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Case No. 6276-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GIBRALTAR PRIVATE BANK & TRUST COMPANY,	:	
Plaintiff,	:	
v.	:	**C.A. No. 6276-VCN**
BOSTON PRIVATE FINANCIAL HOLDINGS, INC.,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: August 31, 2011
Date Decided: November 30, 2011

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Gibraltar Private Bank and Trust Company (the "Plaintiff" or "Gibraltar"), brought this action against Defendant Boston Private Financial Holdings, Inc. (the "Defendant" or "Boston Private") for specific performance of Boston Private's obligations under the tax allocation provision of the stock purchase agreement between the Plaintiff and Defendant, dated September 17, 2009 (the "Stock Purchase Agreement"). Both parties have moved for judgment on the pleadings under Court of Chancery Rule 12(c) on the question of how the tax payment provided for in the Stock Purchase Agreement should be calculated. For the reasons set forth below, both motions for judgment on the pleadings are denied.

II. BACKGROUND

Boston Private acquired Gibraltar in October 2005, and, thereafter, Gibraltar, a banking entity, operated as a wholly-owned subsidiary of Boston Private. On September 17, 2009, Boston Private sold all of its shares of Gibraltar to a group of buyers pursuant to the Stock Purchase Agreement. In the Stock Purchase Agreement, Boston Private also undertook to make a payment to Gibraltar if it received certain tax benefits accruing from the business of Gibraltar (the "Tax Payment"). Before Gibraltar's sale, its income tax liability or benefit was included as part of Boston Private's consolidated income tax return.

Section 5.5(d) of the Stock Purchase Agreement describes each party's obligations with regard to the Tax Payment and its calculation. Section 5.5(d) contemplates a Tax Payment for both the 2008 tax year and the short 2009 tax year ending on the date the stock sale closed; only the 2009 Tax Payment is at issue here. Under Section 5.5(d), Gibraltar first calculates its income tax liability or benefit for the 2008 and short 2009 tax years as though it filed separate returns for those years. To the extent that Gibraltar would have owed taxes on a standalone basis, it would be obligated to pay the entire amount of this hypothetical tax liability to Boston Private 15 days before the applicable tax payment is due from Boston Private to the taxing authority. The pending motions, however, address the calculation of the Tax Payment when Gibraltar's standalone tax return yields negative taxable income.

The relevant portion of Section 5.5(d) states:

> ***To the extent that the separate return taxable income of [Gibraltar] and its Subsidiaries for any such taxable year is negative and generates a [sic] income Tax Benefit to [Boston Private] and [Boston Private's] other Subsidiaries either as a result of being able to offset such loss against taxable income of [Boston Private] and its other Subsidiaries or as a result of being able to carry back such loss against prior years' taxable income, [Boston Private] shall pay to [Gibraltar] the amount of such Tax Benefit when and if realized by [Boston Private] or, if sooner, within 15 days after the applicable Tax Return would be due if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a refund of income Tax if they had filed a separate income Tax Return historically***; *provided, however*, that in the case of the short 2009 taxable year any gain recognized for federal income tax purposes by [Boston Private] on the sale of the

> Shares hereunder shall first be taken into account to offset on a dollar-for-dollar basis any negative taxable income of [Gibraltar] and its Subsidiaries, and only the net amount, if any, remaining after such offset shall be taken into account for purposes of calculating any loss or Tax Benefit for the short 2009 taxable year under this Section 5.5(d). To the extent [Boston Private] cannot currently use all of its available losses, for purposes of the preceding sentence, [Boston Private] will use a pro-rata portion of each category of losses, including the losses from [Gibraltar] and its Subsidiaries, with the remainder being carried back and then forward, as may be applicable.[1]

Section 5.5(d) goes on to define the term "Tax Benefit" as "the *positive* difference, if any, between (i) Taxes that would have been payable by the relevant party for such year without taking into account any such adjustment and (ii) Taxes actually payable by the party for such year" (emphasis in the original).[2]

It is undisputed that, as a result of Gibraltar's losses, Boston Private received a Tax Benefit of approximately $15 million for the short 2009 tax year.[3] Gibraltar contends that it is owed this $15 million under the terms of Section 5.5(d).[4] Boston Private argues that it owes and has offered to pay Gibraltar a much smaller sum of $2,371,247, which is the amount of the refund to which Gibraltar would have been

