IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RWI ACQUISITION LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 6902-VCP
	)	
RONNY DEE TODD,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OPINION

Submitted: February 20, 2012
Decided: May 30, 2012

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PARSONS, Vice Chancellor.

This is a declaratory judgment action under 6 *Del. C.* § 18-111 to determine the duties, obligations, and liabilities, if any, of a Delaware limited liability company to one of its initial members. In particular, Plaintiff, RWI Acquisition LLC ("RWI (Del.)"), filed a one-count complaint (the "Complaint") seeking a judicial declaration that: Defendant, Ronny Dee Todd, is no longer a member of RWI (Del.); Todd does not have any equity or other interests in RWI (Del.); and RWI (Del.) does not owe Todd any money in connection with the repurchase of his membership interest in RWI (Del.). Todd, however, is a New Mexico resident whose primary, and perhaps only, connection to the State of Delaware is his involvement with RWI (Del.). In that regard, RWI (Del.) was formed in 2007 as the vehicle to effect a substantial, outside investment in RWI Construction, Inc. ("RWI (N.M.)"), a New Mexico corporation that Todd founded in 1974. Additionally, the gravamen of RWI (Del.)'s Complaint is that it allegedly exercised certain contractual options to repurchase or treat as forfeited Todd's membership interest in RWI (Del.) upon the termination of his employment with RWI (N.M.) in New Mexico. Although this litigation was first-filed, Todd recently commenced another action in New Mexico related to these and other issues surrounding his termination from RWI (N.M.).

This matter is now before the Court on Todd's motion to dismiss the Complaint under Court of Chancery Rules 12(b)(2) for lack of personal jurisdiction and 12(b)(3) for improper venue (the "Motion"). For the reasons stated in this Memorandum Opinion, the Court concludes that a clear forum selection clause in Todd's employment agreement with RWI (N.M.), which closely parallels a similar provision in a related Stock Purchase Agreement (the "SPA"), precludes this Court from determining what effect, if any, Todd's

termination from RWI (N.M.) had upon, at least, a subset of the RWI (Del.) units he previously held. As a result, this Court lacks the ability to determine definitively whether Todd continues to hold any interest in RWI (Del.), at least until a court in New Mexico resolves Todd's ownership of this subset of units. Therefore, on its own initiative, the Court will stay this action as a matter of judicial efficiency and in deference to the apparent intent of the contracting parties in favor of the proceedings now pending in New Mexico.

I. BACKGROUND[1]

A. The Parties

RWI (Del.) is a Delaware limited liability company with its principal office located in Lehi, Utah.

Todd was one of three initial members of RWI (Del.) and sat on RWI (Del.)'s four-person board of managers. Until January 2011, Todd also was the President and founder of RWI (Del.)'s subsidiary, RWI (N.M.).

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[1] Because Todd's Motion raises defenses under Rules 12(b)(2) and (3), the Court "has discretion to consider evidence outside the pleadings." *Sloan v. Segal*, 2008 WL 81513, at *6 (Del. Ch. Jan. 3, 2008) (citing *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *5 (Del. Ch. Oct. 19, 2000), *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000), and 5C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1364, at 124-26 (3d ed. 2004)). Therefore, this Background includes relevant matters not referenced in the Complaint—*e.g.*, Todd's employment agreement with RWI (N.M.), which contains the pertinent forum selection clause. For the most part, however, the facts recited herein largely are undisputed.

B. Facts

1. RWI (Del.)'s acquisition of RWI (N.M.)

Todd incorporated RWI (N.M.) under the laws of New Mexico in 1974 and held all of its outstanding shares between 1974 and March 30, 2007.[2] Sorenson Capital Partners, L.P. ("Sorenson"), a private equity firm based in Salt Lake City, initially contacted Todd in late 2006 to express interest in acquiring RWI (N.M.).[3] In March 2007, an agreement was reached on a final transaction in which the newly-formed RWI (Del.) acquired all of the outstanding stock of RWI (N.M.) from Todd, and Todd would hold a minority interest in RWI (Del.) and be employed by RWI (N.M.), a wholly owned subsidiary of RWI (Del.), moving forward. Indeed, according to Todd, RWI (Del.) was "organized and formed . . . to act as the holding company for the shares of [RWI (N.M.)] once they were purchased from [him]. To [his] knowledge, [RWI (Del.)] conducts no business other than holding all the shares of [RWI (N.M.)]."[4]

To effect Sorenson's investment in RWI (N.M.), the parties entered into a number of agreements dated as of March 30, 2007, the following of which are relevant to this litigation:

- The Operating Agreement of RWI (Del.), which, among other things, identifies Todd as an initial "Member" of the company, defines "Member" to require continuous holding

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2 Def.'s Op. Br. Ex. A-1 ("Todd Aff.") ¶¶ 6-7.

3 *Id.* ¶ 8.

