COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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RE: Smartmatic Corp. v. SVS Holdings, Inc. and Sequoia Voting Systems, Inc.; and
SVS Holdings, Inc. and Sequoia Voting Systems, Inc. v. Smartmatic Corp. and Hart InterCivic, Inc.
Civil Action No. 3585-VCL

Dear Counsel:

This letter opinion addresses the issues left unresolved at the March 24, 2008 oral argument of four different motions.

I.

This litigation centers on the terms of a stock purchase agreement (the "SPA") under which SVS Holdings, Inc. acquired 100% of the issued shares of stock of Sequoia Voting Systems, Inc. ("SVS") from Smartmatic Corporation.[1] In exchange, SVS gave Smartmatic a $2 million unsecured promissory note (the "Note"). The SPA expressly allows Smartmatic to sell the Note to a third party, provided that Smartmatic gives SVS notice of the sale via a "Sale Notice," defined as a written bona fide offer stating the terms and conditions upon which the purchase is to be made, and offers SVS 60 days to match.[2]

Should SVS not exercise its right to match in that 60 days, each holder of SVS stock has 15 days in which to notify Smartmatic that it intends to exercise the put right granted by article 11.1 of the SPA.[3] In addition, expiration of SVS's 60 days to match triggers a 120-day period in which Smartmatic and the third-party purchaser have to close the sale of the Note. If the sale does not close in that 120 days, SVS's right to match is revived.

Upon sale of the Note, section 4.1 entitles the third-party purchaser to convert the Note into SVS stock on any day after the sale, as long as the Note's

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[1] All of the corporate parties in this case are Delaware corporations.
[2] *See* Art. 8.16 of the SPA.
[3] Article 11.1 of the SPA provides that "each [SVS stockholder] has the option to sell all, but not less than all, of such holder's Stock to the Third Party Purchaser . . . ."

aggregate purchase price is at least $16 million.[4] At the time the purchaser exercises this conversion right, the SVS stockholders may exercise the put right (provided they gave notice to Smartmatic in the 15 days after SVS's right to match expired of their intent to do so) and force the third-party purchaser to buy their shares of SVS stock.[5] The third-party purchaser must purchase this stock for the same price per share it paid for stock obtained through conversion of the Note.[6]

Smartmatic found a potential third-party purchaser in Hart InterCivic, Inc.[7] and the two parties have executed a letter of intent (the "Hart Offer"). In addition to providing non-cash consideration, Hart has agreed to pay Smartmatic $7 million on closing, as well as 40% of the net income of the combined Hart/Sequoia company for the next 5 years, with a promise to pay at least $9 million in those 5 years. Thus, Hart promises to pay at least $16 million, and possibly more.

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[4] Section 4.1 of the Note provides that the third-party purchaser obtains the right to convert the Note into SVS shares in a ratio of 1% of SVS's outstanding shares for each $25,000 of principal outstanding on the Note. The third-party purchaser obtains this right as long as the sale price of the Note is "for an aggregate purchase price of at least $16 million, if such sale occurs during the period from the Closing Date to and including April 30, 2008."

[5] Article 11.1 states that the SVS stockholders have the option to sell all, but not less than all, of their SVS stock "upon a sale . . . of the [Note] . . . and the conversion of the [Note]."

[6] For example, assume that SVS has 1,000 shares outstanding. If the SVS stockholders have not paid off any of the Note's $2 million principal, the third-party purchaser can obtain 800 shares under the conversion right. If the third-party purchaser paid $16 million for the Note, the price per share it paid will be $20,000 per share. The third-party purchaser will then have to pay $20,000 per share to those SVS stockholders who exercise the put right.

[7] Hart is a corporation organized under the laws of Texas with its principal place of business in Austin, Texas.

The parties have litigated over several issues related to the potential sale of the Note. First, SVS notified Smartmatic on February 19, 2008 that it would not allow Hart to conduct due diligence until its 60 days to match had expired. As a result, Smartmatic filed a complaint on February 28, 2008, seeking a declaration that Hart was entitled to due diligence immediately. Smartmatic also filed a motion to expedite, which was granted. The court granted Smartmatic's motion for summary judgment for declaratory and injunctive relief at oral argument on March 17, 2008.

