IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

YECHEZKEL GILDOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1416-N
	)	
OPTICAL SOLUTIONS, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: May 11, 2006
Date Decided: June 5, 2006

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STRINE, Vice Chancellor.

This case is before me on cross-motions for summary judgment. A preferred shareholder, plaintiff Yechezkel Gildor, filed this case in an attempt to assert his preemptive rights to buy certain new preferred shares issued by a privately-held company in which he invested, defendant Optical Solutions, Inc. Optical Solutions does not dispute that Gildor had preemptive rights that were triggered by Optical Solutions' decision to undertake a new round of preferred equity financing (the "New Issuance"). Rather, the key dispute is whether Optical Solutions complied with the notice requirements of the Third Amended and Restated Stockholders' Agreement (the "Stockholder Agreement") in seeking to inform Gildor of his opportunity to exercise his preemptive rights and participate in the New Issuance.

Optical Solutions sent notice of the New Issuance through Federal Express ("FedEx") to Gildor at the address he provided in a Subscription Agreement, which was the Agreement that bound Gildor to purchase his preferred shares in the first instance. That address was not reflected in the Stockholder Agreement, where the notice provision at issue is found. After attempting to deliver the notice, FedEx informed Optical Solutions that the recipient, Gildor, was not at that address. To make sure it had not misaddressed the first package, Optical Solutions sent a second notice to the same address provided in the Subscription Agreement. When it was returned unclaimed for the second time, Optical Solutions did not undertake any further efforts to find Gildor, although it had in its records an alternate address and other contact information previously provided by Gildor.

Gildor brings this suit alleging that Optical Solutions breached the Stockholder Agreement and violated its implied duty of good faith and fair dealing by not undertaking further efforts to notify him about the need to exercise his preemptive rights. For its part, Optical Solutions claims that its only duty was to comply with the notification provisions of the Stockholder Agreement and that it fulfilled its duty by sending notice to Gildor twice by overnight courier at the address he provided in the Subscription Agreement.

In this opinion, I conclude that Optical Solutions did not fulfill its contractual duty to notify Gildor. The problem for Optical Solutions is that the Stockholder Agreement has a clear notice provision, which it did not satisfy. Under the plain terms of the Stockholder Agreement, notice was to go to recipients at the address reflected in the schedules to the Stockholder Agreement. Optical Solutions, though, did not attach such a schedule to the Stockholder Agreement, so the address Optical Solutions used necessarily was not listed in any schedule to the Stockholder Agreement.

Nor does the record contain any evidence that Optical Solutions required Gildor to provide a notice address on his Stockholder Agreement signature page or in conjunction with the Stockholder Agreement. Instead, Optical Solutions opted to rely on an address that was provided in the Subscription Agreement and that was listed in exhibits to two other documents executed at the same time as the Stockholder Agreement — the Preferred Stock Purchase Agreement (the "Purchase Agreement") and the Third Amended and Restated Registration Rights Agreement (the "Registration Rights Agreement"). Reliance by Optical Solutions on the address provided in the other documents, however understandable, did not comply with the Stockholder Agreement.

Had Optical Solutions created a schedule of addresses for notice, as the Stockholder Agreement contemplated, its only duty would have been to adhere to the contract. Confronting a situation, however, where it was impossible to give notice in accordance with the contract, and realizing that notice failed to reach Gildor at the address he provided in the Subscription Agreement, Optical Solutions was not free to take no further action. Rather, Optical Solutions was required to comply substantially with that notice provision by taking further reasonable efforts to notify Gildor. Optical Solutions' own files contained several contact methods provided by Gildor, including an address that he had provided as his record address within the past two years, an email address, a phone number, and a fax number. Optical Solutions, then, had low cost methods by which to seek to provide actual notice. It failed to do so, clinging to the erroneous belief that it had complied with the literal terms of the Stockholder Agreement.

I. Factual Background

These are the undisputed facts that emerge from the parties' cross-motion papers. The plaintiff, Gildor, is a preferred shareholder of Optical Solutions who resides in Israel. Gildor holds 1,055,522 of Optical Solutions' Series F preferred shares, purchased at $0.1579 per share, and another 42,517 Series D preferred shares, purchased for $11.76 per share. Gildor first invested in Optical Solutions in September 2000, when he purchased the Series D shares. He later purchased the Series F shares in April 2002 pursuant to the Subscription Agreement. Gildor's Series D and F preferred shares were acquired for a total of approximately $667,000. Gildor's investment, at all times, was managed by his brother Ephraim Gildor, who is a money manager in New York City.