4 *Id.* ¶ 9.

of RWI (Del.) units, and appoints Todd to the company's four-person board of managers[5];

- The SPA memorializing RWI (Del.)'s purchase of Todd's RWI (N.M.) stock and, among other terms, providing for application of Delaware law but designating courts in New Mexico as the "sole and exclusive" forum for any "lawsuit or other proceeding relating to or arising from this Agreement"[6];

- The Subscription Agreement, by which Todd received 2,732.138 Class A Units and 303.571 Class L Units of RWI (Del.) (the "Subscription Units") for an aggregate purchase price of approximately $275,000[7];

- The Members Agreement, which restricts the transfer of RWI (Del.) units by, among other methods, providing RWI (Del.) with an option to repurchase RWI (Del.) units from employees upon their termination according to a contractually provided formula of Fair Market Value (the "Repurchase Option")[8]; and

- The Employment Agreement between RWI (N.M.) and Todd, which, among other things, reflects RWI (N.M.)'s retention of Todd to serve as President of RWI (N.M.) at his prior Hobbs, New Mexico office, defines termination for "Cause" and certain consequences thereof, and contains a choice of law and forum selection clause in favor of courts in New Mexico.[9]

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5 Pl.'s Ans. Br. Ex. A ("Operating Agreement") at 29 (signature page identifying Todd as one of three members) & §§ 1.7 (defining "Member"), 4.2(b) (designating Todd as an initial member of the board).

6 Def.'s Op. Br. Ex. A-1 ("SPA") §§ 2.1(A) (purchase and sale of RWI (N.M.) stock), 12.9 (choice of law and forum selection provision).

7 Compl. Ex. B ("Subscription Agreement") at 1.

8 Compl. Ex. A ("Members Agreement") § 2(c).

9 Def.'s Op. Br. Ex. A-2 ("Employment Agreement") §§ 1 (defining termination for "Cause"), 2(d)(i)(C) (delineating consequences of termination for "Cause"), 2(g)

Later, in September 2007, Todd and RWI (Del.) also entered into a Restricted Equity Award Agreement (the "REA Agreement"), by which Todd received an additional, unvested 2,746.424 Class A Units of RWI (Del.) (the "Restricted Units").[10] The Restricted Units expressly are subject to both the Repurchase Option of the Members Agreement and a right of RWI (Del.) to call and treat as forfeited the Restricted Units if Todd is terminated by RWI (N.M.) for Cause, as defined in the Employment Agreement (the "Call Right").[11]

2. Salient provisions of the Members, REA, and Employment Agreements

A few contractual provisions are particularly salient to Todd's Motion: the Repurchase Option and Call Right (the operation of which, according to RWI (Del.), divested Todd of his Subscription and Restricted Units); the Employment Agreement's definition of for-Cause termination (which allegedly triggered the Repurchase Option and Call Right); and the forum selection clause of the Employment Agreement (upon which Todd's improper venue defense primarily is based). These provisions are quoted in detail below.

The Repurchase Option is described in Section 2(c) of the Members Agreement, which provides as follows:

(locating office in Hobbs, N.M.), 7(e) (New Mexico choice of law and forum selection clause).

[10] Compl. Ex. C ("REA Agreement") § 1. The Restricted Units vest in two tranches only upon a change-of-control transaction involving RWI (Del.). *Id.* § 3.

[11] *Id.* § 4(d).

> (i) Repurchase Option. In the event an employee of the Company[12] (an "Employee") ceases to be employed by the Company (the "Termination"), the Units and Units Equivalents of such Employee . . . (the "Termination Units") shall be subject to a repurchase option (the "Company Repurchase Option") exercisable by the Company. . . .
>
> (ii) Repurchase Price. The purchase price for each Termination Unit shall be equal to the Fair Market Value (as defined in Section 2(c)(iii) below) of such Termination Unit . . . ; provided that, if such Termination is (a) by the Company for "Cause" . . . then the purchase price for each Termination Unit shall be equal to the lower of the Fair Market Value of such Termination Unit and the price paid by Todd for such Termination Unit.
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> (iii) The "Fair Market Value" of the Termination Unit shall be the pro-rata portion (allocated among the classes of the Company's membership interests . . .) of the Fair Market Value of the Company, determined by multiplying (1) the Company's [EBITDA] for the twelve (12) month period ending on the last day of the calendar month preceding the date with respect to which Fair Market Value is to be determined, by (2) 3.6, and then subtracting the sum of the Company's indebtedness minus its cash.[13]

RWI (Del.)'s Call Right is defined in Section 4(d) of the REA Agreement, which provides:

> **Call Right.** The Employee shall be subject to the repurchase option upon termination of employment provided in Section 2(c) of the Members Agreement; provided that, notwithstanding anything contained in the Members Agreement, prior to a Sale [of RWI (Del.)], if (a) the Employee's employment with [RWI (N.M.)] is terminated by [RWI (N.M.)] for Cause (as defined in that certain Employment Agreement dated March 30, 2007 between [RWI (N.M.)] and the Employee[)] . . . the [Restricted

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[12] The defined term "Company," as used in the Members Agreement, refers to RWI (Del.). Members Agreement at 1 (introductory paragraph).

[13] *Id.* § 2(c).

