



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DENNIS T. MANGANO, PHD, MD,
individually,

Plaintiff,

v.

PERICOR THERAPEUTICS, INC., a
Delaware corporation, and
VERN NORVIEL, individually,

Defendants.

C.A. No. 3777-VCN

MEMORANDUM OPINION

Date Submitted: July 1, 2009
Date Decided: December 1, 2009

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Dennis T. Mangano, Ph.D., M.D. (“Mangano”) holds a substantial percentage of the shares of Defendant PeriCor Therapeutics, Inc. (“PeriCor” or the “Company”). Many of those shares were placed in a voting trust (the “Voting Trust”) that terminates when Mangano no longer holds a beneficial interest in 45% of the Company’s voting securities. Mangano is also bound by a Stock Purchase Agreement, which restricts his right to transfer his shares without having first offered them to the Company under a right of first refusal. Transfers to family members are exempt from the right of first refusal. Mangano transferred to his sister a sufficient number of shares to reduce his stock ownership below 45% of the outstanding securities. He then sought issuance of certificates for the shares that had been subject to the Voting Trust and sought to vote those shares. PeriCor, however, asserted that the shares transferred to Mangano’s sister were still held for his beneficial interest.

Mangano has filed a complaint in which he alleges that the Voting Trust has terminated because of the transfer of shares to his sister. He also seeks an order issuing the share certificates to him. He has moved for partial summary judgment on these claims.¹

¹ This action was commenced under Section 225 of the Delaware General Corporation Law after Mangano had attempted to vote his shares in favor of a slate of directors he proposed at an

II. BACKGROUND

A. *The Parties and their Relationship*

Mangano co-founded PeriCor in 2004, and since that time has been and remains a director and its single largest shareholder. By execution of a Technology and Sublicense Agreement, dated January 12, 2005, the Company acquired from Mangano the exclusive right to several chemical compounds as well as the non-exclusive rights to the databases supporting these compounds.² In return, Mangano received 5,050,000 shares of PeriCor, which constituted 85% of its founding stock.³ PeriCor issued Mangano these shares pursuant to a Stock Purchase Agreement, dated January 24, 2005 (the “SPA”). The SPA, adopted to reduce control-related risks to other investors, provides PeriCor with a right of first refusal whereby Mangano is obligated to offer any shares to the Company before selling or otherwise disposing of the shares to a third party.⁴ The SPA, however,

annual meeting and was denied the opportunity to do so. This memorandum opinion does not address any claims regarding the voting, as such, at the annual meeting.

² PeriCor is a biopharmaceutical company that develops certain cardioprotective compounds known as adenosine regulating agents.

³ Aff. of Richard R. Stover (“Stover Aff.”) ¶ 8. Richard R. Stover co-founded PeriCor with Mangano and is the Company’s President and Chief Executive Officer, positions he has held since January 2005.

⁴ SPA ¶ 5.

exempts intra-family transfers, ostensibly as a convenience to the shareholder for estate-planning purposes.⁵

Mangano and PeriCor also entered into a Voting Trust Agreement (the “VTA”) on April 15, 2005, for the purpose of limiting Mangano’s control over the Company.⁶ Under the VTA, Mangano transferred 2,419,200 shares of his PeriCor stock to a voting trust (the “Trust”) to be administered by a trustee, in this instance, the Defendant Vern Norviel (the “Trustee” or “Norviel”). The VTA obligated the Trustee to vote in conformity with the majority of PeriCor’s outstanding voting securities, other than the shares held by the Trust (the “Trust Shares”).⁷

The VTA lists several events that will result in the Trust’s termination. One such event is a diminution in Mangano’s equity. Specifically, the Trust terminates on the date on which Mangano’s beneficial interest drops below 45% of PeriCor’s

⁵ *Id.* at ¶ 5(f); Stover Aff. ¶10. On April 13, 2005, Mangano transferred and assigned more than 1,000,000 of his shares to Metabasis, the company from which Mangano originally had acquired his license to the compounds later transferred to PeriCor. This stock transfer was required as part of Mangano’s license from Metabasis, “and was an integral part of PeriCor’s formation.” After the transfer to Metabasis, Mangano owned 4,040,000 shares of PeriCor. Stover Aff. ¶ 14.

