm

After Kay and Campbell signed the agreements, Campbell walked around his desk and embraced Kay and Powers.[198] The entire meeting lasted only two to five minutes.[199]

8. Events after the August 28 signing

Kay and Campbell never completed the closing on their agreement. On October 28, 2014, Kay, Campbell, Rogers, and Offit exchanged emails indicating Kay's and Campbell's different positions.[200] Kay emailed, "What else can we do together to get this done. I understand we have signed the deal but need the

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represented only Kay and Campbell himself had been unrepresented. Tr. 33:15-22 (Offit); Tr. 794:23-795:9 (Campbell). Second, the Letter Agreements each served as a "roadmap to reaching a binding agreement." Pls.' Opening Post-Trial Br. 20. Third, unlike the August 28 Transaction Documents, months of negotiations did not precede the Letter Agreements. Fourth, the November 2013 and April 2014 Letter Agreements are three and four pages in length respectively, which contrasts greatly with the dozens of pages that comprise the Transaction Documents. Fifth, Kay and Campbell carefully reviewed the terms of the Letter Agreements together and made joint revisions to the Letter Agreements before signing them; this process differs greatly from the brief August 28 meeting. *See* Tr. 131:5-7 (Offit). Sixth and finally, by the time they signed the August 28 Transaction Documents, Campbell and Kay's relationship had deteriorated, and they no longer trusted each other.

[198] Kay and Powers testified that Campbell hugged each of them after signing the Transaction Documents. Tr. 240:7-9 (Powers); Tr. 332:10-16 (Kay). Campbell testified that instead of a hug, he gave Kay a dap handshake. Tr. 987:24-988:10 (Campbell).

[199] Tr. 294:21-22 (Powers); Tr. 978:14-20 (Campbell).

[200] JX 93.

exhibits."[201] Campbell responded, stating in part, "The signatures on the drafts did not represent the completed document which remains not completed given the two or three remaining items."[202] Over the following months, Kay and Campbell's relationship became more contentious. 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 [sic] 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.[203]

On March 17, 2015, Eagle Force Holdings and EF Investments filed this lawsuit to enforce the August 28 Contribution Agreement and LLC Agreement.[204]

III. ANALYSIS

Plaintiffs allege claims for breach of contract and breach of fiduciary duty.[205] Plaintiffs seek an order requiring Campbell to specifically perform his

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[201] *Id.* at 1.

[202] *Id.*

[203] JX 103.

[204] Compl. for Specific Performance, Declaratory and Injunctive Relief and Imposition of Constructive Trust.

[205] Compl. ¶¶ 63-74.

obligations under the Transaction Documents and granting monetary damages to Plaintiffs.[206] In the alternative, Plaintiffs assert claims for fraud and unjust enrichment.[207]

A. Legal Standards

Plaintiffs have the burden of proving their claims by a preponderance of the evidence.[208] "Proof by a preponderance of the evidence means proof that something is more likely than not. 'By implication, the preponderance of the evidence standard also means that if the evidence is in equipoise, Plaintiffs lose.'"[209]

To enforce either the Contribution Agreement or the LLC Agreement, Plaintiffs must prove that the respective document is a valid contract with Campbell.[210]

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[206] Compl. ¶¶ 33-38, 74.

[207] Compl. ¶¶ 45-49, 76-80. Plaintiffs also assert that Campbell raises affirmative defenses of fraudulent inducement, duress, and mutual mistake in his post-trial briefs; they, however, do not cite Campbell's post-trial briefs. Pls.' Opening Br. 28-33. Plaintiffs are correct as to the defenses of duress and mistake, but a careful review of Campbell's post-trial briefs reveals no reference to fraudulent inducement.

[208] *Revolution Retail Sys., LLC v. Sentinel Techs., Inc.*, 2015 WL 6611601, at *9 (Del. Ch. Oct. 30, 2015).

[209] *Id.* (footnote omitted) (citing *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010)) (quoting *2009 Caiola Family Tr. v. PWA, LLC*, 2015 WL 6007596, at *12 (Del. Ch. Oct. 14, 2015)).

[210] The parties raise the question of which jurisdiction's law applies to this case, but they do not brief the choice of law issue. The briefing relies heavily on Delaware law, and none of the parties asserts that the law of Delaware is in conflict with the law of

It is settled Delaware law that "a valid contract exists when (1) the parties intended that the instrument would bind them, demonstrated at least in part by its inclusion of all material terms; (2) these terms are sufficiently definite; and (3) the putative agreement is supported by legal consideration."[211]

The Supreme Court held that the terms of the Transaction Documents are sufficiently definite,[212] and the parties do not dispute whether the Transaction Documents are supported by legal consideration.[213] Thus, the question presented is whether the parties intended that the Transaction Documents would bind them.

> This question looks to the parties' intent as to the contract as a whole, rather than analyzing whether the parties possess the requisite intent to be bound to each particular term. "Under Delaware law, 'overt manifestation of assent—not subjective intent—controls the formation of a contract.'" As such, in applying this objective test for determining whether the parties intended to be bound, the court reviews the evidence that the parties communicated to each other up until the time that the contract was signed—*i.e.*, their words and actions—including the putative contract itself.

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any other jurisdiction whose law may apply. The Court, thus, will apply Delaware law to all issues this opinion addresses.

[211] *Supr. Ct. Op.*, 187 A.3d at 1229 (citing *Osborn*, 991 A.2d at 1158-59).

[212] *Id.* at 1238, 1240.

[213] *Id.*

> And, where the putative contract is in the form of a signed writing, that document generally offers the most powerful and persuasive evidence of the parties' intent to be bound. However, Delaware courts have also said that, in resolving this issue of fact, the court may consider evidence of the parties' prior or contemporaneous agreements and negotiations in evaluating whether the parties intended to be bound by the agreement.[214]

B. The Credibility of Kay and Campbell

The August 28 meeting plays a critical role in the question of formation. Kay and Campbell signed the Transaction Documents at issue during this meeting. However, no contemporaneous evidence exists, other than the Transaction Documents themselves, that reflects what happened at that meeting. Further, Kay's and Campbell's recollections of the August 28 meeting differ. As for the third attendee of the August 28 meeting, Powers, it appears that she was not present for or privy to all communications between Kay and Campbell.[215] Further, she does not recall the details of the

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[214] *Id.* at 1229-30 (footnotes omitted) (citing *Black Horse*, 2014 WL 5025926, at *12; *Seiler*, 367 A.2d at 1005; *Osborn*, 991 A.2d at 1158-59; *Del. Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006)) (quoting *Black Horse*, 2014 WL 5025926, at *12). Although the Supreme Court has tasked me with determining the parties' intent to be bound, the Supreme Court appears to foreclose any analysis of material terms, as I held in my first opinion that there were missing material terms, which the Supreme Court reversed.

[215] *See* Tr. 291:16-292:13 (Powers).

conversations between Kay and Campbell during that meeting.[216] Thus, credibility assessments of Kay and Campbell tip the scales in this case. In my role as the trier of fact, I must assess the credibility of the witnesses, supported by the record.[217] My credibility determinations are based on the testimony and evidence submitted to make up the record.

Kay challenges Campbell's credibility. Kay charges that Campbell's testimony given at deposition, multiple evidentiary hearings, and trial varies regarding (1) the manner in which the parties had signed documents in the past to acknowledge receipt, (2) the number of different drafts of the Transaction Documents that existed, and (3) Campbell's reliance on Kay's statements regarding the finality of the Transaction Documents.[218] First, Campbell's testimony varies regarding the method to acknowledge receipt of various drafts of the Transaction Documents. In his deposition testimony, he said that he generally initialed the cover page of the draft documents to acknowledge receipt but signed the August 28 Transaction Documents

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[216] *Id.*

[217] *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1221 (Del. 2012) ("The law requires the trial judge to weigh the evidence, including the credibility of live witness testimony."); *Adams v. Jankouskas*, 452 A.2d 148, 151 (Del. 1982) ("[W]here, as here, the trial court was faced with conflicting testimony, we accord great deference to the findings of the trial judge who heard all the witnesses.").

[218] Oral Arg. Tr. 19:5-28:1 (Dec. 13, 2018); Pls.' Opening Br. 23-24.

also to acknowledge receipt.[219] He also acknowledged that he was not consistent in initialing documents and sometimes used "some kind of indication" for his own tracking purposes.[220] In his trial testimony, he noted that he "signed" various documents, including the August 28 Transaction Documents.[221] Regardless, any inconsistency in Campbell's testimony pertains to the method to acknowledge receipt, not to the purpose of initialing or signing. Additionally, Campbell's deposition and trial testimony is consistent regarding the nature of the August 28 Transaction Documents.[222]

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[219] JX 148, at 427:6-428:10. Plaintiffs mischaracterize Campbell's deposition testimony when they state that Campbell testified that he "never signed his full name on the signature lines of the Transaction Documents to acknowledge receipt." Pls.' Reply Br. 11. Campbell's deposition testimony indicates that he used various methods to acknowledge receipt. JX 148, at 363:13-364:14.

[220] JX 148, at 363:13-364:14.

[221] Tr. 915:12-916:22 (Campbell). A review of this testimony reveals that the examiner's questions and Campbell's answers focused on determining the number of endorsed drafts, not on the method of endorsement.

[222] To the extent a procedure for acknowledging receipt of draft documents existed, Kay and Campbell used that procedure only for their own discussions. Their attorneys did not require the parties to acknowledge receipt of documents by signing or initialing them. Tr. 862:16-19 (Rogers). Regarding this point, Plaintiffs again mischaracterize Campbell's testimony when they explain that "Campbell further acknowledged that his practice of initialing a document was not something that was required by Kay or Kay's counsel." Pls.' Reply Br. 11 (citing JX 148, at 367:4-10). The examiner asked, "[D]o you recall whether or not you were required *to send* that acknowledgement to either [Kay's counsel] or Mr. Kay or anyone else?" JX 148, at 367:4-7 (emphasis added).

Second, Campbell testified at trial that he did not produce any previously signed (or initialed) drafts,[223] but he does not claim in his testimony that these drafts are different from and in addition to one of the drafts the parties introduced as exhibits at trial.[224] Third and finally, Campbell testified that Kay stated that the attorneys had resolved all outstanding issues.[225] But Campbell did not say that he relied on this statement to sign the agreements,[226] as Kay asserts.[227] To the

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The examiner failed to ask whether Kay's counsel or Kay required Campbell to initial documents, the point for which Plaintiffs cite Campbell's deposition testimony.

[223] Tr. 1276:22-1277:22 (Campbell).

[224] *See* Tr. 915:12-916:22, 1274:23-1277:22 (Campbell). Plaintiffs claim that Campbell "was unable to produce any of these seven or more signed versions, which he now claimed were in addition to the eight versions listed in the Joint Stipulations." Pls.' Reply Br. 11-12 (citing Tr. 1276:22-1277:22 (Campbell)). This claim mischaracterizes Campbell's testimony: "My testimony is that I think I signed both of those documents on that time. On a previous time, I think I signed three documents or four documents which were redlined. On a previous time, I signed one document. And I think the one – the time that I signed the one document was the first one. The time that I signed three was the second one; and the time that I signed two was the August one." Tr. 1276:13-21 (Campbell). This testimony from Campbell does not include any claim that any signed versions are in addition to the eight versions listed in the Joint Stipulations.

[225] Tr. 976:2-4 (Campbell).

[226] Tr. 976:2-16 (Campbell).

[227] Pls.' Reply Br. 10. Again, Plaintiffs mischaracterize Campbell's testimony and, in this instance, his arguments. Plaintiffs challenge Campbell's credibility, stating that he "claims he signed the documents intending to be bound, but he did so in reliance on Kay's representation that the lawyers had signed off on the documents." Pls.' Reply Br. 10 (citing Tr. 976:2-4 (Campbell)).

contrary, Campbell testified that he attempted to confirm the finality of the documents and when he could not, he signed to acknowledge receipt.[228]

I had multiple opportunities to observe Campbell and assess his credibility; he testified before me on three days of the five-day trial and at four evidentiary hearings. His testimony as it relates to his intent to be bound by the Transaction Documents is credible. He consistently testified that (1) he wanted confirmation from one of the attorneys that the documents were final, (2) when he could not get this confirmation, Kay asked Campbell to sign to acknowledge receipt, and (3) the nature of the Transaction Documents suggested they were draft documents and it was okay to sign to acknowledge receipt. Documentary evidence suggesting the Transaction Documents appear on their face incomplete supports Campbell's testimony.