> Units] shall upon such termination of employment be forfeited and transferred back to [RWI (Del.)] without payment of any consideration by [RWI (Del.)].[14]

Todd's Employment Agreement with RWI (N.M.) defines termination for "Cause" as including, among other things:

> (1) a material breach of Sections 2(b)(iii) [which delineates Todd's responsibilities as President], 3 [regarding confidentiality], 4 [regarding ownership of work product] or 5 [noncompetition covenant] of this Agreement . . . ; (4) the Employee's gross negligence or willful misconduct in the conduct or management of the Company[15]; (5) the Employee's misappropriation of the Company's assets or business opportunities; . . . [and] (7) the Employee's intentional misrepresentation to the Board of . . . information material to the Company, its business and operations . . . .[16]

As mentioned above, the Employment Agreement also contains a choice of law and forum selection provision in favor of courts in New Mexico. That provision states, in pertinent part:

> All questions concerning the construction, validity and interpretation of this Agreement . . . will be governed by and construed in accordance with the domestic laws of the State of New Mexico, without giving effect to any choice of law or conflict of law provision or rule . . . . Any lawsuit arising out of or in any way related to this Agreement [or] to the parties' relationship under this Agreement shall be brought only in those state or federal cou[r]ts having jurisdiction over actions arising in the State of New Mexico. AS A SPECIFICALLY BARGAINED INDUCEMENT FOR [] EACH OF THE

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[14] REA Agreement § 4(d).

[15] In contrast to the Members Agreement, the defined term "Company" in the Employment Agreement refers to RWI (N.M.). Employment Agreement at 1 (introductory paragraph).

[16] *Id.* § 1.

> PARTIES TO ENTER INTO THIS AGREEMENT[,] . . . EACH PARTY EXPRESSLY: . . . (B) AGREES THAT SUIT TO ENFORCE ANY PROVISION OF THIS AGREEMENT OR TO OBTAIN ANY REMEDY WITH RESPECT HERETO SHALL BE BROUGHT EXCLUSIVELY IN THE STATE OR FEDERAL COURTS LOCATED IN LEA COUNTY, NEW MEXICO, AND EACH PARTY HERETO EXPRESSLY AND IRREVOCABLY CONSENTS TO THE JURISDICTION OF SUCH COURTS.[17]

3. Todd's termination for Cause

In a letter dated January 10, 2011, RWI (N.M.) terminated Todd for Cause, citing, among "additional material misconduct," his use of "company resources, including company personnel, . . . in connection with a painting project at [his] house in Texas" and subsequent dishonesty about that incident during a January 3, 2011 meeting.[18] The Complaint further alleges, in vague terms, other bases for terminating Todd for Cause from RWI (N.M.), such as "violating his non-solicitation and non-competition obligations."[19]

In another letter also dated January 10, 2011 (the "January Notice Letter"), RWI (Del.) informed Todd that it was exercising its Repurchase Option and Call Right as to all of

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[17] *Id.* § 7(e). A similar forum selection clause appears in the SPA. It provides:

> If any party commences a lawsuit or other proceeding relating to or arising from this Agreement, the parties hereto agree that the United States District Court for the District of New Mexico shall have sole and exclusive jurisdiction over any such proceeding. If such court lacks federal subject matter jurisdiction, the Parties agree that the courts of the State of New Mexico in the County of Lea shall have sole and exclusive jurisdiction.

SPA § 12.9.

[18] Compl. Ex. D at 1.

[19] Compl. ¶ 20.

his RWI (Del.) units "[b]ecause you are being terminated for cause."[20] In doing so, RWI (Del.) indicated that "the purchase price for each vested Unit," *i.e.*, the Subscription Units, would be determined by reference to the Members Agreement's Fair Market Value formula, while "[e]ach unvested Unit [*i.e.*, the Restricted Units] will be forfeited and transferred back to [RWI (Del.)]" in conformance with the Call Right of the REA Agreement. On March 17, 2011, RWI (Del.) sent a second letter regarding these matters (the "March Notice Letter"). In the March Notice Letter, RWI (Del.) first reaffirmed that "[e]ach unvested Unit is forfeited and transferred back to [RWI (Del.)] as of this date. No payment is due to you with respect to the forfeiture."[21] As to Todd's vested Subscription Units, the March Notice Letter stated:

> [t]he applicable purchase price . . . is the lesser of Fair Market Value (as defined in the Members Agreement of [RWI (Del.)]) of such Unit and the price paid by you for such Unit. The Fair Market Value of the Units is calculated by multiplying [RWI (Del.)'s] EBITDA for the twelve months ended December 31, 2010 of $5,371,000 by 3.6, and then subtracting the sum of

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[20] Compl. Ex. E ("January Notice Letter") at 1. As indicated in the previous subsection, the Repurchase Option is exercisable "[i]n the event an employee of the *Company*" is terminated, whether for cause or not. Members Agreement § 2(c)(i) (emphasis added). As used in the Members Agreement, however, the term "Company" refers to RWI (Del.), not RWI (N.M.). *Id*. at 1 (introductory paragraph). Arguably, therefore, Todd's termination from RWI (N.M.) in January 2011 did not trigger RWI (Del.)'s Repurchase Option under the Members Agreement. Indeed, Todd conceivably could prevail in proving at a final hearing on the merits that he was never RWI (Del.)'s employee at all. By contrast, Plaintiff's counsel offered at least a colorable theory at oral argument that Todd was an employee of both RWI (Del.) and RWI (N.M.) at the time of his termination. *See* Hr'g Tr. 34-37. For purposes of Todd's Motion, however, I have drawn the inferences in Plaintiff's favor and presumed that his termination from RWI (N.M.) did trigger the Repurchase Option.

[21] Compl. Ex. F ("March Notice Letter") at 1.

