



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONNA F. MILLER, :
 :
 : No. 394, 2014
 :
 Plaintiff Below, Appellant, :
 :
 : On Appeal from the Court of
 :
 v. : Chancery of the State of
 :
 : Delaware
 NATIONAL LAND PARTNERS, LLC, *et al.* :
 :
 : C.A. No. 7977-VCG
 Defendants Below, Appellees. :

**APPELLEE NATIONAL LAND PARTNERS, LLC'S
REPLY IN SUPPORT OF CROSS APPEAL**

**COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.**

Michael F. Bonkowski (No. 2219)
Nicholas J. Brannick (No. 5721)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Phone: (302) 651-2006

Counsel for Appellee,
National Land Partners, LLC

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¹ See Exhibit B.

² See Exhibit A.

NATURE OF THE PROCEEDINGS

On July 25, 2014, plaintiff Donna F. Miller (“Plaintiff”) filed her Notice of Appeal from the Order and the Opinion (D.I. 1).

On August 11, 2014, defendant National Land Partners, LLC (“NLP”) timely filed its notice of cross-appeal from the Transcript Ruling denying NLP’s Motion for Partial Summary Judgment (the “NLP Summary Judgment Motion”), filed with the Trial Court (D.I. 12).

On September 17, 2014, Plaintiff filed a Corrected Opening Brief (D.I. 17). On October 13, 2014, NLP filed Appellee National Land Partners, LLC’s Answering Brief on Appeal and Cross-Appellant’s Opening Brief on Cross Appeal (the “NLP Opening Brief” or “NOB”) (D.I. 22).

On November 20, 2014, Plaintiff filed a Corrected Answering Brief to Cross-Appellant’s Opening Brief on Cross-Appeal and Reply to the Answering Brief on Appeal of National Land Partners, LLC (the “Plaintiff Reply” or “PRB”) (D.I. 29).

This is NLP’s reply in support of its cross-appeal. NLP incorporates herein by reference the Nature of Proceedings set forth in the NLP Opening Brief. *See* NOB at pp. 1-4.

STATEMENT OF FACTS

NLP incorporates herein by reference the Statement of Facts set forth in the NLP Opening Brief. *See* NOB at pp. 6-12. Certain facts relevant to the cross-appeal are restated herein for the convenience of the Court.

I. PLAINTIFF'S TRANSFER OF HER INTEREST IN HCWV

Between approximately 1997 and December 17, 2004, Plaintiff and defendant Leon Hunter Wilson (“Wilson”) each owned 50% of defendant Hunter Company of West Virginia, a West Virginia corporation (“HCWV” and together with Wilson, the “Hunter Defendants”). *See* NOB at p. 12. However, on December 17, 2004, Plaintiff assigned her interest in HCWV to Wilson. *See* (B721-22). That transfer was ratified by a subsequent stock certificate, signed by Plaintiff, showing Wilson as the only stockholder of HCWV. *See* (B718).

Five months after transferring her interest in HCWV to Wilson, Plaintiff commenced the Divorce Proceeding³ in West Virginia. On November 21, 2008, the Family Court entered the Divorce Order that, among other things, directed Wilson to pay Plaintiff \$4,914,582.50 on account of manager fees purportedly earned by HCWV before May 31, 2005. *See* (A695). The Family Court also directed that Wilson was to “**have exclusive ownership and possession of 100% of the shares of [HCWV] stock.**” *Id.* (emphasis supplied).

³ Capitalized terms used but not defined in this reply shall have the meaning ascribed to such terms in the NLP Opening Brief.

Wilson appealed the Divorce Order to the Circuit Court as to the amount awarded to Plaintiff and the issue of “enterprise goodwill”. *See* (B467-88). Plaintiff did not appeal any portion of the Divorce Order. On March 25, 2009, the Circuit Court entered an order reversing the Divorce Order on both issues appealed by Wilson. The Circuit Court directed that Wilson would “**have in equitable distribution the exclusive ownership of ... the shares of stock of HCWV.**” *See id.* at (B486) (emphasis supplied). The Circuit Court also found that Wilson had over-compensated Plaintiff, and directed Plaintiff to reimburse Wilson \$894,286.00. *See id.* at (B487).