Further, Kay faces his own challenges regarding the veracity of his representations concerning the August 28 Transaction Documents. In particular, he manipulated the signed Contribution Agreement to convince others that the Transaction Documents were final. Cresswell testified that Kay showed him and Morgan the signed Contribution Agreement to make the point that Campbell and Kay had finalized their agreement.[229] But Cresswell also noted that the cover

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Campbell does not testify to this in the cited testimony, and Plaintiffs provide no other source for this claim. *See* Tr. 976:2-977:24.

[228] Tr. 1291:5-11 (Campbell).

[229] Tr. 661:14-662:2 (Cresswell).

page of the document was torn.[230] Contemporaneous documentary evidence corroborates this testimony. An exhibit from Cresswell's deposition clearly shows the top-right corner missing from the first page where "OK DRAFT 8-26-14" had appeared, and text from the top-left corner of the second page is also missing.[231]

After listening to Campbell's testimony on multiple days, I find Campbell to be credible concerning the events of August 28 and place more weight on Campbell's testimony when it conflicts with Kay's and there is an absence of contemporaneous evidence.

C. The Contribution Agreement

The parties present competing renditions of both the events leading up to the August 28 signing and the meeting where they signed the Transaction Documents. I summarize Plaintiffs' and Campbell's different stories for the reader.

1. Plaintiffs' story (as narrated by Kay)

Plaintiffs' strongest evidence of an intent to be bound is the signatures on the Transaction Documents. To bolster the evidence of the signatures, Plaintiffs also point to the relevant context leading up to the signing on August 28, 2014. From April 2014, when Campbell and Kay signed the April 2014 Letter

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[230] Tr. 662:3-663:3 (Cresswell). Kay does not rebut or challenge Cresswell's testimony.

[231] JX 114, at 1-2.

Agreement, through August 28, 2014, Kay and Campbell continued the negotiation process.[232] Also during that time, Kay continued funding the business activities of EagleForce Associates.[233]

On July 7, 2014, Kay and Campbell met together with their attorneys.[234] During this extended meeting, they completed negotiations on three major issues.[235] Although another substantial issue arose during that meeting,[236] Kay and Campbell, with the assistance of their respective counsel, had worked through a majority of the open issues.[237] Two days later, an email was sent from Campbell's email address to Morgan announcing that EagleForce Associates and EagleForce Health had taken on Kay as their "first Partner."[238] Morgan responded, congratulating both Kay and Campbell and copying several EagleForce employees.[239] The same day, Campbell held a meeting at EagleForce Associates' office with all of the office staff to introduce Kay as a partner.[240]

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[232] *See* JX 14; JX 15; JX 19; JX 23; JX 31; JX 41; JX 52; JX 53; JX 58; JX 59.

[233] JX 106.

[234] Tr. 61:8-23 (Offit).

[235] Tr. 63:16-66:9 (Offit).

[236] Tr. 69:16-70:20 (Offit).

[237] Tr. 63:22-66:9 (Offit).

[238] JX 33.

[239] *Id.*

[240] Tr. 1188:17-1189:8 (Morgan).

As part of the negotiating process, on or about August 14, Campbell and Kay met together and hashed out some of the remaining issues.[241] They summarized their discussion in a handwritten list containing thirteen points they had reached agreement on.[242] Their attorneys used this list to continue revising the Transaction Documents.[243] On August 25, Rogers said in his email to Kay, Offit, and Campbell that he believed they would be able to finalize the Contribution Agreement "within the next few days."[244] Offit's email on August 27 reflected a similar feeling when he instructed the parties to "commence preparation of schedules needed for closing."[245]

On August 28, 2014, Kay and Powers went to the EagleForce Associates offices for the purpose of executing the Transaction Documents.[246] Because Campbell could not meet with them immediately, they waited at a nearby restaurant.[247] While they were at the restaurant, Campbell emailed Kay and referenced their business venture: "Only you can make these folks know we are equal partners."[248]

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[241] Tr. 346:2-18 (Kay); JX 56.

[242] Tr. 345:16-346:1 (Kay).

[243] *See* JX 58; JX 59.

[244] JX 67, at 1.

[245] JX 68.

[246] Tr. 287:8-19 (Powers); Tr. 329:7-11 (Kay).

[247] Tr. 330:4-7 (Kay).

[248] JX 76, at 3.

Kay's emails to Campbell made clear that Kay would take no action and contribute no funds until Campbell signed the Transaction Documents, literally stating, "[I] cant [sic] do anything until the agreement documents you have are signed."[249] At that time, EagleForce Associates was struggling financially. Still in its start-up phase, Associates had limited sources of revenue.[250] Rent for the EagleForce Associates offices was overdue for July and August, and September rent would soon be due.[251] Plaintiffs suggest that Campbell signed the Transaction Documents to secure Kay's continued funding of the EagleForce businesses.[252] Plaintiffs also state that Campbell failed to say or do anything that conveyed he lacked the intent to be bound by the signed Transaction Documents.[253] For example, Campbell failed to indicate orally or in writing that he signed the documents only to acknowledge receipt.[254] According to Plaintiffs, Kay and Campbell saw signing the documents as a next step in the partnership. The mood between them was happy.[255]

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[249] *Id.* at 2.

[250] Tr. 323:19-24 (Kay).

[251] Tr. 244:14-21 (Powers).

[252] Pls.' Reply Br. 9.

[253] Pls.' Opening Br. 22-23.

[254] Tr. 238:11-14 (Powers); Tr. 334:21-335:1 (Kay).

[255] Tr. 240:12-16 (Powers); Tr. 332:7-16 (Kay); Tr. 1296:9-1297:8 (Campbell).

2. Campbell's story

Although Campbell and Kay had been working toward finalizing the Contribution Agreement, several stumbling blocks to this process developed: (1) Kay and Campbell's relationship deteriorated, (2) employees complained about Kay, (3) each felt the other was reneging on the previous agreement, and (4) Campbell gave Kay multiple signs before August 28 that he (Campbell) wanted out of their agreement.

First, as Kay's involvement in EagleForce Associates business operations deepened, the relationship between Kay and Campbell deteriorated. Campbell was uncomfortable with some of Kay's business decisions. For example, in or about June 2014, Kay suggested that EagleForce Associates hire Melinda Walker as a secretary and pay her $75,000 per year,[256] a salary that concerned Campbell because it was higher than most EagleForce Associates employees' salaries.[257] Additionally, Kay sometimes acted aggressively toward Campbell and shouted and cursed at Campbell.[258] On June 30, 2014, Kay sent Campbell an email that included a word that Campbell interpreted as a racial slur.[259] On Campbell's part, he, at times, avoided meeting Kay.[260] This conduct, on the part of

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[256] Tr. 436:16-22 (Kay); Tr. 917:19-21, 918:12-18 (Campbell).

[257] Tr. 919:6-10 (Campbell).

[258] Tr. 722:9-15 (Variganti); Tr. 1089:7-16 (Salah); Tr. 1181:14-1182:9 (Morgan).

[259] Tr. 1301:12 (Campbell); *see* JX 16.

[260] *See* Tr. 1171:20-24 (Morgan).

both Kay and Campbell, evidences the deterioration of their relationship and a growing mistrust between them.

Second, Kay mistreated multiple EagleForce employees, and some employees complained about Kay's behavior. Kay directed his aggressive or demeaning behavior toward Variganti, Salah, and Henien. Kay yelled at Variganti and pinned him against a cubicle wall.[261] Kay condescended to multiple EagleForce Associates employees, sometimes treating them like errand runners, rather than valued employees in a business.[262] Campbell, Salah, and Morgan observed that this mistreatment often ran along lines of national origin.[263] Kay told Morgan that he (Kay) "can't work with somebody like [Salah]. [H]e's an Arab."[264] Kay's behavior toward employees like Variganti, Salah, and Henien reflected this bias, and this behavior led to tensions in the office. Multiple employees voiced their concerns about Kay's addition as a partner.[265] In a company as diverse as EagleForce Associates, a suggestion of racism would create problems at staff and management levels that Campbell could not ignore. In fact, Morgan's concerns about Kay's behavior were so great that he (Morgan) told Campbell that he might quit if

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[261] Tr. 720:3-6, 720:16-721:5 (Variganti); Tr. 1175:6-14 (Morgan).

[262] *E.g.*, Tr. 931:18-932:1 (Campbell).

[263] Tr. 927:15-932:16 (Campbell); Tr. 1089:17-1090:3 (Salah); Tr. 1174:4-12 (Morgan).

[264] Tr. 1174:10-12 (Morgan).

[265] *E.g.*, Tr. 921:13-20 (Campbell); Tr. 1174:16-18 (Morgan).

Campbell did not address Kay's behavior.[266] Losing employees and their talent, especially in the start-up phase, would reduce EagleForce Associates' chances of success.

Third, Kay and Campbell both began to suspect that the other was not adhering to their original agreement. Campbell observed that Kay "kept moving the goalposts" in their agreement[267] and Kay reduced his original financial commitment to EagleForce.[268] Campbell testified that Kay unilaterally set up Eagle Force Holdings as a Delaware LLC without informing Campbell that he (Kay) was changing or ignoring a term of the November 2013 Letter Agreement.[269] Campbell also testified that Kay would threaten to turn off funding unless Campbell conceded something new, such as the structure of the board or Kay's control over another area of business operations.[270] Kay, on the other hand, stated explicitly in an email dated July 22, 2014, to Campbell that Campbell "may be trying to change the deal."[271] Kay felt the need to include other people, either attorneys or EagleForce employees like Cresswell and Morgan, in his meetings with Campbell.[272]

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[266] Tr. 1180:21-1181:6 (Morgan).

[267] Tr. 994:24-995:1 (Campbell).

[268] Tr. 995:2-9 (Campbell).

[269] Tr. 991:3-992:21 (Campbell).

[270] Tr. 995:2-20 (Campbell).

[271] JX 43.

[272] Tr. 663:18-664:5 (Cresswell).

Fourth and finally, the mistrust and disagreements between Kay and Campbell reached a crescendo, causing Campbell to attempt to back out of the agreement. On August 20, 2014, only eight days before the parties would sign the Transaction Documents, Campbell sent an email to Kay asking Kay to "refrain from any further disbursements to EagleForce until we have [an] executed agreement and established closing procedures."[273] When Kay refused to stop funding, Campbell responded by refusing to cash his own paychecks.[274] Campbell's purpose for refusing his checks was twofold.[275] First, he wanted to make the point to Kay that they needed to resolve issues in their negotiations before continuing their business relationship.[276] Second, anticipating that EagleForce Associates would have to make payroll without any contribution from Kay, Campbell wanted to lower company expenses where he could.[277] Campbell had experienced difficulty making payroll and meeting the company's other financial obligations in the past. Campbell informed Kay that he (Campbell) was seeking other sources of funding and investment to replace Kay's contributions.[278] But even without additional funding, Campbell was prepared to continue the EagleForce Associates business. At several points in the

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[273] JX 65, at 1.

[274] Tr. 948:21-949:16 (Campbell).

[275] Tr. 950:6-8 (Campbell).

[276] Tr. 950:11-18 (Campbell).

[277] Tr. 950:9-11 (Campbell).

[278] *See* JX 65, at 1.

company's history, Campbell obtained financial support from other sources, including Salah, Campbell's wife, and loans from financial institutions.[279] Campbell knew what it took to run the businesses with limited sources of revenue, and he was preparing to do it again.

Even during the evening of August 28, 2014, leading up to the signing, Kay and Campbell's conduct evidences their growing animosity for each other. At first, Campbell was not available to meet with Kay and Powers, and he asked Kay and Powers to wait in a conference room.[280] He asked them to wait while he completed a different meeting with developers.[281] Kay and Powers decided to wait at a nearby restaurant.[282] While they were waiting, Kay's tone in his emails to Campbell grew more aggressive. In just over an hour, Kay sent six emails to Campbell.[283] Two of those emails replied to the same email from Campbell.[284] Shortly before Kay and Powers returned to Campbell's office, Kay emailed Campbell, "So what. This is getting really petty. . . . Have you send [sic] the signed doc?"[285]

After Campbell had completed his meeting with developers, Kay and Powers returned to Campbell's

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[279] Tr. 775:6-11, 926:1-3, 952:23-953:9, 953:12-17 (Campbell).

[280] Tr. 234:11-15 (Powers).

[281] *Id.*

[282] Tr. 330:4-7 (Kay).

[283] *See* JX 75; JX 76.

[284] *See* JX 76, at 3, 5.