> [RWI (Del.)'s] debt of $21,763,000 minus [RWI (Del.)'s] cash of $1,587,000, which equals ($840,400). Because the Fair Market Value is a negative number, the applicable purchase price is $0.00.[22]

Within days of the March Notice Letter, Todd's counsel sent a letter to RWI (Del.) disputing that the Subscription Units had been purchased for $0. Since then, Todd continually has denied that his Subscription Units were repurchased at all.[23] In addition, approximately four months after this action was filed and amidst briefing on the pending Motion, Todd and his wife filed their own lawsuit in the United States District Court for the District of New Mexico, naming RWI (Del.) and RWI (N.M.) as co-defendants and alleging, among other things, breaches of the Members and REA Agreements, conversion, and violations of federal and New Mexico blue sky securities laws in connection with the same set of facts recited above.[24]

C. Procedural History

RWI (Del.) filed its Complaint in Delaware on September 30, 2011. The Complaint contains one count for declaratory judgment, asserting that

> [t]here is an actual controversy between the parties regarding: (i) whether Ronny Todd's membership interest in [RWI (Del.)] has been repurchased; (ii) whether Ronny Todd has any remaining equity interest in [RWI (Del.)] or any right in such interest; and (iii) whether [RWI (Del.)] owes Ronny Todd any money in

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22 *Id.*

23 Compl. ¶ 24.

24 *See* Def.'s Reply Br. Ex. A (Todd's complaint in the New Mexico federal action, filed February 3, 2012).

> connection with the repurchase of Ronny Todd's membership interest in [RWI (Del.)].[25]

On November 21, Todd filed this Motion. Following briefing, the Court heard argument on Todd's Motion on February 20, 2012.

D. Parties' Contentions

Todd has moved to dismiss on two grounds, lack of personal jurisdiction under Rule 12(b)(2) and improper venue under Rule 12(b)(3). As to his personal jurisdiction defense, Todd contends that (1) he has not "transacted any business" in this State within the meaning of Delaware's Long-Arm Statute, 10 *Del. C.* § 3104(c); (2) even if he had, he lacks the minimum contacts with Delaware necessary for an exercise of personal jurisdiction to comport with his due process rights under the U.S. Constitution; and (3) although, at least initially, he was a manager of RWI (Del.), the "implied consent" provision of the Delaware LLC Act, 6 *Del. C.* § 18-109(a), does not apply because the disputed issues in this action do not arise from any managerial act he performed on RWI (Del.)'s behalf. Regarding his improper venue defense, Todd asserts that any declaration by this Court regarding whether his Restricted Units, in fact, were forfeited by operation of the Call Right first would require the Court to interpret and apply the for-Cause termination provisions in the Employment Agreement. Thus, Todd contends that this is a "lawsuit arising out of or in any way related to" the terms of the Employment Agreement, which the Employment Agreement's forum selection clause requires to be litigated in the state or federal courts of New Mexico.[26]

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[25] Compl. ¶ 26.

[26] Employment Agreement § 7(e).

In response to Todd's jurisdictional arguments, Plaintiff asserts that: (1) Todd did transact business within this State by co-forming a Delaware LLC as the vehicle to effect a substantial investment in his company; (2) he cannot be surprised to face suit in Delaware after availing himself of the protections of Delaware law in the SPA, the principal transaction contract, especially because this suit concerns the exercise of specific options he granted to RWI (Del.) in connection with, and at the time of, that transaction; and (3) the implied consent statute is sufficient to confer personal jurisdiction here because disputes about the capital structure and ownership of a closely held Delaware LLC involve the "business" of the LLC for purposes of 6 *Del. C.* § 18-109(a). As to Todd's improper venue defense, RWI (Del.) denies that resolution of this action requires interpretation of the Employment Agreement for two independent reasons. First, RWI (Del.) contends that the Repurchase Option makes no distinction between Subscription and Restricted Units and that, because the Fair Market Value of those Units is $0, there is no meaningful difference between "repurchase" and "forfeiture." As a result, RWI (Del.) asserts that this Court can decide this case without reference to the Employment Agreement. Plaintiff's second argument is that, because the Members Agreement contains its own definition of termination for "Cause," which is substantially similar to the one in the Employment Agreement, the Court may restrict itself to the Members Agreement and still be able to determine whether Todd was terminated for Cause.

II. ANALYSIS

A. Todd's Motion to Dismiss for Improper Venue[27]

Delaware "courts afford great weight to a plaintiff's choice of forum. Only extraordinary circumstances can supersede a plaintiff's right to select its choice of forum."[28]

