

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NEXT LEVEL VENTURES, LLC, a :
Washington limited liability company, :
 :
Plaintiff, :
 :
v. : C.A. No. 2022-0699-MTZ
 :
AVID USA TECHNOLOGIES LLC, :
a Delaware limited liability company, :
JONATHAN CARFIELD, and HANNA :
CARFIELD, :
 :
Defendants. :

MEMORANDUM OPINION

Date Submitted: January 27, 2023

Date Decided: March 16, 2023

Kurt M. Heyman and Kelly E. Rowe, HEYMAN ENERIO GATTUSO & HIRZEL LLP, Wilmington, Delaware; David W. Tufts and Peter H. Donaldson, DENTONS DURHAM JONES PINEGAR P.C., Salt Lake City, Utah, *Attorneys for Plaintiff Next Level Ventures, LLC.*

David H. Holloway, SHLANSKY LAW GROUP, LLP, Wilmington, Delaware; Colin R. Hagan and David J. Shlansky, SHLANSKY LAW GROUP, LLP, Chelsea, Massachusetts, *Attorneys for Defendants Jonathan Carfield and Hanna Carfield.*

ZURN, Vice Chancellor.

Jonathan and Hanna Carfield are entrepreneurs in the field of cannabis vaporization devices, and created multiple brands including AVD and AVEO. Hanna owns several trademarks relating to these brands, including “AVD” and “AVEO.”¹ Jonathan wholly owns AVID Holdings Ltd. (“AVID HK”), a Hong Kong entity. In April of 2020, the Carfields, through AVID HK, entered into a business arrangement with Washington LLC Next Level Ventures (“Next Level”), and several Chinese factories. Under this arrangement, Next Level was to market and distribute AVD-branded products to sub-distributors and wholesalers. AVID HK served as a middleman between Next Level and the factories, receiving orders and payments from Next Level and remitting payments to the factories. This arrangement was supported by a distribution agreement between AVID HK on one hand, and Next Level on the other. That agreement granted Next Level exclusive worldwide distribution rights for certain enumerated vaporization device components, as well as an exclusive license to use certain trademarks, including “AVD.” At all relevant times, Next Level did business as AVD or Advanced Vapor Devices.

The relationship between the Carfields and Next Level eventually began to deteriorate, with each side claiming the other was falling short of its obligations under the distribution agreement. Shortly thereafter, Next Level launched arbitration

¹ In pursuit of clarity, I refer to various individuals in this case, including Jonathan Carfield and Hanna Carfield, by their first names. I intend no familiarity or disrespect.

proceedings against AVID HK, and took a series of actions that cut out AVID HK as a middleman and established a direct relationship with the factories. AVID HK did not appear in the arbitration proceedings to contest the claims, and the arbitrator ruled in Next Level's favor in April of 2022.

Meanwhile, the Carfields were working with two Americans to form a joint venture and replace Next Level as their exclusive distributor. The plan was to use a Delaware entity as a joint venture vehicle through which the Americans would serve as distributors based in the United States. One of the Americans directed the formation of a Delaware LLC, which would eventually be named AVID USA Technologies, LLC ("AVID USA"). AVID USA then acquired a bank account and a tax identification number. By December of 2021, AVID USA had reached out to prospective customers, and by April of 2022 it had a number of active customer accounts. In early 2022, the Carfields and the Americans circulated an operating agreement for the LLC. Jonathan eventually signed a version of the operating agreement and listed his title as "Manager"; the Americans never signed it. The joint venture fell apart in the summer of 2022.

The Carfields persisted. That same summer, they set up a website for the AVEO brand. The website launched in June of that year, and "AVID USA Technologies, LLC" appeared at the bottom of each page. Also in June, a LinkedIn post announced the launch of the AVEO brand, and implied that Next Level was no

longer an exclusive distributor under the distribution agreement and that it was selling AVD-branded products without the Carfields' or AVID HK's permission. In July, another post on a different forum repeated those statements, and stated that Next Level was "likely facing an enormous tax debt and penalty that will financially ruin them." Both posts contain indicia that they were written by or on behalf of the Carfields or one of their entities.