[285] *Id.* at 5.

office to sign the documents.[286] Before signing the Contribution Agreement, Campbell attempted to confirm Kay's assertion that the attorneys were done with the documents.[287] Campbell tried, unsuccessfully, to reach his attorney.[288] Campbell testified that, in the absence of his own attorney's confirmation, he asked Kay to confirm with Kay's attorney that the attorneys had finalized the Transaction Documents.[289] Kay testified that he does not recall Campbell asking him to try calling his attorney.[290] In either case, Kay did not call his attorney.[291] Still without confirmation from either his or Kay's attorney, Campbell did not take the time to read the Transaction Documents before he signed them.[292] Then, during a meeting that lasted only two to five minutes,[293] Campbell signed the Transaction Documents.[294] Campbell testified that he signed the Transaction Documents at Kay's request to acknowledge receipt of the draft documents.[295]

Documentary evidence also suggests that the Contribution Agreement was not a final agreement. The

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[286] Tr. 237:3-12 (Powers).

[287] Tr. 976:23-978:8 (Campbell).

[288] Tr. 977:14-21 (Campbell).

[289] Tr. 977:22-978:8 (Campbell).

[290] Tr. 334:4-6 (Kay).

[291] Tr. 334:7-10 (Kay).

[292] *Compare* Tr. 976:15-16 (Campbell), *with* Tr. 239:10-14 (Powers).

[293] Tr. 294:21-22 (Powers); Tr. 978:14-20 (Campbell).

[294] Tr. 239:15-17 (Powers).

[295] Tr. 976:17-22 (Campbell).

most recent email from Offit makes it clear that Kay and Campbell still needed to approve the agreements and prepare the schedules to the Contribution Agreement.[296] Further, as Campbell testified, the state of the documents themselves do not suggest finality. Specifically, the first page of the Contribution Agreement is marked "DRAFT."[297] The Contribution Agreement also contained "many odd omissions involving important subjects."[298] "The Draft Contribution Agreement was unclear as to key issues, like the capitalization of the key operating subsidiaries, because key text that the agreement's terms called for, such as critical schedules, were absent."[299]

3. The reconciliation of the stories

Plaintiffs have the burden of establishing by a preponderance of the evidence that Campbell is bound by the Contribution Agreement.[300] "Proof by a preponderance of the evidence means proof that something is more likely than not. 'By implication, the preponderance of the evidence standard also means that if the evidence is in equipoise, Plaintiffs lose.' "[301]

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[296] JX 68.

[297] JX 78, at 1; Tr. 977:11-12, 987:13-23 (Campbell).

[298] *Supr. Ct. Op.*, 187 A.3d at 1244 (Strine, C.J., dissenting).

[299] *Id.*

[300] *Revolution Retail*, 2015 WL 6611601, at *9.

[301] *Id.* (footnote omitted) (citing *Agilent Techs.*, 2010 WL 610725, at *13) (quoting *2009 Caiola Family Tr.*, 2015 WL 6007596, at *12).

The Supreme Court discusses the evidence that the parties intended to be bound by the Contribution Agreement, noting that both parties' signatures provide "strong evidence that the parties intended to be bound by [the Contribution Agreement]."[302]

"[W]here the putative contract is in the form of a signed writing, that document generally offers the most powerful and persuasive evidence of the parties' intent to be bound."[303]

> [P]rofessor Williston has stated that a signature "naturally indicates assent, at least in the absence of an invalidating cause such as fraud, duress, mutual mistake, or unconscionability. . . ." In *Osborn* itself, the signatures of both parties and the notarization of the written agreement provided enough evidence to show that the parties intended to be bound by it. Here, both parties signed the Contribution Agreement. That is strong evidence that the parties intended to be bound by it.[304]

"However, Delaware courts have also said that, in resolving this issue of fact, the court may consider evidence of the parties' prior or contemporaneous

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[302] *Supr. Ct. Op.*, 187 A.3d at 1231. The Supreme Court also highlights Campbell and Kay's embrace "after signing" as suggestive of the parties' reconciliation and the consummation of a deal. *Id.*

[303] *Id.* at 1230 (citing *Seiler*, 367 A.2d at 1005; *Osborn*, 991 A.2d at 1158-59).

[304] *Id.* at 1231 (omission in original) (footnotes omitted) (citing 2 Richard A. Lord & Samuel Williston, *Williston on Contracts* § 6:44 (4th ed.); *Osborn*, 991 A.2d at 1158-59).

agreements and negotiations in evaluating whether the parties intended to be bound by the agreement."[305]

I recognize the strength of the evidence of a signature on an agreement. Signatures are often dispositive evidence of an intent to be bound. And in most instances, that evidence should carry the day. But in this highly unusual case, the signatures alone are not sufficient.[306] Here, the circumstances surrounding the execution of the Transaction Documents indicate that the signatures are not presumptive and certainly not conclusive. The record evidence reveals that Campbell's conduct and communications do not constitute an overt manifestation of his assent to be bound by the Contribution Agreement. First, trial testimony from Campbell and Salah evidence a practice of endorsing draft documents to acknowledge receipt, and this testimony weakens the presumption of an intent to be bound.[307] Campbell also credibly testified that,

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[305] *Id.* at 1230 (footnote omitted) (citing *Del. Bay Surgical Servs.*, 900 A.2d at 650; *Black Horse*, 2014 WL 5025926, at *12).

[306] 17A Am. Jur. 2d *Contracts* § 173, Westlaw (database updated Aug. 2019) ("The fact that a party has signed a contract creates a strong presumption that the party has assented to the terms of the agreement."); *Carey's Home Constr., LLC v. Estate of Myers*, 2014 WL 1724835, *4 n.12 (Del. Super. Apr. 16, 2014) (citing 17A Am. Jur. 2d *Contracts* § 174 (2004), which correlates to § 173 in the 2016 update); *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 584 (3d Cir. 2009) (Under Pennsylvania law, "[s]ignatures are not dispositive evidence of contractual intent.").

[307] Tr. 1104:6-1105:15 (Salah); Tr. 1276:13-21 (Campbell). In their Reply Brief, Plaintiffs claim that Salah did not answer the question asked by Campbell's counsel, "whether Kay told him that he (Kay) had 'asked Campbell to sign those drafts and that Mr. Campbell did sign those drafts?' " Pls.' Reply Br. 12 (citing Tr.

consistent with this practice, Kay requested Campbell's signature to acknowledge receipt during the August 28 meeting.[308]

Second, the conduct and communications between Kay and Campbell before and during the signing appear inconsistent with what one would expect from two business partners finalizing a significant business deal. Leading up to the endorsement of the Transaction Documents, tensions rose between Kay and Campbell, disagreements increased (both in quantity and severity), and distrust between Kay and Campbell grew. Kay and Campbell both believed at times that the other was not honoring the original agreement or was trying to change the agreement. Campbell accused Kay of excluding Campbell from business decisions he should be included in[309] and bringing in outsiders without Campbell's approval.[310] To address these problems, Campbell required more and more safeguards to ensure that he was not losing control of the businesses.[311]

1105:3-9 (Salah)). Plaintiffs cherry-picked this testimony and ignore the surrounding testimony. *See* Tr. 1104:6-1105:15 (Salah); *see*, *e.g.*, Tr. 1104:6-10 (Salah) ("Q. Now, before the end of August 2014, did Mr. Kay ever tell you that he brought any of these earlier drafts of the transaction documents to Mr. Campbell and asked Mr. Campbell to sign them? A. Yes.").

[308] Tr. 976:17-22 (Campbell).

[309] *See*, *e.g.*, Tr. 992:17:23 (Campbell).

[310] JX 75, at 3.

[311] *E.g.*, JX 56, at 2 (evidencing that Campbell's veto on new investors was an issue).

At the same time, Kay felt that Campbell's requests for safeguards were encroachments on Kay's "swim lane."[312] He accused Campbell of trying to change their deal.[313] Kay's assessment is understandable, especially when Campbell indicated that he sought other funding and wanted to delay the closing.[314]

Kay's and Campbell's problems with one another, however, were not the only issue. Campbell testified to disturbing instances of abuse, frequently directed at people of other national origins. Other non-party witnesses, both those who were the targets of abuse and those who personally saw their colleagues endure this abuse, corroborated this testimony. Salah testified credibly that Kay condescended to him, questioned Salah's purpose at EagleForce Associates, and was abrasive and vulgar toward Salah.[315] Variganti testified credibly that his interactions with Kay left him feeling threatened by Kay.[316] Morgan testified credibly that he witnessed Kay's abuse of others and heard first-hand from Kay that he is biased against "Arabs."[317] These non-party witnesses stood to gain nothing from lying to this Court regarding this matter, and their very consistent testimony was highly credible. These employees reported these and other issues at the time,

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[312] JX 75, at 1.

[313] JX 43.

[314] *See* JX 65, at 1.

[315] Tr. 1088:10-24 (Salah).

[316] Tr. 720:3-721:5 (Variganti).

[317] Tr. 1174:10-12, 1175:6-14 (Morgan).

pressuring Campbell to reconsider a partnership with Kay.

Further, the tone of the August 28, 2014 meeting is inconsistent with Kay's story. When Kay and Powers arrived at the EagleForce Associates offices for the purpose of signing the Transaction Documents, Campbell did not greet them warmly or with an excitement associated with completing the deal. Instead, Campbell asked them to wait while he first met with his developers, even though the meeting with Kay would take only a few minutes.[318] He let Kay, the person who was about to become a fifty-percent partner in Campbell's business, sit and wait in a conference room.[319] After sitting in a conference room for well over an hour, Kay and Powers chose to continue to wait at a nearby restaurant.[320]

While they were waiting, Kay and Campbell exchanged emails.[321] These emails express anger, frustration, and disappointment from both Kay and Campbell. Kay was frustrated that Campbell was not respecting his swim lane.[322] Campbell expressed dissatisfaction that Kay excluded him from business activities and brought in outsiders without first informing Campbell.[323]

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[318] Tr. 329:18-330:1 (Kay).

[319] Tr. 234:11-15 (Powers).

[320] Tr. 235:3-10 (Powers).

[321] *See* JX 75; JX 76.

[322] *See* JX 75, at 1.

[323] *See id.* at 3; JX 76, at 5.

Finally, Kay and Powers returned to Campbell's office after 7:00 p.m., about two hours after they originally arrived.[324] Instead of an enthusiastic meeting to sign the Transaction Documents and move forward with the deal, Campbell dampened the mood with a request to confirm whether the lawyers had completed the documents.[325] This request seems reasonable in light of the draft notation on the first page of the Contribution Agreement.[326]

Neither Rogers nor Offit confirmed that the Transaction Documents were final.[327] The subject of the Contribution Agreement included the exchange of fifty percent of Campbell's business for millions of dollars.[328] For an exchange of this significance between parties who did not trust each other, a reasonable person would expect Campbell to wait to speak with his attorney or to read the documents more thoroughly before signing. While the law does not require that Campbell do either of these things, under the unusual facts of this case, both acts are indicators of Campbell's intent to be bound (or a lack thereof). Nonetheless, Kay

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[324] Tr. 237:9-12 (Powers).

[325] Tr. 977:14-978:8 (Campbell).

[326] JX 71, at 1.

[327] Tr. 334:7-10, 334:15-20 (Kay); Tr. 977:14-978:8 (Campbell).

[328] *See* JX 79 § 3.2.1.

and Campbell quickly signed the Transaction Documents, embraced, and left the meeting.[329]

It is unclear to me why Campbell signed the Transaction Documents rather than initialing them or waiting to sign them. Maybe it is because the face of the Contribution Agreement did not reflect a final agreement.[330] The Contribution Agreement contained "many odd omissions involving important subjects."[331] Dates were missing, schedules were still completely blank,[332] and key issues were unclear.[333] The Contribution Agreement, with its omissions, does not reflect a document a reasonable person expects to be a final version. Regardless, this meeting and the events leading up to it do not suggest to me that Campbell intended to be bound by the Contribution Agreement.

Kay highlights that Campbell had no other source of funding for the EagleForce businesses when Kay stopped contributing cash.[334] Kay's emails just before the meeting indicated that Kay was unwilling to help

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[329] Tr. 240:7-9 (Powers); Tr. 331:18-333:7 (Kay); Tr. 978:23-979:2 (Campbell).

[330] *See* Tr. 987:13-23 (Campbell) ("Q. When you saw the word 'Draft' on the document that you signed on the 28th, did that mean anything to you? A. Yes. That it was a draft. Q. Did you understand draft to mean a final agreement? A. Absolutely not. I understood it to be a draft. And then once we got to a final agreement, it would somehow be enumerated with 'Final'. . . .").

[331] *Supr. Ct. Op.*, 187 A.3d at 1244 (Strine, C.J., dissenting).

