THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PLAZE, INC. and APOLLO AEROSOL INDUSTRIES LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2018-0721-TMR
CHRIS K. CALLAS, MARIA T. CALLAS, AMCC DESCENDANTS TRUST, AMC COBB HOLDINGS, LLC, AMC UPSON HOLDINGS, LLC, and AMC WHIFIELD HOLDINGS, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: November 20, 2018
Date Decided: February 28, 2019

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MONTGOMERY-REEVES, Vice Chancellor.

In 2015, Plaze, Inc. purchased Apollo Industries, a specialty chemical and aerosol business based in Georgia, from Chris Callas, Maria Callas, and a trust in favor of Anna Callas. Plaze, however, did not purchase three Apollo production facilities. Instead, Plaze and Apollo leased the production facilities from Callas-affiliated entities.

In 2018, the Callas-affiliated entities sued Plaze and Apollo in Georgia state court, alleging property damage, lease violations, and environmental harm. In response, Plaze and Apollo commenced this action. Plaze and Apollo seek a preliminary injunction, arguing that the 2015 purchase agreement mandates that litigation "arising out of or relating to" the sale occur in Delaware courts. The Callases and their affiliated entities move to dismiss the Delaware complaint, contending that the purchase agreement excludes the Callas entities from the forum selection clause.

For the reasons that follow, I hold that the forum selection clause does not bind the Callas-affiliated entities.

I. BACKGROUND

For purposes of the Motion for Preliminary Injunction, I draw the facts from the pleadings, the affidavits, and the exhibits submitted to this Court. For the purposes of the Motion to Dismiss, I draw the facts from Plaintiffs' Verified

Complaint and the documents incorporated by reference therein; I take all of Plaintiffs' well-pled facts as true and draw all reasonable inferences in their favor.[1]

Plaintiff Plaze, Inc. ("Plaze") "is a leading full-service specialty contract manufacturer of automotive, household, insecticide and pesticide aerosols" and has "decades of experience and expertise in formulating, blending, filling, and packaging aerosols for its customers."[2]

On December 15, 2015, Plaze purchased Plaintiff Apollo Aerosol Industries LLC, formerly known as Apollo Industries ("Apollo")[3] from Defendants Chris K. Callas, Maria T. Callas (the "Callas Sellers"), and AMCC Descendants Trust, a Georgia trust with Anna Maria Callas as its sole beneficiary (the "Trust"), for approximately $130 million under the terms of a Stock Purchase Agreement (the "SPA").[4] Plaze did not purchase Apollo's three production facilities. Instead, it leased them, one each from Defendants AMC Cobb Holdings, LLC ("AMC Cobb"), AMC Upson Holdings, LLC ("AMC Upson"), and AMC Whitfield Holdings, LLC

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1 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004).

2 *Id.* ¶ 2.

3 Compl. ¶¶ 2-9.

4 *Id.* ¶¶ 5-12.

("AMC Whitfield") (collectively, the "RE Holdcos").[5] The Callas Sellers own and control the RE Holdcos.[6]

All of the Defendants are signatories to the SPA.[7] The SPA defines Plaze as "Buyer," Apollo as "Company," Stephen Bowen as "Administrator," the Trust and each individual Callas Seller as a "Seller," and each individual RE Holdco by name.[8] The SPA states that "[e]ach of Buyer, the Company, the Administrator and each Seller is also referred to herein as a 'Party.'"[9] The SPA does not name the RE Holdcos as "Parties."

Section 8.8 of the SPA (the "Forum Selection Clause") states that

> [e]ach of the Parties submits to the jurisdiction of the State of Delaware and the Federal District Court for the District of Delaware in any action or proceeding arising out of or relating to this Agreement and agrees that all claims in respect of the action or proceeding shall be heard and determined in any such court. Each Party also agrees not to bring any Proceeding arising out of or relating to this Agreement in any other court. . . . Nothing in this Section 8.8, however, shall affect the right of any party to serve legal process in any other manner permitted by law or at equity. Each Party agrees that a final judgment in any Proceeding so brought shall be conclusive and may be

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5 *Id.* ¶¶ 13-16.

6 *Id.* ¶ 13.

