IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CREDIT SUISSE SECURITIES (USA) LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 4380-VCN**
	:	
WEST COAST OPPORTUNITY FUND, LLC,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: April 24, 2009
Date Decided: July 30, 2009

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NOBLE, Vice Chancellor

An individual signs a "lockup" agreement prohibiting him from pledging or otherwise transferring, "directly or indirectly," stock in a publicly traded company. He personally owns no such stock. He signs his name; underneath his signature is a title line designating him has "Chief Executive Officer." The pending dispute is about the pledge of shares of the publicly traded company owned by a limited liability company, which does not have a chief executive officer. The stock, thus, is held neither by the signatory to the Lockup Agreement in his individual capacity nor by a corporation of which he is the chief executive officer. The individual is, however, the sole member and manager of the limited liability company. The limited liability company subsequently pledges the shares as security for a margin account. A party entitled to enforce the lockup agreement has contested the efficacy of the pledge, and the creditor now seeks a declaration that the lockup agreement cannot be invoked to deprive it of the security which it took in good faith as an inducement to extend credit.

One side asks the question of whether the lockup agreement, which makes no mention of the limited liability company, can be read, through its "directly or indirectly" language, to preclude the pledge of the shares held by the limited liability company as security for its debt. The other side simply asks how the limited liability company can be bound by an agreement to which it is not a party and which does not purport to restrict its actions.

I. BACKGROUND

Plaintiff Credit Suisse Securities (USA) LLC ("Credit Suisse"), a Delaware limited liability company, is a broker dealer engaging in securities brokerage and financial advisory services. In July 2008, Investment Hunter LLC, a Delaware limited liability company ("Investment Hunter"), pledged shares (the "Pledged Shares") of GreenHunter Energy, Inc. ("GreenHunter"). With the Pledged Shares, Investment Hunter established a margin account (the "Margin Account") and borrowed substantial sums from Credit Suisse.[1] Investment Hunter, in the agreement establishing the Margin Account, represented to Credit Suisse that:

> The [Pledged] Shares are fully paid for and the undersigned is the conditional beneficial owner of the [Pledged] Shares, free and clear of any security interest, claim or charge. The [Pledged] Shares are registered in the name of the undersigned, no other person or entity has an interest in the [Pledged] Shares and the undersigned has the full right, power and authority to sell, pledge, transfer and deliver the [Pledged] Shares.[2]

That agreement was signed by Gary C. Evans ("Evans") in his capacity as manager of Investment Hunter. Within a few months, the market value of the Pledged Shares had dropped significantly, and Credit Suisse issued a margin call.

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[1] The Margin Account is actually through Pershing LLC which also loaned the funds to Investment Hunter. The loans were arranged by Credit Suisse which bears the full risk of loss and holds collection rights, including the claimed rights to seize and to sell the Pledged Shares. For simplicity, no further reference will be made to Pershing LLC. No one has suggested that Credit Suisse is limited here because of the way in which the loan has been structured.

[2] Stock Borrower's Agreement, ¶ 1, quoted at Compl. ¶ 19.

Evans is also Chairman, Chief Executive Officer, and President of GreenHunter. In March 2007, Defendant West Coast Opportunity Fund, LLC ("WCOF")[3] and others (collectively the "2007 Investors") invested in GreenHunter in accordance with a Securities Purchase Agreement[4] which was accompanied by a Registration Rights Agreement.[5] Pursuant to Section 2.7(r) of the Registration Rights Agreement, GreenHunter was required to deliver a lockup agreement from Evans (the "Lockup Agreement")[6] (as well as from other executives) prohibiting the transfer of GreenHunter stock for a period of 360 days following the date when the Securities and Exchange Commission declared an anticipated registration statement effective.

Evans executed the Lockup Agreement on March 9, 2007. It provides in pertinent part:

> To induce [the 2007 Investors] to enter into the proposed transactions with [GreenHunter], the undersigned hereby agrees that, without the prior consent of [West Coast] on behalf of the [2007 Investors], he will not, during the period commencing on the date hereof and ending 360 days after the Effective Date, (1) offer, pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, lend, or otherwise transfer or dispose of, directly or indirectly, any shares of Common Stock or any securities convertible into or exercisable or

[3] WCOF, also a Delaware limited liability company, engages in asset management.
[4] The Securities Purchase Agreement appears at Defs.' Opening Br. Ex. A. It is governed by Texas law. *Id.* § 9(a).
[5] The Registration Rights Agreement appears at Defs.' Opening Br. Ex. B. It is governed by Delaware law. *Id.* § 12.
[6] Compl. Ex. A.

