IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| BRADLEY C. BAKER, | ) | |
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| Petitioner, | ) | |
| | ) | |
| v. | ) | Civil Action No. 4960-VCP |
| | ) | |
| IMPACT HOLDING, INC., | ) | |
| | ) | |
| Respondent. | ) | |

**MEMORANDUM OPINION**

Submitted: January 28, 2010
Decided: May 13, 2010

Edmond D. Johnson, Esquire, Benjamin Strauss, Esquire, James G. McMillan, III, Esquire, PEPPER HAMILTON LLP, Wilmington, Delaware; *Attorneys for Petitioner*

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**PARSONS, Vice Chancellor.**

This case, one of four currently pending in this Court between these parties or their related entities, involves an action to determine whether Petitioner, Bradley C. Baker, is entitled to a seat on the board of directors of Respondent, Impact Holding, Inc. ("Holding"). The case is presently before me on Holding's motion to dismiss for improper venue based on a forum selection clause in an agreement among Holding's shareholders that requires all actions related to that agreement to be brought in a court in Dallas, Texas. For the reasons stated herein, I find that the forum selection clause is both applicable to Baker and enforceable and, therefore, dismiss his suit without prejudice.

## I. BACKGROUND[1]

### A. The Parties

Petitioner, Baker, is a citizen of Colorado, a director of Holding, the manager of Impact Investments Colorado II, LLC ("Impact Investments"), and the trustee of the Baker Investment Trust (the "Trust").

Respondent, Holding, is a Delaware corporation that owns Impact Confections, Inc. ("Confections"). Holding is controlled by its majority stockholder, Brazos Private Equity Partners, LLC ("Brazos").

### B. Facts and Procedural History

On January 15, 2008, Impact Investments and the Trust sold all of the capital stock of Confections to Holding in accordance with a stock purchase agreement. A

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[1] Unless stated otherwise, the facts recited herein come from Baker's Petition and the exhibits thereto and are assumed to be true for purposes of Holding's motion to dismiss.

Stockholders Agreement (the "SHA") was executed in connection with this sale. Section 2.1.1 of the SHA provides that "one (1) individual [on Holding's board of directors] shall be Bradley C. Baker, for so long as he, Impact [Investments], [the] Trust and their respective Permitted Transferees together continues to own, in the aggregate, all of the Securities owned by each of them as of the date hereof." Section 8.4 of the SHA, entitled "Exclusive Jurisdiction" (the "Forum Selection Clause"), provides that:

> Any action between the parties hereto (a) to enforce any of the terms of this Agreement, or (b) in any other way pertaining to this Agreement, shall be brought only in a State or Federal court sitting in the State of Texas in the city of Dallas and not in any other State or Federal court.

By a written consent dated July 24, 2009, Holding removed Baker from its board of directors. Holding informed Baker of his removal by letter dated August 3, 2009. Believing that his removal violated the SHA, Baker filed his Petition in this action on October 8, 2009, seeking a declaratory judgment under § 225 of the Delaware General Corporation Law.[2] Holding then moved to dismiss for improper venue under Court of Chancery Rule 12(b)(3). This is my ruling on that motion.

### C. Parties' Contentions

Holding contends that because this action is related to the SHA, it must be dismissed by application of the Forum Selection Clause, which mandates that all such actions be brought in a court sitting in Dallas, Texas. Baker denies that the Forum Selection Clause applies to him because he is not a party to the SHA. Baker also asserts

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[2] 8 *Del. C.* § 225.

that application of the Forum Selection Clause here would violate Delaware public policy, which he contends forbids application of an exclusive forum selection clause that would oust Delaware courts of jurisdiction over a case involving the internal affairs of a Delaware corporation. In response, Holding argues that Baker is estopped from challenging the applicability of the Forum Selection Clause to him as a nonparty to the SHA because of his close relationship to that agreement. Holding also contests Baker's assertion that Delaware has a public policy limiting the applicability of otherwise valid forum selection clauses with respect to Delaware corporations.

## II. ANALYSIS

The proper procedural rubric for addressing a motion to dismiss based on a forum selection clause is found under Rule 12(b)(3), improper venue.[3] Courts traditionally will dismiss a matter under Rule 12(b)(3) when the contract underlying the dispute contains an explicit forum selection clause.[4] Here, the contract underlying this dispute, the SHA, contains an explicit Forum Selection Clause that requires actions to enforce or pertaining to the SHA, which indisputably includes the present action, to be brought in Dallas, Texas. Baker, however, challenges both the validity and the applicability of the Forum

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[3] *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super. Jan. 16, 2007) (citing *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *3-7 (Del. Ch. Oct. 19, 2000)).

[4] *Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *3 (Del. Ch. Nov. 13, 2009) (citing *Simon*, 2000 WL 1597890, at *5).

Selection Clause in the circumstances of this case. Thus, I address each of those arguments in turn.