A. Gildor's Addresses

The various addresses provided by Gildor to Optical Solutions are important in determining the outcome of this case. Initially, when Gildor purchased his Series D shares in 2000, he listed his address as:

Hezi Gildor
163 John St.
Greenwich, CT 06831

This is the "Connecticut Address." The Connecticut Address was provided expressly by Gildor as his "New Address of Record" on an Optical Solutions form when purchasing the Series D shares.[1] In actuality, Gildor himself resided in Israel but his brother and financial advisor, Ephraim, lived at the Connecticut Address. Shortly after purchasing his Series D shares, Gildor submitted a change of address form to Optical Solutions. That change of address form merely clarified that Gildor himself lived in Israel, while his brother Ephraim lived at the Connecticut Address. Gildor continued to want communications to go to the Connecticut Address. In fact, on the change of address request form, Gildor expressly wrote "Please contact" above the Connecticut Address.[2]

More than a year after providing the Connecticut Address as his record address and submitting the change of address form, Gildor executed a Subscription Agreement to purchase Series F preferred shares on April 29, 2002. On the signature page of the Subscription Agreement, Gildor provided the following address as his "Mailing Address:"

[1] Gildor's Ex. 2.
[2] Aff. of Dagenais Exs. B, C.

c/o Ephraim Gildor
Gildor Trading
712 5th Ave. 6th Fl.
New York, NY 10019

This is the "New York Address." The Subscription Agreement's signature page indicates that the Series F stock certificates will be sent to the New York Address. The signature page of the Subscription Agreement also contained another address block adjacent to the Mailing Address block, which was labeled "Residence Address." The preferred stockholder was to complete the Residence Address block "if different from Mailing Address." As Gildor did not provide an alternate residence address in the Subscription Agreement, it is reasonable to infer that Gildor intended to have the New York Address serve as both his mailing and residence addresses. Indeed, his counsel candidly conceded as much at oral argument.[3] The Subscription Agreement, though, never referred to the New York Address as Gildor's record address or requested from Gildor a "New Address of Record," which was the lexicon Optical Solutions used when Gildor was asked to provide an address in connection with his purchase of Series D shares.

Approximately one week later, on May 9, 2002, Gildor executed several other documents to complete his purchase of the Series F shares. Those documents included the Purchase Agreement, the Registration Rights Agreement, and the Stockholder Agreement. Exhibit A to the Purchase Agreement lists Gildor's address as the New York Address, and Exhibit E to the Registration Rights Agreement also lists Gildor's address as the New York Address. Presumably, the address list that was provided as an exhibit to

[3] Tr. at 41.

those two agreements was compiled from the addresses that the preferred stockholders provided in the Subscription Agreement. The preemptive rights that Gildor now seeks to vindicate were provided for in the Stockholder Agreement — not in the Subscription, Purchase, or Registration Rights Agreements.

B. The Pertinent Provisions Of The Stockholder Agreement

The preemptive rights contained in § 4(a) of the Stockholder Agreement required Optical Solutions first to notify "each Series B Holder, Series C Holder, Series D Holder, and Series F Holder of such proposed transaction and offer to sell to each . . . a portion of such stock or securities . . . ." The portion that was required to be offered was, in simplified terms, that which was necessary to prevent the existing Holders from being diluted by the later offering.[4] Therefore, § 4(a) entitled each holder of a prior series of preferred stock to buy into the New Issuance "at the most favorable price and on the most favorable terms as such stock or securities are to be offered to any other Persons."

A central issue before me now is whether Optical Solutions properly notified Gildor of the New Issuance as required by § 4(a) of the Stockholder Agreement. The Stockholder Agreement's notice provision, § 16(g), provides that:

> *Any notice provided for in this Agreement shall be in writing and shall be either personally delivered, by facsimile or mailed first class mail (postage prepaid) or sent by reputable overnight courier service (charges prepaid) to the Company at the address set forth below and to any other recipient at the address indicated on the schedules hereto* and to any subsequent holder of Stockholder Shares subject to this Agreement at such address as indicated by the Company's records, or at such address or to the attention of such other person as the recipient party has specified by prior written notice to the sending party. Notices shall be deemed to have been given

[4] Stockholder Agmt. § 4(a).

> hereunder when delivered personally, sent by facsimile, upon receipt if sent through the U.S. mail and one day after deposit with a reputable overnight courier service . . . .[5]

Section 16(g), then, requires Optical Solutions to provide notice to "other recipients," i.e., Gildor, at the address in the schedules to the Stockholder Agreement.[6] Optical Solutions did not attach an address schedule to the Stockholder Agreement. In addition, the Stockholder Agreement signature page provided to Gildor by Optical Solutions did not contain an address block directing Gildor to provide an address for notice.[7]

C. Optical Solutions Attempts To Notify Gildor Of The New Issuance

This case arises because in mid-2003, Optical Solutions decided to raise capital through the New Issuance. On or about June 4, 2003, Optical Solutions sent notice of the New Issuance to over 300 holders of certain series of preferred shares. Optical Solutions used the addresses that the preferred shareholders provided in the Subscription Agreement when sending that notice. The Stockholder Agreement, though, did not reference the address provided in the Subscription Agreement as an acceptable address for providing notice.

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[5] Emphasis added.

[6] Gildor was not a "subsequent holder of Stockholder Shares," so the provision for sending notice to "such address as indicated by the Company's records" was not applicable directly to him. Gildor was an original holder. In the Stockholder Agreement, the definition of "Stockholder Shares" is, essentially, "any Common Stock." The Stockholder Agreement further states that "any Person who holds Preferred Stock shall be deemed to be the holder of the Stockholder Shares issuable directly or indirectly upon conversion of the Preferred Stock." This notice provision was presumably designed to cover a person who purchased preferred stock from the original preferred stockholders who had the option to convert their shares.