On March 10, 2008, SVS filed an answer, counterclaims, and a third-party complaint.[8] The counterclaims and third-party complaint allege breach of contract, breach of implied duty of good faith and fair dealing, and tortious interference with prospective contractual relations against Smartmatic and Hart. In relief, SVS seeks a declaration that the Hart Offer is not a bona fide offer and does not meet the minimum requirements of a Sale Notice. Alternatively, SVS asks the court to find that, if the Hart Offer is deemed a bona fide offer and Sale Notice, the Sale Notice was not delivered to SVS until February 26, 2008. SVS also seeks to enjoin Hart and Smartmatic from tortiously interfering with certain of its contracts.

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[8] SVS and Sequoia filed the answer, counterclaims, and third-party complaint jointly. However, for simplicity's sake, the court refers simply to SVS.

On March 14, 2008, Smartmatic moved to dismiss the tortious interference claim against it, and moved for summary judgment on SVS's request for injunctive and declaratory relief. On March 16, 2008, Hart filed a motion for summary judgment on the tortious interference claim against it, as well as on SVS's request for injunctive and declaratory relief. On March 20, 2008, SVS cross-moved for summary judgment on its requests for injunctive and declaratory relief. SVS also asks the court for a declaration that even if the Hart Offer constitutes a bona fide offer triggering its right to match, the offer is insufficient to trigger the conversion rights outlined in section 4.1 of the Note. This court held oral argument on all four motions on March 24, 2008, deciding some issues and reserving decision on others. In this written letter opinion, the court will first address the remaining claims for declaratory judgment, and then address the tortious interference claims.

II.

To prevail on summary judgment, the moving party must "demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law."[9] Thus, a defendant is entitled to summary judgment if the plaintiff cannot prove an essential element its case.[10] "The court must view the evidence presented in the light most favorable to the non-moving party, and the moving

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[9] *Levy v. HLI Operating Co., Inc.*, 924 A.2d 210, 219 (Del. Ch. 2007).
[10] *Krahmer v. Christie's Inc.*, 911 A.2d 399, 405 (Del. Ch. 2006).

party bears the burden of demonstrating the absence of a material factual dispute."[11] Once the moving party has demonstrated such facts, and those facts entitle it to summary judgment, the burden shifts to the non-moving party to present "specific facts showing that there is a genuine issue of fact for trial."[12] The non-moving party "may not rest upon the mere allegations or denials [contained in the pleadings]."[13]

The mere existence of cross-motions does not necessarily make summary judgment for either party inappropriate, nor does it change the standard for summary judgment.[14] Rather, the court examines each motion separately,[15] and "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, then summary judgment is appropriate."[16]

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[11] *Levy*, 924 A.2d at 219.
[12] *Id.* (citing Ct. Ch. R. 56(e)).
[13] *Id.*
[14] *See Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *3 (Del. Ch. May 13, 2005); *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).
[15] *See Union Oil Co. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *9 (Del. Ch. Dec. 15, 2006).
[16] *Mehiel*, 2005 WL 1252348, at *3; *see also Rochester v. Katalam*, 320 A.2d 704 (Del. 1974); *Levy*, 924 A.2d at 219; *Fasciana v. Electronic Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003). The court notes that the filing of cross-motions sometimes triggers Court of Chancery Rule 56(h). That rule treats cross-motions for summary judgment as a stipulation for decision on the merits based on the record submitted. In this case, however, each party argues that issues of material fact precluding summary judgment exist. "Because both sides have alleged that there are outstanding issues of fact material to the resolution of the other's motion, Rule 56(h) does not apply by its own terms." *Chambers v. Genesee & Wyoming, Inc.*, 2005 WL 2000765, at *5 n.21 (Del. Ch. Aug. 11, 2005).

A motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6) invokes a well settled analysis. All well pleaded factual allegations must be accepted as true and all reasonable inferences should be drawn in favor of the non-moving party.[17] However, the court will not construe mere conclusions unsupported by factual allegations as true.[18] Indeed, "[w]hile specific allegations of fact, along with reasonable conclusions buttressed by specific allegations of fact, will sustain a complaint, mere conclusions of law or fact are insufficient under this standard of review."[19] Dismissal under Rule 12(b)(6) is only appropriate where the court finds, with reasonable certainty, that the plaintiff could not prevail on any set of facts inferable from the pleadings.[20]

While Delaware law governs the procedural aspects of this case, New York law governs the interpretation of the contract itself.[21] Under New York law, the court looks to the plain meaning of its terms when interpreting the contract.[22]