> exchangeable for Common Stock or (2) enter into any swap or other arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of Common Stock whether any such transaction described in clause (1) or (2) above is to be settled by delivery of Common Stock or such other securities, in cash or otherwise.

Evans signed the Lockup Agreement as follows:

> Name: Gary C. Evans
> Title: Chief Executive Officer

No company name was provided.

On October 10, 2007, Evans disclosed, through a filing with the Securities and Exchange Commission, that all of his holdings in GreenHunter were held indirectly by Investment Hunter.[7] Evans is the sole owner, member, and manager of Investment Hunter.[8]

Evans, after receipt of the margin call to Investment Hunter, directed GreenHunter's counsel to respond to Credit Suisse.[9] From that response, Credit Suisse learned that WCOF, the "principal shareholder" of GreenHunter, objected to any sale of the Pledged Shares to meet the margin delinquency and that

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[7] Burns Aff. Ex. A. Investment Hunter acquired these shares from Wind Hunter, LLC on December 6, 2006, three months prior to the execution of the Lockup Agreement. Compl. ¶ 35.
[8] *Id.* ¶ 4.
[9] The role of GreenHunter's counsel is a curious one. Credit Suisse alleged that GreenHunter's counsel, a few days before execution of the Margin Agreement, had opined to Credit Suisse that, as Investment Hunter had represented in the Stock Borrower's Agreement (at paragraph 1), the Pledged Shares were not subject to any claims by third parties and that "full right, power, and authority to sell, pledge, transfer, and deliver the [Pledged] Shares" existed. *Id.* ¶ 21. Counsel also represented that the Pledged Shares were "eligible to be sold" to satisfy any margin delinquency. *Id.* ¶ 22.

GreenHunter would instruct its transfer agent to place a stop order on any GreenHunter shares owned by Investment Hunter.[10] The objection was based on the Lockup Agreement.

II. PROCEDURAL HISTORY AND CONTENTIONS

Credit Suisse filed a two-count Complaint in this Court on February 17, 2009. By Count I, Credit Suisse seeks a declaration that the Lockup Agreement does not prohibit a transfer of the Pledged Shares to Credit Suisse. By Count II, Credit Suisse seeks damages for WCOF's interference with its contract with Investment Hunter. WCOF filed an answer on March 10, 2009. Credit Suisse moved for partial judgment on the pleadings as to Count I on March 25, 2009. WCOF moved for judgment on the pleadings as to both counts the same day. This memorandum opinion resolves both motions.

This is a case which turns on how the "question presented" is framed. According to Credit Suisse, the question is whether Investment Hunter is somehow bound through application of the Lockup Agreement and thereby precluded from transferring the Pledged Shares. According to WCOF, the question is whether Evans can accomplish through Investment Hunter that which he personally agreed to refrain from doing either directly or indirectly.

[10] To be clear, Credit Suisse alleges that Evans, who had signed the documents pledging Investment Hunter's shares, later instructed GreenHunter's counsel to advise Credit Suisse that Credit Suisse could not look to the Pledged Shares for satisfaction of the margin delinquency.

III. DISCUSSION

A. *Applicable Legal Standards*[11]

Under Court of Chancery Rule 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A motion for judgment on the pleadings may be granted if no material issue of fact exists and where the moving party is entitled to judgment as a matter of law. In ruling on cross-motions for judgment on the pleadings, the Court must view the facts pled and the inferences to be drawn from them in the light most favorable to the non-moving party.[12] The Court need not, however, accept as true conclusory assertions unsupported by specific factual allegations.[13] The Court may consider the unambiguous terms of exhibits attached to the pleadings and those incorporated into them by reference.[14] If, after these principles are applied, there is no material question of fact and the movant is entitled to judgment as a matter of law, its motion will be granted.[15]

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[11] The parties address the question of whether this dispute is governed by Texas law or Delaware law (or possibly, but unlikely, California law). They, however, agree that the choice of laws question need not be resolved for the purposes of the pending motions because either Texas or Delaware law applies, and they are not in conflict as to the general principles under consideration. Pl.'s Opening Br. at 7; Def.'s Answering Br. at 2 n.2. *See also Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 892 (Del. 2000).