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[27] As mentioned, Todd has moved to dismiss for both lack of personal jurisdiction and improper venue. "In the normal order of addressing contentions, personal jurisdiction would be at the beginning." *EuroCapital Advisors, LLC v. Colburn*, 2008 WL 401352, at *2 n.3 (Del. Ch. Feb. 14, 2008). As was true in *EuroCapital Advisors*, the bases RWI (Del.) advances in support of personal jurisdiction here push the boundaries of this Court's precedents. For example, the "implied consent" statute permits the exercise of jurisdiction over a "manager . . . of a limited liability company . . . in all civil actions or proceedings brought in the State of Delaware involving or relating to the *business* of the limited liability company . . . ." 6 *Del. C.* § 18-109(a) (emphasis added). Plaintiff relies on *Cornerstone Technologies LLC v. Conrad*, 2003 WL 1787959, at *12 (Del. Ch. Mar. 31, 2003), for the proposition that any dispute regarding the ownership and transferability of equity interests in a closely held Delaware LLC "obviously relate[s] to the business of [the LLC] and fall[s] within the literal terms of § 18-109." In the *Conrad* case, however, "the confusion about ownership ar[ose] out of disputed *managerial* acts." *Id.* (emphasis added). Here, by contrast, Plaintiff's counsel offered, at best, only an attenuated connection between this suit and Todd's conduct qua manager of RWI (Del.). *See* Hr'g Tr. 39-40. Alternatively, Plaintiff bases its transacting-business theory on *AeroGlobal Capital Management, LLC v. Cirrus Industries, Inc.*, 871 A.2d 428 (Del. 2005). In *AeroGlobal*, the Supreme Court "acknowledge[d] that the ownership of a Delaware [business entity] does not, without more, amount to the transaction of business," but held that such ownership can be sufficient to confer personal jurisdiction "where the underlying cause of action arises from the creation and operation of the Delaware [business entity]." *Id.* at 439. In this regard also, it is not immediately apparent whether the underlying cause of action here merely concerns the ownership of equity interests in a Delaware company or arises out of the creation of the Delaware company in the first instance. As in *EuroCapital Advisors*, however, the Court "declines the invitation to address these interesting issues because, regardless of the outcome of the jurisdictional analysis, the parties' dispute is not, for now at least, going forward in this forum." 2008 WL 401352, at *2 n.3.

[28] *Eisenbud v. Omnitech Corporate Solutions, Inc.*, 1996 WL 162245, at *1 (Del. Ch. Mar. 21, 1996) (citing *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g*

One such circumstance to which Delaware courts routinely defer, however, is a contractual forum selection clause. Thus, "[u]nder Court of Chancery Rule 12(b)(3), a court will grant a motion to dismiss based upon a forum selection clause where the parties 'use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action.'"[29] The rationale for so doing is "to effectuate the parties' intent"[30] by adhering to "the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[31] Still, dismissal under Rule 12(b)(3) is inappropriate "[i]f the contractual language is not crystalline."[32]

The Complaint contains one count seeking a declaration of, among other things, "whether Ronny Todd has any remaining equity interest in [RWI (Del.)]."[33] Before the events giving rise to this action, Todd had two sets of equity interests in RWI (Del.): the Subscription Units, which he received pursuant to the Subscription Agreement, and the Restricted Units, which he received pursuant to the REA Agreement. Additionally, both

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Co., 263 A.2d 281, 283 (Del. 1970) and *Aetna Cas. & Surety Co. v. Certaineed Corp.*, C.A. No. 93C-06-125 (Del. Super. Feb. 22, 1994) (ORDER)).

29 *Ashall Homes Ltd. v. ROK Entm't Gp. Inc.*, 992 A.2d 1239, 1245 (Del. Ch. 2010) (quoting *Eisenbud*, 1996 WL 162245, at *1).

30 *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

31 *Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found. II, LLC*, 2005 WL 1364616, at *7 (Del. Ch. May 27, 2005) (internal quotation marks omitted).

32 *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007).

33 Compl. ¶ 26.

sets of equity interests are subject to the Repurchase Option provided for in the Members Agreement. None of the Subscription, REA, or Members Agreements contains an express forum selection clause.[34]

Nevertheless, Todd's interest in the Restricted Units potentially implicates his Employment Agreement with RWI (N.M.). Section 4(d) of the REA Agreement subjects the Restricted Units "to the repurchase option upon termination of employment provided in Section 2(c) of the Members Agreement." Section 4(d), however, goes on to provide for the Call Right as follows:

> [N]otwithstanding anything contained in the Members Agreement, . . . [if Todd's] employment with [RWI (N.M.)] is terminated by [RWI (N.M.)] for Cause (as defined in [the Employment Agreement]) . . . the [Restricted] Units shall upon such termination of employment be forfeited and transferred back to [RWI (Del.)] without payment of any consideration by [RWI (Del.)].

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[34] Although none of those Agreements, on its own, contains a forum selection clause, the forum selection clause of the SPA might extend to the Subscription and Members Agreements. Under the SPA, execution of the Subscription and Members Agreements were closing conditions protecting both RWI (Del.) and Todd. SPA §§ 8.1(H)(3) & (10), 8.2(D)(1)-(2). Furthermore, a Form of Members Agreement was attached as Exhibit A to the SPA, and Section 12.14 provides that all "exhibits attached hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein." Thus, it is at least arguable that the SPA reflects the parties' intent to confer exclusive jurisdiction upon courts in New Mexico for all issues related to the Subscription and Members Agreements, if not also a binding agreement to that effect. That interpretation, however, is not free from doubt. *See* note 51, *infra*. In any case, as discussed *infra*, I conclude that Delaware is an improper venue on narrower grounds, relying on the forum selection clause of the Employment Agreement and assuming, without deciding, that neither the Subscription nor Members Agreements contains a comparable provision. Therefore, I do not reach the extent to which the forum selection clause of the SPA may be imported into the other relevant agreements, if at all.