Plaintiff appealed the decision of the Circuit Court Order to the West Virginia Supreme Court solely with regard to the amount she was ordered to refund to Wilson and the issue of “enterprise goodwill.” *See, Wilson v. Wilson*, 706 S.E.2d 354, 360 (W. Va. 2010).⁴ Plaintiff did not appeal the Circuit Court’s holding that Wilson was to own 100% of HCWV. The West Virginia Supreme Court affirmed the Circuit Court Order regarding the issue of “enterprise goodwill.” *Id.* at 366-67. However, it reversed the Circuit Court’s calculation of the portion of manager fees to which Plaintiff was entitled. *Id.* at 376. The West Virginia Supreme Court held that “[HCWV’s] manager fees on the projects at the date of separation are subject to equitable distribution” and remanded to the Family

⁴ *See* Exhibit A hereto.

Court “for the sole purpose of determining an accurate value of [HCWV’s] manager fees at the time of the parties’ May 31, 2005 separation”. *Id.* (emphasis supplied).

II. THE MANAGEMENT AGREEMENTS

NLP, Wilson and HCWV are party to several management agreements, to which Plaintiff is not a party. *See, generally* (B1-11; A609-263; B12-31; A624-33; and A635-44). Of particular relevance to this matter are: (i) the management agreement dated April 14, 2003 and effective as of October 15, 2002 (A624-33) (the “2003 Agreement”); and (ii) the management agreement dated December 3, 2004 and effective as of November 3, 2004 (A635-44) (the “2004 Agreement” and together with the 2003 Agreement, the “Agreements”).

Section 10.13 of each of the Agreements provides that the “[a]greement is for the sole benefit of the parties and nothing herein, express or implied, shall give or be construed to give to any person or entity, other than the parties, any legal or equitable rights hereunder.” *See* (A633; A644).

III. NLP’S MOTION FOR SUMMARY JUDGMENT

On April 1, 2013, NLP filed its opening brief in support of the NLP Summary Judgment Motion (A30-57; B492-732), which the Hunter Defendants joined. In the NLP Summary Judgment Motion, NLP sought summary judgment declaring that Plaintiff lacked direct standing to pursue Count I of her Initial

Complaint (*see* A46-51), which sought declaratory judgment regarding the Agreements in Plaintiff's individual capacity (*see* A29.-29.9).

On May 1, 2013, Plaintiff filed her opposition to the NLP Summary Judgment Motion (A168-87). On May 16, 2013, NLP filed a reply in support of the NLP Summary Judgment Motion (B747-68) (the "NLP Summary Judgment Reply"), which the Hunter Defendants joined. Knowing that Plaintiff intended to amend the Initial Complaint to pursue Count I derivatively, NLP fully briefed the issue of Plaintiff's lack of derivative standing in the NLP Summary Judgment Reply. *See* (B758-67); *see also* (B513-21).

IV. PLAINTIFF'S AMENDED COMPLAINT

Plaintiff filed her amended complaint (the "Amended Complaint") on May 28, 2013. (A241-54). Count I of the Amended Complaint seeks declaratory judgment that transfers from HCWV to NLP, which allegedly occurred in December of 2008, were not required under the Agreements. *See* (A245, ¶ 23). By the Amended Complaint, Plaintiff purported to pursue Count I **solely** as a derivative action as a stockholder of HCWV, and not individually. *Compare* (A29.8 ("Donna Miller respectfully requests that this Honorable Court...")) *with* (A250 ("Donna Miller derivatively on behalf of Hunter Company of West Virginia....")).