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[17] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 (Del. 1997).
[18] *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996).
[19] *Feldman v. Cutaia*, 2007 WL 2215956, at *6 (Del. Ch. Aug. 1, 2007).
[20] *Solomon*, 672 A.2d at 38.
[21] "As a general proposition, Delaware courts will recognize and enforce contractual choice-of-law provisions if the selected jurisdiction has a material connection with the transaction." *Trilogy Dev. Group, Inc. v. Teknowledge Corp.*, 1996 WL 527325, at *3 (Del. Super. 1996) (citing *Falcon Tankers, Inc. v. Litton Systems, Inc.*, 300 A.2d 231, 235 (Del. Super. 1972)). The current dispute involves interpretation of several agreements providing that New York law governs disputes resulting therefrom. The parties conduct business in New York. New York law thus governs interpretation of this contract. Procedural matters, however, are determined by Delaware law. *See, e.g., Taylor v. LSI Logic Corp.*, 1998 WL 51742, at *4 n.19 (Del. Ch. Feb. 3, 1998); *Lutz v. Boas*, 176 A.2d 853, 857 (Del. Ch. 1961) ("It is well established that the law of the forum governs questions of remedial or procedural law.").
[22] *See, e.g., CanWest Global Commcn's Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 568 (N.Y. 2005); *Von Steen v. Musch*, 776 N.Y.S.2d 170, 175 (N.Y. 2004); *Milonas v. Public*

III.

A. Declaratory Judgment

This court has already determined that the Hart Offer constitutes a bona fide offer triggering SVS's right to match,[23] and that SVS received notice of this offer on February 15, 2008, triggering SVS's right to match on that date. What remains to be decided, then, is SVS's request that the court declare that the Hart Offer cannot trigger conversion rights under section 4.1 of the Note. The court will also articulate in greater detail why the Hart Offer constitutes a bona fide offer triggering SVS's right to match, despite the absence of any reference to the SVS stockholders' put right. Finally, the court will discuss why it declines to address SVS's request that the court declare that SVS need not match two terms of the Hart Offer.

Employ. Reltn's Bd., 648 N.Y.S.2d 779, 784 (N.Y. App. Div. 1996); *Fed. Deposit Ins. Corp. v. Herald Sq. Fabrics Corp.*, 439 N.Y.S.2d 944, 952 (N.Y. App. Div. 1981).

[23] This court rejected SVS's argument that the Sales Notice must constitute an offer capable of creating a binding contract on acceptance. *See* Tr. 59-60 (stating "I don't have any doubt in my mind that the offer that was made was an offer, as that term is understood in the context of mergers and acquisition. There's simply no possibility that what was intended here is that there be a signed contract that had to be performed if the right of first refusal isn't exercised. What you bargained for was the right to get a good faith offer."). The court also rejected the notion that the offer is not bona fide. *Id.* (holding "[t]here can't be any question that the offer was made in good faith, given its structure and its terms"). Indeed, Hart has even placed $2 million in escrow to effect the transaction.

1. The Conversion Right

a. Aggregate Purchase Price

SVS argues that the Hart Offer cannot trigger the conversion rights outlined in section 4.1 of the Note because it does not aggregate to a $16 million purchase price. According to SVS, the purchase price does not aggregate to $16 million because it is paid out over 5 years, rather than in full upon closing. In essence, SVS's argument is that the sale price must have a present value of $16 million upon closing.

Neither the SPA nor the Note contain such a requirement. If the parties intended payment in full upon closing, they could have stated that intention. Instead, Hart's offered purchase price is very much like the payment SVS arranged with Smartmatic under the Note. Article 3.1 provides that "the aggregate consideration" SVS must pay to Smartmatic for Sequoia shares consists of the Note and earn-out payments over 5 years. This indicates that the parties intended the term "aggregate purchase price" to include arrangements such as earn-out payments. Further, as the court stated at oral argument, Hart's earn-out payments might not "aggregate" to $16 million if paid out over 100 years.[24] But that is not Hart's offer. Rather, Hart promises to pay at least $16 million for the Note over 5 years, a commercially reasonable amount of time, and the same amount of time

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[24] Tr. 24.

over which SVS is obligated to pay Smartmatic for the Note.[25] The offer in this case meets the requirement that the "aggregate purchase price" be at least $16 million.

b. The Put Right

Hart has indicated that it will pay for shares put to it in the same way it is paying for the Note. Thus, at the closing of the sale of the Note, Hart would pay Smartmatic $7 million—approximately 44% of the total purchase price—and, upon Hart's conversion of the Note, each SVS stockholder exercising the put right would receive the same percentage of the total amount owed for its shares. SVS seeks a declaration that Hart cannot trigger the conversion rights outlined in section 4.1 of the Note using this payment structure. According to SVS, Hart cannot convert the Note into shares unless it pays for shares put to it in full and in cash at the time the put right is exercised. In support, SVS cites to section 4.2 of the Note, which provides that, before exercising any conversion right, a third-party purchaser must tender the "full amount payable for the Stock subject to [the] put right."