Thus, the contractual scheme reflected in Section 4(d) permits RWI (Del.) to "repurchase" Todd's Restricted Units pursuant to the Repurchase Option of the Members Agreement, but Todd's Restricted Units may be treated as "forfeited" only if he is terminated for Cause under the Employment Agreement.[35]

In contrast to the Members, Subscription, and REA Agreements, the Employment Agreement provides that any lawsuit "in any way related to [the Employment Agreement] . . . shall be brought *only* in those state or federal courts having jurisdiction over actions arising in the State of New Mexico."[36] This is "express language clearly indicating the forum selection clause excludes all other courts before which th[e] parties c[an] otherwise properly bring an action."[37] Accordingly, whether the issues necessary to determining Todd's remaining interest in the Restricted Units, if any, must be litigated in New Mexico reduces to whether Todd's Restricted Units were (1) "repurchased" pursuant to Repurchase Option of the Members Agreement, which arguably does not implicate the Employment Agreement, or (2) "forfeited" pursuant to the Call Right of the REA Agreement, which

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35 Because the Call Right provided for in the REA Agreement expressly refers to termination "for Cause (*as defined in [the Employment Agreement*])," I reject Plaintiff's suggestion that the Court look instead to the definition of Cause provided by the Members Agreement as some sort of proxy. Rather, the plain language of the Call Right defines the parties' rights and obligations by reference to the Employment Agreement. Thus, the Employment Agreement is the only acceptable agreement to consider in interpreting the scope of those rights and obligations. *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992) ("When the language of a[] . . . contract is clear and unequivocal, a party will be bound by its plain meaning . . . ." (internal quotation marks and citations omitted)).

36 Employment Agreement § 7(e) (emphasis added).

37 *Ashall Homes Ltd.*, 992 A.2d at 1245 (internal quotation marks omitted).

would implicate issues at least "in [some] way related to" the for-Cause termination provision of the Employment Agreement.

RWI (Del.) alleged that Todd "forfeited" the Restricted Units. Both the January and March Notice Letters distinguish between "vested" and "unvested" Units, *i.e.*, between the Subscription and Restricted Units, respectively. While stating that "the *purchase* price for each *vested* Unit" would conform to the terms of the Members Agreement, RWI (Del.) asserted in the January Notice Letter that "[e]ach *unvested* Unit will be *forfeited*," as provided for in Section 4(d) of the REA Agreement.[38] Likewise, the March Notice Letter repeats that (1) "[t]he applicable *purchase* price for each *vested* Unit we are *repurchasing* [after applying the contractual formula of Fair Market Value] is $0.00" and (2) "[e]ach *unvested* Unit is *forfeited* and . . . [n]o payment is due to you with respect to the *forfeiture*."[39] Finally, RWI (Del.)'s Complaint itself, filed approximately six months later, preserves this distinction between, on the one hand, the repurchase of the Subscription Units and, on the other hand, the forfeiture of the Restricted Units. For example, RWI (Del.) alleges that "no payment was due from [it] to Ronny Todd for the *repurchase* of the *vested* Units"[40] and that "Todd has not challenged his termination for cause by [RWI (N.M.)] and, therefore, the *forfeiture* of any membership interest in *unvested* Units . . . ."[41]

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38 January Notice Letter at 1 (emphasis added).

39 March Notice Letter at 1 (emphasis added).

40 Compl. ¶ 23 (emphasis added).

41 *Id.* ¶ 19 n.1 (emphasis added).

At argument, Plaintiff's counsel advanced a slightly different argument—*viz.*, that because the Fair Market Value of Todd's Units allegedly is $0, there is no meaningful difference between the "repurchase" or "forfeiture" of the Restricted Units. That is, the Repurchase Option provided by the Members Agreement applies to all units—without distinction between vested and unvested units—and, therefore, RWI (Del.) simply could have "repurchased" the Restricted Units for $0. In that case, according to Plaintiff, this Court would have no need to refer to the Employment Agreement (and its New Mexico forum selection clause), and could focus solely on the Members and REA Agreements (which are silent as to forum).[42] Plaintiff's argument is unavailing, however, because it is oversimplified and because RWI (Del.)'s new theory does not comport with its own actions or the allegations in its Complaint. To the contrary, as recounted above, RWI (Del.) alleged in its Complaint that it exercised the Repurchase Option as to the Subscription Units and that Todd forfeited his Restricted Units because RWI (N.M.) terminated him for Cause.

Thus, to determine based on the allegations of the Complaint "whether Ronny Todd has any remaining equity interest in [RWI (Del.)],"[43] this Court would need to decide, among other things, whether Todd's "employment with [RWI (N.M.) was] terminated . . . for Cause (as defined in [the Employment Agreement])."[44] That decision, in turn, would involve questions of fact as well as issues of law concerning the construction and

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42 *See* Hr'g Tr. 38-39.

43 Compl. ¶ 26.

44 REA Agreement § 4(d).

interpretation of the Employment Agreement. Among those issues would be whether the use of RWI (N.M.)'s resources and personnel "in connection with a painting project at [Todd's] house in Texas"[45] and alleged subsequent dishonesty—both of which RWI (N.M.) mentioned in its January 10 letter as bases for terminating him for Cause—in fact occurred and whether they constituted "misappropriation of the Company's assets" or "intentional misrepresentation to the Board of . . . information material to the Company" within the contractual definition of Cause.[46] Similarly, the Court would have to make findings of fact regarding Plaintiff's vague allegations of "violating [Todd's] non-solicitation and non-competition obligations."[47] If true, the alleged violations would appear to constitute breaches of Section 5 of the Employment Agreement and, thereby, also fall within the definition of Cause.