[332] JX 78, at 1-2; *id.* Scheds. 3.5, 4.1, 4.2(a).

[333] *Id.* § 3.2(c); *Supr. Ct. Op.*, 187 A.3d at 1244 (Strine, C.J., dissenting).

[334] *See* Pls.' Reply Br. 9.

in any way until Campbell signed the Transaction Documents.[335] Kay suggests that Campbell finally capitulated to Kay to avoid financial difficulties and signed the Transaction Documents. The evidence, however, does not support this conclusion. First, Campbell had operated EagleForce Associates for years before Kay's involvement with limited sources of revenue.[336] He had been able to fund the company with loans or investment from others, such as Campbell's wife and Salah, during that time.[337] Second, Campbell had asked Kay to stop contributing funds days before signing, and Campbell had started looking for other funding.[338] Third, Kay had contributed tens of thousands of dollars, against Campbell's clear instructions, as recently as August 21, 2014, only a week before signing the Transaction Documents.[339] It is unclear to me that Kay turning the screws between August 22 and August 28 really changed the EagleForce businesses' financial circumstances to such a degree that Campbell capitulated and signed the Transaction Documents that he believed were incomplete.

At best, Plaintiffs' counter-narrative presents evidence equal to that presented by Campbell. This balance is insufficient to prevail. Plaintiffs must prove that a contract exists by a preponderance of the evidence. Even including their strongest evidence, the

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[335] JX 76, at 3.

[336] *See* Tr. 775:10-11 (Campbell).

[337] Tr. 775:6-11, 926:1-3, 952:23-953:9 (Campbell).

[338] JX 65, at 1.

[339] JX 106.

signatures on the Transaction Documents, the evidence is at best in equipoise. And the evidence certainly does not meet the clear and convincing standard necessary for the relief Plaintiffs seek, specific performance.

D. The LLC Agreement

To be an enforceable contract, the LLC Agreement must also meet the three elements of the *Osborn* test. Just as with the Contribution Agreement, I need address only whether the parties intended that the LLC Agreement would bind them.[340]

In signing the November 2013 and April 2014 Letter Agreements, Kay and Campbell demonstrated their intent to create a limited liability company together. The LLC Agreement "amended and restated a preexisting agreement that stood on its own in the past and could do so in the future."[341] The August 27 version of the LLC Agreement was much more complete than the Contribution Agreement.[342] The parties have not argued that the LLC Agreement is missing material terms.[343]

Nonetheless, Kay and Campbell's negotiations and conduct leading up to the signing and at the signing also apply to the LLC Agreement. Kay and

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[340] *See Supr. Ct. Op.*, 187 A.3d at 1240.

[341] *Id.* at 1239.

[342] *Compare* JX 78, *with* JX 79.

[343] *Supr. Ct. Op.*, 187 A.3d at 1240.

Campbell negotiated the LLC Agreement in tandem with the Contribution Agreement. Indeed, the LLC Agreement is an exhibit to the Contribution Agreement.[344] Rogers and Offit sent drafts of the LLC Agreement with drafts of the Contribution Agreement.[345] Campbell and Kay signed the LLC Agreement at the same meeting where they signed the Contribution Agreement.

Because the facts surrounding the negotiation and signing of the LLC Agreement are largely identical to those of the Contribution Agreement, the conclusion I draw from Kay and Campbell's negotiations and conduct for the Contribution Agreement applies equally to the LLC Agreement. Nothing about the events leading up to or during the August 28 meeting suggests an intent to be bound by one document and not the other. Therefore, I conclude that Campbell did not intend to be bound by the LLC Agreement.

E. Section 18-109 of the Delaware Limited Liability Company Act

The Supreme Court did not reach the question of whether Campbell is subject to jurisdiction by virtue of 6 *Del. C.* § 18-109(a).[346] Plaintiffs argued post-trial that this Court has personal jurisdiction over Campbell because (1) Campbell signed the April 2014 Letter Agreement that named him as a "member, President

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[344] JX 78 Ex. B.

[345] *E.g.*, JX 57.

[346] *Supr. Ct. Op.*, 187 A.3d at 1227 n.127.

and Chairman" of the LLC and, thus, impliedly consented to personal jurisdiction under § 18-109(a)[347] and (2) Campbell actively participated in the management of a Delaware LLC, which also creates implied consent under § 18-109(a).[348] I held in the September 2017 Memorandum Opinion that because the April 2014 Letter Agreement concerns a Virginia LLC, Campbell did not consent to personal jurisdiction in Delaware by signing that agreement.[349] Additionally, I held that Campbell did not participate in the management of a Delaware LLC.[350]

Now, Plaintiffs argue only that § 18-109(a) applies to Campbell because (1) he was aware by at least May 13, 2014, that Eagle Force Holdings was a Delaware LLC by virtue of the LLC Agreement's reference to the March 17, 2014 certificate of formation for Eagle Force Holdings and (2) Campbell consented to this Court's jurisdiction when he did not object to his appointment as a manager of an existing Delaware LLC.[351] Plaintiffs

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[347] Pls.' Answering Post-Trial Br. 44-45.

[348] *Id.* at 45.

[349] *Trial Op.*, 2017 WL 3833210, at *19.

[350] *Id.* The Supreme Court did not reverse or otherwise disturb this holding.

[351] Pls.' Opening Br. 54-55. Plaintiffs waive their earlier argument regarding Campbell's participation in management of a Delaware LLC because they do not raise the issue in their post-remand briefs. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)) ("Issues not briefed are deemed waived.").

assert that § 18-109(a) applies regardless of the enforceability of the Transaction Documents.[352]

Campbell responds that the language of §§ 18-109(a) and 18-101(10)[353] requires Plaintiffs to show that Campbell materially participated in the management of the Delaware LLC or that "a limited liability company agreement or similar instrument under which the limited liability company is formed" names Campbell as a manager.[354] Campbell notes that the Supreme Court did not disturb the finding that Campbell did not materially participate in the management of a Delaware LLC, and he argues that there is no valid limited liability company agreement or similar instrument naming Campbell as a manager of a Delaware LLC.[355] Thus, according to Campbell, § 18-109(a) does not apply here.

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[352] Pls.' Opening Br. 53.

[353] The parties' briefs refer to 6 *Del. C.* § 18-101(10) for the definition of "Manager." Effective August 1, 2019, § 18-101(12) defines "Manager." Del. S.B. 91, 150th Gen. Assem., 82 Del. Laws ch. 48 § 1 (2019). The amended definition, however, does not apply retroactively. This opinion, therefore, refers to subsection 10 and applies § 18-101(10) as it existed prior to the 2019 amendment. *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993) ("Delaware courts have recognized the general principle that statutes will not be retroactively applied unless there is a clear legislative intent to do so.").

[354] Def.'s Answering Br. 46 (citing 6 *Del. C.* § 18-101(10)).

[355] *Id.* at 46-47.

Section 18-109 provides for the service of process on managers of Delaware limited liability companies. The relevant portion of § 18-109(a) states,

> A manager . . . of a limited liability company may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company or any member of the limited liability company. . . . [T]he term "manager" refers (i) to a person who is a manager as defined in § 18-101(10) of this title and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in § 18-101(10) of this title, participates materially in the management of the limited liability company. . . .

Section 18-101(10) provides the definition for "Manager": "a person who is named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement or similar instrument under which the limited liability company is formed."

Plaintiffs' arguments regarding the application of § 18-109(a) do not persuade me to alter my September 2017 ruling because the first document indicating Eagle Force Holdings is a Delaware LLC is the unenforceable LLC Agreement. Plaintiffs argue post-remand that Campbell became a member and manager of Eagle Force Holdings by executing the April 2014 Letter

Agreement and, thus, impliedly consented to personal jurisdiction in Delaware under § 18-109(a).[356] The April 2014 Letter Agreement did not inform Campbell that Kay had secretly created a Delaware limited liability company; nor did it mention anywhere the creation of a Delaware limited liability company.[357] To the contrary, it amended the November 2013 Letter Agreement, which mentioned a Virginia limited liability company.[358] When Campbell signed the April 2014 Letter Agreement, he was unaware that Kay had secretly created a Delaware LLC. The April 2014 Letter Agreement, thus, does not serve as implied consent to jurisdiction in Delaware.

Plaintiffs also argue that Campbell's failure to object to the provisions in the draft LLC Agreement after he learned of them warrants his implied ratification of those provisions.[359] This argument fails. "Agreements made along the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative."[360] The parties here had not completed their negotiation, and therefore, the provisions of the LLC Agreement "must . . . be treated as provisional and tentative." A close reading of the April 2014 Letter Agreement supports this conclusion: "Until the [LLC Agreement] referred to herein is executed by the parties, [the April 2014 Letter Agreement] shall

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[356] Pls.' Opening Br. 54-55.

[357] *See* JX 12.

[358] *Id.* at 1; JX 1 ¶ 2.

[359] Pls.' Reply Br. 29.

[360] *Leeds*, 521 A.2d at 1102.

govern their conduct of business and the transactions and matters set out herein."[361] Without an enforceable LLC Agreement, the April 2014 Letter Agreement remains the operative agreement, and as I explain above, this letter agreement does not create Campbell's implied consent for this Court's personal jurisdiction. Thus, § 18-109(a) is not a source for this Court's personal jurisdiction over Campbell.

IV. CONCLUSION

For the foregoing reasons, the Transaction Documents are not binding on Campbell. Plaintiffs, therefore, are not entitled to specific performance or damages under the Transaction Documents, and Campbell is not subject to this Court's personal jurisdiction pursuant to the forum selection clauses in the Transaction Documents. Additionally, § 18-109 is inapplicable as a basis for personal jurisdiction. Plaintiffs identify no other basis for personal jurisdiction. Thus, I dismiss the remaining claims in this action. Defendant's motion to conform the pleadings to the evidence is denied as moot.

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[361] JX 12 ¶ 18.

APPENDIX G

2020 WL 3866620
Only the Westlaw citation is currently available.

Supreme Court of Delaware.

EAGLE FORCE HOLDINGS, LLC, and EF Investments, LLC, Plaintiffs-Below, Appellants/Cross-Appellees,
v.
Stanley V. CAMPBELL, Defendant-Below, Appellee/Cross-Appellant.

No. 405, 2019
|
Submitted: May 6, 2020
|
Decided: July 8, 2020

Vaughn, J., filed concurring opinion.

Court Below: Court of Chancery of the State of Delaware, C.A. No. 10803

Upon appeal from the Court of Chancery. **AFFIRMED**, in part; **REVERSED**, in part.

Attorneys and Law Firms

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David L. Finger, Esquire, Finger and Slanina, LLC, Wilmington, Delaware for Appellee/Cross-Appellant.

Before SEITZ, Chief Justice; VALIHURA, VAUGHN, TRAYNOR, Justices; and JOHNSTON, Judge* constituting the Court en Banc.

Opinion

VALIHURA, Justice:

In a decision dated May 24, 2018, (the "Opinion"),[1] this Court reversed and remanded a decision of the Court of Chancery (the "Trial Opinion").[2] This is an appeal of the Court of Chancery's August 29, 2019 decision following remand (the "Remand Opinion").[3]

I. Background

This lawsuit was filed on March 17, 2015 by Plaintiffs Eagle Force Holdings, LLC and EF Investments, LLC (collectively, the "Plaintiffs") against Stanley Campbell. In 2013, Richard Kay and Campbell decided to form a business venture to market medical

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* Sitting by designation under Del. Const. Art. IV § 12.

[1] *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209 (Del. 2018) [hereinafter *Opinion*]. The facts are recounted in detail in the Opinion, and we do not repeat them here, except as necessary to address the issues raised in this appeal.

[2] *Eagle Force Hldgs., LLC v. Campbell*, 2017 WL 3833210 (Del. Ch. Sept. 1, 2017) [hereinafter *Trial Opinion*].

[3] *Eagle Force Hldgs., LLC v. Campbell*, 2019 WL 4072124 (Del. Ch. Aug. 29, 2019) [hereinafter *Remand Opinion*].

diagnosis and prescription technology that Campbell had developed. The parties outlined the principal terms of the investment through two letter agreements in November 2013 and April 2014. Under the principal terms, Kay and Campbell would form a new limited liability company and each would be a fifty-percent member. Kay would contribute cash. Campbell would contribute stock of Eagle Force Associates, Inc. ("Eagle Force Associates"), a Virginia corporation, and the membership interest of Eagle Force Health, LLC ("Eagle Force Health," and together with Eagle Force Associates, "Eagle Force"), a Virginia limited liability company, along with intellectual property.