[7] A Joinder Agreement that would allow a subsequent purchaser to buy Series F shares after the execution of the Stockholder Agreement, though, does in fact have a spot for "notice address." Index of Joint Submissions Ex. 15.

Of these over 300 preferred stockholders, Optical Solutions sent out notice using FedEx to approximately 280, only four of which were not delivered, and sent out notice to the remaining preferred stockholders using first-class mail because those holders provided a post office box, rather than a physical address. Optical Solutions claims that this method of notice complied with § 16(g) of the Stockholder Agreement and that it had no obligation to take further steps to track down the preferred shareholders who did not receive the notice at the address provided in the Subscription Agreement.

As to Optical Solutions' specific efforts to notify Gildor, Optical Solutions employed FedEx on June 4, 2003 to deliver the notice of the New Issuance to Gildor at the New York Address, which was the address provided in the Subscription Agreement. The FedEx airbill indicates that the notice was scheduled for standard overnight delivery and that, when FedEx attempted to deliver the package, the recipient was not at the address listed.[8] As a result, FedEx destroyed the package.[9]

After learning that FedEx could not deliver the notice to the New York Address, Optical Solutions again attempted on June 25, 2003 to provide the notice via overnight FedEx to the New York Address, presumably in order to ensure that neither Optical Solutions nor FedEx erred the first time notice was sent. Again, the package was not delivered. The reason is now clear — Ephraim's business was no longer located at the New York Address. Neither Gildor nor his brother Ephraim ever contacted Optical

[8] App. to Gildor's Op. Brief at 5.
[9] *Id*.

Solutions to inform it that Ephraim's business had changed locations and that the New York address would no longer work.

Given that the notice failed to reach him, Gildor claims that he did not learn of the New Issuance until July 2004, which was approximately a year after the first offering of shares in New Issuance had closed. Gildor states that, even as of July 2004, he would not have learned about the New Issuance except that Ephraim had fortuitously contacted Optical Solutions at that time to inquire about the company's financial performance. During that call, apparently someone at Optical Solutions informed Ephraim about the New Issuance, which had closed the second tranche offering of preferred shares in early 2004. When Gildor asked to participate in the New Offering, Optical Solutions refused to allow him to exercise his preemptive rights. This lawsuit then ensued.

Gildor now argues that Optical Solutions' attempts to provide notice of this New Issuance were deficient because Optical Solutions sent it to an address that was not his notice or record address, which ultimately resulted in a dilution of his Optical Solutions ownership. Optical Solutions argues that it complied with the notice provision of the Stockholder Agreement by sending notice to Gildor's New York Address. The issue, then, is whether Optical Solutions was required by the Stockholder Agreement to provide notice to Gildor at an address other than the New York Address.

II. Procedural Framework

Gildor and Optical Solutions have filed cross-motions for summary judgment, both contending that the plain language of the relevant contracts and applicable law warrant summary judgment. Typically, to prevail on a motion for summary judgment, each moving party must show that no genuine issue exists as to any material fact and that it is "entitled to judgment as a matter of law."[10] Here, the parties are taking advantage of a recent amendment to Court of Chancery Rule 56, which now states:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.[11]

Both Gildor and Optical Solutions contemplate the resolution of this matter on the written record and do not argue that an issue of material fact precludes summary judgment. Therefore, I will treat the cross-motions for summary judgment as a submission for a judgment on the merits as required by Rule 56(h).

In his complaint, Gildor states only one claim — breach of contract, including breach of the implied covenant of good faith and fair dealing. My task, therefore, involves the interpretation of contractual language, and initially, I will focus solely on the language of the contract itself. If that language is unambiguous, its plain meaning alone dictates the outcome.[12] In determining a contract's meaning, "the language of an agreement, like that of a statute, is not rendered ambiguous simply because the parties in

[10] *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).
[11] Ct. of Ch. R. 56(h).
[12] *Pellaton v. The Bank of New York*, 592 A.2d 473, 478 (Del. 1991).

litigation differ concerning its meaning."[13] Rather, it is for the court to determine whether the contested provisions are "reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[14]

III. Legal Analysis

The core of Gildor's complaint is that he failed to receive notice of an event that would trigger his preemptive rights. The question is whether the failure of the notice to reach Gildor is the contractual fault of him or is the contractual fault of Optical Solutions.

A. Did Optical Solutions Comply With The Stockholder Agreement By Sending Notice To Gildor's New York Address?

The manner in which Optical Solutions is required to provide notice to Gildor, and other preferred stockholders, is stated expressly in § 16(g) of the Stockholder Agreement. The language of § 16(g) is clear and unambiguous, which means that the language alone would typically dictate the outcome.[15] That section provides that "[a]ny notice provided for in this Agreement" will be "personally delivered, by facsimile or mailed first class mail . . . or sent by reputable overnight courier service . . . to the Company at the address set forth below and to any other recipient at the address indicated on the schedules hereto." Optical Solutions' primary problem is that the Stockholder Agreement did not contain a schedule that listed an address for Gildor, or apparently for any other preferred stockholder. As a result of failing to include Gildor's address in a schedule, literal compliance with § 16(g) was impossible.