7 *Id.*

8 Sauder Affidavit Ex. 1, at 1.

9 *Id.*

> enforced by suit on the judgment or in any other manner provided by law or at equity.[10]

In addition, Section 8.7 of the SPA states that

> [t]his Agreement and agreements, certificates, instruments, and documents entered into in connection herewith may be executed and delivered in one or more counterparts and by fax or email, each of which shall be deemed an original and all of which shall be considered one and the same agreement. No Party shall raise the use of a fax machine or email to deliver a signature or the fact that any signature or agreement or instrument was transmitted or communicated through the use of a fax machine or email as a defense to the formation or enforceability of a contract and each Party forever waives any such defense.[11]

Section 8.3 of the Purchase Agreement provides that "[t]his Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of each Party and each Party's successors and assigns."[12]

The SPA also requires the Sellers to deliver lease agreements for all three RE Holdcos as a condition for closing and attaches a form lease as an exhibit.[13] The RE

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10 *Id.* Ex. 1 § 8.8.

11 *Id.* Ex. 1 § 8.7.

12 *Id.* Ex. 1 § 8.3.

13 *Id.* Ex. 1 § 2.5(b)(vi)(I).

Holdcos and the Buyer executed the lease agreements on the same day that the SPA closed.[14]

The three leases between the RE Holdcos and Apollo (the "Leases") have identical provisions related to trials. They read,

> EACH PARTY HERETO HEREBY WAIVES ITS RESPECTIVE RIGHTS TO A JURY TRIAL UNDER THE LAWS OF THE STATE OF GEORGIA OR OTHERWISE OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF, DIRECTLY OR INDIRECTLY, THIS LEASE, ANY DEALINGS AMONG THE PARTIES HERETO RELATING TO THE SUBJECT MATTER OF THE TRANSACTIONS CONTEMPLATED BY THIS LEASE, AND/OR THE RELATIONSHIP THAT IS BEING ESTABLISHED AMONG THE PARTIES HERETO.[15]

Beginning on November 23, 2016, the RE Holdcos sent a series of letters to Apollo and Plaze regarding purported chemical spills and disrepair on the leased properties.[16] In those letters, the RE Holdcos asserted breaches of their respective Leases and the SPA.[17]

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14 Compl. ¶ 16.

15 Sauder Aff. Ex. 2 § 32(f); *id.* Ex. 3 § 32(f); *id.* Ex. 4§ 32(f).

16 Compl. ¶¶ 20-21.

17 *Id.* ¶ 21.

On June 7, 2017, Plaze and Apollo filed *Plaze, Inc. and Apollo Aerosol Industries LLC v. Chris K. Callas, Maria T. Callas, and AMCC Descendants Trust* in this Court,[18] "relating to the violation of certain provisions of the SPA."[19] That action "is currently in the discovery phase and the trial is scheduled for December 2019."[20] On August 31, 2018, the RE Holdcos filed *AMC Cobb Holdings, LLC v. Plaze, Inc.* (the "Georgia Action") in Georgia state court,[21] asserting claims for damages based on violations of the Leases but not the SPA.[22]

On October 5, 2018, Plaintiffs filed this action seeking to enjoin Defendants from pursuing the Georgia Action. Plaintiffs also filed a Motion for Preliminary Injunction on the same day. On October 26, 2018, Defendants filed their Motion to Dismiss. On November 20, 2018, I heard oral argument on both the Motion for Preliminary Injunction and the Motion to Dismiss. Both motions are now fully briefed and before me.

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18 C.A. No. 2017-0432-TMR (Del. Ch.).

19 Compl. ¶ 22.

20 *Id.*

21 Civ. No. 18106582 (Georgia Superior Court of Cobb County).

22 Compl. ¶ 1.

II. PRELIMINARY INJUNCTION ANALYSIS

Plaintiffs seek a preliminary injunction to prevent Defendants from pursuing the Georgia Action pending resolution of this action.[23]

"The Court of Chancery has broad discretion in granting or denying a preliminary injunction."[24] Nonetheless, "[t]he relief afforded by a preliminary injunction is both powerful and extraordinary. As such, it is not granted lightly."[25] "A preliminary injunction may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief."[26] "The moving party bears a considerable burden in establishing each of these necessary elements. Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief 'will never be granted unless earned.'"[27] Yet, "there is no steadfast formula for the relative weight each [element]

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23 Pls.' Opening Br. in Supp. of Mot. for Prelim. Inj. 1-3.