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[1] Emphasis before the semi-colon added and emphasis following the semi-colon in the original.
[2] Although as defined in the Stock Purchase Agreement, the term "Tax Benefit" can refer to a benefit received by either Boston Private or Gibraltar, as used in this Memorandum Opinion, the term "Tax Benefit" will refer more specifically to the benefit received by Boston Private as a result of Gibraltar's losses; otherwise, the definition used here is the same as the one quoted above.
[3] Def.'s Answer ¶ 13.
[4] Compl. ¶ 25.

entitled for the short 2009 tax year if it had filed separately historically (the "Hypothetical Refund").[5]

III. THE CONTENTIONS

In support of their respective motions, both Boston Private and Gibraltar argue that Section 5.5(d) is unambiguous and that their respective interpretation is the only reasonable interpretation. Both parties claim that their respective reading of the provision comports with its plain meaning. Gibraltar further contends that its reading is supported by the last antecedent rule and confirmed by extrinsic evidence.

In opposition to the other party's motion, both Boston Private and Gibraltar contend that the opposing party's reading of Section 5.5(d) is unreasonable, does not comport with the plain meaning of the contractual language, and is not the only reasonable interpretation. Additionally, Boston Private challenges Gibraltar's use of extrinsic evidence and the last antecedent rule.

IV. ANALYSIS

A. *Applicable Standard*

The Court must accept the non-moving party's well-pleaded facts as true and view those facts in the light most favorable to the non-moving party when

[5] Def.'s Opening Br. in Supp. of its Mot. for J. on the Pleadings 4-5.

considering a Rule 12(c) motion.[6] The motion will only be granted if the Court finds that no material issue of fact exists and the movant is entitled to judgment as a matter of law.[7] At the heart of this dispute is the interpretation of a portion of Section 5.5(d). When ruling on dueling Rule 12(c) motions that turn on an issue of contract construction, the Court must deny both motions if each has "advanced reasonable but conflicting readings of the Agreement,"[8] or, in other words, if the contract provision in question is ambiguous.[9] Delaware adheres to the "objective" theory of contracts under which a contract is construed as it would be understood by an objective, reasonable third party.[10]

B. *Boston Private's Interpretation of Section 5.5(d)*

The portion of Section 5.5(d) central to this dispute states: ". . . [Boston Private] shall pay to [Gibraltar] the amount of such Tax Benefit when and if realized by [Boston Private] *or, if sooner, within 15 days after the applicable Tax Return would be due if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a refund of income Tax if they had filed a separate income Tax Return*

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[6] *Rag American Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *1 (Del. Ch. Dec. 7, 1999).
[7] *Id.*
[8] *Id.* The Stock Purchase Agreement, at Section 6.8(a), recites that it is to be construed in accordance with the laws of Delaware.
[9] Ambiguity exists "when the provisions in controversy are reasonably or fairly susceptible [to] different interpretations or may have two or more different meanings." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). Whether a contract is ambiguous, addressed in the context of contract interpretation, is a question of law. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2006).
[10] *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005).

historically . . .” (emphasis added). Boston Private contends that the clause “if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a refund of income Tax” (the “limiting clause”) is a limitation on its obligation and applies to the Tax Payment regardless of when it is paid. According to Boston Private’s interpretation, regardless of whether the Tax Payment is paid “when and if the [Tax Benefit is] realized by [Boston Private]” (the “first timing provision”) or “within 15 days after the applicable Tax Return is due” (the “second timing provision”), Boston Private’s Tax Payment obligation equals the value of the Tax Benefit limited to the amount of the Hypothetical Refund. Grammatically, Boston Private argues that the limiting clause acts as an adverb to modify “pay,” as in: “[Boston Private] shall pay . . . if and to the extent [Gibraltar] and its Subsidiaries would be entitled to [the Hypothetical Refund] . . . .”

Under this reading, Gibraltar would never receive more than the Hypothetical Refund, but it would receive less if the Tax Benefit is worth less to Boston Private than it would have been worth to Gibraltar on a standalone basis. Thus, if the Tax Benefit exceeds the Hypothetical Refund, only the amount of the Hypothetical Refund would be owed. Alternatively, if the Tax Benefit is less than or equal to the Hypothetical Refund, Boston Private would owe the amount of the Tax Benefit. More simply, under Boston Private’s interpretation, it would owe the lesser of the Tax Benefit or the Hypothetical Refund.