As an initial matter, section 4.2 does not require Hart to pay in full in cash at the time SVS stockholders put their shares to it. Rather, it merely requires Hart to

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[25] Section 3.4 of the SPA provides for earn-out payments from the date of the sale of the Sequoia stock to SVS through the fifth anniversary of that closing date.

tender that amount of money that is "payable" to the SVS stockholders at that time. The entire question presented is what constitutes "the full amount payable." SVS contends that the amount payable is the full price of the stock put to Hart. Hart contends that the amount payable is the percentage owed to the SVS stockholders relative to each payment Hart makes to Smartmatic over time for the Note.

Moreover, nothing in either section 4.1 of the Note or article 11.1 of the SPA requires that the SVS stockholders be paid in full in cash on the date they exercise their put right. The parties could have, of course, provided for such a requirement, but did not. Instead, the parties negotiated in section 4.1 of the Note that the put right could be exercised after the sale of the Note for at least an *aggregate purchase price* of $16 million. This careful wording suggests the parties intended to allow payment for the Note over time, not in full on a specific date. In the context of these agreements, the reasonable interpretation of the language regarding the put right is that, absent explicit wording to the contrary, Hart may pay the SVS stockholders in the same way.

2. <u>The Bona Fide Offer</u>

SVS asserts the Sale Notice must include all information necessary for SVS to decide whether to exercise its right to match, including the exact amount of money the SVS stockholders would receive upon selling stock to Hart pursuant to the put right. As SVS explains: "the right to match and the put right go hand-in-

hand. The SVS Holdings shareholders need to be able to determine what they could receive if they exercise the put right, compared to the risk/reward of matching any existing offer."[26] SVS argues that the Hart Offer does not meet this requirement because it does not reference the SVS stockholders' put right at all, much less the specific amount of money the SVS stockholders would receive upon putting their stock to Hart.

SVS's argument seems logical at first glance; one could imagine that the parties intended the Sale Notice to give SVS stockholders the opportunity to weigh the value of the put right against the right to match. However, SVS can point to no language in the SPA or the Note requiring that the Sale Notice include any reference to the put right. To the contrary, article 11.1 of the SPA specifically provides that the put right will be "included in any agreement of sale," a step in contract negotiations occurring after the "bona fide offer" constituting the Sale Notice under article 8.16 is made. This undercuts any suggestion that the parties intended the Sale Notice to provide SVS stockholders with the ability to compare the value of exercising the put right with the risk/reward of matching any existing offer.

Further, as noted in section 1(b) above, Hart need not pay in full in cash for the shares put to it. Rather, Hart may pay for those shares over time, and for a

[26] SVS's Mot. for Partial Summ. J. and Opp'n 19.

price contingent upon the currently unknown future revenue of the combined Hart/Sequoia company. It would be truly anomalous to find that Hart may pay for the shares in this manner while at the same time requiring Hart to assign a concrete value to those shares in the Sale Notice.

In addition, the court notes that the SVS stockholders do have some information as to the amount of money they would receive upon putting their stock to Hart—they know that the price per share will be made in reference to an aggregate price of at least $16 million, possibly more. Thus, the SVS stockholders can compare the value of the put right with the risk/reward of matching any existing offer.

3. Matching Terms

Given the court's holding that the Hart Offer constitutes a bona fide offer and meets the requirements of a Sale Notice, SVS seeks a declaration that it need not match two terms of the Hart Offer. First, SVS asks whether Hart's promise to give Smartmatic a 40% earn-out from the combined Hart/Sequoia company for the next 5 years is a term it must match, and, if so, how it can match this term. The second term for which SVS seeks guidance is one under which Hart promises not to compete with Smartmatic in Latin America, the Philippines, and Belgium. In return, Smartmatic promises to grant to Hart a license to use its intellectual

property currently found in Sequoia's machines.[27] SVS argues that it need not match Hart's non-compete promise because it is part of a separate contract between Smartmatic and Hart, not any consideration given in exchange for the Note.