24 *Data Gen. Corp. v. Dig. Comput. Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citing *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49 (Del. 1952)).

25 *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010).

26 *Nutzz.com, LLC v. Vertrue, Inc.*, 2005 WL 1653974, at *6 (Del. Ch. July 6, 2005).

27 *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (citing *Lenahan v. Nat'l Comput. Analysts Corp.*, 310 A.2d 661, 664 (Del. Ch. 1973)).

deserves. Accordingly, a strong demonstration as to one element may serve to overcome a marginal demonstration of another."[28]

Plaintiffs argue that they demonstrate a probability of success on the merits based on the Forum Selection Clause. Delaware law favors the enforcement of valid forum-selection clauses.[29] "Forum selection [ ] clauses are 'presumptively valid' and should be 'specifically' enforced unless the resisting party '[ ] clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.'"[30] "The courts of Delaware defer to forum selection clauses and routinely 'give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation.'"[31]

Plaintiffs advance four reasons why the Forum Selection Clause binds the RE Holdcos. First, Plaintiffs argue that the plain text of the Forum Selection Clause

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28 *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004) (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

29 *Nat'l Indus. Gp. (Hldng) v. Carlyle Inv. Mgmt.*, 67 A.3d 373, 381 (Del. 2013) (citation omitted) ("A valid forum selection clause must be enforced.").

30 *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (alterations in original) (quoting *Capital Gp. Cos. v. Armour*, 2004 WL 2521295, at *3 (Del. Ch. Nov. 3, 2004)).

31 *Ashall Homes Ltd. v. ROK Entm't Gp.*, 992 A.2d 1239, 1245 (Del. Ch. 2010) (citing *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007)).

applies to the RE Holdcos. Second, Plaintiffs argue that this Court should read the SPA and the Leases together to apply the Forum Selection Clause to the RE Holdcos. Third, Plaintiffs argue that equitable estoppel binds the RE Holdcos to the Forum Selection Clause as third-party beneficiaries or entities "related to" the agreement.[32] Fourth, Plaintiffs argue that the RE Holdcos should not be able to avoid the Forum Selection Clause through artful pleading. For the reasons that follow, all four arguments fail.

A. The Plain Language of the Forum Selection Clause

The parties disagree about whether the plain language of the Forum Selection Clause binds the RE Holdcos. Delaware follows the objective theory of contracts. "Under Delaware law, courts interpret contracts to mean what they objectively say. This approach is longstanding and is motivated by grave concerns of fairness and

[32] Because Plaintiffs fail to show a probability of success on the merits, I decline to address the other elements of a preliminary injunction—irreparable harm and balance of the equities. Defendants make two additional arguments for why a preliminary injunction should not issue: (1) the Forum Selection Clause does not bear on this case because it only covers actions that "arise out of or relate to" the SPA, which they argue the Georgia Action does not, and (2) the leases implicitly endorse litigation in Georgia. Because I hold that the Forum Selection Clause does not cover the RE Holdcos, I decline to address these arguments.

efficiency."[33] "[A] judicial attempt to uncover the subjective meaning of contracts would incentivize perjury and needlessly complicate litigation."[34]

> Because Delaware adheres to the objective theory of contract interpretation, the court looks to the most objective indicia of that intent: the words found in the written instrument. As part of this initial review, the court ascribes to the words their common or ordinary meaning, and interprets them as would an objectively reasonable third-party observer.[35]

"Standing in the shoes of an objectively reasonable third-party observer, if the court finds that the terms and language of the agreement are unmistakably clear, then the court should look only to the words of the contract to determine its meaning and the parties' intent."[36] "[W]hen we may reasonably ascribe multiple and different interpretations of a contract, we will find that the contract is ambiguous."[37] "The parties' steadfast disagreement will not, alone, render [a] contract ambiguous."[38]

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33 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 n.1 (Del. Ch. Nov. 8, 2007) (citing Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 Fordham L. Rev. 427, 477 (2000)).

34 *Id.*

35 *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008) (footnotes omitted).

36 *Dittrick v. Chalfant*, 948 A.2d 400, 406 (Del. Ch. 2007).

37 *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

38 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992) ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.").