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[13] *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).
[14] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[15] *Pellaton*, 592 A.2d at 478.

Despite the lack of a schedule or notice address contained in the Stockholder Agreement, Optical Solutions attempted to notify Gildor of the New Issuance at the New York Address. Optical Solutions points to the fact that Gildor provided the New York Address in the Subscription Agreement and that the New York Address was listed as Gildor's address in Exhibit A to the Purchase Agreement and in Exhibit E to the Registration Rights Agreement. The Stockholder Agreement, though, makes no reference to any address provided in the Subscription, Purchase, or Registration Rights Agreement.[16] In fact, § 16(c) of the Stockholder Agreement states that "this Agreement embodies the complete agreement and understanding among the parties hereto . . . ."

It is possible that Optical Solutions contemplated that the address provided by the preferred stockholders in the Subscription Agreement and listed in the Purchase and Registration Rights Agreements would become the notice address for all notices to the Series F preferred stockholders under all the related agreements, including the Stockholder Agreement. But Optical Solutions did not provide Gildor with a clear statement to that effect in any of the documents it provided to him. For example, the Subscription Agreement signed by Gildor could have contained a clear statement indicating that the "address provided will supersede all previous addresses provided to

[16] Though argued by neither party, precedent exists suggesting that contracts entered into at the same time and relating to the same subject matter should be construed together as a single contract in the appropriate circumstances. *See Simon v. The Navellier Series Fund*, 2000 WL 1597890, at *7 (Del. Ch. Oct. 19, 2000); *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *1 (Del. Ch. Feb. 28, 1990). *See also* RICHARD A. LORD, 11 WILLISTON ON CONTRACTS § 30:26 (4th ed.); 17A *C.J.S. Contracts* § 315 (2005). In this case, the parties expressed their intent in writing, through the inclusion of an integration clause in § 16(c) of the Stockholder Agreement, that the agreements not be considered as one. In addition, each agreement contained its own notice provision, and the notice provisions in various agreements differed in important ways, including as to the manner by which notice was to be delivered.

Optical Solutions and will serve as the address of record for all notices under this Agreement and any other agreement between the holder and Optical Solutions." No language of this kind appears in that document. Likewise, there is no other document that can be interpreted as unambiguously incorporating the New York Address provided by Gildor under the Subscription Agreement as a schedule to the Stockholder Agreement. Therefore, Optical Solutions could not rely on the New York Address to comply with § 16(g) of the Stockholder Agreement.

All the agreements provided to the preferred stockholders during the Series F offering, including the Subscription, Purchase, Registration Rights, and Stockholder Agreements, were drafted by Optical Solutions. Optical Solutions had numerous options, when drafting those agreements, as to how it would provide notice and to what address it would provide notice. In fact, the Purchase Agreement and Registration Rights Agreement have their own notice provisions. The Purchase Agreement provides that notice will be sent "to the party to be notified at such party's address as set forth on the signature page or Exhibit A hereto." Exhibit A to the Purchase Agreement, in fact, contains an address for Gildor. The Registration Rights Agreement provides that notice will be addressed to "the party to be notified as such party's address or fax number as set forth in the Company's records." Optical Solutions, then, could search its records in order to comply with the Registration Rights Agreement, which is a simple step Optical Solutions failed to take when attempting to notify Gildor of the New Issuance pursuant to the Stockholder Agreement. Interestingly, Exhibit E to the Registration Rights Agreement is the same document that is attached to the Purchase Agreement as Exhibit

A. The notice provision of the Registration Rights Agreement, though, failed even to mention Exhibit E or any other schedule as a source of addresses for notice and, as discussed, opted to rely on a preferred stockholder's record address. Exhibit A to the Purchase Agreement and Exhibit E to the Registration Rights Agreement, then, listed Gildor's address as the New York Address but failed to indicate in any way that Gildor had changed his address of record or that the New York Address would be used as a general notice address.

Having put itself in a position in which it was impossible to give notice in precise conformity with the Stockholder Agreement, Optical Solutions relied on addresses received under the Subscription Agreement. Thus, it instructed FedEx to deliver notice to Gildor at the New York Address. After FedEx informed Optical Solutions that Ephraim's business was no longer at the New York Address, Optical Solutions attempted to send notice to that address again — presumably in order to ensure that neither it nor FedEx made an error. That second delivery also failed.

At that point, then, the situation was that Optical Solutions had attempted to send notice to an address that did not comply with the express terms of the Stockholder Agreement, and Optical Solutions had been notified by FedEx that the notice required under the Stockholder Agreement had not reached Gildor. Facing that situation, Optical Solutions chose to do nothing else to notify Gildor. If Optical Solutions had complied with the Stockholder Agreement, even if it knew that the notice did not reach Gildor, it

would have been under no further obligation to search for him.[17] That was not the case here. Optical Solutions' failure to comply with the Stockholder Agreement, when combined with its knowledge that notice was not delivered to Gildor, imposed upon it a contractual obligation to do more than it did.