With regard to the second timing provision, the parties agree that the phrase "the applicable Tax Return" refers to the tax return Gibraltar would file if it filed a standalone return for the tax year in question (the "Hypothetical Return"). Boston Private argues that the second timing provision is meant to protect the time value of the Tax Payment (as interpreted by Boston Private) by ensuring that Boston Private cannot delay disbursing the Tax Payment by delaying the filing of its tax return.[11] Therefore, Boston Private contends, the second timing provision requires remittance of the Tax Payment within 15 days after the filing deadline for the Hypothetical Return, regardless of whether Boston Private has filed its tax return and realized the Tax Benefit.[12]

Boston Private sums up its interpretation of the relevant portion of Section 5.5(d) as such:

> Aside from the initial directive that "[Boston Private] shall pay," the remaining phrases in the provision modify that directive by detailing (1) who [Boston Private] shall pay ("to [Gibraltar]"), (2) what [Boston Private] shall pay ("the amount of such Tax Benefit"), (3) when [Boston Private] shall pay ("when and if realized by [Boston Private] or, if sooner, within 15 days after the applicable Tax Return would be due"), and (4) to what extent [Boston Private] shall pay ("if and to the extent [Boston Private] and its Subsidiaries would be entitled to a refund of income Tax if they had filed a separate income Tax Return historically").[13]

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[11] Mot. for J. on the Pleadings Hr'g Tr. ("Hr'g Tr"), Aug. 31, 2011, at 17.
[12] *Id.*
[13] Def.'s Reply Br. in Further Supp. of Its Mot. for J. on the Pleadings & Answering Br. in Opp'n to Pl.'s Cross-mot. for J. on the Pleadings 4-5.

Gibraltar's primary arguments in opposition to Boston Private's interpretation of Section 5.5(d) are that Section 5.5(d) is unambiguous and its own interpretation is mandated by the text's plain meaning, supported by the last antecedent rule, and confirmed by extrinsic evidence.[14] Additionally, citing related precedent,[15] Gibraltar contends that if Section 5.5(d) was meant to have the meaning proposed by Boston Private, a comma should have been inserted before the limiting clause.[16] It is true that if this additional comma were present, this case would be much easier to decide, and its absence is an argument against Boston Private's interpretation. Still, where a contract provision is ambiguous, the absence of punctuation that would clearly support one interpretation does not necessarily render such an interpretation unreasonable.[17]

Finally, Gibraltar contends that Boston Private's interpretation creates "mere surplusage"[18] out of a significant portion of Section 5.5(d) by rendering the amount

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[14] These arguments in favor of Gibraltar's interpretation of Section 5.5(d) are explained in further detail below.

[15] *See New Castle County v. Nat'l Union Fire Ins. Co.*, 174 F.3d 338, 349 n.10 (3rd Cir. 1999) (applying Delaware law); *Rag American Coal Co.*, 1999 WL 1261376, at *4.

[16] The relevant language would then read: "[Boston Private] shall pay to [Gibraltar] the amount of such Tax Benefit when and if realized by [Boston Private] or, if sooner, within 15 days after the applicable Tax Return would be due**[,]** if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a refund . . . ."

[17] *See Whitcraft v. Parsons*, 2002 WL 927377, at *2 (Del. Ch. Apr. 30, 2002) (finding that there was "enough of a question [regarding a contract's interpretation] that summary judgment [was] not appropriate" in a case involving a similar absence of a comma).

[18] Delaware courts "will read a contract as a whole and . . . will give each provision and term effect, so as not to render any part of the contract mere surplusage." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010)).

of the Tax Benefit and the timing of the Tax Payment irrelevant.[19] For the reasons explained below, this surplusage argument is unavailing. First, beyond a conclusory statement that "[b]ased on Boston Private's interpretation . . . the language regarding the [second timing provision] would be 'mere surplusage,'" [20] Gibraltar does not explain why Boston Private's reading would render the timing of the Tax Payment irrelevant. While the timing of the Tax Payment does not affect the *amount* of the payment under Boston Private's reading, it cannot be said that the timing of the payment is irrelevant; cash management considerations and the concept of the time value of money are just two reasons why the timing of a payment may be important. Second, Gibraltar claims that under Boston Private's interpretation the amount of the Tax Benefit is meaningless, since in any scenario, only the amount of the Hypothetical Refund would be owed. This argument is based upon Gibraltar's contention that a federal policy regarding the allocation of taxes between bank holding companies and their subsidiaries (the "Interagency