The Forum Selection Clause itself specifies that it applies to "Parties." It reads, "[e]ach of the Parties submits to the jurisdiction of the State of Delaware and the Federal District Court for the District of Delaware," and "[e]ach Party also agrees not to bring any Proceeding arising out of or relating to this Agreement in any other court."[39] The SPA defines a "Party" as "[e]ach of Buyer, the Company, the Administrator and each Seller."[40] It does not name the RE Holdcos as "Parties," despite their status as signatories and despite imposing other obligations on them.[41]

"If [a party] wanted a contractual right . . . then he should have contracted for it."[42] Here, the signatories negotiated for a contractual right to the Forum Selection Clause. They also negotiated and contracted for whom the Forum Selection Clause would cover. The signatories did not bargain for the right Plaintiffs claim—to extend the Forum Selection Clause to signatories of the SPA who have other obligations under the SPA but are not included in the Forum Selection Clause. To conclude otherwise would require the Court to reform the SPA, which Plaintiffs have not requested.

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39 Sauder Aff. Ex. 1 § 8.8.

40 *Id.* Ex. 1, at 1.

41 Sauder Aff. Ex. 1 § 2.5(b)(6)(I).

42 *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *5 (Del. Ch. May 13, 2005).

Admittedly, in certain circumstances the SPA uses "party" or "parties" when it appears to mean "Party" or "Parties." For example, Section 8.3 of the SPA provides that "[t]his Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of each Party and each Party's successors and assigns."[43] The parties conceivably intended this provision to bind the RE Holdcos. Similarly, Section 8.8 states that "[n]othing in this Section 8.8, however, shall affect the right of any party to serve legal process in any other manner permitted by law or at equity,"[44] although the context suggests that the reference to "party" means "Party."

"Ascertaining the shared intent of the parties does not mandate slavish adherence to every principle of contract interpretation."[45]

> As this Court recently stated: "Contract principles that guide the Court—such as the tenet that all provisions of an agreement should be given meaning—do not necessarily drive the outcome. Sometimes apparently conflicting provisions can be reconciled, but in order to prevail on a contract claim, a party is not always required to persuade the Court that its position is supported by every provision or collection of words in the agreement."[46]

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43 Pls.' Reply Br. 6 (quoting Sauder Aff. Ex. 1 § 8.7).

44 Sauder Aff. Ex. 1 § 8.8.

45 *S'holder Representative Servs. LLC v. Gilead Scis., Inc.*, 2017 WL 1015621, at *16 (Del. Ch. Mar. 15, 2017), *aff'd*, 177 A.3d 610 (Del. 2017).

46 *Id.* (quoting *Cyber Hldg. LLC v. CyberGore Hldg., Inc.*, 2016 WL 791069, at *7 (Del. Ch. Feb. 26, 2016)).

The Forum Selection Clause uses the defined term "Parties" three times, evidencing an intent. This intent is consistent with the overall contractual scheme, which limits the RE Holdcos' obligations. This intent also is consistent with language in the Leases suggesting an expectation to litigate disputes related to the Leases in Georgia.[47] The potential misuses of "party" or "Party" do not unravel the contractual scheme that the SPA's drafters created. Nor do the misuses create ambiguity regarding the application of the Forum Selection Clause.

Plaintiffs argue that it would be absurd and unfair to require Plaintiffs to litigate claims arising from the SPA in Delaware while not holding the RE Holdcos to the same requirement;[48] this argument fails. "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."[49] Plaintiffs and Defendants were free to contract for the Forum Selection Clause to apply to, or in this case not apply to, the RE Holdcos, and that is what they chose. Plaintiffs have not identified any public policy that would save them from their contractual bargaining. As such, the contractual terms stand.

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47 *See* Sauder Aff. Ex. 2 § 32(f) (waiving the right to a jury trial in Georgia); *id.* Ex. 3 § 32(f) (same); *id.* Ex. 4 § 32(f) (same).

48 Pls.' Reply Br. 7-8.

49 *Gildor v. Optical Sols., Inc.*, 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006).

B. A Single Agreement

Plaintiffs next argue that Delaware case law and the SPA itself demonstrate that this Court should read the SPA and the Leases together and apply the Forum Selection Clause to the RE Holdcos' challenges under the Leases.