Because literal compliance with § 16(g) was impossible, the key issue is what further, if anything, Optical Solutions was required to do to satisfy its notice obligations under the Stockholder Agreement. When confronted with less than literal compliance

[17] Gildor argues that, even in the circumstance when an issuer complies with the notice terms of a contract, once the issuer learns that the contractually-compliant notice failed to reach the investor, the issuer owes the investor a duty to take reasonable further steps to locate her. Gildor argues that an implied covenant of good faith and fair dealing would require this type of reasonable search. That is not so. The implied covenant of good faith and fair dealing "cannot contravene the parties' express agreement and cannot be used to forge a new agreement beyond the scope of the written contract." *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 921 (Del. Ch. 1999), *aff'd*, 748 A.2d 407 (Table); *see also Automodular Assemblies (DE), Inc. v. PNC Bank, Delaware*, 2004 WL 1859828, at *7 n.7 (Del. Ch. Aug. 6, 2004); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Tech. Inc.*, 854 A.2d 121, 142 (Del. Ch. 2004). A court should not read a reasonableness requirement into a contract entered into by two sophisticated parties. It is imperative that contracting parties know that a court will enforce a contract's clear terms and will not judicially alter their bargain, so courts do not trump the freedom of contract lightly. *See, e.g.*, *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1059-60 (Del. Ch. 2006); *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in pertinent part*, 2006 WL 196379 (Del. Jan. 24, 2006). The fairness of a judicial rule requiring a company to search for preferred stockholders who do not keep their contractual addresses current is of grave doubt, as these searches would waste company resources and come at the expense of stockholders who maintained current addresses on file with the company. It is not uncommon for an issuer to have thousands of stockholders, a reality that makes a judicially-invented "reasonable search" rule highly unattractive as the costs of such a rule would arguably be substantial. These costs ultimately would burden investors by diverting corporate resources to an activity not central to producing stockholder wealth. To this point, the Delaware General Corporation Law provides issuers with certainty that sending notice to an identifiable group of shareholders in a prescribed manner will satisfy its obligations to provide notice to shareholders. *See, e.g.*, 8 *Del. C.* § 262. Issuers dealing with preferred stockholders should know that an agreement specifying notice provisions will be enforced as written in the same manner that issuers know that they are required only to notify the record holders of common stock, not the beneficial owner, of certain rights in a merger. *See Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354 (Del. 1987); *Gilliland v. Motorola, Inc.*, 859 A.2d 80, 85 (Del. Ch. 2004).

with a notice provision, courts have required that a party substantially comply with the notice provision. The requirement of substantial compliance is an attempt to avoid "harsh results . . . where the purpose of these [notice] requirements has been met."[18] When literal compliance is not possible, that is a sensible rule, and it is one which would not require Optical Solutions to search to the ends of the world for Gildor. Substantial performance is "that which, despite deviations from contract requirements, provides the important and essential benefits of the contract."[19] In this instance, substantial compliance would require that Optical Solutions take reasonable steps to provide Gildor with actual notice of the opportunity to exercise his preemptive rights.

Delaware courts have found favor with this type of substantial compliance requirement. In *Corporate Prop. Assocs. 6 v. The Hallwood Group, Inc.*, this court addressed a situation, like the one before me now, where "literal compliance with [the

[18] *Colson v. Bureau of Labor and Indus.*, 831 P.2d 706, 709 (Or. Ct. App. 1992) (requiring only substantial compliance with statutory notice provisions). *See also Boe v. Edgewood, Inc.*, 425 N.W.2d 39, 1998 WL 63848, at ***3 (Wis. Ct. App. 1988) (Unpublished Disposition) ("Though Boe asserts that this [non-compliance] is fatal to Edgewood's position, we conclude that Edgewood's letter is substantial performance of the notice provision . . . ."); *Liberty Savings Bank, F.S.B. v. Laywers Title Ins. Corp.*, 1990 WL 235470, at *4 (Oh. Ct. App. Dec. 31, 1990) (stating that "there need only be a substantial and reasonable compliance with the notice provision, and not a strict literal compliance"); RICHARD A. LORD, 16 WILLISTON ON CONTRACTS § 49:109 (4th ed.) ("Notice provisions have generally been interpreted to require substantial compliance, so that notice slightly beyond the required time set by the [insurance] policy, or from one other than the insured has been held sufficient."); LEE R. RUSS, 13 COUCH ON INS. § 186:40 (2005) ("Jurisdictions differ with regard to the degree of compliance with the notice provisions of labor and material bond requirements . . . . On one hand, some jurisdictions require only substantial compliance with notice provisions."); *Williams v. Toliver*, 759 So.2d 1195, 1199 (Miss. 2000) (discussing that substantial compliance, not strict compliance, with the notice provisions of the Mississippi Tort Claims Act was required). *But see Maxson Corp. v. Gary King Constr. Co.*, 363 N.W.2d 901 (Minn. Ct. App. 1985) (requiring strict compliance with time requirement in notice provision); *Welch v. Georgia Dept. of Transp.*, 624 S.E.2d 177 (Ga. Ct. App. 2005) (requiring strict compliance with the notice provisions of the Georgia Tort Claims Act).