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[19] According to Gibraltar, based on Boston Private's interpretation, Section 5.5(d) could be read as thus without changing its meaning:

> To the extent that the separate return taxable income of [Gibraltar] and its Subsidiaries for any such taxable year is negative and generates a [sic] income Tax Benefit to [Boston Private] and [Boston Private's] other Subsidiaries either as a result of being able to offset such loss against taxable income of [Boston Private] and its other Subsidiaries or as a result of being able to carry back such loss against prior years' taxable income, [Boston Private] shall pay to [Gibraltar] the amount ~~of such Tax Benefit when and if realized by [Boston Private] or, if sooner, within 15 days after the applicable Tax Return would be due if and to the extent~~ [Gibraltar] and its Subsidiaries would be entitled to [as] a refund of [I]ncome Tax if they had filed a separate income Tax Return historically.

Pl.'s Br. in Opp'n 13.

[20] *Id.*

Policy Statement")[21] would apply to this provision of the Stock Purchase Agreement and forbid Boston Private from paying Gibraltar less than the value of the Hypothetical Refund. The Interagency Policy Statement was adopted by the federal banking regulatory agencies in order to harmonize their guidance regarding the allocation of taxes among a holding company and its depository institution subsidiaries, and its main thrust is that "intercorporate tax settlements between [a bank subsidiary] and the consolidated group should result in no less favorable treatment to the [bank subsidiary] than if it had filed its income tax return as a separate entity."[22] Therefore, argues Gibraltar, in a situation where the Tax Benefit is less than the Hypothetical Refund, Boston Private would still be required by the Interagency Policy Statement to pay Gibraltar the amount of the Hypothetical Refund, and, therefore, the Tax Payment would always equal the amount of the Hypothetical Refund.[23] There are several problems with this application of the Interagency Policy Statement to Section 5.5(d),[24] the foremost one being that the

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[21] Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 63 Fed. Reg. 64,757 (Nov. 23, 1998).

[22] *Id.*

[23] As previously discussed, under the alternative scenario where the Tax Benefit exceeds the Hypothetical Refund, Boston Private's Tax Payment would equal the Hypothetical Refund, according to Boston Private's reading.

[24] When this argument is paired with Gibraltar's interpretation of Section 5.5(d)—which posits that the Tax Payment is equal to the Tax Benefit, subject to certain prepayments—it is evident that Gibraltar's reading would also run counter to the Interagency Policy Statement in a situation where the Tax Benefit is less than the Hypothetical Refund. Furthermore, federal bankruptcy courts have found the Interagency Policy Statement to be merely a non-binding policy statement, not something with the force of law. *See In re Indymac Bancorp, Inc.*, 2011 WL 2883012, at *4

Interagency Policy Statement is intended to apply to banks in a holding company structure, while the instant case involves the sale of a bank out of such a structure.

Ultimately, Boston Private's interpretation of Section 5.5(d) is reasonable, but it is not the only reasonable interpretation. While it is notable that there is no comma before the limiting clause, given the ambiguous nature of the relevant contract language, a reasonable person could read Section 5.5(d) as suggested by Boston Private.

C. *Gibraltar's Interpretation of Section 5.5(d)*

Unsurprisingly, Gibraltar's reading of Section 5.5(d) differs significantly from that of Boston Private. Citing the first clause of the contested portion of Section 5.5(d),[25] Gibraltar argues that the amount of the Tax Payment obligation always equals the amount of the Tax Benefit.[26] The limiting clause, Gibraltar contends, only applies to the second timing provision, and does not limit Boston Private's ultimate obligation. Thus, under Gibraltar's interpretation, when the full amount of the Tax Benefit has been realized, then the entire Tax Payment must be disbursed at that time according to the first timing provision.[27]

(Bankr. C.D. Cal. July 15, 2011); *In re Team Financials, Inc.*, 2010 WL 1730681, at *8 (Bankr. D. Kan. Apr. 27, 2010).

[25] Stock Purchase Agreement § 5.5(d) (". . . [Boston Private] shall pay to [Gibraltar] the amount of such Tax Benefit . . .").

[26] *See* Hr'g Tr. at 31.