[12] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

[13] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003).

[14] *E.g.*, *Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *9 n.33 (Del. Ch. Dec. 7, 1999).

[15] *Desert Equities*, 624 A.2d at 1205.

This controversy involves the interpretation of the Lockup Agreement. Delaware adheres to the "objective" theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party.[16] Thus, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[17]

B. *Signing Capacity and Parties Bound*

The act which WCOF seeks to nullify is a pledge of the Pledged Shares. That was the act of Investment Hunter, as the owner of the shares. It was Investment Hunter which borrowed the money (incurred the margin indebtedness) and provided security for the loan. Thus, the question which must be answered is whether Investment Hunter was limited in its ability to post shares of GreenHunter as collateral.

Evans signed the Lockup Agreement in his personal capacity, and neither as the Chief Executive Officer of GreenHunter, nor as the manager of Investment Hunter. The parties both agree on this point.[18] The Lockup Agreement makes no mention of either GreenHunter or Investment Hunter. That Evans indicated a title

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[16] *Cantera v. Marriott Senior Living Serv., Inc.*, 1999 WL 118823, at *4 (Del. Ch. Feb. 18, 1999).
[17] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).
[18] Pl.'s Opening Br. at 7; Def.'s Opening Br. at 9.

of "Chief Executive Officer" below his name does not change the result.[19] Although Evans holds the title of Chief Executive Officer at GreenHunter, there is nothing on the face of the Lockup Agreement evincing an intent on the part of Evans to act in that capacity.[20] Accordingly, Evans executed the Lockup Agreement in his personal capacity.

Evans does not own the GreenHunter stock in question. It is entirely the property of Investment Hunter, and Evans's status as a member does not alter this fact.[21] Evans did not sign the Lockup Agreement in his capacity as a member or manager of Investment Hunter, and there is, as noted, no evidence of an intent to act in that capacity. Therefore, the Lockup Agreement does not serve to bind Investment Hunter. "[T]he ordinary rule is that only the formal parties to a contract are bound by its terms."[22] Because Investment Hunter is not a party to the

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[19] *See Wood v. PennTex Res.*, L.P., 458 F. Supp. 2d 355, 363 (S. D. Tex. 2006) (discussing a corporate title's inclusion with an individual's signature as *descriptio personae*; used to indicate who the person is, not his capacity); *see also Johnson v. Bondy*, 232 N.E. 2d 176 (Ill. App. 1967). Even if Evans's use of the title of Chief Executive Officer were construed to bind (or evidence representation of) an entity, the entity would be GreenHunter and not Investment Hunter.

[20] *See Jesselson v. Outlet Assocs. of Williamsburg, Ltd. P'ship.*, 784 F. Supp. 1223, 1229-30 (E.D. Va. 1991) ("Under New York law, where a contract is signed by an individual who does not indicate therein that he is signing as an agent on behalf of a disclosed principal, the individual is deemed to be contracting on his own behalf."); *but see Ray v. Harris*, 2008 WL 2410208 (Del. Super. Feb. 26, 2008) (corporation liable, and individual not liable, on contract plainly intended to bind corporation despite signature line lacking an indication of signatory capacity).

[21] 6 *Del. C.* § 18-701 ("A limited liability company interest is personal property. A member has no interest in specific limited liability company property.").

[22] *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 760 (Del. Ch. 2009).

Lockup Agreement it is not bound by it. Evans cannot encumber property he does not own. WCOF, thus, cannot prevent Investment Hunter's transfer of GreenHunter stock to Credit Suisse in satisfaction of the margin call by virtue of the Lockup Agreement.[23]

Perhaps WCOF and Evans intended that the Lockup Agreement prohibit the very behavior Evans is alleged to have engaged in. Yet, nothing on the face of the Lockup Agreement evinces such an intent to bind Investment Hunter or any other entity with which Evans has a relationship. Instead, it binds only Evans.

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[23] WCOF, in its Answering Brief, at page 3, contends that "general industry usage" supports its interpretation of the Lockup Agreement. Perhaps that is correct, but WCOF, other than a conclusory assertion in a brief, has not backed up that claim and offered the Court any basis for determining that industry usage should guide its reading of the Lockup Agreement.