[19] 17A AM. JUR. 2D *Contracts* § 619 (2005).

notice] provision would have been impossible."[20] Vice Chancellor, now Justice, Jacobs took into account the prior conduct of the parties and determined that "the parties . . . intended that substantial compliance with the notice provision would suffice," and that, in fact, the defendant "substantially and to the extent reasonably practicable complied with the notice provision" of the relevant agreement.[21]

In another situation with similar facts, the Delaware Superior Court reached a similar conclusion. In *Beach Treat, Inc. v. New York Underwriters Ins. Co.*,[22] an insurer sent a cancellation notice to an insured in a manner that "did not adhere to the cancellation provision of the policy."[23] That cancellation notice was returned undelivered to the insurer, and the insurer opted to do nothing in light of learning that the notice was not delivered.[24] The court held that "[a]t least under the present facts, [the insurer] had a duty to make further efforts to communicate with plaintiff concerning the cancellation."[25] In that situation, which is analogous to this case, the Superior Court premised its holding heavily on the fact that the insurer departed from the terms of the policy in providing notice. In fact, the court stated that after learning the notice never reached the insured, one alternative was for the insurer to "give notice literally complying with the cancellation provisions of the policy."[26] Because Optical Solutions failed to create an

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[20] *Corporate Prop. Assocs. 6 v. The Hallwood Group Inc.*, 792 A.2d 993, 1000 (Del. Ch. 2002), *rev'd*, 817 A.2d 777 (Del. 2003). Although the Supreme Court reversed the decision on appeal, that aspect of Vice Chancellor Jacobs' opinion was not disturbed or criticized on appeal.
[21] *Id*. at 1001.
[22] 301 A.2d 298 (Del. Super. 1972).
[23] *Id*. at 300.
[24] *Id*. at 301.
[25] *Id*.
[26] *Id*.

address schedule for the Stockholder Agreement, making literal compliance impossible in this situation, it was bound to undertake reasonable efforts in order to substantially comply with the notice provision of the Stockholder Agreement.

One contractually-rooted method would have been for Optical Solutions to attempt notice to Gildor as if he were a subsequent holder of Stockholder Shares. Section 16(g) of the Stockholder Agreement directs Optical Solutions to notify those subsequent holders "at such address as indicated by the Company's records." Had it looked to its records, Optical Solutions would have discovered that it had more than one address on file for Gildor and that none of its recent documents had clearly indicated that any new address provided by a stockholder would supersede all prior contact information for all purposes. In addition, Gildor has pointed, without contradiction, to record evidence that Optical Solutions had in its possession his email address, his fax number, his phone number, and the Connecticut Address. He has also pointed to evidence that he clearly provided the Connecticut Address as his "New Address of Record" when purchasing his Series D shares and again as his contact address before purchasing the Series F shares. Further, Gildor claims that Optical Solutions had used email to communicate with him on other occasions, including to notify him of the Series F financing, and could have again contacted him through email. Optical Solutions, then, could have satisfied its duty to substantially comply with the notice provision by sending Gildor notice at the Connecticut Address as well as the New York Address, or sending an email to find out where to send the notice. No heroic or even costly measures (such as employing a finder) would have been required.

Fortunately for Gildor, this case does not involve a balancing of equities, as he is not in a very sympathetic position. Gildor entrusted his brother Ephraim to serve as his financial advisor. That role involved managing Gildor's investment in Optical Solutions, which necessarily entailed Ephraim receiving communications from Optical Solutions concerning Gildor's investment. Again, as Gildor's counsel candidly conceded, Gildor and Ephraim likely meant for all notices to go to the New York Address when they provided that address to Optical Solutions in 2002. Ephraim, who served as Gildor's financial advisor in connection with his Optical Solutions investment, and specifically the purchase of the Series F shares, was negligent in failing to update his address when his business left the New York Address. In a case decided on the equities, that negligence would weigh heavily.[27]

But this is a case of Optical Solutions breaching a clear provision of the Stockholder Agreement, which was a document that it crafted unilaterally. Faced with the inability to literally comply with the Stockholder Agreement, Optical Solutions attempted to send notice to the New York Address when Optical Solutions itself had created ambiguity as to which address, the Connecticut or the New York Address, was Gildor's record address.[28] That ambiguity resulted because Optical Solutions failed to reflect anywhere that the New York Address would replace the Connecticut Address as Gildor's record address and would be used for *all* notices sent by Optical Solutions, for

[27] In addition, when Gildor executed the Stockholder Agreement, there was no schedule containing notice addresses, and he had the opportunity to bring that fact to Optical Solutions' attention, if he was concerned with the mechanics of the notice provision.