⁶ Stover Aff. ¶¶ 15-16. PeriCor sought this agreement to make itself more attractive to outside investors. It claims that Mangano is affiliated with two entities, the Ischemia Research and Education Foundation (“IREF”) and the Multicenter Study of Perioperative Ischemia Research (“McSPI”), which engage in a similar line of business as PeriCor. PeriCor therefore sought the VTA to assure both outside investors and itself that the Company would not be subject to Mangano’s potential conflicts of interest. *Id.* at ¶ 16.

⁷ Voting Trust Agreement (“VTA”) § 1.7. The parties agreed that the VTA is to be governed by Delaware law. VTA § 3.2.

outstanding voting securities.⁸ Upon termination, the share certificates are, after some prescribed paper shuffling, to be issued to Mangano.

B. *The Transfer to Magnotti*

On April 1, 2008, Mangano requested that PeriCor transfer 200,500 shares to his sister, Roberta Magnotti (“Magnotti”); PeriCor effectuated the transfer and subsequently recorded Magnotti as the holder of the transferred shares on its stock ledger.⁹ Mangano believed that the transfer dropped his beneficial interest below 45% of the total PeriCor stock outstanding, and he thereafter considered the Voting Trust terminated. He requested the return of the PeriCor share certificates held by the Trustee, and forwarded the equivalent of the Trust Share certificates to Norviel on April 26, 2008;¹⁰ Norviel, however, had resigned as trustee on April 24, 2008, at which time he delivered the Trust Share certificates to PeriCor.¹¹

C. *The Stockholders’ Meeting*

The Company held its annual meeting on May 23, 2008;¹² during the meeting, Mangano nominated his own slate of directors in opposition to the group

⁸ VTA § 1.9(a). “Beneficial interest” is not a defined term within the VTA.

⁹ First Am. Verified Compl. (the “Compl.”) ¶ 17; Stover Aff. ¶ 39. Mangano transferred these shares from that portion of his holdings that had not been placed in the Voting Trust.

¹⁰ See *infra* note 65.

¹¹ Stover Aff. ¶ 36; Norviel Ans. ¶ 22; VTA § 1.8(a). The VTA permits the Trustee to resign at any time. It also permits the Trustee to return the Trust Share Certificates to the Company upon the Trust’s termination “to be held subject to the surrender of such Trust Certificates for the benefit of the person . . . entitled thereto.” Upon delivery to the Company, the Trustee is “fully acquitted and discharged with respect to the shares.” VTA § 1.9(b).

¹² On April 7, 2008, the Company sent its annual meeting notice, which established April 4, 2008, as the record date for the May 23, 2008, meeting. Stover Aff. ¶ 39.

nominated by PeriCor's board.¹³ The PeriCor board also proposed an amended stock option plan and an increase in the total number of authorized shares.¹⁴ Magnotti attended the meeting and voted in favor of Mangano's proposed slate and against PeriCor's resolutions. Mangano sought to vote the shares formerly held in the Voting Trust, which if counted, would have allowed him to seat his nominees. PeriCor, while counting Magnotti's votes, refused to consider the Trust terminated, and the Trust Shares were therefore not voted as he had directed.¹⁵ As a result, the Board's nominees won the contested seats.¹⁶

III. THE PARTIES' CONTENTIONS

Mangano contends that the stock transfer to Magnotti lowered his beneficial interest in PeriCor's voting securities from roughly 47% to slightly less than 45%.¹⁷ According to Mangano, this transfer terminated the Voting Trust, and, with termination, he acquired voting control over the Trust Shares. He seeks a declaration that he is the beneficial owner of no more than 45% of PeriCor's

¹³ Stover Aff. ¶ 42. Mangano was also nominated on the management slate.

¹⁴ *Id.* at ¶ 40; Compl. ¶ 23.

¹⁵ Compl. ¶ 28. Mangano alleges that PeriCor's stock ledger, as of the April 4, 2008 record date, continued to list Norviel as the holder of the 2,419,200 Trust Shares. *Id.* at ¶ 26.

¹⁶ The proposals to amend the stock option plan and authorize additional shares both failed even without the voting of the Trust Shares by Mangano. Compl. ¶ 30.

¹⁷ Compl. ¶ 18.

outstanding securities; that the Voting Trust is thereby terminated; and that he is now entitled to vote the 2,419,200 shares that the Trust once held.¹⁸

Mangano moved for partial summary judgment. He argued that there is no material question of fact that he is no longer the beneficial holder of more than 45% of PeriCor's equity. The Court heard argument on this motion and thereafter granted PeriCor leave to conduct limited discovery on the issue of whether Mangano retained any beneficial interest in the shares transferred to his sister. PeriCor has since deposed both Magnotti and Mangano, after which the parties filed supplemental briefs.

PeriCor argues that Mangano retained a beneficial interest in the shares transferred to his sister; and that for this reason, his beneficial interest at all times has remained above 45% of PeriCor's outstanding common stock; thus, the Trust never terminated. It contends that the term "beneficial interest" is inherently ambiguous, and to interpret the term the Court should look to the underlying purpose of the VTA.¹⁹ PeriCor argues that, because the parties intended for the VTA to prevent Mangano from taking control of the Company, beneficial interest "must be interpreted in a way that would prohibit Mangano from effecting a

¹⁸ Compl. ¶ 45. Mangano also asks that the Trust Share certificates be physically delivered to him.

¹⁹ Def. PeriCor's Suppl. Br. in Opp'n to Pl.'s Mot. for Partial Summ. J. ("Def.'s Suppl. Br.") at 23 ("[T]he term 'beneficial interest' is, at best, ambiguous and its meaning depends on context.").

termination of the VTA by transferring shares while maintaining effective voting control of at least 45% of PeriCor's stock."²⁰ It maintains that Mangano and Magnotti's depositions support its position that Mangano continues to exercise authority over the shares transferred to Magnotti.

PeriCor argues that Magnotti is unsophisticated in the medical and pharmaceutical matters that drive PeriCor's business and uninformed as to the Company's products and research activities; in addition, Magnotti is "confused as to what she is able to do with her PeriCor shares, . . . [and] unaware that there is no public market for her shares."²¹ It also contends that Mangano serves as something of a patriarch within his extended family, which looks to him for financial support.²² PeriCor asserts that, given Magnotti's abject lack of sophistication regarding the Company's affairs and her brother's respected status in his family, Mangano could expect that his sister would vote in accordance with his wishes.²³ It concludes that "although the transfer may have caused a change in the legal title

²⁰ Def.'s Suppl. Br. at 25.

²¹ See Def.'s Suppl. Br. at 4-12 (arguing that Magnotti's deposition demonstrated her lack of knowledge about the Company, her lack of any business experience, her misunderstanding of the shares' value and ability to be sold, and confusion regarding the election.)

²² See Mangano Tr. 67 (stating that he had provided his brother with \$50,000 to \$100,000 in financial assistance "over the years" and that he had given roughly \$250,000 to his other family members).

²³ Def.'s Suppl. Br. at 30. In fact, Mangano testified at deposition that he would have been surprised if his sister had not voted in favor of his slate. See Mangano Tr. 174 ("Of course you are surprised when people you know are running for something and if you have respect for them versus people you don't know, if you think they are equally competent, one would be surprised that you don't vote for them . . .").

to the shares, it left Mangano’s voting control, and therefore his beneficial interest, undiminished.”²⁴

If the Court determines that Mangano has retained no beneficial interest in the shares transferred to his sister, PeriCor argues in the alternative that Mangano cannot receive the share certificates deposited with the Trust, and therefore cannot vote these shares until a succeeding trustee is duly appointed; it claims that Mangano has thus far frustrated PeriCor’s attempts to appoint a successor trustee. Lastly, PeriCor asserts the equitable defense of “unclean hands” on the premise that Mangano seeks control of PeriCor solely to advance his own interests and those of his affiliates.²⁵

IV. ANALYSIS

This case turns on the meaning of beneficial interest. Although “beneficial interest” is a term laden with ambiguity, in this context—a contract to be interpreted under state law—it at least implies the existence of some enforceable right or benefit. There is, accordingly, nothing ambiguous about whether Mangano maintains a beneficial interest in the shares transferred to Magnotti because PeriCor has put forth no facts that create a genuine issue as to whether he retained

²⁴ Def.’s Suppl. Br. at 30.

²⁵ Mangano serves as the chief executive officer of IREF, *see supra* note 6, and his involvement in IREF provided the specific impetus for the VTA, which was intended to assure investors that Mangano would not control the Company and potentially subject it to his arguably conflicted interests. PeriCor argues that Mangano is now attempting to take control of the Company so that he may weaken it to IREF’s benefit. Stover Aff. ¶ 16.

some actual right in the shares transferred to his sister. Although Mangano may anticipate that Magnotti will vote alongside him most of the time, she is under no obligation to do so and, except for the right of first refusal retained by PeriCor, has taken full legal and equitable title to the shares. Thus, under no reasonable interpretation of the term could it be said that Mangano retained a “beneficial interest” in his sister’s stock.

A. *Standard on a Motion for Summary Judgment and a Word on Ambiguity*

In deciding a motion for summary judgment, the Court must view the facts in a light most favorable to the nonmoving party, while imposing on the moving party the burden of demonstrating that there are no material facts in dispute.²⁶ Summary judgment will be granted when the record indicates that no material fact is in dispute or if there is no need to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.²⁷ When interpretation of a contract is the Court’s task, a motion for summary judgment will only be granted when the contract is unambiguous.²⁸

A term within a contract is ambiguous when “it is fairly susceptible to two or more reasonable interpretations.”²⁹ Only then may the Court look to parol

²⁶ *Bank of New York Mellon v. Realogy Corp.*, 979 A.2d 1113, 1119 (Del. Ch. 2008).

²⁷ *Id.* (quoting *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

²⁸ *Firemen’s Ins. Co. of Wash., D.C. v. Birch Pointe Condo Ass’n*, 2009 WL 1515550, at *2 (Del. Ch. May 29, 2009) (quoting *United Rentals Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007)).

²⁹ *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

evidence; otherwise, it considers only the language of the contract when determining the parties' intentions, and will give binding effect to its evident meaning.³⁰ In general, when interpreting a contract between sophisticated, represented parties, the Court is reluctant to read contractual provisions into an agreement that could have been included by the parties themselves.³¹

B. *The Meaning of Beneficial Interest*

“Beneficial interest” can be considered an inherently ambiguous term. Our case law makes clear that beneficial ownership or interest has no “universal meaning,” but is instead “a phrase of art which implies certain relationships and attributes but which requires particularization before its meaning can be precisely determined.”³² In *Sundlun v. Executive Aviation, Inc.*, this Court held that the phrase “beneficial ownership” “requires construction by the Court,” and that the context in which the term is used should shape its interpretation.³³

In *Sundlun*, the Court of Chancery found that a prior owner of securities no longer had beneficial interest in the stock after it submitted its shares to a trustee for liquidation. The stock was non-voting when held by the initial holder, but

³⁰ *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1031 (Del. Ch. 2006).

³¹ See *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *10 (Del. Ch. May 2, 2007) (declining to read a time of the essence clause into the contract).

³² *Sundlun v. Executive Aviation, Inc.*, 273 A.2d 282, 285 (Del. Ch. 1970).

³³ *Id.*; see also *Anadarko Petrol. Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1176 (Del. 1988) (“The concept of ‘beneficial ownership’ of stock, though somewhat inexact, is contextually defined . . .”).

could be converted to voting stock upon the transfer of the initial holder's "beneficial interest."³⁴ The liquidating trustee converted the shares upon their receipt, which the plaintiffs contested on the ground that, since the initial holder was entitled to the proceeds of the liquidation, it retained some beneficial interest in the securities, and thus the shares could not yet be converted. The Court found otherwise and held that the limits on conversion were drafted to preclude the initial holder from voting its equity, and thus "beneficial interest" in this context meant the power to vote or control the shares.³⁵ The Court concluded that, since the initial owner relinquished its vote to the liquidating trustee, beneficial interest had been transferred and thus the shares could be converted.

Similarly, in *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, the Supreme Court was tasked with determining whether the prospective shareholders of a wholly-owned subsidiary were owed fiduciary duties by the subsidiary's parent corporation after the parent declared a spin-off but before it actually issued the subsidiary's securities.³⁶ During this interim time period, the parent corporation had entered into contracts with the subsidiary that favored the parent, and did so while rights to acquire the subsidiary's stock were being traded on the

³⁴ *Sundlun*, 273 A.2d at 284-85.

³⁵ *Id.* at 286-87.

³⁶ *Anadarko*, 545 A.2d at 1172.

New York Stock Exchange on a “when-issued” basis.³⁷ The parent, however, publicly disclosed its intention to enter into these contracts when it announced the spin-off. Because of its disclosure, the Court reasoned that the prospective shareholders had no expectation that these detrimental contracts would not be entered into; it consequently found that the prospective shareholders had no beneficial interest in the stock for the purpose of being owed fiduciary duties by the parent, despite their right to acquire the securities when issued.³⁸

As shown above, context will shape whether a Court finds one particular attribute dispositive and another irrelevant when deciding whether there exists “beneficial interest”; however, the cases make clear that the term still necessarily implies some right in the securities, be it the right to vote or to expect to receive duties of loyalty and due care from a fiduciary.³⁹ Indeed, “beneficial interest” or “beneficial ownership” is often used to describe the tangible interests one has in securities held in trust or held by a brokerage firm as record owner.⁴⁰ In these

³⁷ *Id.* at 1173.

³⁸ *Id.* at 1176-77.

³⁹ *See id.* at 1176 (“As applied in this case, beneficial ownership contemplates a separation of legal and equitable ownership. Under this concept, the equitable or beneficial owner possesses an economist interest in the subject property distinct from legal ownership or control.”).

⁴⁰ *See CME Group Inc. v. Chi. Bd. Options Exch.*, 2009 WL 1856693, at *5 (Del. Ch. June 25, 2009) (“[T]he term “beneficial ownership[]” . . . is commonly understood to encompass the notion of having the “true” ownership interest but with title held by another.”); *see also* Black’s Law Dictionary 156 (6th ed. 1990) (defining “beneficial interest” as the “[p]rofit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control,” and defining “beneficial owner” as “[o]ne who does not have legal title to property but has rights in the property which are the normal incident of owning the property.”).

instances, the “beneficial owner” is one who holds some equitable right in the securities. This may include the full right to dividends or current income, or the right (perhaps through one’s heirs) to take full title based on some future event; or, with securities held in “street name,” the right to enjoy all benefits of ownership except for raw legal title.

PeriCor would broaden this common definition, and it asks the Court to apply the meaning of “beneficial interest” used under the federal securities laws.⁴¹ Specifically, PeriCor cites to Section 13(d) of the Securities Exchange Act, which requires “any person who is directly or indirectly a beneficial owner” of more than five percent of beneficial securities to disclose that information to the issuer, stock exchanges on which the security is traded, and the Securities and Exchange Commission.⁴² The Securities and Exchange Commission has defined “beneficial owner,” “for the purposes of sections 13(d) and 13(g)” of the Exchange Act to mean “any person who, directly or *indirectly*, through any contract, arrangement,

⁴¹See Def.’s Suppl. Br. at 25 (“[T]his court should look to case law construing beneficial ownership in the context of voting and control issues, such as the federal securities law dealing with control groups and voting blocs of stock.”).

See 17 C.F.R. § 240.13d-3(a). (“For purposes of sections 13(d) and 13(g) of the [Exchange] Act, a beneficial owner of a security includes any person who, directly or indirectly, through any contact, arrangement, understanding, *relationship*, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of such security.”)

⁴² 15 U.S.C. § 78m(d).

understanding, *relationship*, or otherwise has or shares: (1) voting power which includes the power to vote, or to direct the voting of, such security”⁴³

PeriCor’s reliance on the Exchange Act and its interpretive rules is problematic for two reasons: 1) the parties expressly agreed that the contract would be governed by Delaware law;⁴⁴ and 2) the policies that support these laws are not applicable here. Section 13’s disclosure requirements were enacted “to alert the marketplace about every large, rapid aggregation or accumulation of securities which might represent a potential shift in corporate control.”⁴⁵ These provisions implement a “policy of full disclosure” in an attempt to “protect investors engaged in the purchase and sale of securities.”⁴⁶ By mandating such broad disclosures, “shareholders and the investing public” can make better “informed investment decisions” based upon heightened knowledge of who exactly is in a position to influence the corporation; in addition, management is in a better position to “carefully and fully evaluate changes in control.”⁴⁷

⁴³ 17 C.F.R. § 240.13d-3(a) (emphasis added).

⁴⁴ VTA § 3.2

⁴⁵ *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799, 807 (M.D.N.C. 1987) (citing *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 248 (8th Cir. 1979)). The District Court in *Burlington* further explained that Section 13, as part of the Williams Act, was put into place out of concern for “creeping acquisitions and open market or privately negotiated large block purchases.” 666 F. Supp. at 807 (quoting Thomas Lee Hazen, *The Law of Securities Regulation* § 11.13 (1985)).

⁴⁶ *Id.* (citing *Sec. Exch. Comm’n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)).

⁴⁷ *Bath Indus., Inc. v. Blot*, 305 F. Supp. 526, 538 (E.D. Wis. 1969).

The Commission's broad definition of "beneficial ownership" is inapposite in this context.⁴⁸ Here, PeriCor does not need an expansive reading of beneficial ownership or interest for its protection; the Company could have protected itself when it drafted the Voting Trust Agreement. If it had feared that Mangano would benefit from transferring shares to his sister with whom he shared a strong relationship and who would likely vote in his favor, it could have explicitly prohibited such transfers under the SPA.⁴⁹ PeriCor knew, or should have known, that Mangano had the right to transfer the shares to Magnotti as a result of the family member exception in that agreement. It could also have defined "beneficial interest" within the VTA to include shares held by family members instead of allowing the term to go undefined. The Court will not read past the term's unambiguous limits unless the parties have otherwise expressly defined beneficial interest to go beyond those boundaries.

⁴⁸ Cf. *Anadarko*, 545 A.2d at 1175 n.3 (rejecting plaintiff's application of the "beneficial ownership" definition used under the 1934 Exchange Act on the ground that "[t]his expansive definition does not comport with the rationale and purpose of establishing fiduciary duties under Delaware corporate law"); *Whiting v. Dow Chem. Co.*, 523 F.2d 680, 688 (2d Cir. 1975) (holding that "beneficial ownership" should be read more expansively under the 1934 Securities Exchange Act "than it would under the law of trusts").

⁴⁹ The SPA was drafted before the VTA and apparently allowed (what PeriCor might characterize as) a loophole not foreclosed by the VTA whereby Mangano could transfer stock to his family members to lower his beneficial interest below 45%. This appears to be exactly what happened in this case, but the Court will not redraft the VTA to prohibit this result.

PeriCor contends that the intra-family exception in the SPA demonstrates the parties' mutual understanding that such transfers would not facilitate a change in control. Because the Court has already concluded that "beneficial interest" unambiguously requires some right or expectation, the Court may not look to parol evidence, such as the SPA, to broaden the term's meaning.

Mangano has no “beneficial interest” under the term’s commonly understood meaning as he retained no right or benefit in the transferred stock. He gave 200,500 PeriCor shares to his sister by gift and expects to pay gift tax on the transfer. At Mangano and Magnotti’s depositions, both denied that they had an agreement or understanding, formal or otherwise, that Magnotti would vote the shares in accord with her brother’s wishes.⁵⁰ Nor did Mangano and Magnotti agree that any dividends or other rights accruing to the transferred shares go to Mangano instead of Magnotti. Magnotti therefore took full legal and equitable title to the transferred shares with no reserved interest for her brother.⁵¹

PeriCor makes much of Magnotti’s lack of sophistication and reverence for her brother to argue that she likely would vote in line with his preferences.⁵² For this reason, it concludes that the transfer to Magnotti, while causing a change in the shares’ legal title, “left Mangano’s voting control, and therefore his beneficial interest, undiminished.”⁵³ However, even if Magnotti’s vote is likely to run parallel to Mangano’s, it does not follow that he has a beneficial interest in those shares. Again, Mangano may very well anticipate that Magnotti will cast her votes

⁵⁰ See Magnotti Tr. 56 (stating that Mangano told her “to vote the way I wanted to vote”).

⁵¹ Instead, it may be PeriCor, and not Mangano, that has a beneficial interest in the transferred shares, which are still subject to the SPA. Thus, PeriCor presumably maintains its right of first refusal and may exercise this right upon any proposed transfer of the shares by Magnotti to anyone outside of the family members listed in the Agreement.

⁵² Def.’s Suppl. Br. at 30 (“By transferring shares to Magnotti, Mangano was giving them over to the quintessential loyal ally who could only look to his judgment for guidance on how to vote her shares at the Annual Meeting.”).

⁵³ *Id.*

alongside his, but she is free to vote her shares as she wishes.⁵⁴ It is clear and uncontested that Mangano has no enforceable right over, let alone an informal agreement with, Magnotti regarding her voting control over the transferred shares.⁵⁵

In addition, Mangano may not care that his sister votes with him.⁵⁶ The fact that Magnotti might vote in line with her brother most likely represented a convenient ancillary benefit to his stated reasons for transferring the shares: namely, to terminate the Voting Trust and to make a gift to his sister.⁵⁷ Although PeriCor contends that Mangano would need his sister's votes to approach a majority,⁵⁸ it has made no effort to dispute the actual and projected voting returns from the May 23, 2008 annual meeting detailed in the Complaint. Had PeriCor counted the Trust Shares as Mangano attempted to vote them, each member of Mangano's slate would have won by margins between 800,000 and 1.3 million

⁵⁴ PeriCor makes much of Mangano's status in the extended family as a financial provider; however, it does not go so far, nor can it on these facts, to allege that there is some quid pro quo whereby Magnotti would vote her shares for Mangano in return for his beneficence.

⁵⁵ As for the one effort by Magnotti to vote her shares, there is also no evidence that Mangano attempted to influence his sister's vote outside of comments he made publicly at the shareholders' meeting.

⁵⁶ See Def.'s Suppl. Br. at 18 (arguing that, without the motive of terminating the Voting Trust, the transfer to Magnotti "would not have made any sense, economic or otherwise").

⁵⁷ See Mangano Tr. 101, 105-07 (agreeing that one of his purposes in transferring the shares was to reduce his interest below 45% to break the Voting Trust). PeriCor makes much of Mangano's intent to terminate the Voting Trust. PeriCor negotiated (and apparently took the lead in drafting) the VTA and the SPA. That these documents failed to protect PeriCor's objective is, at the core, a drafting problem. Mangano's intent is largely irrelevant, but both foreseeable and open.

⁵⁸ Def.'s Suppl. Br. at 20.

shares, significantly more than the 200,500 shares Magnotti voted at the meeting.⁵⁹

Mangano had the power to influence the election without his sister's votes, if he acquired voting control over the Trust Shares.

C. *Because the Voting Trust Has Been Terminated, Mangano May Now Vote the Shares Formerly Held in the Trust*

PeriCor argues that, even if Mangano terminated the Voting Trust by transferring 200,500 shares to his sister, he may not vote the shares held in trust until he actually receives the stock certificates. It goes further and contends that Mangano may not receive the stock certificates until he cooperates in the appointment of a successor trustee, who may then deliver the shares. According to PeriCor, Mangano has been in constant breach of the VTA by refusing to cooperate in the appointment of a successor trustee following Norviel's resignation.

PeriCor's argument rests on its interpretation of Section 1.9(b) of the VTA, which reads in part that, "upon termination of this Agreement . . . the Trustee, in exchange for and upon surrender or cancellation of any Trust Certificates representing such Shares, shall . . . deliver certificates for such Shares to the registered holders thereof in the amounts called for by such Trust Certificates."⁶⁰

The Company argues that such a trustee cannot be appointed because "plaintiff has

⁵⁹ Compl. ¶ 32.

⁶⁰ Def. PeriCor's Br. in Opp'n to Pl.'s Mot. for Partial Summ. J. ("Def.'s Ans. Br.") at 19.

obstructed the appointment of a successor Trustee by threatening litigation against anyone who might accept that role.”⁶¹ It contends that Mangano has frustrated the “mechanism necessary for him to obtain the certificates for the Trust Shares” and that he must take possession of those certificates in order to acquire the voting rights.⁶²

The trustee of the VTA is “entitled to exercise [the] . . . rights and powers to vote the [Trust] Shares” until the VTA’s termination.⁶³ Once the VTA is terminated, the trustee no longer has power to vote the Trust Shares, and such power necessarily reverts to Mangano as legal and beneficial owner of the deposited stock.

The fact that Mangano does not yet have the certificates has no bearing on his right to vote the securities. Possession of a stock certificate is not essential to the ownership of stock.⁶⁴ Although the VTA provided a mechanism by which the Trust Share certificates would be exchanged for the trust certificates, it does nothing to change the basic premise that possession of such share certificates is not necessary for Mangano to reacquire all attributes of ownership upon termination of the VTA.

⁶¹ *Id.* at 18 (citing *Stover Aff.* ¶¶ 36-37).

⁶² *Id.* at 19.

⁶³ VTA § 1.7.

⁶⁴ *See, e.g., Lynam v. Gallagher*, 526 A.2d 878, 883 (Del. 1987) (“Stock certificates are mere evidence of property.”); *Testa v. Jarvis*, 1994 WL 30517, at *6 (Del. Ch. Jan. 12, 1994).

In addition, PeriCor, which holds the Trust Share certificates, has no valid reason not to issue the certificates to Mangano, who is now the full legal and equitable owner. Both parties agree that, by April 26, 2008, Mangano had returned to PeriCor all the documentation it, or a duly appointed trustee, needed under the VTA to return the underlying Trust Shares.⁶⁵ Since there is no longer any trust to administer, requiring the appointment of a successor trustee simply to return to Mangano the stock certificates that are rightfully his serves little purpose.⁶⁶

D. *Unclean Hands*

Lastly, PeriCor argues that the Trust should remain intact, and Mangano denied the right to vote his Trust Shares, based on a defense of unclean hands. PeriCor argues that Mangano wants to take control of the Company and operate it to the benefit of his affiliates—McSPI and IREF. It further argues that Mangano sought to install people affiliated with McSPI and IREF at the 2008 stockholders’

⁶⁵ Section 1.9(b) of the VTA states that, upon termination of the Trust, the Trustee shall return the Trust Shares once the Trust Certificates representing such shares have been surrendered or cancelled. Mangano purported to “fill out forms tendered by the company certifying the certificates were lost,” and he sent these documents to the company on April 26, 2009. According to Mangano, at that time, “PeriCor has had all the documents required to issue the stock certificates to Mangano.” Pl.’s Reply Mem. in Supp. of its Mot. for Partial Summ. J. at 12. PeriCor seems to concede this point: “[p]laintiff did not attempt to surrender his Trust Certificates to the Trustee until after the Trustee had resigned.” PeriCor’s Answer ¶ 16; Def.’s Ans. Br. at 18.

⁶⁶ In a similar vein, the Court grants Norviel’s motion for judgment on the pleadings. Mangano asserts that Norviel has remaining obligations as the Trustee of the VTA and that his resignation, whether effective or not, does not resolve Mangano’s claim that Norviel wrongfully frustrated Mangano’s voting rights. Norviel, however, rightly delivered the Trust Shares certificates to PeriCor on April 24, 2008, which discharged his obligations as Trustee. *Supra* note 11. Since Norviel no longer has the certificates, there is no relief he can afford Mangano, and Norviel has not committed any wrongdoing that can sustain a cause of action.

meeting, but failed to disclose their involvement before or during the vote.⁶⁷ PeriCor also alleges that Mangano already “violated his duties to PeriCor” when IREF billed PeriCor more than \$1 million in the summer and fall of 2006 and spring of 2007 for work “purportedly performed by Mangano” on IREF’s behalf.⁶⁸ PeriCor claims that Mangano used knowledge of PeriCor’s then-ongoing critical negotiations with a third party as leverage to extract \$800,000 in payment on the invoice as well as gaining other concessions. For these reasons, PeriCor argues that Mangano came to this Court with unclean hands, and that his allegedly inequitable conduct precludes relief in his favor.

The doctrine of unclean hands exists to protect the integrity of the processes of the Court, which will refuse “to consider requests for equitable relief in circumstances where the litigant’s own acts offend the very sense of equity to which he appeals.”⁶⁹ The inequitable conduct, however, must be related directly to the issue before the court.⁷⁰ The timing of the alleged misconduct plays an important role in determining whether the inequitable acts preclude relief; and the

⁶⁷ Def.’s Ans. Br. at 21.

⁶⁸ Def.’s Ans. Br. at 20.

⁶⁹ Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 11.06[a], at 11-71 (2009) (quoting *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1988)).

⁷⁰ *Id.* § 11.06[c] at 11-78.

Court may therefore decline to apply unclean hands when the conduct occurs subsequent to the plaintiff's cause of action.⁷¹

The fact that IREF previously billed PeriCor for services rendered by Mangano in 2006 and 2007 has little, if any, bearing on this action. Not only did PeriCor settle the invoices, but that contractual dispute has no relation to the termination of the VTA and Mangano's subsequent right to vote the shares formerly held in trust. Likewise, Mangano's alleged designs to seek control of PeriCor (for the reasons ascribed by PeriCor) are beyond the scope of this action. Although Mangano may have committed a misdeed by not disclosing the affiliations of his nominees, that alleged misconduct has no direct relation to the status of the Trust and Mangano's rights as a shareholder.

In addition, PeriCor's fears that Mangano may control the Company to its detriment and for the benefit of McSPI and IREF are conjectural. If Mangano does in fact acquire control over PeriCor, and if he uses his control to engage in self-dealing, that conduct can be addressed by a fiduciary duty action at the appropriate time. As of now, Mangano has undertaken no inequitable conduct that taints his right to vote the Trust Shares, which rightfully reverted to him upon the Trust's termination in conformity with the terms of the VTA.

⁷¹ *Walter v. Walter*, 136 A.2d 202, 207 (Del. 1957).

V. CONCLUSION

For the foregoing reasons, the stock transfer from Mangano to his sister reduced his equity in PeriCor to under 45%, which terminated the VTA and the Voting Trust. Mangano is therefore now entitled to vote the shares formerly held in trust. Accordingly, Mangano's Motion for Partial Summary Judgment is granted. Furthermore, Norviel's Motion for Judgment on the Pleadings is granted, and all claims against him are dismissed.

Counsel are requested to confer and to submit an implementing order.