V. THE TRANSCRIPT RULING

On July 31, 2013, the Trial Court denied the NLP Summary Judgment Motion. In the Transcript Ruling, the Trial Court correctly concluded that Plaintiff is no longer a stockholder of HCWV (*see* B820 at 52:13-14; B824 at 56:15-16), but held that “the West Virginia court has given her a right to receive from [HCWV] whatever portion of the management fees are ultimately determined to have been earned during the period of the marriage or whatever the order is” and this gave Plaintiff “a sufficient property interest in the [Agreements] and [their] fruits to allow her to bring a declaratory judgment action.” (B824 at 56:15-24). The Trial Court held that it did not need to address whether Plaintiff had standing to bring Count I derivatively because she had “standing based on ... at least [an] equitable property interest that the[] West Virginia courts have awarded in the distribution of the management fees.” (B829 at 61:2-9; B831 at 63:14-17).

ARGUMENT IN REPLY

I. PLAINTIFF LACKS STANDING TO PURSUE COUNT I OF THE AMENDED COMPLAINT DERIVATIVELY OR INDIVIDUALLY

NLP's basis for appealing from the Transcript Ruling denying the NLP Summary Judgment Motion, stated succinctly, is that: (1) by the time of the July 31, 2013 hearing, Plaintiff had abandoned pursuing Count I individually and was pursuing that claim **solely** on a derivative basis and (2) Plaintiff was not a stockholder of HCWV either (a) at the time of the transfers as to which she complains, which allegedly occurred in December of 2008 or (b) at the time she filed her Initial Complaint or the Amended Complaint.

Plaintiff never squarely addresses the crux of NLP's position in the Plaintiff Reply. Indeed, Plaintiff ignores the fact that she abandoned pursuit of Count I in her individual capacity by the Amended Complaint and concedes that she was not a stockholder of HCWV either in December of 2008 or when she filed her Amended Complaint by resorting to various equitable stockholder theories to support derivative standing.

Any argument made by Plaintiff in support of her individual standing is irrelevant. Plaintiff's standing to pursue Count I must be assessed **solely** on the grounds of whether she had derivative standing under Chancery Rule 23.1. It was reversible error for the Trial Court to find that Plaintiff had standing to pursue Count I individually and she lacks standing to pursue Count I derivatively.

Therefore, if this Court is inclined to reverse the Trial Court's Opinion (which NLP believes is unwarranted), this Court should also determine that Count I of the Amended Complaint should have been dismissed for lack of standing.

A. Regardless Of Whether West Virginia Or Delaware Law Applies, Plaintiff Lacks Derivative Standing To Pursue Count I

Delaware Chancery Rule 23.1(a) provides, in relevant part:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation ..., the corporation ... having failed to enforce a right which may properly be asserted by it, **the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains** or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law.... (emphasis supplied).

This Court has recognized that "a derivative shareholder must not only be a stockholder at the time of the alleged wrong and at time of commencement of suit but that he must also maintain shareholder status throughout the litigation."⁵

Plaintiff claims that West Virginia law contains no similar requirement. *See* PRB at p. 14. That statement is false. In fact, the West Virginia Rules of Civil Procedure contain language nearly identical to Chancery Rule 23.1(a), stating

In a derivative action brought by one or more shareholders ... to enforce a right of a corporation ..., the corporation ... having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) **that the plaintiff was a shareholder or member at the time of the transaction of which the**

⁵ *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984).

plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law...⁶

Plaintiff concedes that she was not a stockholder of HCWV at the time of the alleged December 2008 transfers from HCWV to NLP by failing to assert otherwise in the Plaintiff Reply.⁷ It is incontrovertible that Plaintiff transferred her interest in HCWV to Wilson in December of 2004. *See* B721-22 and B718.

B. Plaintiff Lacks Equitable Stockholder Status

Recognizing, as she must, that she lacks standing as a stockholder to pursue Count I as a derivative claim, Plaintiff resorts to various equitable stockholder theories under West Virginia and Delaware law to establish that she has derivative standing. *See* PRB at pp. 11-13. All of these claims fail, however, because Plaintiff retains no equitable interest in the shares of HCWV owned by Wilson.

Plaintiff claims that she “was to surrender her stock in exchange for the value of that stock” under the Family Court Order and Circuit Court Order. *Id.* at [p. 12]. But nothing in the Circuit Court order ties the obligation of Plaintiff to relinquish her interest in HCWV to Wilson in return for the value of HCWV. The Circuit Court's order awarded the HCWV stock to Wilson in a separate sub-paragraph from the sub-paragraph regarding the issue of who was to pay what to

⁶ W. Va. R. Civ. P. 23.1 (emphasis supplied).