The Employment Agreement, however, provides that any lawsuit "in any way related to [it] . . . shall be brought *only* in those state or federal courts having jurisdiction over actions arising in the State of New Mexico."[48] Because this is not a state or federal court with plenary jurisdiction over actions arising in New Mexico, any attempt by me to resolve the disputed issues just mentioned would fail "to effectuate the parties' intent"[49] or show

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45 Compl. Ex. D. at 1.

46 Employment Agreement § 1.

47 Compl. ¶ 20.

48 Employment Agreement § 7(e) (emphasis added).

49 *Lorillard Tobacco Co.*, 903 A.2d at 739.

appropriate "respect for the parties' contractual designation."[50] Therefore, Todd's Motion is granted to the extent that, at a minimum, Delaware is not a proper venue for determining whether Todd "forfeited" his Restricted Units and, consequently, whether he has any remaining membership or equity interest in RWI (Del.) on account of those Units.

B. The Remainder of this Action Also Should Be Stayed

Although this Court cannot determine whether Todd has any interest in the Restricted Units, it arguably could determine whether RWI (Del.) validly repurchased the Subscription Units and whether RWI (Del.) owes Todd any money in connection with that repurchase.[51]

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50 *Prestancia Mgmt., Gp., Inc.*, 2005 WL 1364616, at *7.

51 In making this determination, I decline to adopt categorically Todd's argument that, because the Members and Employment Agreements were executed on the same day and relate to the single sale of Todd's stock in RWI (N.M.), the Agreements should be interpreted as one integrated contract regarding intertwined aspects of a single transaction such that the express forum selection clauses of the Employment Agreement and SPA extend to the Members Agreement for all purposes. *See* Def.'s Op. Br. 19-20. Although, "in construing the legal obligations created by [a] document, it is appropriate for the court to consider . . . the language of contracts among the same parties executed or amended as of the same date that deal with related matters," *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *1 (Del. Ch. Feb. 28, 1990), this principle of contractual interpretation "does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties." 11 *Williston on Contracts* § 30:26 (4th ed., rev. vol. 2011).

> It is important to note that even though several instruments relating to the same subject and executed at the same time should be construed together in order to ascertain the intention of the parties, it does not necessarily follow that those instruments constitute one contract or that one contract was accordingly merged in or unified with another so that every provision in one becomes a part of every other.

Id. (footnotes omitted). Viewing the totality of the circumstances of RWI (Del.)'s acquisition of RWI (N.M.), I cannot conclude that the parties clearly indicated an intent to submit to exclusive jurisdiction and venue in the State of New Mexico for

Therefore, this action conceivably could proceed in Delaware as to the Subscription Units, assuming, of course, the Court may exercise personal jurisdiction over Todd.[52] Plaintiff's prayer for relief, however, seeks a judicial declaration that, among other things, Todd "is no longer a member of [RWI (Del.)]."[53] In that regard, RWI (Del.)'s Operating Agreement defines "Member" to include Todd "so long as [he] continuously holds any Units," which would include the Restricted Units.[54] The import of that definition is that this Court lacks the ability to provide the declaration Plaintiff requests. Even if the Court ultimately found that RWI (Del.) validly exercised the Repurchase Option at a purchase price of $0 as to the Subscription Units, the Court could not declare definitively that Todd is not otherwise (*i.e.*, by holding Restricted Units) a member of RWI (Del.). Especially where, as is now the case here, a second action is pending in a court with competent jurisdiction to hear all of the parties' disputes related to these (and other) matters, this Court raises *sua sponte* whether

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any and all disputes that might arise between them relating to the Members Agreement. Furthermore, the logical extension of Todd's argument in this regard arguably leads to results prone to attack as contrary to public policy. If the forum selection clauses of the Employment Agreement and SPA extend to every aspect of the Members Agreement, then they arguably would extend also to the Operating Agreement. But the implied consent statute, 6 *Del. C.* § 18-109(a), reflects a legislative determination to "prevent[] members from forming an LLC in Delaware while barring jurisdiction in the state . . . and ensures that Delaware retains ultimate jurisdiction over its limited liability companies . . . ." *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, at *5 (Del. Ch. Aug. 19, 2008). In any event, I need not decide this issue for purposes of the pending Motion, as explained *infra*.

52 *See* note 27, *supra*.

53 Compl. at 6.

54 Operating Agreement § 1.7.

this action should be stayed as a matter of judicial efficiency and in the interest of effectuating the parties' apparent intent.[55]

In *Ashall Homes*,[56] the plaintiffs alleged that the defendant corporation—originally a United Kingdom entity that had reincorporated in Delaware—breached two agreements related to their stock in the Delaware entity. Specifically, the plaintiffs received stock in the United Kingdom entity under a subscription agreement and then agreed in a share sale agreement to sell and transfer their stock in that entity in exchange for shares in an Oklahoma corporation, which then reincorporated in Delaware.[57] Because both agreements contained forum selection clauses in favor of England, however, now-Chancellor Strine granted the defendant's motion to dismiss for improper venue.[58] The Chancellor then went on to note that, to the extent one of the two forum selection clauses arguably did not require *exclusive* venue in England,

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55 *See Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009) ("This Court possesses the inherent power to manage its own docket, including the power to stay litigation on the basis of comity, efficiency, or simple common sense."); *Kingsland Hldgs. Inc. v. Fulvio Bracco*, 1996 WL 422340, at *2 (Del. Ch. July 22, 1996) ("this Court may stay actions *sua sponte*").