### A. The Forum Selection Clause Does Not Violate Delaware Public Policy

Citing § 18-109(d) of the LLC Act,[5] Baker contends that Delaware has a public policy that renders unenforceable contractual provisions that prevent Delaware courts from hearing matters related to the internal affairs of Delaware business entities. Section 18-109(d) states, in pertinent part, "a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company." The Delaware Legislature added this language to § 18-109(d) in 2000 in response to the Delaware Supreme Court's decision in *Elf Atochem*, which held that § 18-109(d), as then written, did not prohibit parties to a Delaware LLC agreement from consenting to the exclusive jurisdiction of another state's courts.[6] When it amended § 18-

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[5] 6 *Del. C.* § 18-109(d). This section provides in its entirety that: "In a written limited liability company agreement or other writing, a manager or member may consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the State of Delaware, or the exclusivity of arbitration in a specified jurisdiction or the State of Delaware, and to be served with legal process in the manner prescribed in such limited liability company agreement or other writing. Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State of Delaware, *a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company*." *Id.* (emphasis added).

[6] *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 296 (Del. 1999); 72 Del. Laws ch. 389, § 3 (2000).

109(d), the Legislature also amended § 17-109(d) of the Delaware Revised Uniform Limited Partnership Act ("DRULPA") in an analogous fashion.[7]

Baker argues that the Delaware Legislature's enactment of §§ 17-109(d) and 18-109(d) reflects a clear public policy forbidding the enforcement of forum selection clauses that mandate exclusive foreign jurisdiction over matters involving the internal affairs of Delaware entities. I disagree. To start, while the Legislature enacted provisions that effectively ban forum selection clauses similar to the one at issue here with respect to nonmanager members of LLCs and limited partners, it, importantly, did not enact such a provision in the corporate context. The Legislature easily could have amended the General Corporation Law in a similar fashion, but did not do so. I infer from this that the Legislature did not intend to make an analogous provision applicable to corporations and that Delaware does not have an overarching public policy that prevents the stockholders of Delaware corporations from agreeing to exclusive foreign jurisdiction of any matter involving the internal affairs of such entities. Because there is no statute or other clear indication of a legislative intent to limit the scope of forum selection clauses with respect to corporations and Delaware courts routinely enforce such forum selection

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[7] 6 *Del. C.* §17-109(d). This amendment states, in pertinent part, "a limited partner may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited partnership."

clauses, even where they mandate exclusive foreign jurisdiction,[8] I find that no public policy of the State of Delaware invalidates the SHA's Forum Selection Clause.

Furthermore, even if I were to hold that the prohibition in § 18-109(d) applied by analogy to corporations on public policy grounds, that still would not provide a basis for invalidating the Forum Selection Clause as applied in this case. Section 18-109(d) only limits the behavior of members of an LLC who are not managers.[9] Analogizing from the LLC context to the corporate context, the managers of an LLC would be akin to a corporation's directors and officers, while the nonmanager members of an LLC would be similar to a corporation's stockholders. Baker claims to be a director of Holding and, thus, has status analogous to a manager for purposes of § 18-109(d). As such, the restriction in that provision preventing nonmanager members from waiving Delaware jurisdiction over suits involving the internal affairs of a Delaware business entity would not apply to someone in Baker's position.[10] Accordingly, even if § 18-109(d) did reflect

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8 *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *3-4 (Del. Super. Mar. 31, 2009); *HealthTrio*, 2007 WL 544156, at *3-4; *In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *9 n.21 (Del. Ch. Apr. 18, 2001).

9 6 *Del. C.* § 18-109(d). Similarly, the parallel provision in DRULPA, § 17-109(d), applies only to limited partners. *See supra* note 7. I further note that the first sentence of § 18-109(d) pertains to the rights of "a manager or member" of an LLC to consent to the nonexclusive jurisdiction of the courts of another jurisdiction. This confirms that the Legislature intentionally limited the prohibition on prescribing a non-Delaware jurisdiction as the exclusive forum for hearing disputes relating to the internal affairs of Delaware LLCs to members, and not managers.

10 In this regard, Baker emphasizes that he, personally, is not a party to the SHA. Instead, Impact Investments is a stockholder of Holding and a party to the SHA.

a Delaware public policy prohibiting the application of forum selection clauses like the one in the SHA under certain circumstances, this public policy would not go so far as to forbid the application of the Forum Selection Clause to Baker under the circumstances of this case.

### B. Baker Is Estopped from Challenging the Applicability of the Forum Selection Clause

Baker correctly asserts that he is not a party to the SHA. The SHA's cover page lists Holding, Brazos, Brazos Equity Fund II, L.P., Wholesome Holdings Group, LLC, Impact Investments, and "other holders named herein" as the parties to the SHA.[11] The SHA defines "Holder," in pertinent part, as "a holder of Securities listed on the signature page hereof."[12] Baker signed the SHA, but he did so only on behalf of Impact Investments, and he is not otherwise "listed as a holder of Securities on the signature page" of the SHA.[13] As is well established under Delaware law, signing an agreement in

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Thus, according to Baker, Impact Investments's position effectively corresponds to that of a member of an LLC, and it should be subject to the same policy underlying 6 *Del. C.* § 18-109(d). I do not find that argument persuasive for several reasons, including the facts that Baker, not Impact Investments, is the Petitioner in this action and Impact Investments has the right under the SHA to appoint a director to Holding's board.