⁷ *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (“Issues not briefed are deemed waived”).

whom. *See* (B486-87, ¶ 4.A) and 4.C)).⁸ Plaintiff did not believe any link existed between the equitable distribution of manager fees and the allocation of the HCWV stock, because when she appealed the Circuit Court order, she appealed **only** the calculation of manager fees, **not** the award of the HCWV stock.

Moreover, when the West Virginia Supreme Court remanded the Divorce Proceeding back to the Family Court, it **did not** direct the Family Court to determine the value of the shares of HCWV. It very specifically directed the Family Court to determine **only** the value of pre-separation manager fees. *See Wilson*, 706 S.E. at 376 (“Upon remand, the family court shall hold a hearing **for the sole purpose** of determining an accurate value of [HCWV’s] manager fees at the time of the parties May 31, 2005 separation.”) (emphasis supplied).

What Plaintiff in fact has is not an equitable interest in the stock of HCWV, but an equitable interest in Wilson’s interest in HCWV’s interest in pre-separation (*i.e.* May 31, 2005) manager fees earned under the Agreements. Such attenuated interests are insufficient to establish beneficial or equitable stockholder status.⁹

Finally, to the extent Plaintiff presented the issue of the equitable distribution of the value of HCWV stock to the West Virginia Supreme Court at

⁸ Plaintiff was also awarded a \$20,000 education fund. *See* (B487 at ¶ 4.B)). Presumably she is not asserting that that award was contingent upon the remaining provisions of the Circuit Court Order.

⁹ *Cf. Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 1987 WL 13520, at *5 (Del. Ch. Jul. 7, 1987) (expectation of stock dividend did not create beneficial interest in stock).

all, she presented it on the question of whether HCWV possessed “enterprise goodwill” subject to equitable distribution. *See Wilson*, 706 S.E.2d at 360-67. The West Virginia Supreme Court held that HCWV possessed only “personal goodwill” and that, whatever the value of that “personal goodwill” might be, Plaintiff was not entitled to an equitable distribution on account of it. *Id.* at 362 (“personal goodwill’ represents nothing more than the future earning capacity of the individual and is not divisible”) (quotation omitted) and 366 (“the circuit court’s order is affirmed to the extent that it finds that [HCWV] has only personal goodwill”). Thus, Plaintiff has already lost on the question of whether she is entitled to an equitable distribution on account of the value of HCWV stock.

C. Plaintiff’s Remaining Assertions Are Meritless

Plaintiff makes two additional meritless arguments regarding standing, including: (1) that she has standing to bring Count II of the Amended Complaint under the Delaware Uniform Fraudulent Transfer Act, 6 Del. C. §§ 1301 *et seq.* (the “UFTA”) and, therefore, standing as to Count I (*see* PRB at p. 5-6) and (2) that Plaintiff has standing under West Virginia law (*see id.* at pp. 8-11).

1. Creditors of Corporations Lack Derivative Standing

Plaintiff’s standing to pursue Count II of the Amended Complaint—her claims under the UFTA—is entirely dependent upon Plaintiff’s alleged status as a

creditor of HCWV.¹⁰ However, this Court has held that creditors lack standing to bring derivative claims on behalf of corporations.¹¹ And Plaintiff cannot rely on the exception recognized by this Court where a corporation is insolvent,¹² because Plaintiff failed to plead in the Amended Complaint that HCWV was insolvent when it allegedly made the transfers to NLP in December of 2008 or was rendered insolvent thereby. *See* (A29.5-29.7; A29.9-29.10); *see also* (A208-10) (NLP’s motion for cross summary judgment on Count II discussing failure of Plaintiff to plead insolvency). Plaintiff’s assertion that she has standing to pursue Count I of the Amended Complaint because she claims to have standing to pursue Count II of the Amended Complaint fails as a matter of law.