For many months after April 2014, the parties negotiated several key terms of the transaction documents. Kay contributed cash to Eagle Force Associates. Campbell executed a promissory note for these contributions with the agreement that Kay would cancel the note when they closed the deal on the new venture. After months of negotiations, on August 28, 2014, Kay and Campbell signed versions of two transaction agreements: a Contribution and Assignment Agreement (the "Contribution Agreement") and an Amended and Restated Limited Liability Company Agreement, (the "LLC Agreement," and with the Contribution Agreement, the "Transaction Documents").

A serious question arose as to whether the parties intended to be bound by these signed documents. Plaintiffs asserted that the parties formed binding contracts at the August 28 meeting. Campbell contended that he signed merely to acknowledge receipt of the

latest drafts of the agreements but not to manifest his intent to be bound by the agreements. Whether there was a valid, binding contract affected the other main issue this Court addressed on the prior appeal, namely, whether this Court and the Court of Chancery could exercise personal jurisdiction over Campbell. After numerous evidentiary hearings, a five-day trial, and several motions for contempt filed against Campbell—proceedings spanning more than two years—the Court of Chancery determined that neither transaction document was enforceable. Accordingly, it dismissed the case for lack of personal jurisdiction, even after finding Campbell in contempt of the status quo order.

In reversing the Court of Chancery, this Court held that the trial court did not properly apply the test set forth in *Osborn ex rel. Osborn v. Kemp*.[4] In setting forth the elements of a valid, enforceable contract, we explained that 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."[5]

Though it mentioned the *Osborn* test, the trial court relied primarily on *Leeds v. First Allied*

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[4] 991 A.2d 1153 (Del. 2010).

[5] *Opinion*, 187 A.3d at 1212-13 (quoting *Osborn*, 991 A.2d at 1158). The dissenting Justices agreed that, "the Court of Chancery's analysis tended to blend two issues relevant to formation: whether the parties intended to be bound by the contract and whether the contract contained sufficiently definite terms." *Id.* at 1242.

Connecticut Corp.,[6] a Court of Chancery decision that addresses the enforceability of letters of intent and provides that the "determination of whether a binding contract was entered into will depend on the materiality of the outstanding issues in the draft agreement and the circumstances of the negotiations."[7] Applying *Leeds*, the trial court found that the agreement was not sufficiently definite due to a lack of agreement on certain material terms, primarily the consideration to be exchanged. We acknowledged that this could have been viewed as an implicit finding that the parties never intended to be bound. But we believed there was force in Plaintiffs' contention that the parties' intent to be bound required a separate factual finding. There was evidence within the four corners of the documents and other powerful, contemporaneous evidence, including the actual execution of the agreements, that suggested the parties intended to be bound. However, we acknowledged that there was evidence that cut the other way. Given that this was a question of fact, we remanded the case to the Court of Chancery to make a finding on the parties' intent to be bound.

As to *Osborn's* second inquiry, *i.e.*, whether the contract's terms were sufficiently definite, we said that was largely a question of law. We held that the agreements sufficiently addressed all issues identified by the trial court as material to the parties—including

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[6] 521 A.2d 1095 (Del. Ch. 1986).

[7] *Trial Opinion*, 2017 WL 3833210, at *14 (quoting *Greetham v. Sogima L-A Manager, LLC*, 2008 WL 4767722, at *15 (Del. Ch. Nov. 3, 2008) (citing *Leeds*, 521 A.2d at 1101-02)).

the consideration to be exchanged. As to the last requirement for a valid contract, the existence of legal consideration, the parties did not dispute that legal consideration existed. We directed that, "[o]n remand, as with the Contribution Agreement, the Court of Chancery should revisit the evidence and make an express finding on the parties' intent to be bound by the LLC Agreement."[8] We stated further that, "[g]iven that the parties do not contend before this Court that any terms of the LLC Agreement are not sufficiently definite or that the LLC Agreement is not supported by legal consideration, we conclude that these two prongs are satisfied."[9]

Finally, we addressed the trial court's determination that, because it lacked personal jurisdiction over Campbell, its prior contempt orders were unenforceable and that it, therefore, could not decide the pending contempt motion. More specifically, after presiding over two hearings on the contempt motions, the trial court determined that, because it had found that it lacked personal jurisdiction over Campbell, it could not hold Campbell in contempt and impose sanctions for his violations of a status quo order.[10] We observed that

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[8] *Opinion*, 187 A.3d at 1239.

[9] *Id.* at 1240.

[10] On July 23, 2015, the Court of Chancery granted Plaintiffs' requested status quo order, providing them access to information concerning Eagle Force. *Eagleforce Hldgs., LLC v. Campbell*, 2015 WL 4501504 (Del. Ch. July 23, 2015) (Order) [hereinafter *2015 Order*]. The status quo order required Campbell to give Plaintiffs ten business days' advance notice of any transaction subject to the status quo order, and it mandated that any

this Court had not squarely addressed whether the Court of Chancery could impose sanctions on a defendant for violating a status quo order if the court ultimately found that it lacked personal jurisdiction over the defendant. In resolving this unsettled question, we unanimously held that, "when a Delaware court issues a status quo order pending its adjudication of questions concerning its own jurisdiction, it may punish violations of those orders with contempt and for sanctions, no matter whether it ultimately finds that it lacked jurisdiction."[11] Otherwise, we reasoned, "[t]hose

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transaction that Plaintiffs objected to in writing could not proceed without court approval. On May 27, 2016, while proceedings were pending before the trial court, Plaintiffs moved for sanctions and to hold Campbell in contempt for violating the status quo order (the "First Contempt Motion"). Campbell appeared and testified in an August 31, 2016 evidentiary hearing, but he failed to appear the next day as directed by the trial court. The court found him in contempt for failing to provide the required notice before withdrawing approximately $100,000 in accrued unreimbursed expenses from Eagle Force Associates and paying $38,000 in vendor fees. On March 6, 2017, Plaintiffs filed a supplemental motion for contempt against Campbell for an additional alleged violation of the Order (the "Second Contempt Motion"). On May 5, 2017, the court held an evidentiary hearing on the Second Contempt Motion. Plaintiffs filed yet another such motion on May 24, 2017, captioned Second Supplemental Motion to Hold Defendant in Contempt for Violations of the Order (the "Third Contempt Motion"). The court held an evidentiary hearing on August 28, 2017 on this motion. Campbell testified at the evidentiary hearings on both supplemental motions. The trial court delayed its rulings until its decision on personal jurisdiction.

[11] *Opinion*, 187 A.3d at 1241-42.

orders would be meaningless absent the power to enforce them."[12]

On August 29, 2019, following additional briefing and argument, the Court of Chancery issued its opinion on remand.[13] The court held that Campbell's conduct and communications with Kay, before and during the signing of the Transaction Documents, did not constitute an overt manifestation of assent to be bound by the documents. Accordingly, it held that "the contribution agreement and the operating agreement are not enforceable."[14] Because it concluded that Campbell was not bound by the agreements' forum selection clauses, and because Plaintiffs failed to identify any other applicable basis for personal jurisdiction, the court dismissed the remainder of the claims for lack of personal jurisdiction.

Plaintiffs now raise three issues in their appeal of the Remand Opinion. First, Plaintiffs assert, in a nutshell, that by relying on and drawing inferences from the parties' subjective state of mind, the trial court: (i) considered the wrong evidence (Campbell's state of mind); (ii) applied the wrong test for determining

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[12] *Id.* at 1241 (citations omitted). As noted above, on this point, this Court was unanimous. *See id.* at 1242 (Strine, C.J., concurring in part, dissenting in part, joined by Vaughn, J.) (stating that, "[h]aving exercised the privilege to litigate before our Court of Chancery, [Campbell] was bound to honor its orders relating to his behavior, and he cannot escape responsibility for his non-compliance by claiming that he was only before the court to contest the question of personal jurisdiction").

[13] *Remand Opinion*, 2019 WL 4072124.

[14] *Id.* at *1.

intent to be bound (*e.g.*, a subjective test based upon Campbell's unexpressed state of mind); and (iii) reached an irrelevant conclusion (*e.g.*, in his mind, Campbell did not intend to be bound). Second, Plaintiffs assert that the Court of Chancery erred in failing to undertake a separate analysis of the parties' intent to be bound to the LLC Agreement and "ignored and failed to take into account the additional factors appurtenant to the LLC Agreement identified in this Court's [Opinion]."[15] Finally, Plaintiffs contend that the Court of Chancery erred in finding that Campbell did not consent to personal jurisdiction based upon Campbell's actual consent contained in the executed LLC Agreement. They further assert that the court erred in finding that Campbell did not impliedly consent to personal jurisdiction pursuant to 6 *Del. C.* § 18-109(a). They base this assertion on Campbell's "knowingly accepting 50%—member status and appointment as a manager, director, and officer of Eagle Force Holdings, LLC, pursuant to the April 2014 Letter Agreement."[16]

Campbell counters that Plaintiffs do not claim that the factual findings lack evidentiary support in the record. Rather, according to Campbell, Plaintiffs complain that the court weighed more heavily evidence favorable to Campbell, and that this does not constitute reversible error. As to the assertion that the trial court erred in not making separate findings as to the

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[15] Opening Br. at 4.

[16] *Id*.

LLC Agreement, Campbell cites the trial court's finding that "the facts surrounding the negotiation and signing of the LLC Agreement are largely identical to those of the Contribution Agreement" and that its conclusions drawn from those facts apply equally to both.[17] Finally, Campbell asserts that he did not impliedly consent to jurisdiction.

In addition, Campbell raises three arguments on cross-appeal. First, he asserts that in the absence of personal jurisdiction, he was not subject to contempt citations arising from the status quo order, and that to hold otherwise violated the Due Process requirement of the Fourteenth Amendment to the United States Constitution. Second, he contends that the Court of Chancery erred by finding him in contempt without Plaintiffs first submitting a sworn affidavit as required by Court of Chancery Rule 70(b). Third, Campbell contends that the Court of Chancery erred by holding him in contempt for action taken between that court's initial dismissal based upon lack of personal jurisdiction, and this Court's reversal, when there was no stay of proceedings under Court of Chancery Rule 62.

For the reasons stated below, we reject all claims of error, except for the third issue on cross-appeal, and thus, we AFFIRM the decision of the Court of Chancery in part, and REVERSE in part.

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[17] *Remand Opinion*, 2019 WL 4072124, at *21.

II. Analysis

A. The Intent to Be Bound

First, we address Plaintiffs' contention, broadly framed, that the Court of Chancery "erred in finding that intent to be bound to the Transaction Documents was not manifested by Campbell's objective overt acts."[18] Plaintiffs assert a myriad of subsidiary challenges, all of which we have considered and find to be meritless. Some challenges assert that the court improperly focused on subjective evidence and ignored other objective evidence. Many challenges criticize the trial court's weighing of the evidence, and still others assert that its credibility determinations were flawed.[19] We will not address, in detail, each challenge, but rather, will deal with them broadly. We have reviewed each of the challenges carefully, and we now have had two occasions to review this record. Based upon our review of the record, we find none of Plaintiffs' claims of error to be meritorious.

The parties begin their discussion of these issues by suggesting that the trial court ignored the guidance in our Opinion, and they disagree on the level of deference to be given to the trial court's factual findings. In our Opinion, we stated that, "[u]nder Delaware law, overt manifestation of assent—not subjective intent—controls the formation of a contract."[20] "As such, in

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[18] Opening Br. at 3.

[19] *See*, *e.g.*, Opening Br. at 41-44.

[20] *Opinion*, 187 A.3d at 1229 (quoting *Black Horse Capital, LP v. Xstelos Hldgs., Inc.*, 2014 WL 5025926, at *12 (Del. Ch. Sept.

applying this objective test for determining whether the parties intended to be bound, the court reviews the evidence that the parties communicated to each other up until the time that the contract was signed—*i.e.*, their words and actions—including the putative contract itself."[21] Whether a party manifested an intent to be bound is a question of fact.[22] The weight given to the evidence is for the trier of fact to determine.[23] Further,

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30, 2014) (quoting *Indus. Am. Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971))) (internal quotation marks omitted).