[27] Stock Purchase Agreement § 5.5(d) (". . . when . . . realized by [Boston Private] . . ."). If any advance payments had previously been made under the second timing provision (explained below), the amount of the advance payments would be deducted from the final payment so that

According to Gibraltar, the second timing provision, in conjunction with the limiting clause, provides for an advance payment to Gibraltar in the amount of the Hypothetical Refund, if any.[28] An advance payment would be made if Gibraltar would have received a Hypothetical Refund and Boston Private has not yet realized a Tax Benefit. Gibraltar claims the purpose of this advance payment is to ensure Gibraltar "remain[s] in at least the same position it would have been in had it filed a separate tax return."[29] With regard to Boston Private, this advance payment acts as a prepayment of a portion of Boston Private's ultimate Tax Payment obligation; when the Tax Benefit is completely realized, Boston Private would pay the difference between the total Tax Benefit and the advance payments already made. Gibraltar provides the following example of a scenario in which an advance payment would be required:

> For example, if Boston Private could carry forward Gibraltar's 2009 losses and receive a $15 million tax benefit for the 2012 tax year, then Gibraltar would receive the $15 million tax benefit payment once the 2012 tax benefit was realized. [. . .] [U]nder the same example, if Gibraltar would have been entitled to receive a $1 million tax benefit for the 2009 tax year had it filed separately as a stand-alone entity, Gibraltar would receive a $1 million payment from Boston Private within 15 days of when the [Hypothetical Return] would have been

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Boston Private's total payments would equal the value of the Tax Benefit. An example illustrating this scenario is provided below.

[28] This advance payment would be due "within 15 days after [the Hypothetical Return] would be due." *Id.*

[29] Pl.'s Br. in Opp'n to Def.'s Mot. for J. on the Pleadings & in Supp. of Its Cross-mot. for J. on the Pleadings 2.

> due, and would receive the remaining $14 million benefit when Boston Private realized that benefit.[30]

In order to arrive at this interpretation, Gibraltar apparently reads the relevant contract language thusly:

> [Boston Private] shall pay to Gibraltar [(i)] the amount of such Tax Benefit when and if realized by [Boston Private] or, [(ii)] if sooner, within 15 days after the [Hypothetical Return] would be due if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a [Hypothetical Refund].[31]

While an objective reasonable third party could interpret Section 5.5(d) in this manner, the contract language does not compel this reading alone.[32] Just as a

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[30] *Id.*

[31] *See* Pl.'s Br. in Opp'n 9 (stating "Section 5.5(d) provides that Boston Private *must pay* Gibraltar '[. . .] if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a [Hypothetical Refund].'" (emphasis added)).

[32] Indeed, at oral argument Gibraltar appears to have offered a third reading of Section 5.5(d) that contains elements of both the interpretation it sponsored in its briefs and Boston Private's interpretation. This potential third interpretation follows from Gibraltar's explanation of the contested contract language:

> [T]he first question is what is supposed to happen. Boston Private shall pay to Gibraltar. [. . .] That's one. [. . .] Two is how much. How much it should pay is "the amount of such tax benefit." [. . .] Then three is essentially when. It's "when and if realized by Boston Private or sooner within 15 days after the [Hypothetical Return] would be due if and to the extent Gibraltar and its subsidiaries would be entitled to a [Hypothetical Refund]."

Hr'g Tr. at 31. This reading, like the one offered by Gibraltar in its briefs, views the limiting clause as applying to only the second timing provision and the two, together, as providing for an advance payment. Where this interpretation appears to diverge from the one offered in Gibraltar's briefs is at the calculation of the advance payment. Instead of an advance payment equal to the Hypothetical Refund, this interpretation would seemingly calculate the advance payment in the same manner that Boston Private calculates the Tax Payment obligation: the amount of the Tax Benefit limited to the extent of the Hypothetical Refund. This is made clear by reading the three elements together, as proposed by Gibraltar, under the assumption that an advance payment is necessary: (1) Boston Private shall pay to Gibraltar (2) the amount of such Tax Benefit (3) within 15 days after the Hypothetical Return would be due if and to the extent Gibraltar would be entitled to a Hypothetical Refund. Instead of ensuring that Gibraltar receives an advance payment in an amount at least equal to its Hypothetical Refund, regardless of

