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RE: ***In re Neworld Energy Holdings, LLC,***
Civil Action No. 2023-0282-MTZ

Dear Counsel,

I write to address the respondents' motion to dismiss or stay petitioners' statutory claims for judicial dissolution and appointment of a liquidating trustee under 6 *Del. C.* §§ 18-802 and 803 in favor of arbitration. The respondents contend this Court must defer to an arbitrator on the substantive arbitrability of the petitioners' claim, or at least conclude that the claim is arbitrable. I write for the parties, familiar with the background of this case; my conclusion relies entirely on contractual language.

"The court presumes that parties intended courts to decide issues of substantive arbitrability."[1] But under the familiar *Willie Gary* test, if the relevant agreement presents "clear and unmistakable evidence" that the parties intended to

[1] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006).

delegate issues of substantive arbitrability to an arbitrator,[2] "a court possesses no power to decide the arbitrability issue."[3]

Section 15.03 of Neworld Energy Holdings LLC's operating agreement provides, in relevant part:

> Subject to Section 15.12, any dispute whatsoever among any of the parties with respect to the interpretation of, or relating to any alleged breach of, this Agreement . . . shall be resolved by final and binding arbitration before a single arbitrator selected and serving under the Commercial Arbitration Rules of the American Arbitration Association. . . . Such arbitration shall be the exclusive remedy hereunder with respect to the subject matter of such arbitration; provided, however, that nothing contained in this Section 15.03 shall limit any party's right to bring (a) post arbitration actions seeking to enforce an arbitration award or (b) actions seeking injunctive or other similar relief in the event of a breach or threatened breach of this Agreement . . . . If this Section 15.03 is for any reason held to be invalid or otherwise inapplicable with respect to any dispute, then any action or proceeding brought with respect to any dispute arising under this Agreement, or to interpret or clarify any rights or obligations arising hereunder, shall be maintained solely and exclusively in the state or U.S. federal courts in the State of Delaware.[4]

Section 15.12 provides that "each Member shall be entitled to seek an injunction or injunctions to prevent breaches of this Agreement by the other Members and to enforce specifically this Agreement and the terms and provisions hereof."[5] Also

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[2] *Id*. at 78–79.

[3] *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S. Ct. 524, 529 (2019).

[4] Docket Item ("D.I.") 10 Ex. 1 § 15.03.

[5] *Id*. § 15.12.

relevant here is Section 14.01, which provides: "Dissolution. The Company shall be dissolved upon Board Approval."[6]

These provisions are on all fours with those in *Blackmon v. O3 Insight, Inc.*[7] The arbitration provision is not for "all disputes," but rather "any dispute, controversy or claim arising out of, relating to, or in connection with, this Agreement."[8] The provision mentions the American Arbitration Association Rules, which "evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator."[9] And the agreement provides that arbitration is subject to the right to seek equitable relief.[10] *Blackmon* relied on *McLaughlin v. McCann,* as "definitive guidance regarding the application of the *Willie Gary* test," to conclude the reference to AAA rules and the broad range of disputes stemming from the agreement reflected an intent to arbitrate substantive arbitrability, and that the carveout for injunctive relief did not change that result, particularly because that

[6] *Id.* § 14.01.

[7] 2021 WL 868559 (Del. Ch. Mar. 9, 2021).

[8] *Id.* at *1.

[9] *Id.*; *Willie Gary*, 906 A.2d at 80.

[10] *Blackmon*, 2021 WL 868559, at *3 (noting the provisions of that arbitration clause are "[s]ubject to Section 9.13," which provides for equitable relief).

carveout did not prohibit seeking injunctive relief in arbitration.[11] *Blackmon* concluded substantive arbitrability was for the arbitrator.[12]

So must I. Like the provisions in *Blackmon*, Section 15.03 reflects an intent to submit substantive arbitrability to the arbitrator, notwithstanding Section 15.12; Section 15.12 is not limited to seeking injunctive relief before a court;[13] and Section 14.01 does not specifically carve out this judicial dissolution action. Section 15.03 reflects an intent to litigate only if that section is invalid or inapplicable. Neworld's LLC agreement does not refer to judicial dissolution, and

[11] *Id.* (noting equitable relief was in addition to any other remedies to which the signatory was entitled (citing *McLaughlin v. McCann*, 942 A.2d 616, 622–25 (Del. Ch. 2008)); D.I. 10 Ex. 1 § 15.12 (providing equitable relief as "in addition to any other remedies to which such member is entitled at law or in equity").

[12] *Blackmon*, 2021 WL 868559, at *4.

[13] *Compare* D.I. 10, Ex. 1 § 15.12 *and id.* § 11.08(d) ("In the event of the breach or a threatened breach by any Founder or Incentive Member of any of the provisions of this Section 11.08, the Company and its Subsidiaries would suffer irreparable harm, and, in addition and supplementary to other rights and remedies existing in their favor, the Company and its Subsidiaries shall be entitled to specific performance and injunctive or other equitable relief ***from a court of competent jurisdiction*** in order to enforce or prevent any violations of the provisions hereof (without posting a bond or other security and without proving actual damages)." (emphasis added)) *and id.* § 11.08(c) (referencing a court holding a restrictive covenant to be unreasonable). All other relevant references to a "court" reference a final and non-appealable judgment, further supporting the conclusion that the parties intended to litigate before an arbitrator and limit a court to entering a judgment on an award. *Id.* §§ 9.02(j), 10.01, 10.04, 10.09(b), 10.09.

so does not reflect an intent to involve the judiciary in the dissolution process.[14]

This matter is hereby **DISMISSED**.

Sincerely,

/s/ Morgan T. Zurn

Vice Chancellor

MTZ/ms

cc: All Counsel of Record, via *File & ServeXpress*

[14] *Id.* § 14.01; *see Willie Gary*, 906 A.2d at 81–82; *Willie Gary LLC v. James & Jackson LLC*, 2006 WL 75309, at 10 n.32 (Del. Ch. Jan. 10, 2006) ("I am in no way stating that parties cannot contract to have an arbitrator hear claims for dissolution arising under § 18-802."); *Johnson v. Foulk Road Med. Ctr P'ship*, 2001 WL 1563693, at *1–2 (Del. Ch. Nov. 21, 2001) (concluding "there is nothing inherent in the claim for judicial dissolution that could not be fully and fairly litigated in the context of an arbitration").