[28] *See, e.g.*, *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996) ("It is a well-accepted principle that ambiguities in a contract should be construed against the drafter.").

any purpose. Instead, Optical Solutions was left with an address that Gildor provided as his "New Address of Record" and again in a change of address form, the Connecticut Address, and an address that Gildor provided as his mailing address in the Subscription Agreement, the New York Address. In the face of that ambiguity, rather than take low-cost steps to find Gildor such as sending notice to the Connecticut Address, Optical Solutions took no additional steps to notify him and decided to rest on its mistaken belief that it had complied literally with the Stockholder Agreement when it learned that notice did not reach Gildor at the New York Address.

Therefore, Optical Solutions failed to comply with the notice requirements of the Stockholder Agreement by sending notice to the New York Address, which was not contained in the schedules to that Agreement.[29] In light of its failure to comply and its knowledge that notice was not delivered to Gildor, Optical Solutions was required to substantially comply with the notice provision by undertaking further, reasonable efforts to notify Gildor. Instead, it did nothing, and, as a result, breached its notice obligations to Gildor in the Stockholder Agreement. Stated another way, just as issuers should be entitled to discharge their obligations to holders by providing notice in compliance with a contract as written without being subject to an implied duty to take additional efforts if

[29] Gildor alternatively argues that §§ 4(a) and 4(b) require actual notice because § 4(a) states that "the Company shall first notify" certain preferred stockholders and § 4(b) states that a stockholder must "deliver a written notice from the Company to such effect within 15 business days after receipt of written notice." As to § 4(a), the "notify" language is clearly referring to the notice provision, § 16(g), which does not require actual notice. As to § 4(b), the "receipt" language does not confer upon Optical Solutions a requirement to provide actual notice but rather provides a benefit to preferred stockholders who would be notified by a method of notice, i.e., first-class mail, that would reach them later than notice provided to certain shareholders by another method, i.e., overnight courier. Starting the clock at receipt, then, evens the playing field among shareholders who receive notice via different delivery methods.

the contractual form of notice fails, so must issuers who create contractual ambiguity about the method of notice bear the proportionate costs of their own drafting infelicities by undertaking reasonable efforts to provide actual notice.

B. Did Optical Solutions' Failure To Comply With The Stockholder Agreement Implicate A Fiduciary Duty To Gildor?

Aside from its contractual argument that Optical Solutions did not comply with the Stockholder Agreement, Gildor also raises a potential breach of fiduciary duty. He does so improperly because the complaint does not even assert such a cause of action.

I consider the claim to be non-existent and improperly raised now. But, in order to form a complete record, I briefly will address Gildor's improperly-asserted fiduciary duty argument. In Delaware, claims made to protect or enforce a benefit inuring to a specific class of shareholders, such as a preferred stockholder, that arise from a contract are contractual in nature and do not implicate any fiduciary duty.[30] In this respect, the preemptive rights were provided to preferred stockholders owning shares of certain series of stock, and those rights arose expressly out of the Stockholder Agreement, not as a matter of equity. Because the rights Gildor seeks to enforce arose from contract, Optical Solutions' duty to give him notice was purely contractual. Therefore, Optical Solutions' was bound contractually, not by common law fiduciary duties, to notify Gildor in accordance with the Stockholder Agreement.

[30] *See In re General Motors Class H S'holders Litig.*, 734 A.2d 611, 619 (Del. Ch. 1999); *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *6 (Del. Ch. Nov. 2, 1995); *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594 (Del. Ch. 1986).

IV. The Remedy

As a remedy for Optical Solutions' breach of the Stockholder Agreement, Gildor seeks specific performance of his preemptive rights, which will allow him to participate in the New Issuance, or, in the alternative, a return of his entire $667,000 investment in Optical Solutions. The latter remedy is an absurd one, advanced with chutzpah, as it would turn a simple, good faith mistake by Optical Solutions into a windfall for Gildor, whose broker's lack of diligence contributed to the present hoo-ha. As the record makes clear, Gildor's original stake is now worth far less than the amount of money he invested. Therefore, the more relevant issue is whether Gildor should be entitled to purchase a stake in the New Issuance sufficient to prevent dilution of his original ownership percentage, or whether he should be remitted to the remedy of an estimation of what he lost by his exclusion from the New Issuance.

Section 16(f) of the Stockholder Agreement addresses the available remedies. That section states:

> The Company and Stockholders shall be entitled to enforce their rights under this Agreement specifically, to recover damages by reason of any breach of any provision of this Agreement and to exercise all other rights existing in their favor. The parties hereto agree and acknowledge that money damages would not be an adequate remedy for any breach of the provisions of this Agreement and that the Company and any Stockholder may in its sole discretion apply to any court of law or equity of competent jurisdiction for specific performance . . . in order to enforce or prevent any violation of the provisions of this Agreement.

Requiring Optical Solutions to honor the Stockholder Agreement by allowing Gildor to exercise his preemptive rights would be consistent with the bargain struck between Optical Solutions and its Series F stockholders.