missing comma undercuts Boston Private's claim that it provides the only reasonable interpretation of an unambiguous provision, so does the awkward phrasing and grammatical construction of Gibraltar's interpretation undercut its identical claim. When explaining its interpretation in its brief, Gibraltar paraphrases the first part of the relevant contract language, stating: "Section 5.5(d) provides that Boston Private *must pay* Gibraltar '[. . .] if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a [Hypothetical Refund]'" (emphasis added).[33] Section 5.5(d) actually states that "Boston Private shall *pay to* Gibraltar . . . if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a [Hypothetical Refund]" (emphasis added). When reading this language with the word "to" after "pay," the awkwardness of Gibraltar's interpretation becomes apparent. Furthermore, to the extent that Gibraltar's reading is grammatically correct, it would have the word "pay" simultaneously serve as both a transitive verb (when acting upon the object "the amount of such Tax Benefit" in the first timing provision) and an intransitive verb (when not acting upon any object in the second timing provision). While not unreasonable, this reading, like Boston

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whether Boston Private has received a Tax Benefit, the effect of this reading is that Boston Private would be required to make an advance payment when it receives a Tax Benefit but there is a delay in the realization of this Tax Benefit. By preventing Boston Private from delaying its Tax Payment by delaying the filing of its tax return, the effect is the same as that of the second timing provision under Boston Private's interpretation. But, crucially, Boston Private's ultimate obligation still equals the Tax Benefit it received, as under the interpretation offered by Gibraltar in its briefs. As such, the amount owed by Boston Private in the instant case would be the same under either of Gibraltar's interpretations.

[33] Pl.'s Br. in Opp'n 9.

Private's reading, is not so self-evident that it precludes the possibility of other reasonable interpretations of Section 5.5(d).

Boston Private challenges Gibraltar's reading of Section 5.5(d) by arguing that its own interpretation is consistent with the contract's plain meaning and advancing other textual arguments. Boston Private's first textual argument posits that Gibraltar misconstrues the word "or" placed between the two timing provisions ("or, if sooner . . .") (the "contested 'or'").[34] According to Boston Private, here the word "'or' demonstrates the alternative character of the timing provisions";[35] in other words, there is only one payment (the Tax Benefit to the extent of the Hypothetical Refund) to be made either (i) when the Tax Benefit is realized by Boston Private or (ii) if sooner, within 15 days after the Hypothetical Return would be due. Boston Private goes on to contend that Gibraltar's interpretation effectively transforms the contested "or" into a "but." While Boston Private's construction of "or" results in a reasonable reading of Section 5.5(d), in this case, it does not prevent Gibraltar's reading from also being reasonable. Furthermore, the Court does not agree that Gibraltar's interpretation *requires* that the word "but" be read in place of the contested "or"; while Gibraltar's reading could have been expressed using the word "but," the current formulation may be reasonably interpreted in the manner advanced by Gibraltar.

[34] Stock Purchase Agreement § 5.5(d).
[35] Def.'s Reply Br. 12.

Boston Private also contends that Gibraltar's reading of the second timing provision is grammatically unsound because there is no verb following the contested "or" that provides for a payment, and thus, Boston Private argues, there is no basis for an advance payment without reading additional words into the contract. But this is an overly technical reading of Section 5.5(d) that looks at one part of a sentence in isolation. Earlier in the sentence, there is verbiage that provides for a payment.[36] While this clause was not repeated after the contested "or," a reasonable third party could read this clause as applying to both of the timing provisions. Such a reading would not add unwritten language to Section 5.5(d) because it is common for a subject and verb written before a conjunction to not be repeated after the conjunction, even where that subject and verb are meant to apply to the clause following the conjunction. As such, interpreting contract language in this manner is reasonable.

Boston Private's final textual argument contends that Gibraltar's interpretation is undermined by the absence of language regarding partial payments, remainder payments, or any indication that Boston Private must make payments to Gibraltar over time. Moreover, Boston Private maintains that Gibraltar's reading makes no provision for a scenario in which the Hypothetical Refund exceeds the final Tax Benefit—which presumably would require Gibraltar

[36] "[Boston Private] shall pay to [Gibraltar] . . ." Stock Purchase Agreement § 5.5(d).