1. *Ashall Homes*

Plaintiffs rely on *Ashall Homes v. ROK Entertainment Group Inc.*[50] to argue that the Forum Selection Clause applies to the RE Holdcos' claims related to the Leases under the single agreement theory.[51] In *Ashall Homes*, then-Vice Chancellor Strine considered whether a dispute between a corporation and its stockholders over their investments in a company belonged in Delaware courts or English courts.[52] There were two relevant contracts at issue, a subscription agreement and a share sale agreement.[53] Both contained provisions in favor of English courts, but the subscription agreement stated that English courts "shall have jurisdiction," while the

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50 992 A.2d 1239 (Del. Ch. 2010)

51 *See* Pls.' Opening Br. 18 n.22; Pls.' Reply Br. 19 n.43.; *see also Comerica Bank v. Global Payments Direct, Inc.*, 2014 WL 3567610 (Del. Ch. Jul. 21, 2014) (holding that "contemporaneous contracts between the same parties concerning the same subject matter should be read together as one contract").

52 *Ashall Homes*, 992 A.2d at 1241.

53 *Id.* at 1242.

share sale agreements provided that the parties "submit to the exclusive jurisdiction of the English courts."[54]

Then-Vice Chancellor Strine deferred in favor of English courts.[55] He provided three independent bases for his decision. First, he held that "precedent . . . reads a provision stating that a court *shall* have jurisdiction over *any* dispute as a mandatory, rather than permissive, grant of jurisdiction."[56] Second, he identified public policy reasons in favor of keeping litigation over the two contracts in England, noting that "bifurcating this dispute . . . would result in obvious inefficiencies and confusion. Those inefficiencies and the potential for injustice are serious enough" that the claims should be kept together in England.[57] For example, then-Vice Chancellor Strine noted that "this court does not have—and cannot pretend to have—the same knowledge of English law or even access to English sources as the courts of England."[58] Third, then-Vice Chancellor Strine held that "the rule that related contemporaneous documents should be read together" applied in that

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54 *Id.* at 1243.

55 *Id.* at 1250.

56 *Id.*

57 *Id.* at 1251.

58 *Id.*

context.[59] This was because the two contracts "effectuated separate steps of a single integrated scheme."[60]

The case before me differs from *Ashall Homes* in all three respects. First, the plain language of the SPA does not obligate the RE Holdcos to litigate their claims in Delaware. As I held above, the Forum Selection Clause only binds Parties, and the RE Holdcos are not Parties. Second, no public policy reasons favor litigating this Georgia property dispute in Delaware. In fact, the result of this Court dismissing this case would be Georgia courts applying Georgia law to injuries related to Georgia property, something Georgia courts are best positioned to do. Third, the single agreement theory does not apply to bind a party to a provision it never agreed to, as explained in greater detail below. Thus, *Ashall Homes* does not work in Plaintiffs' favor.

2. *Weygandt*

Weygandt v. Weco LLC[61] is more instructive on the application of the single agreement theory under the facts of this case. In *Weygandt*, William Weygandt caused two entities he owned to enter into two agreements with a subsidiary of the Gulfstream Aerospace Corporation ("Gulfstream")—an asset purchase agreement

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59 *Id.* at 1250.

60 *Id.* at 1251.

61 2009 WL 1351808 (Del. Ch. May 14, 2009).

and a lease. One Weygandt-affiliated entity, Weco, Inc. ("Weco"), sold an aviation repair business to Gulfstream through an asset purchase agreement.[62] The asset purchase agreement required Weygandt to cause another affiliated entity, Weygandt and Associates ("W & A"), to lease the facility in which the aviation business operated to Gulfstream.[63] The asset purchase agreement included a consent to jurisdiction in Delaware courts and an exclusive forum selection clause in Delaware's favor, but the lease was silent on the issue.[64]

After FBI agents served a grand jury subpoena on the repair business to investigate purported FAA violations, Weygandt and Weco sued Gulfstream. When Gulfstream attempted to assert counterclaims against Weygandt, Weco, and W & A for breach of contract in Delaware courts, W & A moved to dismiss for lack of personal jurisdiction.[65] Gulfstream argued that "the Asset Purchase Agreement and the Lease Agreement are part of the same transaction, so W & A is bound to the Consent Provision [creating jurisdiction in Delaware] under the general rule that agreements that are part of the same transaction are construed together."[66]

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62 *Id.* at *1.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.* at *3.