2. Standing Must Be Assessed as to Each Claim Individually

Whether Plaintiff has standing under the UFTA is irrelevant to whether she has standing under the Delaware Declaratory Judgment Act, 10 Del. C. §§ 6501 *et seq.* (“DJA”) to seek declaratory judgment regarding the meaning and application of a contract governed by Delaware law.

This Court has recognized that the requirements to establish standing under Article III of the U.S. Constitution “are generally the same as the standards for

¹⁰ *See* 6 Del. C. §§ 1304(a) and 1305.

¹¹ *See Haff v. Kerkorian*, 347 A.2d 133, 134 (Del. 1975) (affirming decision below holding that debenture holders lack standing under Delaware law to sue derivatively because they are not stockholders).

¹² *See N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2006).

determining standing to bring a case or controversy within the courts of Delaware.”¹³ Those requirements include showing that:

(1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹⁴

In addition to these criteria for establishing standing, the U.S. Supreme Court has repeatedly recognized that a “plaintiff must demonstrate standing for each claim he seeks to press”.¹⁵ This requirement has also been recognized by the Third Circuit.¹⁶ Delaware courts also appear to require that plaintiffs establish standing as to each claim.¹⁷

¹³ *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1110 (Del. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

¹⁴ *Id.* (quoting *Society Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 1999)).

¹⁵ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)). See also *Friends of the Earth, Inc. v. Laidlaw Envt’l Svcs (TOC), Inc.*, 528 U.S. 167, 185 (2000) (“a plaintiff must demonstrate standing separately for each form or relief sought”) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996) (“[S]tanding is not dispensed in gross.”)).

¹⁶ See *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 138, n. 5 (3d Cir. 2009) (citing *DaimlerChrysler*, 547 U.S. at 352); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 245 (3d Cir. 2012) (citing *DaimlerChrysler Corp.*).

¹⁷ Cf. *O’Neill v. Town of Middletown*, 2006 WL 4804652 (Del. Ch. Jan. 18, 2006) (conducting standing analysis with regard to each claim brought by plaintiffs); *Microsoft Corp. v. Vadem, Ltd.*, 2012 WL 1564155 (Del. Ch. Apr. 27, 2012) *aff’d* 62 A.3d 1224 (Del. 2013) (separately assessing claims based on derivative and direct standing).

The Trial Court effectively stayed Count II at the same time it determined (incorrectly) that Plaintiff had standing to pursue Count I, thus indicating that Plaintiff's professed standing regarding Count II was irrelevant to the Trial Court's decision regarding Plaintiff's standing to pursue Count I. *See* (B830 at 62:14-24).

The fact that Plaintiff's constructive fraudulent transfer claim under Count II is entirely dependent upon the determination of Count I of the Amended Complaint does not confer standing with regard to Count I because "[t]he issue of standing is concerned 'only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter in controversy.'"¹⁸

Finally, Plaintiff asserts that her standing to pursue Count I should be recognized because, she claims, she has standing to pursue Count II, and this Court should "[i]magine all the circumstances where one spouse might defraud the other at equitable distribution by parting with money and property under unsupported interpretations of contracts with third parties." PRB at p. 5. But Delaware courts utilize standing "as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are mere intermeddlers."¹⁹ Perhaps what this Court should imagine instead is the incredible new market for Chancery Court practitioners that would arise if every ex-spouse (or aspiring ex-spouse) of an

¹⁸ *Dover Historical Soc'y*, 838 A.2d at 1110 (quoting *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)).

¹⁹ *Dover Historical Soc'y*, 838 A.2d at 1110 (quoting *Stuart Kingston, Inc.*, 596 A.2d at 1382).

individual who is party to a contract governed by Delaware law discovers that they can race to Delaware and seek to have that contract re-written by the Chancery Court in order to advance that spouse's divorce litigation strategy in another forum. That is precisely what Plaintiff is attempting to do here.

3. Delaware Law Applies to Determine Plaintiff's Standing Under Count I of the Amended Complaint

The question of standing is jurisdictional.²⁰ This Court has held that it does not “think that ... choice of law concerns should complicate or distort the jurisdictional inquiry.”²¹ A Delaware court either has jurisdiction to hear a matter or it does not, and choice of law issues that may arise during the course of the litigation do not determine the question of jurisdiction.²² Nevertheless, Plaintiff asserts that West Virginia law should be applied to determine whether she has standing to pursue Count I under the “most significant relationship test”. *See* PRB at p. 8.