to refund the difference to Boston Private—or for Section 5.5(d)'s express directive that the 2009 tax year Tax Benefit is calculated using Gibraltar's loss *net of any taxable gain realized by Boston Private from the sale of the Gibraltar shares*.[37] In response, Gibraltar points to the portion of Section 5.5(d) directing that the "remainder" of any losses not used in the current tax year be "carried back and then forward, as applicable." Gibraltar argues that this language provides for a situation "in which some portion—the 'remainder' of Gibraltar's unused losses—could be 'carried . . . forward' and such portion of the Tax Benefit would be paid 'when and if realized' at some future time."[38]

In addition to asserting that its interpretation is consistent with the plain language of Section 5.5(d), Gibraltar contends that it is mandated by the last antecedent rule.[39] Applying this rule, it argues the clause "if and to the extent [Gibraltar] and its Subsidiaries would be entitled to a refund" could only relate to the immediately preceding clause ("if sooner, within 15 days after the applicable

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[37] Stock Purchase Agreement § 5.5(d) (". . . *provided, however*, that in the case of the short 2009 taxable year any gain recognized for federal income tax purposes by [Boston Private] on the sale of the Shares hereunder shall first be taken into account to offset on a dollar-for-dollar basis any negative taxable income of [Gibraltar], and only the net amount, if any, remaining after such offset shall be taken into account for purposes of calculating any loss or Tax Benefit for the short 2009 taxable year under this Section 5.5(d).") (emphasis in original). The netting of Boston Private's tax gain against Gibraltar's loss is one specific reason why the Hypothetical Refund could have exceeded the Tax Benefit for the 2009 tax year.

[38] Pl.'s Reply Br. in Further Supp. of Its Cross-mot. for J. on the Pleadings 6 (quoting Stock Purchase Agreement § 5.5(d)).

[39] "[O]rdinarily, qualifying words or phrases, where no contrary intention appears, usually relate to the last antecedent." *Rag American Coal Co.*, 1999 WL 1261376, at *4 (citation omitted).

Tax Return would be due") and, therefore, would not limit the payment owed under the first timing provision.

Boston Private challenges Gibraltar's use of the last antecedent rule on both grammatical and substantive grounds. First, Boston Private claims that the last antecedent rule is improperly applied by Gibraltar because the clause to which the limitation is applied in Gibraltar's reading is, according to Boston Private, not an "antecedent" because an "antecedent" must be a noun or noun-equivalent. Additionally, Boston Private argues that even if the last antecedent rule could be applied in the manner suggested by Gibraltar, it still would not be applicable in this situation, since a contrary intent is expressed by the text, namely, Boston Private's interpretation of Section 5.5(d).

The Court need not presently resolve the question of whether the last antecedent rule applies in this case, as the Court ultimately finds that the provision in question is ambiguous. As such, even if the Court were to find that the last antecedent rule does apply, it would only serve as an aid in interpreting an ambiguous contract clause.[40] Considering the current procedural posture of this case and the Court's finding that the disputed clause is ambiguous, even with the

[40] *See Paxson Commc'ns Corp.*, 2005 WL 1038997, at *6 ("[T]he last antecedent rule is but one of numerous rules designed to assist in the discovery of intent and is not to be inflexibly or uniformly applied.") (citing *E.I. DuPont de Nemours & Co. v. Green*, 411 A.2d 953, 956 (Del. 1980)); *Rag American Coal Co.*, 1999 WL 1261376, at *5 ("Delaware law holds that the 'last antecedent rule' is 'not inflexible,' and this court will not hang a party's liability on weary drafters' placement of a comma where there is room for doubt as to the parties' intent.") (quoting *E.I. DuPont de Nemours & Co.*, 411 A.2d at 956).

aid of the last antecedent rule, there would not be sufficient grounds for a ruling in favor of Gibraltar.

Finally, Gibraltar argues that its interpretation of Section 5.5(d) is confirmed by extrinsic evidence. Although Gibraltar admits that extrinsic evidence cannot be used to "discern an ambiguity," it contends that extrinsic evidence may be used to "confirm [the Court's] conclusion that the contract language is unambiguous . . . ."[41]

Gibraltar offers two pieces of extrinsic evidence to confirm its interpretation of Section 5.5(d). The first is an email sent on March 18, 2010, from Boston Private's Tax Manager to Gibraltar's Executive Vice President and Chief Financial Officer ("CFO") (the "March 18 Email").[42] This email was sent in response to a request for "the final tax provision calculation used for Gibraltar as of 9/17," which Gibraltar's CFO noted was needed for "the tax footnote in [Gibraltar's] financial statements."[43] In response, Boston Private's Tax Manager provided a number of spreadsheets filled with accounting entries. One of these spreadsheets includes an item entitled "Receivable to Gibraltar for 2009 Loss" and the details of its calculation; the value of this account is listed as $15,368,699.[44] The figures that compose this sum are recorded on another spreadsheet in a column entitled