Considering the doctrine that agreements entered contemporaneously are read as a single agreement, then-Vice Chancellor Strine held that "Gulfstream has not demonstrated that under this rule of contract interpretation, a party can be bound to terms that are not in any of the agreements the party itself signed."[67] He added that "[a]s a general rule, 'only the formal parties to a contract are bound by its terms.' In some cases where the same parties have executed multiple, related agreements, the court will read all of the agreements together in order the determine the rights and obligations of the parties."[68] For example, in *Simon v. Navellier Series Fund* the court "held that a trustee was required to bring his indemnification claim in the venue the parties selected in an Indemnification Agreement even though the trustee's claim purported to be based entirely on a related Declaration of Trust, which did not contain a venue provision."[69] Then-Vice Chancellor Strine, however, identified a key difference between the situations in *Simon* and in *Weygandt*: "in *Simon* the trustee had consented to the venue provision for at least some purposes by executing the Indemnification Agreement; the issue was the scope of that consent. Here, W &

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67 *Id.*

68 *Id.* (quoting *Alliance Data Sys. Corp. v. Blackstone Capital P'rs V L.P.*, 963 A.2d 746, 760 (Del. Ch. 2009)).

69 *Id.* (citing *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *1 (Del. Ch. Oct. 19, 2000)).

A did not execute any agreement containing a consent to jurisdiction in Delaware."[70] Furthermore, "[n]one of the cases cited by Gulfstream support the proposition that, under the single agreement theory, a party can be bound to terms not contained in any document the party executed."[71] Such an interpretation would contradict "Delaware's general policy of not extending the rights and obligations of contracts to parties that did not execute them, absent special circumstances."[72]

Applying *Weygandt*'s principles, this Court cannot bind the RE Holdcos to terms that they never agreed to bind themselves to and did not execute; as I held above, the RE Holdcos never agreed under any circumstance to litigate exclusively in Delaware. Here, like in *Weygandt* and unlike in *Ashall Homes*, the party against whom the Plaintiffs assert the Forum Selection Clause never agreed to the Forum Selection Clause in any circumstance; thus, this is not a question of extending consent to another context.

3. Other terms of the SPA

Plaintiffs also rely on Section 8.7 to argue that this Court should read the SPA and the Leases together as one agreement. Section 8.7 provides that

> [t]his Agreement and agreements, certificates, instruments, and documents entered into in connection

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70 *Weygandt*, 2009 WL 1351808, at *3.

71 *Id.* at *4.

72 *Id.*

> herewith may be executed and delivered in one or more counterparts and by fax or email, each of which shall be deemed an original and all of which shall be considered one and the same agreement. No Party shall raise the use of a fax machine or email to deliver a signature or the fact that any signature or agreement or instrument was transmitted or communicated through the use of a fax machine or email as a defense to the formation or enforceability of a contract and each Party forever waives any such defense.[73]

Section 8.7 does not require this Court to read the SPA and the Leases together as one contract. Indeed, Section 8.7 in its entirety appears designed to allow the parties to execute different copies of the same agreement and deliver those copies to each other electronically. Even if Section 8.7 did require this Court to read the SPA and the Leases together, however, Section 8.7 does not rewrite the Forum Selection Clause to cover the RE Holdcos, which as written, it does not do.[74] As such, Section 8.7 does not provide support to Plaintiffs' argument that the Forum Selection Clause applies to the RE Holdcos because this Court must read the SPA and the Leases together as a single agreement.

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[73] Sauder Aff. Ex. 1 § 8.7.

[74] Indeed, Section 32(f) of each Lease, which waives the right to a jury trial in Georgia, indicates that the drafters of those documents intended for the parties to those documents to litigate disputes regarding the Leases in Georgia.

C. Equitable Estoppel

Plaintiffs argue that equitable estoppel binds the RE Holdcos to the Forum Selection Clause because the RE Holdcos are third-party beneficiaries or entities closely related to the contract.

Delaware courts apply equitable estoppel to prevent someone from accepting the benefits of a contract without accepting its obligations. To determine if equitable estoppel applies, Delaware courts employ a three-part test: "First, is the forum selection clause valid? Second, are the defendants third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the merger agreement?"[75] This Court has expressly addressed the equitable estoppel theory in the context of forum selection clauses with facts very similar to the facts before me.

