COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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New Castle County Courthouse
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RE: Dweck, *et al*. v. Nasser, *et al.*, Consol. C.A. No. 1353-VCL

Dear Counsel:

This is a bilateral dispute between Gila Dweck and her affiliates, on the one hand, and Albert Nasser and his affiliates, on the other. For years, the parties operated a business known as Kids International, Inc. ("Kids"). They are now at odds, and each has asserted a variety of claims against the other.

During a hearing on February 23, 2010, I resolved a series of motions. One was Dweck's motion for leave to file an amended complaint, which Nasser opposed on various grounds, including that the amendment was futile.[1] I granted the motion to amend but took one issue under advisement: the application of the statute of frauds to the "right to compete" claim in the plaintiffs' then-proposed amended complaint. I advised

[1] Nasser's decision to oppose the motion to amend rather than stipulating to the amendment while reserving the right to move to dismiss created a procedural tangle. Dweck's motion for leave was a relatively *pro forma* motion, as they typically are. Nasser responded with a substantive opposition, and Dweck then followed with a substantive reply. This sequence turned Dweck's reply into the equivalent of an answering brief, to which Nasser wanted a reply. Both sides ended up filing supplemental submissions. This headache could have been avoided had Nasser stipulated to the amendment and then moved to dismiss. Stipulating and moving to dismiss generates even greater efficiencies when the proposed amended complaint names additional parties, because briefing is accomplished in one cycle, rather than a first round of briefing by the existing parties followed by a second round of challenges by the new parties.

the parties that I would treat this aspect of Nasser's opposition to the motion to amend as if it were a motion to dismiss pursuant to Rule 12(b)(6). I now reject the statute of frauds argument.

According to Dweck's "right to compete" claim, Dweck and Nasser agreed orally that each would have "an unfettered right to compete with Kids and one another." In support of this theory, Dweck alleges that Kids operated in accordance with a shareholders agreement that went through nine drafts but ultimately was never signed. The draft agreement contained a so-called "free-for-all provision" granting Dweck and Nasser the unfettered right to compete with Kids. The amended complaint contends that the free-for-all provision was part of the oral agreement and that although Nasser declined to sign the agreement, he did so "for reasons unrelated to the free for all provision." The unsigned agreement includes a provision under which the agreement would terminate if any person acquired complete ownership of Kids, or if Kids declared bankruptcy, dissolved, became subject to a receivership, or ceased conducting business for over 180 days. I grant Dweck the plaintiff-friendly inference at the pleading stage that the parties orally agreed to the substance of the termination provision.

Nasser contends that the "right to compete" claim fails because the purported oral agreement was for indefinite duration and therefore proof of its existence is barred by the statute of frauds. The parties disagree over whether New York or Delaware law applies. "Delaware will apply the Statute of Frauds provisions of the State where the contract is made in determining the validity of the contract." *Dietrich v. Texas National Petroleum Co.*, 193 A.2d 579, 584 (Del. Super. 1963). In a rare moment of harmony, the parties agree that the terms of the alleged contractual relationship were negotiated, determined, and carried out in New York. In addition, the unsigned draft shareholders agreement contained a choice of law provision selecting New York law. I therefore apply the New York statute of frauds. The choice is without consequence, as both jurisdictions apply the rule similarly.

Application of New York law to the oral agreement does not conflict with an earlier ruling in this case. *See Dweck v. Nasser*, 2005 WL 3272363 (Del. Ch. Nov. 23, 2005). In his 2005 decision, Vice Chancellor Lamb held that the same oral agreement could not validly operate as a voting agreement because it was not "in writing" as required by Section 218(a) of the General Corporation Law, 8 *Del. C.* § 218(a). This holding did not mean that Delaware law controlled all aspects of the agreement. Regardless of what law governs the contract's formation and terms, a voting agreement must comply with Section 218 as a matter of Delaware corporate law. Nothing prevents New York law from governing the issues of contract formation and the statute of frauds, while at the same time the General Corporation Law governs the validity of the corporate governance implications of the contract. *Compare Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 49 A.2d 603, 607 (Del. Ch. 1946) (Seitz, C.) (holding that

validity of voting agreement must be governed by Delaware law), *and Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *8 n.20 (Del. Ch. July 21, 2000) (questioning but declining to decide whether a voting agreement can "per agreement of the parties, be interpreted as a text in accordance with another state's rules of contract construction"), *with Carlson v. Hallinan*, 925 A.2d 506, 522 n..95, 524 n.109 (Del. Ch. 2006) (applying Pennsylvania law to partially written, partially oral stockholders' agreement providing that all stockholders would "vote all Shares for the election of" specified individuals).

Under New York law, "[u]nless barred by the Statute of Frauds, an oral agreement is just as binding as a written contract." Glen Banks, New York Contract Law § 3:9 at 91 (2006). The statute of frauds requires that a contract be in writing if it cannot possibly be performed within one year. *Id*. § 3:10 at 92; N.Y. Gen. Oblig. Law § 5-701 (a)(1); *see al*so 6 *Del. C.* § 2714(a). The rule is construed narrowly. *See Ohanian v. Avis Rent-A-Car Sys., Inc.*, 779 F.2d 101, 106 (2d Cir. 1985) ("The one-year provision has been held not to preclude an oral contract unless there is not . . . the slightest possibility that it can be fully performed within one year.") (internal citation omitted); *accord Havef Corp. v. Guyer*, 211 A.2d 910, 912-13 (Del. 1965) ("It has been the law in Delaware for many years that the Statute of Frauds does not apply to a contract which may, by any possibility, be performed within a year."). "An agreement is deemed performable within a year if it is terminable at any time by one or both of the parties or upon performance of an act which is within the control of one of the parties." Banks, *supra*, at 93 (citing *North Shore Bottling Co. v. C. Schmidt & Sons, Inc.*, 239 N.E 2d 189 (N.Y. 1968)); *accord Havef Corp. v. Guyer*, 211 A.2d at 911 ("[A]n oral promise of a long-extended performance, which the agreement provides shall come to an end upon the happening of a certain condition, is not within the Statute of Frauds if the condition is one that may happen in one year."). In light of these principles, my task is to determine whether there is any possible scenario whereby the alleged oral contract could have been performed within one year.

Here, the termination provision that appears in the unsigned shareholders agreement and which I infer was part of the oral agreement for pleadings purposes provided that the agreement and "all rights, duties and interests of the parties hereunder" would terminate if any person acquired all the stock of Kids, the company filed for bankruptcy, or if the company dissolved or ceased doing business for a period in excess of 180 days. This provision tips the scales in favor of Dweck by providing various means by which performance of the agreement could be completed within one year without breach by either party. The alleged oral agreement therefore qualifies for an exception to the statute of frauds. *See North Shore*, 239 N.E 2d at 192-93.

Accordingly, I reject Nasser's motion to dismiss. IT IS SO ORDERED.

Sincerely,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/SMS