11 Baker's Pet. Ex. A (the SHA).

12 SHA 4.

13 SHA S-3.

a representative capacity does not bind the signer in his personal capacity.[14] Therefore, Baker is not a party to the SHA.

Holding contends, however, that even though Baker is not a party to the SHA, he still is estopped from refusing to comply with the Forum Selection Clause. Delaware courts use a three-part inquiry to determine whether a nonsignatory to an agreement is bound by a forum selection clause in that agreement: "First, is the forum selection clause valid? Second, are the [nonsignatories] third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the . . . agreement?"[15] If all three questions are answered in the affirmative, the forum selection clause will bind the nonsignatory.

As to the first question, concerning the validity of the Forum Selection Clause, I note that such clauses "are presumptively valid and have been regularly enforced."[16] A forum selection clause will be enforced unless the party objecting to its enforcement can establish: "(i) it is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as

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14 *Credit Suisse Sec. (USA) LLC v. W. Coast Opportunity Fund, LLC*, 2009 WL 2356881, at *3 (Del. Ch. July 30, 2009).

15 *Capital Gp. Cos. v. Armour*, 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004, revised Nov. 3, 2004); *see also Weygandt v. Weco, LLC*, 2009 WL 1351808, at *4 (Del. Ch. May 14, 2009); *Hadley v. Shaffer*, 2003 WL 21960406, at *4 (D. Del. Aug. 12, 2003).

16 *Capital Gp.*, 2004 WL 2521295, at *6.

to be unreasonable."[17] Aside from his previously discussed, and rejected, contention that the Forum Selection Clause violates Delaware public policy, Baker has not challenged the validity of the Forum Selection Clause.[18] Accordingly, Baker has failed to overcome the presumption of validity, and I conclude that the Forum Selection Clause is valid.

The second question is whether Baker is a third-party beneficiary or closely related to the SHA. Holding argues only that Baker is closely related to the Agreement.[19] Case law suggests two ways a party can be closely related to an agreement: 1) the party receives a direct benefit from the agreement or 2) it was foreseeable that the party would be bound by the agreement.[20]

On this point, Holding argues that the seat on the board of directors Baker received via the SHA constitutes a direct benefit to him.[21] Baker disputes this, claiming that the board seat did not provide him with a pecuniary benefit, and, therefore, it cannot

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17 *Hadley*, 2003 WL 21960406, at *4 (citing *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983), *overruled on other grounds by Lauro Lines v. Chasser*, 490 U.S. 495 (1989)).

18 There also is no suggestion that Dallas, Texas, where Brazos, Holding's majority shareholder, is headquartered, is a jurisdiction so seriously inconvenient as to be unreasonable.

19 This is understandable because the SHA expressly disclaims the existence of third-party beneficiary rights. SHA § 8.10 ("[N]o third-party beneficiary rights are granted by the parties pursuant to this Agreement.").

20 *Weygandt*, 2009 WL 1351808, at *4.

21 *See* SHA § 2.1.1.

be considered a direct benefit.[22] Contrary to Baker's assertion, however, a benefit need not be pecuniary to constitute a direct benefit. Further, I find a right to a seat on the board of directors of Holding, a company in which Impact Investments, of which Baker is a manager, has a substantial investment, is sufficient to constitute a direct benefit to Baker. Thus, I find that because the SHA expressly names him as a director of Holding, Baker received a direct benefit from the SHA.[23]

The third question is whether Baker's claim arises from his standing relating to the SHA. The answer is yes. Baker's claim that he is entitled to a board seat under the SHA unquestionably arises from the SHA, and he does not argue otherwise.

Having answered all three pertinent questions in the affirmative, I find that Baker is bound by the Forum Selection Clause and, thus, is estopped from asserting that the Forum Selection Clause does not apply to him. I further find that because the present action seeks to enforce the terms of the SHA, or, at the very least, pertains to the SHA, the Forum Selection Clause mandates that it be brought in a court in Dallas, Texas. Therefore, I dismiss this action on the basis of improper venue, but do so without prejudice to Baker's ability to refile his claims in an appropriate forum.

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[22] Arg. Tr. 19-20 (citing *Capital Gp.*, 2004 WL 2521295, at *7; *Weygandt*, 2009 WL 1351808, at *5; *Hadley*, 2003 WL 21960406, at *5-6).

[23] Baker also argues that the board seat was not a benefit to him, but rather was a benefit to Impact Investments, which had the right to designate a director under the SHA, and, thus, was only an indirect benefit to him. While these facts demonstrate that Impact Investments could have filed a § 225 action of this nature, there would be no question that such an action would be barred by the Forum Selection Clause because Impact Investments is a party to the SHA.

## III. CONCLUSION

For the foregoing reasons, I hold that Baker is bound by the SHA's Forum Selection Clause, which requires that all actions to enforce, or pertaining to, the SHA be brought in a court in Dallas, Texas. Because this action pertains to the SHA, Baker filed it in an improper forum. Therefore, I grant Holding's Rule 12(b)(3) motion to dismiss without prejudice.

**IT IS SO ORDERED.**