In *Weygandt*, the Court held that equitable estoppel required W & A to appear in Delaware.[76] Applying the analysis that Vice Chancellor Lamb adopted in *Capital Group Companies v. Armour*,[77] the Court held that equitable estoppel prevented W & A from arguing lack of personal jurisdiction. Then-Vice Chancellor Strine noted that "the rationale in these [equitable estoppel] cases is based on the principle

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75 *Capital Gp.*, 2004 WL 2521295, at *5.

76 *Weygandt*, 2009 WL 1351808, at *1.

77 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004).

that a third-party beneficiary cannot enjoy the benefits of an agreement without accepting its obligations."[78] W & A enjoyed the benefit of the asset purchase agreement, and thus, the asset purchases agreement's obligatory terms bound W & A.

Weygandt's equitable estoppel paradigm does not apply here. "Generally, cases applying [the doctrine explained in *Weygandt*] involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the forum selection clause in the contract."[79] Contrary to *Weygandt*, the RE Holdcos do not seek to benefit from the contract without accepting their obligations. Instead, they seek to limit their obligations to what they bargained for. As parties (but not Parties) to the contract, the RE Holdcos executed an agreement that excluded them from the Forum Selection Clause. The fact that other parties bargained for other terms that are expressed in the same contract does not give Plaintiffs the ability to bind the RE Holdcos to the terms other parties bargained for.

Thus, equitable estoppel does not bind the RE Holdcos to the Forum Selection Clause and require them to litigate in Delaware.

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78 *Weygandt*, 2009 WL 1351808, at *4.

79 *Capital Gp.*, 2004 WL 2521295, at *6.

D. Artful Pleading

Plaintiffs next argue that "[t]he Callases should not be permitted to engage in artful pleading here by using entities they control to assert claims that they contend fall outside" the Forum Selection Clause.[80]

Plaintiffs rely on *ASDC Holdings v. The Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust*[81] for the proposition that the Forum Selection Clause requires non-Parties such as the RE Holdcos to litigate in Delaware. In *ASDC Holdings*, a private equity fund, ASDC, invested in a Texas-based dental practice management company, All Smiles.[82] The contracts between ASDC and All Smiles included forum selection clauses mandating claims be brought in state or federal court in Delaware, but the only signatories to the contracts were the individual seller, Malouf, and the investor, ASDC.[83]

When disputes arose regarding the sale, Malouf sued All Smiles, the private equity sponsor, individual defendants, and other affiliated non-signatories to the contracts and non-parties to the forum selection clause.[84] Malouf filed suit in Texas

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80 Pls.' Reply Br. 19 n.43.

81 2011 WL 4552508 (Del. Ch. Sept. 14, 2011).

82 *Id.* at *1

83 *Id.* at *1-2.

84 *Id.*

court.[85] The defendants filed an action in Delaware to enforce the forum selection clause.[86] Malouf argued that because the defendants he had selected were not signatories to the forum selection clause, they could not enforce it against him.[87]

In rejecting Malouf's argument, this Court held that "[i]n arguing that he can avoid the forum selection clause through artful pleading and suing non-signatories to the Agreements, [the individual seller] asks this Court to favor form over substance. The Supreme Court, however, considered and rejected such rigid formalism in its decision in *Ashall Homes Ltd. v. ROK Entertainment Group Inc.*"[88] The Court held that the forum selection clause bound Malouf to litigate his claims in Delaware.[89] Non-signatories could enforce that obligation because they were "closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable."[90] Since Malouf himself was bound to litigate claims in Delaware, it was foreseeable that related non-signatories might seek to enforce the

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85 *Id.*

86 *Id.*

87 *Id.* at *7.

88 *Id.* (citing *Ashall Homes*, 992 A.2d 1239).

89 *Id.* at *1.

90 *Id.* at *7 (citing *Ashall Homes*, 992 A.2d at 1245).

forum selection clause against him.[91] As such, this Court allowed the defendants to invoke the forum selection clause against Malouf despite being non-signatories.