It is unclear that Smartmatic is even requesting that SVS match the non-compete agreement. Counsel for SVS stated at oral argument that, in a February meeting, Smartmatic's CEO told SVS's CEO that SVS did not have to match this term.[28] But more importantly, it is inappropriate for this court to consider either issue. These are not questions about what specific terms of the SPA or Note mean, such as those addressed above as to whether the Hart Offer constitutes a Sale Notice. Rather, the SPA and Note say nothing about which terms SVS must match, or how it must match certain terms. They simply provide SVS the right to match.

As stated at oral argument, the court "expects the parties to engage in good faith discussions with respect to the meaning of the right of first refusal and to provide information, if it needs to be provided, to [SVS] so that they can intelligently exercise the rights they have."[29] If SVS offers something that it, in good faith, believes to be a match of Hart's offer, yet Smartmatic rejects the offer,

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[27] At oral argument, Hart's counsel stated Sequoia currently uses that intellectual property pursuant to certain license agreements. Tr. 48.
[28] Tr. 54-55.
[29] Tr. 59.

SVS is free to bring a suit for breach of contract. But this court will not play referee to the parties' contract negotiations.

B. The Tortious Interference Claim Against Hart

Hart's motion for summary judgment on count V of SVS's third-party complaint alleges that several actions by Hart tortiously interfere with various contracts to which SVS is a party. To prevail on a claim for tortious interference with prospective contractual relations, a plaintiff must plead and prove the following elements: (1) the existence of a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff.[30]

In this case, SVS alleges that Hart interfered with its contracts through four acts: (1) sending a joint Smartmatic-Hart letter to SVS stockholders on February 15, 2008 and a February 18, 2008 email to Hart's own employees, notifying such persons of the proposed deal; (2) providing in the Hart Offer that the deal close "prior to April 15, 2008;" (3) failing to mention the put right in the Hart Offer; and

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[30] *Minchew, Santner & Brenner, LLP v. Somoza*, 2008 WL 161024, at *1 (N.Y. Jan. 17, 2008) (citing *Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289 (N.Y. 1993)). The parties applied New York law to the tortious interference claim. They have, through their briefing, implicitly adopted the law of New York. *See Tenneco Automotive, Inc. v. El Paso Corp.*, 2007 WL 92621, at *5 n.24 (Del. Ch. Jan. 8, 2007); *see also UbiquiTel Inc. v. Sprint Corp.*, 2005 WL 3533697, at *3-5 (Del. Ch. Dec. 19, 2005); *Fitzgerald v. Cantor*, 1998 WL 842304, at *1 (Del. Ch. Nov. 5, 1998).

(4) agreeing not to compete against Smartmatic in certain areas of the world in exchange for access to intellectual property owned by Smartmatic and currently found in Sequoia's machines. In support, Hart filed an affidavit from its CEO, Gregg Burt.[31] In response, SVS filed an affidavit from Jack Blaine, its President and CEO. SVS also filed an affidavit pursuant to Court of Chancery Rule 56(f) stating that SVS could not present by affidavit facts essential to opposing Hart's summary judgment motion. The affidavit states, in relevant part, that "without limited fact discovery, SVS Holdings and Sequoia cannot determine whether, and to what extent, Hart has used improper means of economic pressure or coercion during the negotiations with Smartmatic so as to induce a transaction that would preclude or limit the right of SVS Holdings to match . . . ."[32]

The court wholly disagrees with SVS. Summary judgment will be granted, and no fishing expedition allowed, because SVS fails to raise issues of material fact with respect to several elements of the tortious interference claim–in particular with respect to actionable harm and Hart's intentional inducement of others to breach their contracts.

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[31] SVS moved to strike Burt's affidavit as based on information and belief, rather than personal knowledge. The court will ignore those parts of the affidavit based on information and belief, but need not strike the affidavit in whole.
[32] Locke Aff. ¶ 4.