Specific performance, of course, is a form of relief available at the discretion of this court.[31] If the Stockholder Agreement was silent as to the availability of specific performance, Gildor would bear the burden of showing that a legal remedy would be inadequate.[32] The central question in that situation would be whether a monetary award would be sufficient to remedy Gildor's inability to purchase additional Optical Solutions stock in the New Issuance. Contracts providing preemptive rights to purchase non-listed securities have given rise to specific performance orders and there is a colorable argument for that remedy here.[33] But, given Delaware's public policy of favoring freedom of contract, there is no need to make that inquiry. Section 16(f) specifically states that the parties can enforce their contractual rights by seeking specific performance and that a stockholder "may in its sole discretion apply to any court of law or equity of competent jurisdiction for specific performance . . . in order to enforce or prevent any violation of the provisions of this Agreement." Although this court has not had the prior

[31] *See, e.g.*, *Marvel v. Conte*, 1978 WL 8409, at *4 (Del. Ch. Oct. 24, 1978); *Esso Standard Oil Co. v. Cunningham*, 114 A.2d 380, 383 (Del. Ch. 1955).

[32] *See Lineberger v. Welsh*, 290 A.2d 847, 848 (Del. Ch. 1972) ("Whether the subject matter of a contract is real or personal property, the test for availability of the remedy of specific performance is inadequacy of the remedy at law."); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 12-3 (2005) ("The quintessential guidepost for availability of specific performance, therefore, is inadequacy of the remedy at law.").

[33] This court has recognized that specific performance of a stock purchase is appropriate in situations where the stock is not available in the market, is unique, or has unique value to the purchaser. *See, e.g.*, *Amaysing Tech. Corp. v. Cyberair Commc'ns, Inc.*, 2004 WL 1192602, at *3 (Del. Ch. May 28, 2004); *Hazen v. Miller*, 1991 WL 244240, at *5-6 (Del. Ch. Nov. 18, 1991). Here, the stock was not available in the market, as Optical Solutions was a small private company, and the preemptive rights gave Gildor the right to maintain his proportional share of the upside of a start-up firm. Due to the remedy provision of the Stockholder Agreement, though, I need not determine whether the specific nature of Optical Solutions' stock would warrant specific performance in the absence of that provision.

opportunity to determine whether a contractual provision granting an aggrieved party a contractual right of specific performance is enforceable,[34] Delaware courts do not lightly trump the freedom to contract and, in the absence of some countervailing public policy interest, courts should respect the parties' bargain.

Indeed, in the analogous context of a party seeking a preliminary injunction, this court has held that a contractual stipulation of irreparable harm is sufficient to demonstrate irreparable harm.[35] This court, in *Kansas City Southern v. Grupo*, held that as long as the parties did not include the irreparable harm stipulation as a sham, i.e., when an adequate remedy at law clearly exists, or simply as a means to confer jurisdiction on this court, then the stipulation will be upheld.[36] It would create an odd kink in Delaware law, then, to determine that parties are permitted to stipulate by contract that a breach will give rise to irreparable harm but not to stipulate that an aggrieved party may obtain specific performance as a remedy for breach. Here, Optical Solutions' breach prevented

[34] WOLFE & PITTENGER § 12-3 ("Given the requirement that the applicant demonstrate the inadequacy of the legal remedy as a precondition to obtaining specific performance of a contract as well as the discretionary nature of that form of relief, discussion is warranted regarding the extent to which the Court of Chancery will defer to a contract provision stipulating that any breach of the contract necessarily constitutes irreparable harm rendering the legal remedy inadequate. Such provisions are commonplace in modern commercial agreements. Yet there is little Delaware law touching on the enforceability or effect of such provisions in the context of a request for specific performance.").

[35] *See Kansas City Southern v. Grupo TMM, S.A.*, 2003 WL 22659332, at *5 (Del. Ch. Nov. 4, 2003); *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209-10 (Del. Ch. 2001); *True North Commc'ns, Inc. v. Publicis S.A.*, 711 A.2d 34, 44 (Del. Ch. 1997), aff'd, 705 A.2d 244 (Del. 1997); *see also* WOLFE & PITTENGER § 12-3 ("In the context of applications for interim injunctive relief, the Court of Chancery consistently has held that contractual stipulations of irreparable injury resulting from breach are sufficient in and of themselves to establish the element of irreparable harm . . . . One may suspect that the Court will take a similar approach when considering whether to specifically enforce a contract containing such a provision.").

[36] *See Kansas City Southern*, 2003 WL 22659332, at *5.

Gildor from exercising his preemptive right to buy additional preferred stock. That breach arguably would warrant specific performance even in the absence of a contractual authorization for that remedy, but specific performance, in this case, is warranted because Optical Solutions breached the Stockholder Agreement, and the parties stipulated in § 16(f) that an aggrieved stockholder could petition a court for specific performance in order to enforce provisions in the Stockholder Agreement.

V. Conclusion

For the foregoing reasons, Gildor's motion for summary judgment is GRANTED, and Optical Solutions' motion for summary judgment is DENIED. The parties shall confer and craft an order of specific performance, working together cooperatively to address any practicability problems.