Plaintiffs' reliance on *ASDC Holdings* is misplaced. In *ASDC Holdings*, Malouf had agreed to a binding forum selection clause that unambiguously and undisputedly applied to him. The question before the court was whether non-signatories could enforce that forum selection clause against him. In the case before me, the RE Holdcos are not Parties and the Forum Selection Clause does not apply to them by its plain terms. *ASDC Holdings* is about who may enforce a relevant and binding forum selection clause against a signatory of that clause. *ASDC Holdings* does not discuss binding signatories to a portion of the agreement they did not accept, and I decline to extend its holding to do so.

Thus, Plaintiffs' arguments that Defendants have attempted to artfully plead their Georgia case to avoid the Forum Selection Clause by strategically choosing parties also fails.

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[91] Then-Vice Chancellor Strine made a similar observation in *Ashall Homes*, noting that "it was foreseeable that the defendants would invoke the Forum Selection Provision of the Share Sale Agreements, and it would be inequitable to permit the Ashall Plaintiffs to escape their contractual promise to litigate all disputes arising under the Share Sale Agreements in England." *Ashall Homes*, 992 A.2d at 1249.

III. MOTION TO DISMISS ANALYSIS UNDER COURT OF CHANCERY RULE 12(B)(2)

The RE Holdcos also move to dismiss for lack of personal jurisdiction under Court of Chancery Rule 12(b)(2). "When a defendant moves to dismiss a complaint pursuant to Court of Chancery Rule 12(b)(2), the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the defendant."[92]

> Delaware courts apply a two-step analysis to determine whether the exercise of personal jurisdiction over a nonresident is appropriate. First, we must consider whether Delaware's long arm statute is applicable, recognizing that 10 *Del. C.* § 3104(c) is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause. Next, the court must determine whether subjecting the nonresident defendant to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment.[93]

"If, as here, no evidentiary hearing has been held, plaintiffs need only make a prima facie showing of personal jurisdiction and the record is construed in the light most favorable to the plaintiff."[94]

> Because the defense of lack of personal jurisdiction is a personal right, it may be obviated by consent or otherwise waived. In the absence of consent, the determination of whether personal jurisdiction exists under Delaware law involves the two-step process previously described.

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92 *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).

93 *Hercules, Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480-81 (Del. 1992) (citations omitted).

94 *Ryan*, 935 A.2d at 265.

> [C]onsent has been recognized as a basis for the exercise of general personal jurisdiction. In fact, a variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the Court. Parties may, for example, submit to a given court's jurisdiction by contractual consent, or stipulate to personal jurisdiction.[95]

Plaintiffs advance the same arguments in favor of personal jurisdiction as they do in favor of the forum selection clause, namely that the RE Holdcos consented to the personal jurisdiction of Delaware courts by signing the SPA and the Leases.[96] Plaintiffs do not allege any other basis for personal jurisdiction.

Because I held above that the RE Holdcos did not consent to this Court's personal jurisdiction, I now hold that this Court does not have personal jurisdiction over the RE Holdcos; thus, dismissal under Rule 12(b)(2) is merited.

IV. MOTION TO DISMISS ANALYSIS UNDER COURT OF CHANCERY RULE 12(B)(6)

The Callas Sellers and the Trust move to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6), arguing that they have not violated the SPA because they are not parties to the Georgia Action.

When considering a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6), a court must accept all well-pled factual allegations in

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95 *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *6 (Del. Ch. Jul. 14, 2008) (citations omitted) (alteration in original).

96 Pls.' Reply Br. 24.

the complaint as true, accept even vague allegations in the complaint as well-pled if they provide the defendant notice of the claim, "draw all reasonable inferences in favor of the non-moving party," and deny the motion unless the plaintiff could not recover "under any reasonably conceivable set of circumstances susceptible of proof."[97]

The Callases and the Trust are not parties to the Leases. They are also not parties to the Georgia Action. The Complaint alleges no claims that the Callases or the Trusts have directly violated the Forum Selection Clause, only that the RE Holdcos have done so. The RE Holdcos' filing of the Georgia Action does not implicate the Callases or the Trust. Therefore, dismissal under 12(b)(6) is appropriate.

V. CONCLUSION

For the foregoing reasons, I DENY Plaintiffs' Motion for Preliminary Injunction and GRANT Defendants' Motion to Dismiss. To the extent the foregoing requires an Order to take effect, **IT IS SO ORDERED**.

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97 *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002).