[21] *Id.* at 1229-30 (citing *Black Horse*, 2014 WL 5025926, at *12). In their Opening Brief, Plaintiffs weakly contend that the trial court erred in considering evidence that post-dated the signing of the Transaction Documents. They assert that, "no evidence was offered (or identified by the Chancery Court) as to when each alleged incident with an employee took place," and that, "in the absence of evidence that the various reported incidents took place before August 28, it was improper for the Chancery Court to rely on them to find Campbell subjectively intended not to be bound on August 28." Opening Br. at 17-18. They refer to several specific examples in their Reply Brief and contend that these events occurred after August 28. Reply Br. at 34-36. They acknowledge that some of the testimony was "vague and generalized" as to the timing of them. Plaintiffs assert that the trial court improperly relied upon these examples and inferred that they may have caused Campbell to have second thoughts about proceeding with the deal. We first note the trial court's recognition of our guidance in the Remand Opinion. *See Remand Opinion*, 2019 WL 4072124, at *3 (stating that, "[t]he evidence that may be considered is limited to the conduct of the parties during the period they negotiated the agreements and when they signed the agreements," and that, it considered "only that evidence that the parties communicated to each other up until the time the parties signed the documents"). Further, based upon our review of the record, we find no reversible error.

[22] *Opinion*, 187 A.3d at 1230.

[23] *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002).

claims of inconsistencies in the testimony of a witness go to the weight of that testimony, and the trier of fact is free to accept part of a witness's testimony while rejecting other parts.[24]

As this Court stated in *CDX Holdings, Inc. v. Fox*:

> After a trial, findings of historical fact are subject to the deferential 'clearly erroneous' standard of review. That deferential standard applies not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. When factual findings are based on determinations regarding the credibility of witnesses, the deference already required by the clearly erroneous standard of appellate review is enhanced.[25]

Plaintiffs assert that the trial court erred in focusing on Campbell's subjective thoughts about events and communications and what he thought about Kay as a person. The Court of Chancery concluded that, "this meeting and the events leading up to it do not suggest to me that Campbell intended to be bound by the Contribution Agreement."[26] Pointing to the court's reference to Campbell's intent, Plaintiffs argue that

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[24] *Jeffers v. State*, 934 A.2d 908, 911 (Del. 2007).

[25] 141 A.3d 1037, 1041 (Del. 2016).

[26] *Remand Opinion*, 2019 WL 4072124, at *20.

the court instead should have focused on whether a reasonable person in Kay's position would have understood from Campbell's overt actions of August 28, that Campbell intended to be bound.[27]

As to the assertion that the Court of Chancery improperly relied on the parties' subjective intent and disregarded objective evidence, we are satisfied that the Court of Chancery adhered to this Court's guidance for adjudicating the remaining issue of intent on remand. It engaged in a careful and detailed analysis of the factual record, and it focused on objective events. At the outset of its Remand Opinion, the trial court stated its key holding, *i.e.*, "that Campbell's conduct and communications with Kay before and during the signing of the transaction documents do not constitute an overt manifestation of assent to be bound by the documents."[28]

Plaintiffs next contend that if the subjective evidence were stripped away, the overt acts leading up to the August 28 signing tip the scales in their favor.[29] We

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[27] Opening Br. at 16.

[28] *Remand Opinion*, 2019 WL 4072124, at *1; *see also id.* at *18 ("The record evidence reveals that Campbell's conduct and communications do not constitute an overt manifestation of his assent to be bound by the Contribution Agreement.").

[29] For example, Plaintiffs contend that: Campbell's words and actions on August 28 conveyed his intent to be bound; the trial court disregarded the testimony of Katrina Powers (who was present at the August 28 signing); Campbell's testimony regarding a practice of meeting with Kay and Powers to acknowledge receipt of drafts by signing them was not credible; other objective evidence leading up to the August 28 signing was ignored by the

reject Plaintiffs' invitation to re-weigh the evidence. We are satisfied that the trial court appropriately weighed the evidence and committed no error in this regard. The record reflects that in the trial court's view, Plaintiffs did not sufficiently tip the scales in their favor, as the trial court found:

> At best, Plaintiffs' counter-narrative presents evidence equal to that presented by Campbell. This balance is insufficient to prevail. Plaintiffs must prove that a contract exists by a preponderance of the evidence. Even including their strongest evidence, the signatures on the Transaction Documents, the evidence is at best in equipoise. And the evidence certainly does not meet the clear and convincing standard necessary for the relief Plaintiffs seek, specific performance.[30]

Plaintiffs suggest that the trial court erred in not giving greater weight to the parties' signing of the Transaction Documents. Although the trial court recognized that, "[s]ignatures are often dispositive evidence of an intent to be bound,"[31] it concluded that "in this highly unusual case, the signatures alone are not sufficient."[32] On this point, we are sympathetic to

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court; and the court admitted that it could not explain Campbell's overt acts in a manner consistent with its finding that Campbell did not intend to be bound.

[30] *Remand Opinion*, 2019 WL 4072124, at *20.

[31] *Id.* at *18.

[32] *Id.*

Plaintiffs' argument that the act of placing signatures on the signature lines at the end of a contract "is so universally recognized as the means of accepting and binding one's self to the contract, that no other act or statement is ordinarily required for the signature to create legal consequences."[33] Indeed, Plaintiffs point out that on August 28, Campbell did not merely initial or put his first name on the front or last page of the document, as he testified he sometimes did.[34] Rather, he put his entire signature on the signature lines of the Contribution and LLC Agreements, and hand-wrote his title, "CEO" and/or hand-printed his name on them. (*See* Exs. A, B). After Kay and Campbell signed the agreements, Campbell walked around his desk and embraced Kay and Powers.[35] This evidence strongly and objectively suggests more than mere acknowledgement of receipt of the documents. But in remanding this case, we recognized that this case was unusual, and we specifically asked the trial court to make a finding on intent to be bound. The trial court did just that, and found that the evidence revealed that Campbell had a practice of endorsing draft documents to acknowledge receipt, and that "Campbell also credibly testified that, consistent with this practice, Kay requested Campbell's signature to acknowledge receipt during the August 28 meeting."[36] Even if a reviewing

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[33] Opening Br. at 21-22.

[34] App. to Opening Br. at A1056 (Campbell Dep. at 363-64); *see also id.* at A1521 (Trial Tr. at 916).

[35] *Trial Opinion*, 2017 WL 3833210, at *11.

[36] *Remand Opinion*, 2019 WL 4072124, at *18.

court were to come out differently, that is not a basis to overturn the decision of the trial court.[37] Plaintiffs' dissatisfaction with the weight given to this evidence does not constitute reversible error.

Plaintiffs also contend that the trial court did not properly consider evidence and testimony from the third attendee at the August 28 meeting, Katrina Powers. The Court of Chancery concluded that, as to Powers, "it appears that she was not present for or privy to all communications between Kay and Campbell."[38] The court stated, "[f]urther, she does not recall the details of the conversations between Kay and Campbell during that meeting."[39] Plaintiffs argue, however, that "Powers gave detailed testimony about what was said, and not said, at the August 28 meeting which Chancery did not take into account when it weighed the evidence this time around."[40] Powers testified that she was present for the entire meeting,[41] but it appears

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[37] *See New Castle Cnty. v. DiSabatino*, 781 A.2d 687, 690-91 (Del. 2001) ("This court must accept the factual findings made by the trial judge if those findings are supported by the record and are the product of an orderly and logical deductive process. In the exercise of judicial restraint, the applicable standard of appellate review requires this Court to defer to such factual findings, even though independently we might have reached different conclusions.").

[38] *Remand Opinion*, 2019 WL 4072124, at *13.

[39] *Id*.

[40] Opening Br. at 26.

[41] Powers did testify that she was present during the entire meeting when the Transaction Documents were executed:

that Powers was not privy to emails that were sent between Kay and Campbell.[42] The Court of Chancery found that she was not aware of *all communications* between Kay and Campbell. Although the record suggests that Powers was in fact present during the meeting at issue, just as Plaintiffs say, she did not have all the information about all that was transpiring, nor did she remember it all.[43] We do not find a basis for upsetting the trial court's conclusions that the "credibility assessments of Kay and Campbell tip the scales in this case."[44]

Plaintiffs devote a section of their Opening Brief to arguing that the trial court's "credibility determination is flawed and should not be given deference because the court ignored relevant evidence directly contradicting Campbell's credibility."[45] They further

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> Q. During the second visit in particular, were you in the presence of Mr. Campbell the whole time that Mr. Kay was in the presence of Mr. Campbell?
>
> A. Yes.

App. to Opening Br. at A1136 (Trial Tr. at 237/24-238/3).

[42] *Remand Opinion*, 2019 WL 4072124, at *11.

[43] Powers testified that she did not quite remember what was spoken about: "I'm sure we spoke. I'm not sure what the conversation was. But, you know, I had the documents. That was obviously the reason why we were there, why we had waited around." App. to Opening Br. at A1136 (Trial Tr. at 237/18-21). *see also id.* at A1181 (Trial Tr. at 291-92).

[44] *Remand Opinion*, 2019 WL 4072124, at *11.

[45] Opening Br. at 41. In this regard, Plaintiffs contend, for example, that: the objective facts do not support Campbell's credibility concerning the events of August 28; there was an abundance of evidence (including the testimony of Katrina Powers)

contend that the objective facts do not support Campbell's credibility concerning the events of the August 28 meeting when the Transaction Documents were signed. Finally, they ask this Court to reverse, and to make our own credibility determinations, instead of remanding the matter to the Court of Chancery.[46]

We reject these contentions as well. The trial court stated that it "had multiple opportunities to observe Campbell and assess his credibility; he testified before [the court] on three days of the five-day trial and at four evidentiary hearings," and that "[h]is testimony as it relates to his intent to be bound by the Transaction Documents is credible."[47] The trial court further found that, "[a]fter listening to Campbell's testimony on multiple days, [it found] Campbell to be credible concerning the events of August 28 and place[d] more weight on Campbell's testimony when it conflict[ed] with Kay's and there [was] an absence of contemporaneous evidence."[48] We decline Plaintiffs' request that we draw

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that undermined Campbell's credibility; the undisputed facts both before and after August 28 support the credibility of Kay and Powers; Campbell's testimony at trial was contradicted by his prior deposition testimony; and Campbell's credibility was undercut by having been found in contempt by the trial court on four occasions.

[46] They argue in their Opening Brief that, "[t]his Court should make its own determination of the intent to be bound issue and reverse, not remand." Opening Br. at 55.

[47] *Remand Opinion*, 2019 WL 4072124, at *15.

[48] *Id.* We reject Plaintiffs' various other contentions that certain evidence was disregarded or ignored. We do not find that to be the case, or that any such challenges, singly or collectively, constitute reversible error.

our own inferences and make our own fact findings. As we said in *Levitt v. Bouvier*:

> It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact. When the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, his findings will be approved upon review. If there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm.[49]

Finally, Plaintiffs assert that despite this Court's prior holding that the Transaction Documents sufficiently addressed all issues identified by the trial court as material to the parties, the trial court "attempted to reinsert this factor in support of the intent to be bound factor. . . ."[50] We note at the outset that Plaintiffs did not make this precise argument in their Opening Brief on appeal, and thus, it is arguably waived.[51] But even so, we reject it. The separate concurring and dissenting opinion differed with the Majority on this point. The

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[49] 287 A.2d 671, 673 (Del. 1972) (citations omitted).

[50] Reply Br. at 49-50.

[51] Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."). Plaintiffs do argue that the trial court observed that the Contribution Agreement "did not reflect a final Agreement" based upon omissions in the document and the presence of the word "Draft" on the first page supports a finding that Campbell did not intend to be bound when signing it. Opening Br. at 40.

Remand Opinion cites the dissent several times,[52] and it observes that, "[t]he Contribution Agreement, with its omissions, does not reflect a document a reasonable person expects to be a final version."[53] If that sentence stood alone, we would understand the basis for Plaintiffs' concern. But the trial court's next sentence states that, "[r]egardless, this meeting and the events leading up to it do not suggest to me that Campbell intended to be bound by the Contribution Agreement."[54] The Remand Opinion also states that, "because the Supreme Court's analysis suggests that both transaction documents address all terms material to the parties, this Court does not examine the materiality of the terms of the agreements, or lack thereof."[55] Thus, we think the fairest reading of the Remand Opinion is that the trial court intended to address, and did address, only the parties' intention to be bound, and that it did not disregard this Court's prior holding.

As to Plaintiffs' contention that the Court of Chancery failed to undertake a separate analysis of the parties' intent to be bound to the LLC Agreement, we find no reversible error. We are satisfied with the trial

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[52] *See*, *e.g.*, *Remand Opinion*, 2019 WL 4072124, at *18 nn.298, 299; *id.* at *20 nn.331, 333.

[53] *Id.* at *20.