Count I seeks declaratory judgment regarding the Agreements, which are governed by Delaware law, providing:

Governing Law; Jurisdiction. This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of

²⁰ *See, e.g., In re Patalone*, 2011 WL 6357794, at *2 (Del. Ch. Dec. 9, 2011) (citing *Thornton v. Bernard Techs., Inc.*, 2009 WL 426179, at *4 (Del. Ch. Feb. 20, 2009)).

²¹ *Sternberg v. O'Neil*, 550 A.2d 1105, 1123 (Del. 1988) (quotation omitted).

²² *See id.* (“GenCorp is an Ohio corporation. In this case, the applicability of Ohio law to a portion of Sternberg’s claim may present itself during the course of litigation, but only after jurisdiction over GenCorp in Delaware is established.”).

Delaware, without regard to any conflict of laws provisions. The state courts and the federal courts in the State of Delaware shall have exclusive jurisdiction over all controversies which may arise with respect to this Agreement, and the parties hereby submit to the jurisdiction of those courts and waive any other venue to which they may be entitled by virtue of domicile or otherwise. *See* (A632 & A653 at § 10.5).

Delaware Courts give great deference to the choice of law selected by the parties to a contract when considering choice of law issues.²³ “Delaware courts analyzing contractual claims apply the ‘most significant relationship’ test of Restatement (Second) of Conflicts § 188 in cases where the parties do not specify a choice of law. Where the parties do specify a choice-of-law, Section 187 [sub-paragraph (2), of the Restatement] allows the law of the state chosen by the parties to govern contractual rights and duties unless the chosen state lacks a substantial relationship to the parties or transaction or applying the law of the chosen state will offend a fundamental policy of a state with a material greater interest.”²⁴

The Delaware legislature has established by statute a policy favoring the enforcement of Delaware contracts under Delaware law. Under that provision:

(a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed

²³ *See, e.g., SIGA Tech., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341-42 (Del. 2013); *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1049 (Del. Ch. 2006) (“When parties have chosen a state’s contract law to govern their contract, it is illogical to assume that they wished to have the enforceability of that contract judged by another state’s law.”).

²⁴ *SIGA Tech., Inc.*, 67 A.3d at 341-42.

under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are:

(1) Subject to the jurisdiction of the courts of, or arbitration in, Delaware; and

(2) May be served with legal process.

The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.²⁵

Where, as here, Section 2708(a) of title 6 of the Delaware Code is satisfied, Section 187(2) of the Restatement (Second) of Conflicts is satisfied, and the law set forth in the Agreements must be applied.²⁶ Thus, under Delaware's choice of law jurisprudence, West Virginia law is irrelevant to determining Plaintiff's standing to pursue Count I of the Amended Complaint.

4. The Delaware Declaratory Judgment Act Does Not Independently Confer Standing

The DJA does not, in and of itself, confer standing. To have standing to pursue a claim under the DJA, the plaintiff must have standing to challenge the underlying transaction or conduct.²⁷ The Delaware Court of Common Pleas correctly addressed the question of standing in a similar case involving a litigant

²⁵ See 6 Del. C. § 2708.

²⁶ See *Abry Partners V, L.P.*, 891 A.2d at 1049.

²⁷ See *Cartanza v. DNREC*, 2009 WL 106554, at *2-3 (Del. Ch. Jan. 12, 2009) (“While the Declaratory Judgment Act may allow courts to adjudicate some issues before they otherwise would or before an injury has occurred, it does not confer standing on plaintiffs to challenge an action that, of itself, does not injure plaintiffs.”).

seeking declaratory judgment regarding a contract to which that litigant was neither a party nor a third-party beneficiary and found that the DJA did not independently confer standing to such a litigant.²⁸ Plaintiff lacks direct standing to seek any relief regarding the Agreements because she is neither a party nor an intended third-party beneficiary under the contracts. *See* NOB at pp. 14-17. The DJA alone cannot remedy this lack of standing.