1. The February 15, 2008 Letter And February 18, 2008 Email

According to SVS, on February 15, 2008, Hart announced to SVS stockholders that it was in the process of completing a deal whereby Hart would acquire the majority of the shares in Sequoia. According to SVS, the February 15 announcement went to one Sequoia employee who was not an SVS stockholder, and this employee later "expressed concern."[33] On February 18, 2008, Hart emailed a similar announcement to Hart's own employees, stressing that the news was confidential and should not be disseminated outside the company. SVS claims that in response to the email, a Hart employee contacted a Sequoia non-management employee about news of the merger, and that Sequoia employee allegedly later "expressed concerns."[34] SVS also alleges that, as a result of these announcements, third parties have contacted Sequoia requesting information about rumors that Sequoia would be acquired, and that these rumors have affected Sequoia's ability to negotiate contracts with vendors. Both announcements portray Hart's purchase of the Note as a potential deal, and express Hart's desire to close the deal by April 1, 2008.

SVS first claims these communications represents tortious interference with its contracts with vendors, customers, and employees. However, SVS has made no

[33] Tr. 56; Blaine Aff. ¶ 9.
[34] Blaine Aff. ¶ 10.

allegations suggesting Hart intended to induce any such parties to breach their contracts. Notably, SVS does not allege that Hart sent the communications directly to any vendors, customers, or employees (save the one employee who accidentally received the February 15 letter). And Burt's affidavit makes clear that any Hart employee who spoke with Sequoia employees after Hart's email was sent did not act at Hart's direction, and in fact acted contrary to Hart's internal policies.[35]

In addition, SVS has identified no damages. SVS's allegations that two employees expressed "concerns" and that SVS had to field unspecified inquiries from unidentified "third parties in the industry" about rumors of Sequoia's possible acquisition do not rise to the level of actionable damages. In short, SVS has made no allegation creating a dispute over a fact material to its tortious interference claim, and the allegations as they stand are insufficient as a matter of law to support a tortious interference claim.

SVS also argues that these communications tortiously interfered with its right to match under the SPA and Note. As SVS points out, it has 60 days from February 15, 2008, *e.g.*, April 15, 2008, to exercise its matching right. The SVS stockholders then have an additional 15 days to notify Smartmatic of any intent to exercise the put right. The two February communications, however, stated the proposed deal was to close by April 1, 2008. According to SVS, these

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[35] Burt Aff. ¶ 5.

communications interfere with SVS's right to match by cutting its time short by two weeks. SVS also contends these communications interfere with SVS's right to match by "presenting the transaction closing as imminent, and making no allowance for a potential right to match, thus enhancing the risk . . . SVS Holdings will be unable to finance a matching offer."[36]

As an initial matter, SVS's claim that these communications truncated the time in which SVS has to match is completely frivolous. These communications were obviously of no legal effect and therefore could not shorten the amount of time in which SVS had to match. Further, the communications were clearly intended only to motivate employees of the relevant parties to act expeditiously.[37] Moreover, SVS's conspiracy theory about Hart's intent to foreclose SVS's access to financing is too outlandish to survive summary judgment. Even were the court to ascribe such cunning and foresight to Hart, SVS has not alleged that Hart sent the communications to any potential financier of SVS's, or identified any such financier who may have received these communications. SVS has identified no actionable harm, and has not established that Hart intentionally induced anyone to breach a contract.

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[36] SVS's Opp'n To Hart's Mot. For Summ. J. 13-14.
[37] *See also* Burt Aff. ¶ 6.

2. The Hart Offer Provides That The Deal Close "Prior To April 15, 2008"

SVS argues that by the literal terms of the SPA and Note, SVS has until midnight on April 15, 2008 to exercise its matching right. Because the Hart Offer requires closing "prior to April 15, 2008," SVS contends, the Hart Offer represents an attempt to induce Smartmatic into ignoring SVS's right to match under the SPA and Note.

Of course, SVS has a contractual right to wait until midnight of April 15 to exercise its right to match, as long as it acts in good faith. Nevertheless, Hart's offer does not constitute tortious interference with that right. Rather, Hart's offer is completely privileged conduct; Hart is allowed to make whatever kind of offer it wishes. If the offer does not conform to certain of Smartmatic's contractual obligations, Smartmatic can reject the offer. Notably, SVS does not make any allegation suggesting that Hart is in a position to economically pressure or coerce Smartmatic into accepting its offer, much less whether, and to what extent, Hart actually did so.[38] Certainly the mere making of a bona fide offer that may be accepted or rejected does not rise to the level of tortious conduct "inducing" a third-party to breach its contract.

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[38] Because SVS has failed to show that Hart is even in a position to economically pressure or coerce Smartmatic, SVS's request for discovery into whether, and to what extent, Hart did so will be denied.