[54] *Id.*

[55] *Id.* at *3; *see also id.* at *13 n.214 ("Although the Supreme Court has tasked me with determining the parties' intent to be bound, the Supreme Court appears to foreclose any analysis of material terms, as I held in my first opinion that there were missing material terms, which the Supreme Court reversed.").

court's explanation of its holding as to the LLC Agreement where it found that:

> Because the facts surrounding the negotiation and signing of the LLC Agreement are largely identical to those of the Contribution Agreement, the conclusion I draw from Kay and Campbell's negotiations and conduct for the Contribution Agreement applies equally to the LLC Agreement. Nothing about the events leading up to or during the August 28 meeting suggests an intent to be bound by one document and not the other. Therefore, I conclude that Campbell did not intend to be bound by the LLC Agreement.[56]

Finally, we reject Plaintiffs' contention that the Court of Chancery erred in finding that Campbell did not consent to personal jurisdiction based upon Campbell's actual consent contained in the executed LLC Agreement, and in finding that Campbell did not impliedly consent to personal jurisdiction pursuant to 6 *Del. C.* § 18-109(a).

We did not reach this question in our prior Opinion. On remand, the trial court, in addressing the implied consent issue, held as follows:

> Plaintiffs argue post-remand that Campbell became a member and manager of Eagle Force Holdings by executing the April 2014 Letter Agreement and, thus, impliedly consented to personal jurisdiction in Delaware under § 18-109(a). The April 2014 Letter

[56] *Id.* at *21.

> Agreement did not inform Campbell that Kay had secretly created a Delaware limited liability company; nor did it mention anywhere the creation of a Delaware limited liability company. To the contrary, it amended the November 2013 Letter Agreement, which mentioned a Virginia limited liability company. When Campbell signed the April 2014 Letter Agreement, he was unaware that Kay had secretly created a Delaware LLC. The April 2014 Letter Agreement, thus, does not serve as implied consent to jurisdiction in Delaware.[57]

The trial court also rejected Plaintiffs' contention that Campbell's failure to object to the provisions in the draft LLC Agreement after he learned of them constituted his implied ratification of them. It held that without an enforceable LLC Agreement, the April 2014 Letter Agreement remained the operative agreement, and that it (for the reasons quoted above) did not reflect Campbell's implied consent to the exercise of personal jurisdiction in Delaware. We find no reversible error in the trial court's conclusions.

B. The Cross-Appeal

We now address Campbell's arguments on cross-appeal. Campbell's first argument, that in the absence of personal jurisdiction, he was not subject to contempt citations arising from the status quo order, is largely a rehash of the issue we rejected in the first appeal. We noted that although this Court divided on the issue of

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[57] *Id.* at *22.

jurisdiction in the first appeal, it was unanimous in holding that Campbell was subject to contempt for his violations of the status quo order.

On remand, the Court of Chancery scheduled separate briefing on the merits and on the contempt motions. On September 14, 2018, the Plaintiffs filed a Motion for Contempt Seeking an Order Directing Campbell to Return Funds. This was their fourth contempt motion (the "Fourth Contempt Motion").[58]

On April 23, 2019, the Court of Chancery granted Plaintiffs' Second and Third Contempt Motions, awarded sanctions on the First, Second and Third Contempt Motions, and awarded reasonable attorneys' fees in an amount to be determined later.[59] The court also granted the Fourth Contempt Motion with sanctions to be determined later. On May 17, 2019, the court ordered disgorgement of funds that Campbell had taken, and it awarded attorneys' fees. It also ordered the appointment of a "facilitator" to monitor Campbell's compliance. Then, on September 9, 2019, the court awarded to Plaintiffs attorneys' fees and costs in connection with the contempt motions.

As to the First, Second, and Third Contempt Motions, we reject Campbell's argument that in the absence of personal jurisdiction, he was not subject to the

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[58] *See* App. to Opening Br. at A14.

[59] *Eagle Force Hldgs., LLC v. Campbell*, 2019 WL 1778269 (Del. Ch. Apr. 23, 2019) (Order).

contempt citations arising from the status quo order.[60] In the first appeal, we held unanimously that, "when a Delaware court issues a status quo order pending its adjudication of questions concerning its own jurisdiction, it may punish violations of those orders with contempt and for sanctions, no matter whether it ultimately finds that it lacked jurisdiction."[61] We observed that, "the Court of Chancery issued its status quo order while the defendant was *before the court*, as other proceedings were pending."[62] We observed that some courts have found that, although a party may contest a contempt order for lack of personal jurisdiction, "the party waives that right if it voluntarily decides to contest the *merits* of the claim that it violated a court order, regardless of whether that order was validly issued."[63] We also said that a court must be able to secure compliance with status quo orders or they would be rendered meaningless. Campbell's present argument, in essence, challenges our prior holding. He never sought to challenge that ruling on reargument, and we reject his attempt to re-litigate this issue.[64]

As to Campbell's second contention of error on cross-appeal, that the court erred by finding him in contempt without Plaintiffs first submitting a sworn

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[60] Campbell does not contest any of the Court of Chancery's factual findings relating to his violations of the order.

[61] *Opinion*, 187 A.3d at 1241-42.

[62] *Id.* at 1241 (emphasis in original).

[63] *Id.* at 1242 (emphasis in original).

[64] *See Mendez v. State*, 69 A.3d 371, 2013 WL 3270899, at *1 (Del. June 24, 2013) (Table).

affidavit under Court of Chancery Rule 70(b), we reject that claim as well. Campbell does not dispute that he received the information that a Rule 70(b) affidavit would contain. Under Rule 70(b),[65] the Court of Chancery may find a party in contempt of court if it fails to obey or to perform an order of which it has knowledge.[66] To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it.[67] In denying Campbell's August 25, 2017 Motion to Dismiss or Reschedule the Contempt Hearing, the Court of Chancery held that, "[t]here is no claim that the defendant or his counsel lacks knowledge or

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[65] Court of Chancery Rule 70(b) states:

> Contempt and other remedies for disobedience of Court order.—For failure to obey a restraining or injunctive order, or to obey or to perform any order, an attachment may be ordered by the Court upon the filing in the cause of an affidavit showing service on the defendant, or that the defendant has knowledge of the order and setting forth the facts constituting the disobedience. At the hearing of the attachment, the examination of the defendant and also of witnesses shall be oral before the Court, unless it be otherwise ordered by the Court.
>
> In other proceedings taken in the name of the State to punish contempt, the attachment may be ordered upon the filing of an affidavit setting forth the facts constituting the contempt and thereupon the proceedings shall be as set forth in the preceding paragraph of this rule.

Ct. Ch. R. 70(b).

[66] *Israel Disc. Bank of N.Y. v. First State Depository Co. LLC*, 2012 WL 1021180, at *2 (Del. Ch. Mar. 19, 2012).

[67] *Id.*

notice of the July 25, 2015 [sic] order sought to be enforced, or the motion to hold defendant in contempt."[68] Also, in granting the Second and Third Contempt Motions and awarding sanctions on the First Motion, the court held that, "Campbell had notice of the Order."[69] In fact, the court noted that Campbell had even submitted a proposed order. He did not challenge the Court of Chancery's findings. Thus, we agree with Plaintiffs that Campbell's argument in this regard is form over substance, and we, accordingly, reject it.

Finally, we address Campbell's third argument on cross-appeal, namely, that the Court of Chancery erred by holding him in contempt for action taken between its initial dismissal based upon lack of personal jurisdiction and this Court's reversal, when no stay of proceedings had been obtained under Court of Chancery Rule 62. We agree with Campbell on this issue.

Plaintiffs filed the Fourth Contempt Motion on September 14, 2018, alleging that in the interim period between the Court of Chancery's issuance of the Trial Opinion and this Court's issuance of the Opinion, "Campbell made nine payments from Eagle Force Associates, Inc.'s funds to himself and his wife totaling $1,853,558.47" in violation of Section 3(F) of the July 23, 2015 status quo order (the "2015 Order") issued by

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[68] Answering Br. Ex. B (August 30, 2016 Order).

[69] *Eagle Force*, 2019 WL 1778269, at *2.

the Court of Chancery at the outset of the litigation.[70] As to its duration, the 2015 Order states:

> This Preliminary Injunction shall take effect immediately upon its execution by the Court (the "effective date") and shall remain in effect pending the *conclusion of this action* or further order of this Court.[71]

The parties disputed whether Campbell remained bound by the 2015 Order during the interim appeal period. The Court of Chancery, in an order dated April 23, 2019, held that Campbell did indeed remain bound, holding that:

> The Order bound Campbell during the appeal period because the Delaware Supreme Court's reversal of the Memorandum Opinion nullified the Memorandum Opinion. By making payments to himself and to his wife during the appeal period, Campbell took the risk that the Supreme Court may reverse the Memorandum Opinion, which it ultimately did.[72]

Then, in its May 17, 2019 Order Resolving the Fourth Motion for Contempt, the court stated that,

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[70] Answering Br. Ex. D at ¶ 4 (April 23, 2019 Order Addressing Pls.' Mot. for Contempt) (internal formatting and quotation marks omitted).

[71] *2015 Order*, 2015 WL 4501504, at *3 (emphasis added).

[72] Answering Br. Ex. D at ¶ 6 (April 23, 2019 Order Addressing Pls.' Mot. for Contempt); *See id.* at ¶ 5 ("[T]he effect of a general and unqualified reversal . . . of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered." (quoting 5 C.J.S. *Appeal and Error* § 1126 (updated Mar. 2019))).

"Campbell agrees that he must return $1,097,558.47 to Eagle Force Associates, Inc."[73] Accordingly, the Court of Chancery ordered Campbell to disgorge $1,097,558.47 to Eagle Force Associates.

We disagree with the Court of Chancery that Campbell remained bound by the 2015 Order when he withdrew funds from Eagle Force Associates during the interim appeal period. The Court of Chancery's determination in 2019 that Campbell remained bound conflicts with its own prior ruling, issued in January 2018, which stated unequivocally that the 2015 Order had been dissolved upon issuance of the Trial Opinion. That 2018 ruling was issued in response to Plaintiffs' Motion for Partial Renewal of Preliminary Relief Order Pending Appeal ("Motion for Partial Renewal"), which they filed on December 12, 2017, requesting renewal of the 2015 Order. In that motion, Plaintiffs acknowledged that, "[a]t the time the Court entered its Memorandum Opinion in this case, *the Court dissolved the [2015 Order]* that, *inter alia*, restricted Defendant Stanley Campbell from selling or disposing of equity in [Eagle Force], or certain defined intellectual property. . . ."[74] In its January 24, 2018 order denying that

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[73] Answering Br. Ex. E at ¶ 5 (May 17, 2019 Order Resolving Pls.' Mot. for Contempt).

[74] Mot. For Partial Renewal of Prelim. Relief Order Pending Appeal at 1, *Eagle Force Hldgs., LLC v. Campbell*, 2018 WL 534465 (Del. Ch. Jan. 24, 2018) (No. 10803-VCF) (emphasis added). Plaintiffs contend that they moved for the partial renewal of the 2015 Order pending appeal because they were concerned with the appeal becoming moot under our holding in *First Allied Conn. Corp. v. Leeds*, 520 A.2d 1044, 1987 WL 36213, at *1 (Del.

motion (the "January 2018 Order"), the court stated that "on September 1, 2017, the Court issued a Memorandum Opinion dismissing Plaintiffs' complaint for lack of personal jurisdiction and *dissolved the [2015] Order prohibiting Defendant from selling or transferring equity in Eagle Force Associates, Inc., equity in Eagle Force Health, LLC, or specified intellectual property assets*."[75] The court stated further that, "Plaintiffs seem to be asking for a *per se* rule that the Court issue an injunction in all cases where a finding regarding the ownership of equity has been appealed, but I am aware of no such rule."[76] Having failed in the Court of Chancery to obtain a renewal of the 2015 Order, Plaintiffs then filed a motion in this Court for partial renewal of the 2015 Order, again acknowledging that, "[w]hen Chancery Court entered its Memorandum Opinion deciding this case (the subject of the pending appeal), *it dissolved the [2015 Order]*."[77] Without commenting on

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Jan. 13, 1987) (Table) (dismissing the appeal as moot when appellees, who were not restrained from selling the property at issue to a third party, sold the property to a third party after the trial court's judgment, thereby rendering appellant's claim for specific performance "impossible to accomplish."). Thus, they contend that the requested stay was not a waiver of their argument that the 2015 Order remained in effect.

[75] *Eagle Force Hldgs., LLC v. Campbell*, 2018 WL 534465, at *1 (emphasis added).