In August, Next Level initiated this action against the Carfields and AVID USA. Next Level alleges the Carfields formed AVID USA to circumvent the distribution agreement and wiggle out from any adverse outcome in the arbitration proceedings. Next Level also alleges the defendants violated the Delaware Deceptive Trade Practices Act (the "DDTPA") by making the June and July online statements, and by unlawfully using trademarks the distribution agreement exclusively licensed to Next Level. Next Level sought expedition, which was granted, and a temporary restraining order, which was granted against AVID USA and its managers but not explicitly the Carfields. In October, Next Level filed an amended complaint adding additional allegations based on documents obtained during discovery. The Carfields moved to dismiss the amended complaint; that motion was recently granted in part.

Next Level sought a preliminary injunction, and the parties conducted discovery toward that end. As briefed, Next Level seeks a preliminary injunction

only on the basis that the June and July posts violate the DDTPA. Next Level argues the injunction should bind the Carfields in their capacity as actual or de facto managers of AVID USA.

The Carfields primarily contest the entry of an injunction against them on the grounds they are not subject to personal jurisdiction in Delaware as de facto managers of AVID USA. They contend they have no affiliation with AVID USA, and that AVID USA is and has always been an empty shell company that was not used because the joint venture fell apart. They also raise the defense of unclean hands, arguing that Next Level's actions establishing a direct relationship with the factories, among other things, should bar the issuance of injunctive relief. Further, the Carfields argue that res judicata should bar Next Level's claims because it should have asserted them in the arbitration. AVID USA has not appeared.

The Court held a hearing on the motion to dismiss and on the preliminary injunction motion, at which the Carfields testified. This opinion holds that Next Level has shown a reasonable likelihood that the Carfields are subject to personal jurisdiction in Delaware as managers of AVID USA, and that a narrow preliminary injunction is appropriate against AVID USA and the Carfields as its managers. In particular, Next Level has shown it is reasonably likely that AVID USA was the operating entity behind the AVEO brand at the time of the posts, that the Carfields were de facto managers of AVID USA, and that the defendants violated the DDTPA.

Next Level will suffer irreparable harm absent injunctive relief, and the equities favor granting an injunction. Further, the Carfields' defenses fail. The grounds for their unclean hands defense lack the necessary relationship with the conduct at issue, namely the two posts made in the summer of 2022. The res judicata argument fails because the arbitration concluded months before the two posts were made; Next Level could not have brought claims based on them during the arbitration.

I. BACKGROUND²

Defendants Jonathan Carfield and Hanna Carfield are a married couple who currently reside in Thailand.³ The Carfields founded the AVD and AVEO brands of

² The background is drawn from discovery to date and the Carfields' testimony at the hearing. At this stage, the Court is reluctant to resolve factual disputes. *See Mitchell Lane Publ'rs, Inc. v. Rasemas*, 2014 WL 4925150, at *5 (Del. Ch. Sept. 30, 2014). Where there is a dispute of fact, I will "assume the fact in favor of the moving party if it appears after evaluating all of the evidence in the record that there is a reasonable likelihood that on final hearing that fact will be so established by a preponderance of the evidence." *Paramount Commc'ns Inc. v. Time Inc.*, 1989 WL 79880, at *2 (Del. Ch. July 14, 1989). Thus, nothing in this decision should be construed as a finding of fact.

Citations in the form "[first initial] [last name] Dep. –" refer to deposition testimony of the referenced witness, available at docket item ("D.I.") 120, D.I. 121, D.I. 123, and D.I. 124. Citations in the form "Hr. Tr. –" refer to the transcript of the January 27, 2023 preliminary injunction hearing, available at D.I. 172. Citations in the form "[first initial] [last name] Hr.–" refer to hearing testimony of the referenced witness. Citations in the form "POB –" refer to the Opening Brief in Support of Plaintiff's Motion for Preliminary Injunction, available at D.I. 126. Citations in the form "CAB –" refer to Defendants Jonathan Carfield's and Hanna Carfield's Answering Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, available at D.I. 142. Citations in the form "PRB –" refer to Plaintiff's Reply Brief in Further Support of Motion for Preliminary Injunction, available at D.I. 148.