Similarly, WCOF argues at some length that Investment Hunter should be viewed as the alter ego of Evans and that Investment Hunter should be equitably estopped from pledging its shares of GreenHunter. WCOF accurately points out that such theories are generally fact intensive and not readily subject to resolution on a motion for judgment on the pleadings. The difficulty with WCOF's contention is that it did not plead the facts necessary to put the alter ego and equitable estoppel arguments at issue. For example, WCOF argues that "there is no information in the Complaint to assume that Investment Hunter is adequately capitalized." Def.'s Answering Br. at 8. It is, however, WCOF's obligation to put such facts before the Court; it is not Credit Suisse's responsibility to plead a negative (i.e., that Investment Hunter is not inadequately capitalized) in this instance. One can argue that a limited liability company with one, and only one, owner, member and manager should be treated as the same as (or the alter ego of) that individual. After all, the limited liability company can only act through that individual. The limited liability company—at least in the absence of factual allegations supporting "piercing the veil," fraud, or the like—is a separate legal entity and that status must be respected. That Evans agreed not to do indirectly what he could not do directly does not change that principle. Investment Hunter is not bound and only the obligation of Investment Hunter is before the Court. Evans's conduct, however, may be subject to a less favorable reading.

Also, WCOF tendered a ripeness affirmative defense. Perhaps that defense has been abandoned; in any event, there is a ripe dispute for resolution. WCOF's conduct—or its view of the Lockup Agreement—has frustrated Credit Suisse's exercise of rights as to the Pledged Shares.

West Coast argues that the Lockup Agreement prohibits Evans from, among other things, pledging GreenHunter shares no matter who owns them by virtue of the phrase "directly or indirectly" included in the Lockup Agreement. Although the parties vigorously debate the proper effect to be given to this language in this context, the Court does not need to decide that interpretative issue, given the posture of this controversy. Having determined that Investment Hunter is not bound by the Lockup Agreement, and thus that West Coast cannot interrupt the transfer of Green Hunter shares to Credit Suisse, the Court's task is complete. It may well be that Evans violated the Lockup Agreement by effectuating Investment Hunter's pledge of GreenHunter shares. Evans however, is not before this Court, and determining whether he violated the Lockup Agreement by pledging the GreenHunter shares owned by Investment Hunter is not necessary.[24]

As between the parties to this litigation, WCOF may not prevent Investment Hunter from transferring its shares of GreenHunter stock to Credit Suisse because WCOF has not bound Investment Hunter by the Lockup Agreement. Judgment on

[24] WCOF also asserted an affirmative defense raising the question of indispensable parties under Court of Chancery Rules 12(b)(7) and 19. The Court addressed this issue at oral argument, although it was not briefed. WCOF did not pursue its indispensable party argument and, thus, the Court cannot be expected to address it substantively. The two potential indispensable parties are Investment Hunter, which as a Delaware limited liability company is subject to the Court's jurisdiction, and Evans who, based on representations of counsel, may not be subject to the Court's personal jurisdiction. *Cf.* 6 *Del. C.* § 18-109. Given the Court's view of the proper question presented by the pending motions, the indispensable party argument is of lesser moment. If the question were whether Evans had himself violated the Lockup Agreement, then his absence would have been more troublesome because, in order for WCOF to prevail, the Court first would have had to conclude that Evans, in fact, breached the Lockup Agreement.

the pleadings as to Count I of Credit Suisse's complaint will be granted in favor of Credit Suisse. Conversely, WCOF's motion as to Count I will be denied.

C. *Tortious Interference with Contract*

With the conclusion that WCOF may not rely upon the Lockup Agreement to frustrate Investment Hunter's transfer of the Pledged Shares, WCOF's motion for judgment on the pleadings as to Count II must be denied. Only if all material facts are undisputed is judgment on the pleadings appropriate,[25] and, for example, WCOF has denied Credit Suisse's allegation that it instructed Green Hunter to issue the stop transfer order preventing Investment Hunter's satisfaction of its obligations to Credit Suisse.[26]

IV. CONCLUSION

Accordingly, for the foregoing reasons, the Plaintiff's Motion for Judgment on the Pleadings as to Count I of its complaint is granted. The Defendant's Motion for Judgment on the Pleadings is denied as to both Count I and Count II. An implementing order will be entered.

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[25] *Desert Equities, Inc.*, 624 A.2d at 1205.

[26] Ans. ¶ 30. WCOF argued in its briefing that Credit Suisse is not entitled to judgment on the pleadings for Count II. Credit Suisse evidently agrees because it did not seek judgment on the pleadings with respect to Count II.