[76] *Id.*

[77] Pls.' Mot. For Partial Renewal of Prelim. Relief Pending Appeal at 2, *Eagle Force Hldgs., LLC v. Campbell*, No. 399, 2017 (Del. Jan. 31, 2018) (emphasis added).

whether the 2015 Order had dissolved, we denied the motion on January 31, 2018.[78]

Nearly a year later, during the December 13, 2018 oral argument on Plaintiffs' Fourth Contempt Motion, the Court of Chancery pointed out that Plaintiffs' Motion for Partial Renewal had stated that "the Court dissolved the [2015] Order" when the court entered the Trial Opinion. The court specifically asked counsel to address that language.[79] In fact, it asked Plaintiffs' counsel: "what I'm struggling with is if the [2015 Order] wasn't dissolved, why did you need [the partial renewal] at all?"[80] Plaintiffs explained that their use of the word "dissolved" was "unfortunate," and was an attempt to emphasize the risk of their appeal becoming moot under *Leeds*.[81] Later, in its April 23, 2019 Order Addressing Plaintiffs' Motion for Contempt, the court, without mentioning its prior January 2018 Order, held that Campbell remained bound by the 2015 Order in the interim appeals period.

Under these circumstances, we hold that it would be unfair and inequitable to hold that Campbell remained bound by the 2015 Order when the Plaintiffs contended, and the Court of Chancery itself stated in its January 2018 Order, that the 2015 Order had

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[78] *Eagle Force Hldgs., LLC v. Campbell*, No. 399, 2017 (Del. Jan. 31, 2018).

[79] Oral Argument Tr. at 93, *Eagle Force Hldgs., LLC v. Campbell*, 1083-VCF (Del. Ch. May 17, 2019) (Order).

[80] *Id.* at 95.

[81] *Id.* at 96; *See Leeds*, 520 A.2d 1044, 1987 WL 36213.

dissolved upon issuance of the Trial Opinion.[82] But even apart from the court's prior ruling, with no stay order in place during that interim period, Campbell cannot be held in contempt for a violation of it.[83]

On appeal, Plaintiffs direct our attention to the text of the 2015 Order, arguing that, by its terms, the 2015 Order remained "in effect pending the conclusion of this action or further order of this Court," and the action had not concluded because there was an appeal pending. But based upon the parties' own pleadings and the court's January 2018 Order, "conclusion of this action" was likely intended to mean the trial court's post-trial final judgment issued on September

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[82] We are aware that in the May 17, 2019 Order Resolving Plaintiffs' Motion for Contempt, the Court of Chancery stated that "[i]n the Stipulated Order, Campbell waives his due process right to an evidentiary hearing to contest whether Campbell had notice of the [2015] Order and whether he violated the [2015] Order." But in the referenced May 10, 2019 stipulated order, Campbell stated that, "[n]othing in this stipulation shall be deemed to be a waiver of Campbell's right to seek an appeal to the Delaware Supreme Court from this Court's Order [Directing Campbell to Return Funds Taken from Eagle Force Associates, Inc. during Appeal Period], except as to the amount of funds taken, or to seek a stay of the Order pending appeal."

[83] *See* Del. Const. Art. IV, § 24; *see also* Randy J. Holland, *The Delaware State Constitution* at 193 (2d ed. 2017) ("Under [Article IV, section 24], appellate proceedings do not operate as a stay on the execution of the judgment, unless sufficient security is given. . . . The Supreme Court has explained that the supersedeas bond serves 'to protect the appellee from losing the benefit of the judgment through the delay or ultimate non-performance by the appellant.' ") (citing *DiSabatino v. Salicete*, 681 A.2d 1062, 1066 (Del. 1996)).

1, 2017.[84] This reading is also more consistent with the commonly understood duration of a preliminary injunction.[85] Thus, even aside from the prior pleadings

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[84] Looking to *Blacks' Law Dictionary*, we note that "action" is defined as a "civil or criminal judicial proceeding." *Action*, *Blacks' Law Dictionary* (11th ed. 2019). The definition then quotes *Estee's Pleadings Practice, and Forms*, stating that, "[m]ore accurately, it is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree. *The action is said to terminate at judgment*." *Id.* (quoting 1 Morris M. Estee, *Estee's Pleadings, Practice, and Forms* § 3, at 1 (Carter P. Pomeroy ed., 3d ed. 1885)) (internal quotation marks omitted) (emphasis added). "Final judgment" is defined as "[a] court's last action that settles the right of the parties and disposes of all issues in controversy . . . Also termed *final appealable judgment*. *Final judgment*, *Blacks' Law Dictionary* (11th ed. 2019). The parties also later stipulated to an order for preliminary interim relief after our reversal Opinion, which the Court of Chancery granted on June 18, 2018. *Eagle Force Hldgs., LLC v. Campbell*, C.A. No. 10803-VCF, at *9 (Del. Ch. June 18, 2018). This stipulated order was substantially similar to the 2015 Order.

[85] *See Gimbel v. Signal Cos.*, 316 A.2d 599, 602 (Del. Ch. 1974) *aff'd*, 316 A.2d 619 (Del. 1974) ("[T]he preliminary injunction constitutes extraordinary relief generally employed 'to do no more than preserve the status quo pending the decision of the cause at the final hearing on proofs taken.' ") (quoting *Williamson v. McMonagle*, 83 A. 139, 140 (Del. Ch. 1912)); *Powers v. Fidelity & Deposit Co. of Md.*, 41 A.2d 830, 853 (Del. Super. 1945) ("It is clearly and concededly the law of Delaware that an appeal from a decree dissolving an injunction does not operate to reinstate or continue the injunction unless a special order to that effect is made by the Chancellor or by the Supreme Court.") (citing *Cutrona v. City of Wilmington*, 125 A. 417 (Del. Ch. 1924)). Further, federal courts have held that, "[a] preliminary injunction imposed according to the procedures outlined in Federal Rule of Civil Procedure 65 dissolves *ipso facto* when a final judgment is entered in the cause." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010); *see also U.S. ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1512 (10th Cir. 1988) ("With the entry of the final

and ruling, we reject the Plaintiffs' contentions that the 2015 Order remained in effect following the Trial Opinion. Accordingly, we hold that Campbell was not bound by the 2015 Order following the issuance of the Trial Opinion, and thus cannot be held in contempt for violating its terms during the interim appeal period.

III. Conclusion

Accordingly, for the foregoing reasons, we AFFIRM the decision of the Court of Chancery in part, and REVERSE in part.

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judgment, the life of the preliminary injunction came to an end, and it no longer had a binding effect on any one. The preliminary injunction was by its very nature interlocutory, tentative and impermanent." (quoting *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1977))); *Fundicao Tupy S.A. v. U.S.*, 841 F.2d 1101, 1103 (Fed. Cir. 1988); *Cypress Barn, Inc. v. W. Elec. Co.*, 812 F.2d 1363, 1364 (11th Cir. 1987); Charles Alan Wright, Arthur R. Miller & Mary K. Kane, 11A *Federal Practice and Procedure* § 2947 (3d ed.) ("A preliminary injunction remains in effect until a final judgment is rendered or the complaint is dismissed, unless it expires earlier by its own terms, or is modified, stayed, or reversed."); Joseph T. McLaughlin with updates by Anthony J. Scirica, 13 *Moore's Federal Practice—Civil* § 65.20 (2020 ed.) ("The order granting a preliminary injunction remains effective until final adjudication. For example, following a grant of a preliminary injunction, if a plaintiff withdraws the complaint or the action is dismissed for any reason, the preliminary injunction becomes ineffective."); George C. Pratt, 20 *Moore's Federal Practice—Civil* § 308.21 (2020 ed.) (stating that a final judgment in an action for an injunction "will not be stayed, even if an appeal is taken, unless the court orders otherwise").

Exhibit A

Signatures to the Amended and Restated Limited Liability Company Agreement of Eagle Force Holdings, LLC[86]

MEMBERS:

STANLEY V. CAMPBELL

By:
Name:
Title:

Address 2250 Corporate Park Drive
Suite 205
Herndon, Virginia 20171

MEMBERS:

EF INVESTMENTS, LLC
By:
Name:
Title:

Address 11300 Rockville Pike
Suite 715
Rockville, MD 20852

Solely for purposes of Section 3.11.10:

Richard A. Kay

IN WITNESS WHEREOF, the parties have executed this Amended and Restated Limited Liability Company Agreement as of the day and year first set forth above.

COMPANY:

EAGLE FORCE HOLDINGS, LLC,
a Delaware limited liability company

By:
Name:
Title:

[86] App. to Opening Br. at A796-A798.

Exhibit B

Signatures to the Contribution and Assignment Agreement[87]

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be duly executed on its behalf, by its officer(s) thereunto duly authorized or for himself, as of the day and year first set forth above.

EAGLE FORCE HOLDINGS, LLC

By: _____
Name:
Title:

STANLEY V. CAMPBELL

_____

VAUGHN, Justice, concurring:

I continue to believe that the Court of Chancery's finding in its Trial Opinion that Kay and Campbell did not form a contract should have been affirmed for the reasons Chief Justice Strine and I gave in our opinions concurring in part and dissenting in part when this Court's May 24, 2018 Opinion was issued. I agree with the rulings the Court makes today on the contempt issues.

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[87] App. to Opening Br. at A735.

APPENDIX H

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

EAGLE FORCE HOLDINGS, LLC and EF INVESTMENTS, LLC	)	
Plaintiffs,	)	C.A. No. 10803-VCP
v.	)	
STANLEY V. CAMPBELL,	)	
Defendant	)	

MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

(Filed Jun. 19, 2015)

Defendant Stanley V. Campbell ("Defendant" or "Campbell") respectfully moves this Court to dismiss the Plaintiffs' First Amended Complaint for Specific Performance, Declaratory and Injunctive Relief, and Imposition of Constructive Trust (the "Complaint") for, among other things, (i) failure to state a claim upon which relief can be granted, lack of standing, lack of service, lack of service of process, and lack of jurisdiction, pursuant to Court of Chancery Rule 12(b)(1)-(6); and (ii) failure to comply with Court of Chancery Rule 9(b) (the "Motion to Dismiss").

The grounds for the above motion will be set forth more fully in briefs to be submitted in accordance with

a schedule to be agreed upon by the parties or ordered by the Court.

/s/ Richard P. Rollo (#3994)
Richard P. Rollo (#3994)
Robert L. Burns (#5314)
Thomas R. Nucum (#6063)
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendant

Dated: June 19, 2015

APPENDIX I

IN THE COURT OF CHANCERY OF
THE STATE OF DELAWARE

EAGLE FORCE HOLDINGS, LLC and EF INVESTMENTS, LLC,	:	
Plaintiffs,	:	Civil Action No. 10803-VCP
v.	:	
STANLEY V. CAMPBELL,	:	
Defendant.	:	

– – –

Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, July 9, 2015
2:12 p.m.

– – –

BEFORE: HON. DONALD F. PARSONS, JR., Vice Chancellor.

– – –

ORAL ARGUMENT ON PLAINTIFFS' RENEWED MOTION FOR INTERIM EMERGENCY RELIEF and RULINGS OF THE COURT

– – –

[2] APPEARANCES:

FRANK E. NOYES, ESQ.
Offit Kurman, P.A.
–and–
HAROLD M. WALTER, ESQ.
of the Maryland Bar
Offit Kurman, P.A.
for Plaintiffs

RICHARD P. ROLLO, ESQ.
ROBERT L. BURNS, ESQ.
Richards, Layton & Finger, P.A.
for Defendant

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* * *

[48] THE COURT: Right. But I guess it probably a good idea for all of us – and you can sit down for a couple minutes, just because I'll be talking. But I don't mean to cut you off from continuing the discussion.

I've looked just at the introduction to see what the motion for protective order is about. I've read some on the lack of personal jurisdiction and those kinds of things. I think – I don't think the Court's going to be able to resolve whether there is or isn't personal jurisdiction without resolving whether there were or were not agreements reached between these parties. And I, frankly, don't real have any intention, now that we've gotten at this point, to probably even hear the personal jurisdiction [49] until – until I hear the whole thing or someone else hears it on the merits.

And I see what – you know, obviously the plaintiffs have to make Mr. Kay and the person – her name escapes me – who was at the meeting, they're going to have be – the August 28th meeting – available for deposition; but it doesn't make sense to have them being made available for some truncated purpose related to personal jurisdiction that depends somewhat on whether we had an agreement or not, which is the main issue in the case. I really suggest that you ought to be talking about full-fledged discovery, unfortunately. It's not that complicated. You haven't been dealing with one another for more than a couple of years. All issues as far as the personal jurisdiction are preserved and they may come up in a summary judgment context or some sort of thing like that that the Court will have enough before it. And then at that point we'd have to decide how are we going to go by summary judgment or just have a – you know, a trial.

* * *