[41] Pl.'s Reply Br. 7 (quoting *Supermex Trading Co. v. Strategic Solutions Group, Inc.*, 1998 WL 229530, at *3 (Del. Ch. May 1, 1998)).
[42] Compl., Ex. B (March 18 Email).
[43] *Id.*
[44] *Id.*

"(Payable)/Receivable."[45] Boston Private's Tax Manager also noted in the email that the calculation "includes estimates" and that the final amount owed to Gibraltar would be determined "shortly after the preparation of the [tax] returns."[46] Gibraltar claims this evidence confirms its interpretation of Section 5.5(d), and is in fact a confirmation by Boston Private of its obligation to pay approximately $15 million under Section 5.5(d).

Gibraltar's second piece of extrinsic evidence is nothing more than a bald assertion of what the evidence *will* show—purportedly, that Section 5.5(d) was meant to implement the past tax allocation practices of Boston Private and Gibraltar, which, according to Gibraltar, achieved the same allocation as its interpretation of Section 5.5(d).[47]

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[45] *Id.*

[46] *Id.*

[47] *See* Pl.'s Br. in Opp'n 16 ("Finally the drafting history and communications between the parties *will* show that all of the parties understood the meaning of the contract to be the interpretation proffered by Gibraltar. Indeed, the intent of Section 5.5(d) was to implement the past practice between Gibraltar and Boston Private . . .") (emphasis added). In fact, one could interpret Gibraltar's Complaint and Brief in Opposition as arguing that the mere existence of this past tax allocation practice supports Gibraltar's reading of Section 5.5(d). *See* Compl. 1, 4, 5 (claiming that Section 5.5(d) was intended to implement the past tax allocation practice); Pl.'s Br. in Opp'n 1, 5, 7 (same). There is no reference to this previous tax allocation practice in the Stock Purchase Agreement, nor, as explained above, does Gibraltar even attempt to offer actual extrinsic evidence to support its contention that Section 5.5(d) was intended to implement this past tax allocation practice. The simple fact that Boston Private and Gibraltar adhered to a certain tax allocation practice prior to Gibraltar's sale does not warrant a controlling inference that Section 5.5(d) was intended to implement this practice.

Boston Private disputes Gibraltar's interpretation of the proffered extrinsic evidence, and challenges Gibraltar's use of extrinsic evidence at this stage of the proceedings and in relation to a contract that contains an integration clause.

The Court will not consider extrinsic evidence at this time. Even under the standard offered by Gibraltar, extrinsic evidence at this stage of the proceedings may only be used to "confirm [the Court's] conclusion that the contract language is unambiguous,"[48] and the Court has determined that the contract language in question is ambiguous.

In sum, the Court concludes that Gibraltar's interpretation of Section 5.5(d) is reasonable, but it is not the only reasonable interpretation.[49] Similar to Boston Private's reading, Gibraltar's interpretation would be aided by the insertion of an additional comma—in this case, a comma before the words ". . . or, if sooner . . . ." Also, while the contract language referring to carrying forward a "remainder" does, perhaps, allude to future payments, it is notable that the payment scheme sponsored by Gibraltar is not fleshed out in greater detail in Section 5.5(d), including provision for the rather obvious issues raised by Boston Private. This, of course, could be merely the result of hasty drafting or the fact that certain scenarios

[48] Pl.'s Reply Br. 7.

[49] Indeed, Gibraltar's reading of the text of the most heavily contested portion of Section 5.5(d) may be the more natural of the two interpretations, especially in light of the absence of a comma before the limiting clause.

were so unlikely that the negotiators failed to provide for them, but at this time, it is impossible for the Court to know if this is the case here.

In conclusion, the relevant portion of Section 5.5(d) is ambiguous. Since each party has advanced a reading of Section 5.5(d) that is reasonable, neither party has met its burden of demonstrating that its interpretation is the only reasonable interpretation. Judgment on the pleadings is not appropriate.

V. CONCLUSION

For the foregoing reasons, the cross-motions for judgment on the pleadings are denied. An order will be entered in accordance with this Memorandum Opinion.