5. Even if West Virginia Law Applies, Plaintiff Has Grossly Mischaracterized That Law

Even if the Court of Chancery were to apply West Virginia law regarding standing to pursue a declaratory judgment action,²⁹ Plaintiff has mischaracterized the law of West Virginia. Plaintiff characterizes the West Virginia Supreme Court's decision in *Shobe v. Latimer*³⁰ as standing for the proposition that “when an interest in a contract exists, the declaratory judgment statute is an appropriate mechanism by which to obtain a declaration regarding those rights.” PRB at pp. 10-11. The West Virginia Supreme Court held no such thing.

The *Shobe* court recognized that “[a]s a general rule, third-parties to a contract between two private citizens cannot sue to obtain a declaration as to the

²⁸ *See Empire Fire & Marine Ins. Co. v. Miller*, 2012 WL 1151031, at *3-5 (Del. Ct. Comm. Pl. Apr. 5, 2012). *Cf. In re Patalone*, 2011 WL 6357794, at *2 (“Non-parties to a contract—even third party beneficiaries—lack standing to seek reformation.”) (citations omitted).

²⁹ Plaintiff does not explain why a Delaware Chancery Court would be the proper forum for a declaratory judgment action under West Virginia law.

³⁰ 253 S.E.2d 54 (W. Va. 1979). Interestingly, despite relying upon it and quoting from it, Plaintiff did not include the *Shobe* decision in her compendium. *See Exhibit B* hereto.

validity of such a contract or to raise questions as to its construction.”³¹

“Controversies arising under an agreement properly are to be determined and settled by parties to the agreement or their assigns, that is, by those who have legal rights or duties thereunder. Absent evidence of a third party beneficiary status, an assignment of contract rights or delegation of contract duties, neither ... (of the nonparty plaintiffs) has rights, duties or obligations under the agreement.”³²

However, the contract at issue in the *Shobe* case was not a contract between private parties, but a contract between two governmental agencies.³³ The *Shobe* court found that the plaintiffs in that case could seek declaratory judgment regarding **government** contracts, and government contracts only, carefully limiting its opinion.³⁴ In fact, the *Shobe* court expressly disavowed any uniform rule emanating from its decision.³⁵ Notably, Plaintiff cites to no subsequent case applying *Shobe* in the context of a private contract between private parties.

³¹ 253 S.E.2d at 58.

³² *Id.* at 58-59 (quoting *Wells v. Bank of Nevada*, 522 P.2d 1014 (Nev. 1974)).

³³ *Id.* at 59 (“The contract involved in this proceeding, however is not a contract between private persons having little or no direct impact on the plaintiffs’ or the public interest. It is, in essence, a contract between two governmental entities for the diversion of a resource necessary for human life, having substantial aesthetic and recreational value, and which is currently serving as a high quality trout habitat.”).

³⁴ *Id.* at 61 (“[W]e hold that when a person’s significant interests are directly injured or adversely affected by **governmental action**, such person has standing under the Declaratory Judgments Act ... to obtain a declaration of rights, status or other legal relations.”) (emphasis supplied).

³⁵ *Id.* (“Sufficient interest will be, in close cases, a question of degree; a formula fitting all cases does not exist.”)

West Virginia law does not recognize a general right of intermeddlers to seek declaratory judgment regarding private contracts to which they are neither parties nor intended third-party beneficiaries any more than Delaware law recognizes such right.

CONCLUSION

Plaintiff cannot establish standing either as a stockholder or equitable stockholder of HCWV to pursue Count I derivatively and she abandoned pursuing that claim directly when she filed the Amended Complaint. Therefore, the Trial Court erred in not granting the NLP Summary Judgment Motion.

**COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.**

/s/ Nicholas J. Brannick

Michael F. Bonkowski (No. 2219)
Nicholas J. Brannick (No. 5721)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
mbonkowski@coleschotz.com
nbrannick@coleschotz.com
Phone: (302) 651-2006

Counsel for National Land Partners, LLC

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