In this regard, I note that Todd obliquely suggested the possibility of a stay in his reply brief, which was filed after the commencement of the litigation in New Mexico. *See* Pl.'s Reply Br. 1 (implying grounds exist for a stay on *forum non conveniens* grounds by referring to "the undisputed fact that all of the events giving rise to this suit and all of the witnesses are in New Mexico"). Todd's counsel also represented at oral argument that, if the pending Motion is denied, Todd "would be inclined to seek a stay of this action to proceed with the action in New Mexico." Hr'g Tr. 64.

56 *Ashall Homes Ltd. v. ROK Entm't Gp. Inc.*, 992 A.2d 1239 (Del. Ch. 2010).

57 *Id.* at 1243.

58 *Id.* at 1246-50.

> there is an important policy reason for adjudicating all of the disputes relating to these two agreements in one court. . . . [B]ifurcating this dispute—so as to send claims arising from the Share Sale Agreements to the English courts, but to keep claims arising from the Subscription Agreements here in this court—would result in obvious inefficiencies and confusion. Those inefficiencies and the potential for injustice are serious enough that long-standing doctrines, such as res judicata and the Delaware Supreme Court's *McWane* doctrine, have been developed to minimize claims splitting . . . [and] the risk of conflicting verdicts. . . .
>
> Under *McWane* and other analogous doctrines, the [plaintiffs] ought to be bound for fairness and efficiency's sake to litigate in one place, and not force the defendants to unnecessarily expend resources on what would essentially be the same defense in multiple venues.[59]

In expressing these concerns, however, the Chancellor noted that *Ashall Homes* was "not an internal affairs case."[60]

The risks of bifurcation discussed in *Ashall Homes*—obvious inefficiencies and confusion, the possibility of conflicting rulings, and the unfairness of litigating overlapping claims in multiple venues—also are present in this case. This declaratory judgment action already represents only a portion of a larger dispute between Todd and RWI (Del.) relating to his termination from RWI (N.M.). Indeed, Todd's New Mexico complaint challenges (1) both his and his wife's termination for Cause under their nearly identical Employment Agreements, (2) the purported forfeiture of their Restricted Units under the REA Agreement, and (3) RWI (Del.)'s ability to invoke the Repurchase Option under the Members Agreement (either because the Todds were employees only of RWI (N.M.) or,

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[59] *Id.* at 1251 (footnotes omitted).

[60] *Id.*

alternatively, because RWI (Del.) manipulated the calculation of Fair Market Value in breach of the implied covenant of good faith and fair dealing).[61] The Todds' New Mexico complaint also asserts that RWI (Del.) breached a nondisparagement provision of the SPA and otherwise defamed the Todds.[62] In addition to federal securities law claims that are beyond this Court's subject matter jurisdiction, their New Mexico complaint claims that RWI (Del.)'s cancellation of the Todds' units constitutes conversion and violates New Mexico's blue sky laws.[63] Finally, the Todds request judicial declarations that, among other things, their RWI (Del.) units have been neither repurchased nor forfeited or, alternatively, that the appropriate purchase price was greater than $0.00.[64] With all of those issues now before a federal court in New Mexico, continuing to adjudicate here in Delaware the status of the Subscription Units would necessitate litigating very similar and overlapping issues in two separate locations.

Unlike *Ashall Homes*, this case arguably does raise issues concerning the internal affairs of a Delaware business entity insofar as RWI (Del.) seeks a declaration of its rights and obligations in regard to one of its initial members. That argument, however, is relatively weak. Essentially, all that is before this Court is a dispute over the alleged exercise of an equity option. While the optioned securities at issue are those of a Delaware entity and one party to this action emphasizes the relative importance of issues of this sort to

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61 Def.'s Reply Br. Ex. A ¶¶ 67-82.

62 *Id.* ¶¶ 83-86, 102-05.

63 *Id.* ¶¶ 87-93, 106-14.

64 *Id.* ¶¶ 94-101.

the capital structure and control of closely-held Delaware LLCs,[65] this Court's interests in regulating the internal affairs of Delaware entities do not automatically preclude it from considering obvious inefficiencies and common sense reasons in favor of permitting another competent court to hear an otherwise conventional contract claim.

In the final analysis, therefore, this case is more similar to *Ashall Homes* than distinguishable from it. As stated previously, the Court's inability to determine definitively whether Todd has any continuing interest in the Restricted Units means it cannot declare in this action—at least for the time being—that Todd is not a member of RWI (Del.), as Plaintiff requests. Therefore, I conclude that these proceedings should be stayed in the interests of judicial economy, efficiency, and comity.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, Todd's Motion to dismiss the sole count of the Complaint is granted in part to the extent that I conclude Delaware is an improper forum to determine what interest, if any, he possesses in the Restricted Units. Therefore, I dismiss that aspect of Plaintiff's claim. In addition, because bifurcating this action and continuing to litigate Todd's interest in the Subscription Units would generate unnecessary inefficiencies, risk the possibility of conflicting rulings, and potentially conflict with the intentions of the parties to the relevant agreements, I stay the remainder of this action in favor of the related litigation now pending in New Mexico.

IT IS SO ORDERED.

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[65] *See Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *12 (Del. Ch. Mar. 31, 2003).