3. The Hart Offer Does Not Mention A Put Right

Third, SVS argues that the Hart Offer induces Smartmatic to interfere with SVS's matching rights because it forces SVS stockholders to decide whether to match Hart's Offer without informing SVS stockholders of the total compensation they would receive were they to exercise the put right. For the reasons already discussed, neither the SPA nor the Note gives SVS stockholders a right to weigh the total compensation resulting from an exercise of the put right against the risk/reward of exercising the matching rights. Therefore, no potential breach of the SPA or Note is implicated, and this allegation cannot provide the basis for a tortious interference claim.

4. The Hart Offer Compels Breach Of Agreements With The Government

Fourth, SVS contends that the Hart Offer is structured such that it compels the post-sale Sequoia to breach its agreements with the Committee on Foreign Investment in the United States ("CFIUS") and other government agencies. Specifically, SVS maintains that if Hart's agreement not to compete in Latin America, the Philippines, and Belgium is honored, Smartmatic has exercised "indirect control" over Sequoia in violation of agreements with the government. Similarly, SVS maintains that the proposal that Smartmatic have co-ownership rights in all intellectual property owned by Smartmatic with respect to Sequoia

products certified in the United States compels the post-sale Sequoia to breach its agreements with the government.

Again, the conduct here alleged is completely privileged conduct. Hart may structure its offer however it wishes. If the offer does not conform to certain contractual obligations of Smartmatic, it can be rejected. But the mere making of an offer in this context does not constitute tortious interference.

C. The Tortious Interference Claim Against Smartmatic

Smartmatic filed a motion to dismiss count V of SVS's counterclaims, which allege tortious interference claims substantially the same as those made against Hart. These claims will be dismissed for the same reasons stated above. In addition, these claims will be dismissed because Smartmatic is a party to each of the contracts with which it is allegedly interfering. Therefore, the first element of SVS's tortious interference claim–the existence of a contract between SVS and a third party other than Smartmatic–is lacking as a matter of law.[39]

SVS does make one tortious interference allegation specifically against SVS that warrants further discussion. SVS claims that Smartmatic has exerted

[39] *Minchew, Santner*, 2008 WL 161024, at *1 (stating "[t]ortious interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a third party"); *cf. Island Rehabilitative Servs. Corp. v. Maimonides Medical Center*, 2008 WL 786507, at *7 (N.Y. Mar. 24, 2008) (stating that "where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations").

"economic pressure" on Hart in an attempt to induce Hart into structuring the Hart Offer such that it deprives the SVS stockholders of the put right. However, SVS has utterly failed to allege facts supporting this truly odd claim–SVS does not even attempt to explain what leverage Smartmatic has over Hart by which it can exert "economic pressure" on Hart, much less whether, and to what extent, Smartmatic has done so. The arms-length negotiations between Smartmatic and Hart are a far cry from the situations in which courts have found "economic pressure" to exist.[40] This allegation is baseless and will be dismissed.

IV.

For the reasons discussed in this letter opinion and at oral argument, the court declares that:

1. The Hart Offer is a bona fide offer and meets the requirements of a Sale Notice, as those terms are used in the SPA;

2. SVS received the Sale Notice on February 15, 2008, thereby triggering SVS's right to match on that date;

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[40] *See New Stadium LLC v. Greenpoint-Goldman Corp.*, 44 A.D.3d 449 (N.Y. App. Div. 2007) (finding "economic pressure" where a landlord refused to comply with contractual obligation to consent to assignment of a lease in order to extort $9 million from the lessee); *see also Scutti Enters., LLC v. Park Place Entm't Corp.*, 173 F. App'x 75, 76 (2d Cir. 2006) (stating "allegations that a defendant has improperly applied economic pressure to a third party are not enough to make out a claim for tortious interference with prospective business relations unless that pressure amounts 'to a crime or an independent tort'").

3. The purchase price in the Hart Offer aggregates to at least $16 million; and

4. SVS stockholders have no right to be paid in full at the time they put their shares to Hart. Rather, they may be paid on the same basis that Smartmatic is paid for the Note.

Smartmatic's motion to dismiss count V of SVS's counterclaim is GRANTED. Hart's motion for partial summary judgment on count V of SVS's third-party complaint is GRANTED. Smartmatic's motion for partial summary judgment is GRANTED. SVS's cross-motion for partial summary judgment on counts I, II, III, IV, and VI of SVS's counterclaim is DENIED. The parties are ordered to conduct further negotiations in good faith. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor