IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONALD SIMON, an individual and former Trustee of the Navallier Series Fund,	)	
Plaintiff,	)	
v.	)	Civil Action No. 17734
THE NAVELLIER SERIES FUND, a Delaware Business Trust, and THE AGGRESSIVE SMALL CAP EQUITY PORTFOLIO of the NAVELILIER PERFORMANCE FUNDS, a. Delaware Business Trust,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 25, 2000
Date Decided: October 19, 2000

Ronald A. Brown, Jr. and Thomas A. Mullen, Esquires, of PRICKETT, JONES & ELLIOTT, Wilmington, Delaware; OF COUNSEL: Vincent P. Finigan, Jr., Gregory L. Lippetz, and Julie F. Unmacht, Esquires, of BROBECK, PHLEGER & HARRISON LLP, San Francisco, California, Attorneys for Plaintiff.

Henry N. Herndon, Jr.., P. Clarkson Collins, Jr., and Michael A.. Weidinger, Esquires, of MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware; OF COUNSEL: Samuel Komhauser, Esquire, of LAW OFFICES OF SAMUEL KORNHAUSER, San Francisco,, California, Attorneys for Defendants.

STRINE, Vice Chancellor

Defendant Navellier Series Fund (the "Fund"), a Delaware business trust,[1] has moved to dismiss this suit for indemnification of legal fees and expenses brought by plaintiff Donald Simon, formerly a trustee of the Fund.

Simon's indemnification claim arises out of a breach of fiduciary duty action brought against Simon and certain other trustees by several Fund shareholders. Simon prevailed at trial in the underlying action, which was filed in the United States District Court for the Northern District of California, and the Fund's appeal of the jury verdict is now pending before the United States Court of Appeals for the Ninth Circuit.

The Fund has moved for dismissal of this action on two alternative grounds: (1) that this court is not the proper venue for Simon's indemnification claim because his indemnification agreement with the Fund provides that the courts of Reno, Nevada shall be the exclusive venue for any indemnification disputes between Simon and the Fund (the "Venue Provision"); and (2) that this action is not ripe for decision pending, the Fund's exhaustion of its appeals in California.

After examining the parties' competing contentions, I conclude that this action must be dismissed in favor of adjudication by the Reno, Nevada

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[1] The Navellier Series Fund is the predecessor in interest to co-defendant Aggressive Small Cap Equity Portfolio of the Navellier Performance Funds. For ease of reference, I will refer to the defendants collectively as "Navellier" or the "Fund" or "defendant." Like the Navellier Series Fund, the Aggressive Small Cap Equity Portfolio is also a business trust.

courts, in accordance with the exclusive forum selection clause contained in Simon's indemnification agreement with the Fund. I treat the Fund's motion as falling under Court of Chancery Rule 12(b)(3), rather than Rule 12(b)(6). Thus, I reject Simon? argument that [am not permitted to refer to the indemnification agreement's Venue Provision because he pled this indemnification claim based solely on the Fund's declaration of trust rather than on his separate indemnification agreement with the Fund and because the declaration of trust neither contains a venue provision nor incorporates the agreement by reference.

Several considerations lead me to conclude that the indemnification agreement and the declaration of trust together comprise the parties' contract on the subject of indemnification. Chief among these factors are the language of the two instruments and the objective circumstances of their execution, which make clear that the only reasonable interpretation of the Venue Provision is that it would govern all indemnification disputes between the Fund and Simon.

Furthermore, even if this court were the proper venue for Simon's claim, I believe that prudential considerations would favor a stay of this matter pending the final disposition of the Fund's appeal of the verdict in the underlying acti on.

The following discussion outlines my reasoning in greater detail.[2]

I. Factual Background

At the center of this dispute is the Navellier Series Fund, which was formed as a Delaware business trust pursuant to Title 12, Chapter 38. Along with plaintiff Simon, the five original trustees of the Fund were Louis G. Navellier, Kenneth Sletten, Lawrence Bianchi, and John Drinkwater (together, the "Trustees").

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[2] I note that I reject the Fund's third ground for dismissal: this court's supposed lack of equitable jurisdiction over indemnification claims against Delaware business trusts. While this appears to be a question of first impression, I am confident that equitable jurisdiction exists.

Unlike the highly specific jurisdictional provision of 8 Del. C. § 145(k), vesting the Court of Chancery with jurisdiction over indemnification claims against Delaware corporations, § 3804(g) of Title 12 states more generally that "[t]he Court of Chancery shall have jurisdiction over 'business trusts to the same extent as it had jurisdiction over common law trusts formed under the laws of the State." 12 Del. C. § 3804(g). *Compare* 8 Del. C. § 145(k) ("The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification .").

Nevertheless, this court's junsdiction over indemnification claims against business trusts by their trustees is made: clear by the synopsis of § 3804 which indicates that "the Court of Chancery has jurisdiction over business trusts and any contested matters relating to the *internal affairs of a business trust, the rights, duties and liabilities of trustees and beneficial owners or the interpretation of its governing instrument*." Substitute No. 1 for Senate Bill No. 332, 138th General Assembly § 4 (1996) (synopsis to 1996 Amendments to Title 12, Chapter 38) (emphasis added).

Here, Simon has based his indemnification claim on a declaration of trust executed pursuant to Chapter 38 of Title 12 and evaluation of his claim will require an "interpretation of [the Fund's] governing instrument," i.e., its declaration of trust. In'; R.F. BALOTTI & J.A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 19.1, at 19-3 (3d ed. 2000) ("The Delaware Court of Chancery has jurisdiction over business trusts and the interpretation of the business trust's governing instrument."); *Nakahara v. NS American Trust,* Del. Ch.. C.A. No. 15905, mem. op., Chandler, C. (Mar. 20, 1998) & *Nakahara v. NS 1991 American Trust,* 718 A.2d 5 18 (1998) (decisions adjudicating claim for advancement and indemnification brought by trustee of business, trust pursuant to the trust's governing instrument, but not discussing jurisdictional issue); see *also Bovay v. H. M. Byllesby & Co.*, Del. Ch., 29 A.2d 801, 804 (1943) ("An express trust is within the exclusive jurisdiction of a court of equity ."); *In re Corcoran Trusts*, Del. Ch., 282 A.2d 653, 655 (1971) (action to enforce trust agreement provision).

A. The Underlying Litigation

The parties trace their falling out to the March 13, 1997 action taken by three of the Fund's Trustees — Simon, Sletten, and Bianchi (the "Former Trustees") -- to remove Navellier Management, Inc. ("NMI"), an affiliate of their co-Trustee Navellier, as the Fund's investment advisor. The Former Trustees sought to replace NMI with Massachusetts Financial A.dvisors, another financial advisory firm.

A subsequent shareholder vote on the issue resulted in the reappointment of NMI, however, and the Former Trustees resigned from their offices shortly thereafter. On February 23, 1998, Navellier and certain other stockholders brought suit against the Former Trustees in California (the "Underlying Action"),[3] alleging breach of fiduciary duty and harm to Navellier, NMI, and the Fund's shareholders.

After surviving a motion to dismiss, the Underlying Action was tried in June and July of 1998. The jury returned a verdict in favor of the Former Trustees, and judgment was entered in tlheir favor on August 24, 1999. As indicated above, the U.S. Court of Appeals for the Ninth Circuit is now considering Navellier's and the other plaintiffs' appeal of the jury's verdict.

[3] *McLachlan v.* Simon, 3 1 F. Supp.2d 73 1 (N.D. Cal. 1998)

B. The Declaration Of Trust And Indemnification Agreements

The present indemnification dispute turns on the above-mentioned instruments, the "Declaration of Trust of the Navellier Series Fund" (the "Declaration of Trust") and the "Trustee Indemnification Agreement" between the Fund and Simon (the "Indemnification Agreement" or "Agreement").

The Declaration of Trust, which was executed May 6, 1993, indemnifies its trustees, officers, employees, and agents "for any action or failure to act (including, without limitation, the failure to compel in any way any former or acting Trustee to redress any breach of trust) except for his own bad faith, willful misfeasance, gross negligence, or reckless disregard of his duties."[4] Section 10.02 of the Declaration of Trust provides that the Fund "shall indemnify each of its Trustees . . . against all liabilities and expenses . . . reasonably incurred by him . . . by reason of his being, or having been such a Trustee . . . except with respect to any matter as to which he shall have been adjudicated to have acted in bad faith, willful misfeasance, gross negligence, or reckless disregard of his duties.[5]""

[4] Defs.' Ex. A (Declaration of Trust) § 10.01

[5] *Id.* § 10.02.

In conjunction with the Declaration of Trust, the Fund entered into separate indemnification agreements with each of the Trustees at the first meeting of the Trustees. These agreements, like the Declaration of Trust, became effective at or around the same time as the Declaration of Trust itself.'

Simon's Indemnification Agreement states that "[t]he Fund agrees to indemnify and hold harmless Trustee against any claim . . . except 1.0 the extent the Trustee has engaged in willful misfeasance, bad faith, gross negligence, or reckless disregard of his obligations."[7] The Indemnification Agreement also contains the Venue Provision, which states that "[t]he parties agree that any litigation arising out of this indemnification shall only be brought and heard and shall only be uenued in a federal or state court in Reno, Nevada."'

Although the Declaration of Trust and the Indemnification Agreement both refer to the Fund's responsibilities to indemnify the Trustees, Simon purportedly bases the present indemnification claim on the Declaration of

[6] Or as Simon's own brief states: "At the time the former trustees executed the Declaration of Trust, they each were asked to execute five separate instruments entitled 'Trustee Indemnification Agreement (one each for the: five trustees)." Simon's Ans. Br. at 5.

[7] Defs.' Ex. B (Indemnification Agreement) at 1.

[8] Defs.' Ex. B (Indemnification Agreement) at 2.

Trust alone. Simon's complaint scrupulously avoids any reference to the Indemnification Agreement.

Similarly, one of the other Former Trustees, Sletten, also tiled an action for indemnification in California pursuant to the Declaration of Trust alone." Judge Orrick of the United States District Court for the Northern District of California dismissed that action in favor of adjudication of the claim by the Nevada courts on the basis that Sletten's indemnification agreement with the Fund contained the same Venue Provision as is in Simon's Agreement. Judge Orrick explained his reasoning for dismissing Sletten's case as follows:

> Sletten carefully pleads his claims for relief:, he purports to seek payment only pursuant to the Declaration of Trust, which contains no forum selection clause. Because the contemporaneous indemnity agreement is mentioned only in passing in his complaint, Sletten argues that the only document at issue is the Declaration of Trust, which does not contain a forum selection clause. Because the indemnity agreement was contemporaneous, however, and because the indemnity agreement involves the same indemnification rights as . . . those under the Declaration of Trust, Sletten cannot avoid the fact that his 1 awsuit implicates the agreement with the forum selection provision.
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> A forum selection clause should not be defeated by artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship, or if the gist of those claims is a breach of that relationship. . .

[9] *Sletten v. The Navellier Series Fund*, No. C-99-4904 WHO, mem. decision and order (N.D. Cal. Mar. 9, 2000) (Orrick, J.).

> Here, Sletten's action triggers the forum selection clause in the indemnity agreement even though he avoids mentioning it in his complaint. The Declaration of Trust defines the parties' business relationship, including rights of indemnity. The indemnity agreement is a contemporaneous document signed in consideration of Sletten's agreeing to act as a trustee, and pursuant to the Declaration of Trust. The indemnity agreement derives its life from the Declaration of Trust, and deals specifically with indemnity pursuant to the contract. Sletten's case is therefore one arising out of this indemnification; it is the same indemnification provided for in the Declaration of Trust. Although the reason for having two separate documents to govern the: relationship between the parties is not clear, it is apparent that these two documents govern their business relationship.[10]

II. The Applicable Procedural Standards

The parties have spilled a lot of ink over the question of which subsection of Court of Chancery Rule 12 governs the aspect of the Fund's motion to dismiss that is premised on its contention that the Venue Provision requires that any indemnification dispute between Simon and the Fund be litigated exclusively in the courts of Reno, Nevada.

Therefore, the threshold issue the court must confront is whether the Fund's Venue Provision-based dismissal motion arises under Court of Chancery Rule 12(b)(3) or 12(b)(6). The Fund takes the position that its motion arises under Rule 12(b)(3) and that I may consider materials outside

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[10] *Id.* at 6-8 (quotarions & citations omitted)

the complaint. But Simon contends that Rule 12(b)(6) applies and that I must hew to the four comers of the complaint or, after proper notice to him, convert the motion into a Rule 56 motion for summary judgment.

For the following reasons, I conclude that the Fund's motion is best considered one made pursuant to Court of Chancery Rule 12(b)(3) rather than Rule 12(b)(6). But, even if Court of Chancery Rules 12(b)(6) and Rule 56 were to apply, the approach I would take in deciding the motion would not change.

As with a motion for lack of personal jurisdiction under Court of Chancery Rule 12(b)(2), a motion to disrniss premised on a forum selection clause does not challenge whether the complaint states a claim upon. which relief can be granted. Instead, a motion based on a forum selection (clause challenges where the plaintiff may assert his claim.

In the *Hart Holding v. Drexel Burnham Lambert*[11] case, Chancellor Allen persuasively articulated why it is impractical to apply Rule 12(b)(6)'s exclusive focus on the allegations of a complaint to a motion to disrniss for lack of personal jurisdiction. Of overriding importance was the fact that a complaint need not contain allegations sufficient to establish personal

[11] Del. Ch., 593 A.2d 535 (1991).

jurisdiction and thus it would rarely be possible to adjudicate a Rule 12(b)(2) motion solely by reference to the complaint's allegations.[12]

The same is true in the case of motions to dismiss based on a forum selection clause. It is not the law, at least as far as I know it, that the plaintiff must plead facts demonstrating that there is no contract that precludes the plaintiff from proceeding in the forum it has chosen. Given this reality and given the adversarial approach that characterizes the American approach to litigation, it is unlikely that a plaintiff will devote portions of his complaint to discussing documents that might be read to bar him from suing in his favored venue. This case illustrates that point because Simon admits that he pled around the Indemnification Agreement.

In cases like this, it therefore seems logical for this court to follow the flexible approach commonly used by federal courts in addressing motions under Federal Rules of Civil Procedure 12(b)(l)-(5).'" *Hart Holding* articulates that basic approach well.[14] Under that approach, the court has discretion to shape a process that is efficient so long as i-t affords the parties a fair opportunity to take discovery and/or to have any relevant factual

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[12] Id. at 538-39.

[13] *See, e.g., Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, Del. Supr., 624 A.2d 1199 (1993) (because the Court of Chancery Rules are patterned upon the Federal Rules of Civil Procedure, federal precedent construing those rules is persuasive authority).

[14] 593 A.2d.at 539.

disputes resolved after an evidentiary hearing if either is necessary to a fair determination o-f the motion.

Put simply, this flexibility permits the court to consider evidence outside the pleadings in determining the motion.[15] This flexibility enables the court to grant a dismissal motion before the commencement of discovery on the basis of affidavits and documentary evidence if the plaintiff cannot make out *aprinza facie* case in support of its position." If, however, the plaintiff seeking to avoid dismissal advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges, the court usually must allow the plaintiff to take discovery to gather proof of those facts.[17] Unless the factual record that emerges from that discovery process produces a set of uncontroverted facts that provide a basis for a legal ruling in favor of one party or the other on the paper record, the court Twill have to conduct an evidentiary hearing to resolve the motion.

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[15] 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1364, at 468-69 (2d ed. 1990) ("The validity of [Rule 12(b)(1)-(5)] defenses rarely is apparent an the face of the pleading and motions raising them generally require reference to matters outside the pleadings.") & § 1366, at 48.5 ("There never has been any serious doubt as to the availability of extra-pleading material on [Rule 12(b)(l)-(5),(7)] motions. Moreover, the other Rule 12(b) defenses only challenge the propriety of the court adjudicating the claim before it and do not reach the validity of the claim itself. Since a motion for summary judgment is designed to test the merits of the claim, the defenses enumerated in Rule 12(b)(l) through Rule 12(b)(5) and Rule 12(b)(7) generally are not proper subjects for motions for summary judgment.").

[16] *Hart Holding*, 593 A.2d at 539.

[17] *Id.*

As properly understood, this approach is quite similar to practice under Rule 12(b)(6), but with one difference. The approach outlined above enables the trial court to resolve the motion without being shackled to the plaintiffs complaint as an initial matter. Because the court is permitted to consider extrinsic evidence from the outset, the court may be able to decide such motions without the expense of discovery if it concludes that such discovery is irrelevant or that either party's position is frivolous. Put more bluntly, when the court is faced — as it is in this case — with artful pleading,[18] this approach lets the court get to the substance of the motion without engaging in a torturous analysis of whether the document containing the forum selection clause is incorporated into and integral to the complaint.[19]

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[18] See, e.g., *Anselmo v. Univision Station Group, Inc.*, 1993 WL 17173, at *2 (S.D.N.Y. Jan. 15, 1993) ("A forum selection clause should not be defeated by artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship, or if 'the gist' of those claims is a breach of that relationship.") (*citing Bense* v. *Interstate Battery Sys. of Am., Inc.*, 683 F 2d 718, 720 (2d Cir. 1982)); *Lambert* v. *Kysar*, 938 F.2d 1110, 1121 (1st Cir. 1993) (rejecting contention that forum selection clause did not apply to tort claims and stating that "[w]e cannot accept the invitation to reward attempts to evade enforcement of forum selection agreements through 'artful pleading of [tort] claims' in the context of a contract dispute").

[19] *See, e.g., Vanderbilt Income & Growth Assocs., LLC v. Arvida/JMB Managers, Inc.*, Del. Supr., 691 A.2d 609, 613 (1996) (emphasizing that the court may only consider documents outside the pleadings on a Rule 12(b)(6) motion for "carefully limited purposes," such as when a "document is integral to a plaintiffs claim and incorporated into the complaint.") (citing *In re Santa Fe Pac. Corp. Shareholder Litig.*, Del. Supr., 669 A.2d 59, 69-70 (1995)).

By moderate contrast, under Rule 12(b)(6) the court would first have to conduct an inquiry into whether the extrinsic evidence was incorporated in to the plaintiff's complaint. If the evidence could not be shoehomed into that narrow exception., the motion would have to be converted under Rule 56. But even that eventuality has more modest implications than is commonly understood.

The fact that a Rule 12(b)(6) motion has been converted does not provide a plaintiff with a blank check to take discovery. Rather, under Rule 56(f), the burden is on the plaintiff to demonstrate, after notice of conversion, why it cannot oppose the motion through the presentation of affidavits. In a case where a plaintiff has material information at its own disposal (as is the case here), the plaintiff must explain why it is necessary to defer consideration of the motion until discovery can be taken.[20]

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[20] *E.g.*, Ct. Ch. R. 56(f); *Von Opel v. Youbet.com,* Del. Ch., C.A. No. 17200, let. op. at 2-3, Steele, V.C. (Jan. 26, 2000) (when defendants could respond to a Rule 56 motion adequately with affidavits the court denied the defendants' request to take discovery) (*citing Avacus Partners, L.P. v. Brian*, Del. Ch., C.A. No. 11001, ltr. op., at 2, Allen, C. (Oct. 5, 1989)); *In re ML/EQ Real Estate Partnership Litigation,* Del. Ch., Cons. C.A. No. 15741, let op. at 4-7, Strine, V.C. (Mar. 22, 2000) (same principle): 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.10[8][a] (3d ed. 1997) ("[T]he court will reject a Rule 56(f) request if the discovery sought pertains to information already available to the nonmovmg party."); *Hudson River Sloop Clearwater, Inc v. Dept. of Navy,* 891 F.2d 414, 422 (2d Cir. 1989) (holding that insofar as the Rule 56(f) request was to uncover certain disclosures, the nonmovmg party made no showing that they did not have reasonable access to such disclosures prior to bringing the request; therefore the request was properly denied); *Paul Kadair, Inc. v. Sony Corp. of America,* 694 F.2d 1017, 1032 (5th Cir. 1983) (affirming district court's denial of discovery request considering that some evidence in refutation of defendant's averments was available to appellant); *Mason Tenders Dist. Council Pension Fund v. Messera,* 958 F. Supp. 869, 894 (S.D.N.Y. 1997) ("Reliefunder Rule 56(f) is not appropriate where the discovery allegedly

Although the Rule 12(b)(6)/Rule 56 approach is not insurmountably inefficient, it is more cumbersome than the approach usually taken by federal courts under Rules 12(b)(1)-(5). Most important, the greater inefficiency the Rule 12(b)(6) approach introduces is not justified by any appreciable improvement in fairness to the litigants. Rather, it simply seems more likely: (i) to increase the need for this court to engage in. the already too prevalent exercise of determining whether documents that a plaintiff has artfully omitted to mention in a complaint are in fact integral to that document, and [ii) to complicate and delay the just disposition of motions that do not ultirnately resolve the merits of cases, but that do determine where the merits may, may not, or must be resolved.

For those reasons, I am disinclined to find that motions to dismiss based on forum selection clauses are subject to Rule 12(b)(6). That disinclination is also bolstered by the extremely weak fit between such motions and the language of Rule 12(b)(6).

A motion to dismiss based on a forum selection clause fits neatly within Rule 12(b)(3).[21] The fact is that an inquiry into whether parties have

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desired 'pertain[s] to information already available to [the non-moving party].'") (quoting *Frankel v. ICD Holdings S.A.*, 930 F. Supp. 54, 66 (S.D.N.Y. 1996)).

[21] *Cf.* WRIGHT&MILLER, *supra* note 15, § 1352, at 262-63 (noting that Rule 12(b)(3) practice typically stems from a statutory provision but that "[i]n recent years there have been a number of venue motions based on forum selection clauses in contracts.").

chosen an exclusive venue by contract is not materially different than determining whether statutory or common law dictates a different venue than the plaintiff has chosen. Quite plainly, Court of Chancery Rule 12(b)(3) focuses on whether the plaintiff has sued in a permissible venue. It seems highly artificial to construe Rule 12(b)(3) as applying only when a statutory or common law bar to the court's venue is alleged, and to analyze a motion to dismiss based on a forum selection clause under Rule 12(b)(6) to determine if the complaint states a claim upon which relief may be granted *by this particular court*. Thus I agree with the majority approach taken by the federal courts, which construes the identical federal counterpart to this court's Rule 12(b)(3) as applying to dismissal motions premised on a forum selection clause.[22]

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[22] *E.g., Commerce Consultants Internat'l, Inc. v. Vetretie Riunite*, S.p.A., 867 F.2d 697 (D.C. Cir. 1989) (affirming Rule 12(b)(3) dismissal based on forum selection clause); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995) (rejecting minority view that a motion to dismiss based on a forum selection clause should be handled under Rule 12(b)(6) rather than Rule 12(b)(3) in part because "judicial economy requires selection of the proper forum at the earliest possible opportunity ." regardless of whether the venue (disputes turns on a statute or a contract); *R.A. Argueta v. Banco* Mexico, *S.A.*, 87 F.3d 320, 324 (9"' Cir. 1996) (treating a motion to dismiss based on a forum selection clause under Rule 12(b)(3) because the United States Supreme Court does not treat the pleadings. as true for purposes of deciding such motions, and "Rule 12(b)(3) permits the District Court to consider facts outside of the pleadings, and is consistent with the Supreme Court standard for resolving forum selection clause cases."); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992) ("A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3)."); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998) ((finding that Rule 12(b)(3) is the correct subsection to address such motions),

I acknowledge that there are federal cases going the other direction. I also acknowledge that the Superior Court recently found that its Rule 12(b)(6), rather than its Rule 12(b)(3), should govern motions to dismiss based on a forum selection clause. It did so without much elaboration, citing federal cases that define venue quite narrowly and as referring to a specific federal statute's definition.[23] In so ruling, it noted that a forum selection clause does not divest the court of jurisdiction, it simply represents a binding agreement that the parties will litigate only in a particular forum.[24]

The federal cases that take this minority approach do not explain why it makes practical sense to approach forum selection clause motions through the rubric of Rule 12(b)(6), rather than the subsection of Rule 12 that specifically addresses whether the case has been brought in a proper venue.[25] Furthermore, the focus on whether a forum selection clause ousts the court

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[23] *Simm Associates,* Inc. *v. PNC Nat'l Bank*, Del. Super., No. 98C-02-219-WTQ, 1998 WL 96 1764, at *3, Quillen, J. (Oct. 8, 1998) (*citing, inter alia*, *Haskel v. FRP Registry, Inc.*, 862 F. Supp. 909, 915 (E.D.N.Y. 1094)). *But see Double Z Enterprises, Inc. v. General Marketing Corp.*, Del. Super., No. 97C-08-076, 2000 WL 970718, at *2-*3, Del Pesco, J. (June 1, 2000) (without discussion, treating a motion based on a forum selection clause that limited plaintiff to a particular venue as one under Rule 12(b)(3)); *Pfizer, Inc. v. Advanced Monobloc Corp.,* Del. Super., No. 97C-04-037, 1908 WL 110129, at *1 rr.2, *2, Quillen, J. (Jan, 23, 1998) (same).

[24] *Simm Associates, Inc* , 1998 WL 961764, at *3

[25] *See, e.g., LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 6-7 (1" Cir. 1984) (forum selection clause does not oust court of *jurisdiction*, thus the court finds that a motion to enforce such a clause does not go to *venue* but must be analyzed under Rule 12(b)(6)); see *also Huntingdon Engineering & Environmental Inc.*, 882 F. Supp. 54, 56-57 (W.D.N.Y. 1995) (treating such a motion under the federal transfer statute rather than Rule 12(b)(3) because venue was legally proper as defined by 28 U.S.C. § 1391; the court did not apply Rule 12(b)(6)); *Nat'l Micrographics Sys., Inc. v. Canon, U.S.A., Inc.*, 825 F. Supp. 671, 678-79 (D.N.J. 1993) (same),

of jurisdiction seems misplaced; Rules 12(b)(1) and 12(b)(2) address *jurisdiction;* Rule 12(b)(3) addresses proper *venue*. Proper definitions of venue include the "particular county, or geographical area, in which a court may hear and determine a case,"[26] and the "proper or a possible place for the trial of a lawsuit . . . ."[27] As a learned commentator has noted, "[t]he distinction must be clearly understood between jurisdiction, which is the power to adjudicate, and venue, which relates to the place where judicial authority may be exercised and is intended for the convenience of the litigants. It is possible for jurisdiction to exist though venue in a particular district is improper, and it is possible for a suit to be brought in the appropriate venue though it must be disrnissed for lack of jurisdiction."[28]

If a forum selection clause validly limits a plaintiff to a single forum, that clause operates to divest a court that otherwise has jurisdiction of its status as a proper venue for the plaintiff to sue. The fact that such a venue limitation is contractual rather than statutory does not render it more efficient and logical to confine the court's analysis to the four comers of the complaint; instead, it rnakes it all the more important that the court can take

[26] BLACK'S LAW DICTIONARY 1396 (5"' ed. 1079).

[27] BLACK'S LAW DICTIONARY 1553 (7th ed. 1999).

[28] CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 42, at 257 (5th ed. 1994).

a more flexible approach that enables it to look at the contract that contains the forum selection provision.

Because I consider the Fund's rnotion to be one under Rule 12(b)(3), I will consider the Indemnification Agreement even though Simon avoided relying upon that Agreement in his complaint and even though it is doubtful that I can say that the Agreement is integral to his claim. After all, Simon would be ecstatic if the: Indemnification Agreement did not exist and he could rely solely on the Declaration of Trust.

Even if I am wrong, however, and. Rule 12(b)(6) applies, I do not believe that the manner in which I intend to handle this motion offends either the letter or the spirit of Rule 56. At oral argument, Simon was given firm notice of my intention to consider the Indemnification Agreement. At that time, his counsel waived any objection to considering that document but did continue to assert his objection to my consideration of the affidavits submitted by the Fund.[29] As Simon's counsel then admitted, he does not need discovery to address this motion so long as this court relies solely upon the Declaration of Trust and the Indemnification Agreement. Only if I decide to consider the affidavits the Fund submitted regarding the intent behind the Indemnification Agreement does Simon request leave to take

[29] Tr. at 68-71.

discovery, Therefore., I intend to consider the Indemnification Agreement both in reliance on my view as to the appropriate subsection of Rule 12(b) under which this motion is proceeding, and in reliance on Simon's waiver of any objection of my consideration of -the Indemnification Agreement.

I will not, however, consider the affidavits submitted by the defendants. I do so only because the procedural uncertainty deprived Simon of a clear indication of the precise burden he bore to produce evidence to defeat this mot-ion. Had that burden been made clear, I am not convinced that Simon would be entitled to discovery to address the motion. As a signatory to his own Indemnification Agreement and a Former 'Trustee who signed the other Trustees' Agreements in his official capacity, Simon is obviously well-positioned to offer an affidavit about the circumstances of the execution of those documents and his understanding of the scope of the Venue Provision they each contain. If Simon cannot advance a. contrary and reasonable interpretation to that offered by the defendants, it is not clear to me that he should be allowed to attempt to "discover" such an interpretation. At the very least, he should be obliged 1.0 file an affidavit discussing precisely what discovery he deems necessary, whether the motion be considered under Rule 12(b)(3) or Rule 56.

Nonetheless, because there was uncertainty as to whether Simon was required to provide evidence opposing the motion or an affidavit explaining why he needed discovery for that purpose, I will limit myself to examining the two underlying documents."[30] Simon concedes that such an approach is fair because additional evidence will only be admissible if I conclude that the two agreements, when read together, are ambiguous regarding the scope of the Venue Provision and because Simon has had a fair opportunity to brief his position regarding the meaning of the two agreements.

111. Is Simon Obligated To Litigate His Indemnification Claims In The Courts Of Reno. Nevada?

For many of the same reasons that led Judge Orrick to make a similar decision, I conclude that the Venue Provision in the Indemnification Agreement requires Simon to litigate his indemnification claims arising under the Declaration of Trust in Reno, Nevada.

In coming to that conclusion, I apply the well-settled rule that "[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

[30] *Cf.* 'WRIGHT & MILLER, *supra* note 15, § 1366 (noting the importance of notice of conversion to avoid unfair surprise to the parties).

language."[31] An ambiguity can be found only if the contract is susceptible to two *reasonable* interpretations.[32]

This case turns on another important principle of construction. As former Chancellor Allen held in Crown *Brooks Corp. v. Bookstop Inc.*, "in construing the legal obligations created by [a] document, it is appropriate for the court to consider not only the language of that document but, also the language of contracts among the same parties executed or amended as of the same date that deal with related matters . . . ."[33]

Because the Indemnification Agreement was entered into for all relevant purposes contemporaneously with the Declaration of Trust, the two instruments in this case must be viewed together and in their entirety when

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[31] *Eagle Industries v. DeVilbiss Health Care,* Del. Supr., 702 A.2d 1228, 1232 (1997).

[32] *Id.* at 1232 n.8; *Rhone Poulenc v. American Motorists Ins. Co.,* Del. Supr., 616 A.2d 1192, 1196 (1992).

[33] Del. Ch., C.A. No. 11255, mem. op. at 2, 1990 WL 26166, at *1, Allen. C. (Feb. 28, 1990); see *also* 17A C.J.S. *Contracts* § 315, at 337 (1999) ("In the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction are construed together as a single contract, as though they were as much one in form as they are in substance, in order to determine the intent, rights, and interests of the parties."); 11 WILLISTON ON CONTRACTS § 30:26, at 239-42 (4th ed. 1999) ("Apart from the explicit incorporation by reference of one document into another, the principle that all writings which are part of the same transaction are interpreted together also finds application in the situation where incorporation by reference of another document may be inferred from the context in which the documents in question were executed. Thus, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together as one contract or instrument, even though they do not in terms refer to each other."); *id.* § 30.26, at 5-6 (2000 Supp.); RESTATEMENT (SECOND) OF CONTRACTS § 202 (2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.").

determining the scope and nature of the indemnification arrangements between Simon and the Fund. Simon and the other Trustees entered into the Indemnification Agreement "[i]n consideration" of their agreement to act as Trustees.[34] Most important, by its own terms, the Indemnification Agreement was entered into "pursuant to" the Declaration of Trust.[35]

The Indemnification Agreement is thus a subordinate document entered under the Declaration of Trust. Indeed, although the precise purpose for the separate document is unclear, -the Indemnification Agreement appears to have been a rather imprecise attempt to reiterate the indemnification rights provided by the Declaration of Trust and, most important, to establish a single forum for the resolution of disputes between the Fund and the Trustees regarding indemnification.

Simon's claim for indemnification falls within the indemnification provided for by the Indemnification Agreement and thus within the scope of claims he agreed to exclusively litigate in Reno, Nevada. That is, his claim for indemnification "arises out of' the indemnification described in the Indemnification Agreement.[36]

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[34] Defs.' Ex. B (Indemnification Agreement) at 1.

[35] *Id.*

[36] *Id.* at 2; See also *Sletten,* mem. op. at 8 (reaching same conclusion as to identical provision)

While Simon points out certain substantive differences between the scope of the indemnification provided by the Indemnification Agreement and the Declaration of Trust, those differences are not material to Simon's current indemnification claim.[37] His claim for indemnification falls within the four corners of the Indemnification Agreement. The fact that there may be circumstances in which the two documents do not cohere does not avail him because that lack of coherence is not relevant here.

Of overriding importance is the lack of any plausible interpretation of the Indemnification Agreement that would construe the 'Venue Provision as leaving a Trustee free to litigate indemnification claims under the Declaration of Trust -itself anywhere he wishes, but as requiring the Trustee to litigate identical claims covered by the Indemnification Agreement solely in Reno, Nevada. Simon has not explained why such an interpretation would advance any rational goal of the Fund or the Trustees, and I can discern no logical business purpose for such an approach. By contrast, the

[37] Simon identifies three primary differences between the documents, namely their provisions regarding the types of claims entitling a trustee to indemnity, the availability of advance payments of expenses and attorneys' fees, and the triggering events for exceptions to a trustee's right to indemnity. It is true that these discrepancies arc not insignificant. Indeed, the varying triggermg events for the indemnification exceptions could affect the Fund's ultirnate responsibility to indemnify Simon. But these differences do not support any *reasonable* reading of the Venue Provision as suggesting that the harmonization of these discrepancies (if that becomes necessary) should be permitted to occur in two separate courts. If one thing is clear, it is that it makes no sense to select an exclusive forum for Indemnification Agreement disputes arising in a contract "pursuant to" the Declaration of Trust, while permitting suits elsewhere for indemnification disputes that putatively relate only to the Declaration of Trust itself.

interpretation that the Venue Provision was designed (perhaps inartfully) to ensure that all indemnification disputes between the Fund and Trustees would be litigated in the city in which the Fund's business operations were centered advances a goal of obvious utility. It is in fact the only reasonable reading of the Venue Provision. Therefore, Simon must assert his claims in Reno, Nevada."*

IV. A Brief Comment On The Fund's Motion To Stay This Proceeding; As Premature

Although I have: determined that Simon's claim must be litigated in Reno, Nevada, I note that the Fund has also raised another argument in favor

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[38] In *surrebuttal at oral argument*, Simon's counsel advanced the new argument that the Indemnification Agreement is an improper amendment of the Declaration of Trust. I reject this argument for two reasons. First, although I was uncertain about the question when it was sprung at the last moments of a lengthy oral argument, it is clear upon reflection that the argument should not be heard now. The parties put in briefs and Simon never raised this argument. It is unfair for him to raise the argument now. By not fairly presenting the argument in his briefs, Simon waived it. *Emerald Partners, v. Berlin,* Del. Supr., 725 A.2d 1215, 1224 (1999). Second, the Venue Provision does not limit the substantive right to indemnification granted by the Declaration of Trust, it simply governs where that right may be asserted and thus in my view need not be accomplished by an amendment to the Declaration of Trust. Third, Simon signed the Indemnification Agreement voluntarily and he had the right to waive any of his *own* rights that he possessed under the Declaration of Trust. 3A JAMES SOLHEIM & KENNETH ELKINS, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1344, at 790-9 1 (1994). Finally, I note that the Declaration of Trust does not indicate what formalities are required for an amendment other than the approval by the Trustees. Each of the Indemnification Agreements was signed by all of the Trustees and none of them have disclaimed their validity until now---some seven years later. Having accepted the benefits of office that were connected to their execution of the Indemnification Agreements, neither Simon nor his fellow Trustees are in an equitable position to now claim that the Venue Provision is void. Had they taken that position earlier, before execution, they might well not have been asked to serve. *Cf. Continental Ins. Co. v. Rutledge* & Co., Del. Ch.. 750 A.2d 1219, 1240 (2000) ("one who has full knowledge of and accepts the benefits of a transaction may be denied equitable relief he or she thereafter attacks the same transaction"). Because these grounds dispose of Simon's waived argument, I do not reach the Fund's other arguments in favor of the validity of the Venue Provision and against Simon's right to disclaim its binding effect on him.

of its motion that deserves some comment in view of the possibility that the issue it concerns will arise in other cases.

As noted, the Underlying Action for which Simon seeks indemnity is not yet finally concluded. An appeal is now pending with the U.S. Court of Appeals for the: Ninth (Circuit.

For that reason, the Fund argues that it would be premature and wasteful to consider Simon's claim now. If the Court of Appeals were to reverse the jury verdict in Simon's favor, any prior decision on Simon's claim for indemnification might be undone depending on the basis of the Court's ruling.

Without addressing whether Simon's claim is ripe as a formal matter,[39] I note that this court's authority to control its own docket should include the authority to stay the determination of a claim such as his in the absence of any showing that such a stay would permit serious injury to him.

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[39] 'To my knowledge, only one court has had occasion to opine on when a corporate director's indemnification rights accrue for the purposes of 8 Del. C. § 145. In *Witco Corp. v. Beekhuis,* a decision affirmed by the United States Court of Appeals by the Third Circuit, the U.S. District Court for the District of Delaware confronted a claim for indemnification pursuant to 8 Del. C. § 14.5 and concluded, *inter alia,* that regardless of what happens on appeal or whether an appeal is taken at all, the disposition of a claim that "is final enough to be appealed is final enough to satisfy the requirements of § 145(c)." *Witco Corp. v. Beekhuis*, C.A. No. 92-301-RRM, 1993 WL 749596, at * 4, McKelvie, J. (D. Del. Oct. 22, 1993), *aff'd*, 38 F.3d 682 (3rd Cir. 1994). In reliance on *Witco*, Judge Orrick denied the Fund's motion to dismiss or stay the *Sletten* case as premature. *Sletten*, mem. op. at 3-5. Without necessarily quibbling with *Witco's* holding, I only write to suggest that this court should retain the discretion to defer indemnification determinations when that is efficient and will not produce undue hardship.

As a matter of litigative efficiency, it makes little sense for this court to decide claims for indemnification -- as opposed to claims for advancement of litigation expenses --- in advance of a non-appealable final judgment. There is simply too great a risk that the appellate courts will take a 'different view than the trial court for it to make much sense to grapple with indemnification claims; until the underlying litigation is concluded with final ity

In this regard, I note that as a matter of fairness and cornmon sense our courts have assumed that the statute of limitations for an indemnification claim under 8 Del. C. § 145 would run from the time that the underlying investigation or litigation was definitely resolved.[40] The implicit rationale for this conclusion is that the person seeking indemnity should not have to rush in at the first possible moment but rather should be able to wait until the outcome of the underlying matter is certain.

As a general matter, similar considerations would seem to counsel against the adjudication of an indemnification claim until a definitive

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[40] *See Scharf v. Edgcomb Corporation,* Del. Ch., C.A. No. 15224, mem. op. at 10, 19'97 WL 762656, at *4, Steele, V.C. (Dec. 2, 1997) (statute of limitations for indemnification claims based on a Securities and Exchange Commission investigation did not run until any plaintiff was "confident" that the investigation "had been resolved with certainty."); *Cochran v. Stifel Financial* Corp., Del. Ch., C.A. No. 17350, mem. op. at 6, 2000 Del. Ch. LEXIS 58, at *8-*9, Strine, V.C. (statute of limitations for plaintiff's indemnification claim began to run when the govcmment's time to seek certiorari from the U.S. Supreme Court regardmg plaintiff's acquittal by the Court of Appeals or. criminal charges had expired).

outcome is reached in the underlying matter. In the absence of a showing of undue hardship, such an approa.ch will reduce the chance that the court will engage in a wasteful exercise in predictive justice, only to see its work undone by a reversal of the trial court's judgment in the underlying matter.

V. Conclusion

For the foregoing reasons, the Fund's motion to dismiss is granted without prejudice to Simon's right to refile his claims in the courts of Reno, Nevada. IT IS SO ORDERED.