³ H. Carfield Dep. 10; J. Carfield Dep. 43–44, 121.

cannabis vaporization devices and hardware.⁴ In 2018, they moved to China and created AVID HK, a Hong Kong limited liability company with a principal place of business in Wan Chai, Hong Kong.⁵ AVID HK is or was “in the business of manufacturing and selling” vaporization devices and accessories.⁶ Jonathan wholly owns AVID HK and serves as its CEO, and Hanna effectively serves as COO.⁷ Hanna also developed certain trademarks used by the company, and owns certain trademarks, including “AVD.”⁸ The Carfields also founded AVEO, which is a “white label manufacturing and distribution services” brand.⁹ Hanna “coined” the trademark “AVEO” in late 2021 and is the current owner of that trademark.¹⁰

Next Level was formed by nonparty Alex Kwon in late 2018 to market and sell vaporization devices.¹¹ Jonathan and Kwon met around the same time,¹² and

⁴ See D.I. 80 ¶¶ 13, 18; D.I. 81 ¶ 6; H. Carfield Dep. 202–03, 236; D.I. 111 ¶ 48.

⁵ H. Carfield Dep. 38–39; see J. Carfield Dep. 22, 44. At the time of its founding, AVID HK had the legal name AlderEgo Group Ltd. See D.I. 111 ¶ 3. For the sake of clarity, I will refer to the entity as AVID HK regardless of its legal name at the relevant time.

⁶ POB Ex. 5 at Recitals [hereinafter “Dist. Agr.”].

⁷ J. Carfield Dep. 122–23; H. Carfield Dep. 42.

⁸ POB Ex. 17 at CARFIELD 000104; H. Carfield Dep. 236; Dist. Agr. § 6 (licensing to Next Level the rights to certain trademarks, including “AVD” and “Advanced Vapor Devices”).

⁹ PRB Ex. 100 at CR0000177; J. Carfield Dep. 247–48; see *supra* note 4.

¹⁰ H. Carfield Dep. 202; POB Ex. 17 at CARFIELD 000104.

¹¹ See A. Kwon Dep. 11; see also Dist. Agr. at Recitals.

¹² D.I. 22 ¶¶ 7–8.

Next Level and AVID HK joined forces to market, manufacture, and distribute certain vaporization device components and to monetize the AVD brand. The relationship was memorialized on January 1, 2019 when Next Level and AVID HK entered into an exclusive distribution agreement, which they amended and restated on April 20, 2020 (the “Distribution Agreement”).¹³ Under the Distribution Agreement, AVID HK appointed Next Level as its exclusive worldwide distributor of specified vaporization device components, defined as the “Goods,” for five years.¹⁴ The Goods comprise bases, mouthpieces, cartridges, and batteries.¹⁵ AVID HK also granted to Next Level a global “sublicensable, exclusive, non-transferable license . . . solely on or in connection with the promotion, advertising, and resale of the Goods in accordance with the terms and conditions of this Agreement to use all [AVID HK’s] trademarks for the Goods,” which included “AVD” and “Advanced Vapor Devices.”¹⁶ The Distribution Agreement prohibits AVID HK and its affiliates from distributing any Goods and from using any of the covered trademarks for the duration of the agreement.¹⁷ It remains in effect today.

¹³ Dist. Agr. at Preamble.

¹⁴ *Id.* § 1.1.

¹⁵ *See id.* at sched. I.

¹⁶ *Id.* § 6.

¹⁷ *Id.* §§ 1.1, 6.

Under the Distribution Agreement, Next Level would submit purchase orders to AVID HK, and AVID HK was required to use its best efforts to promptly fill those orders.¹⁸ In the event AVID HK failed to fill three consecutive purchase orders, the Distribution Agreement allowed Next Level to “engage in seeking self-help and obtain similar substitution of goods from another country, region, manufacturer, or seller to maintain the orders” and “to utilize the marks with permission as outlined in [the agreement].”¹⁹

To carry out this business with Next Level, AVID HK needed a bank account, but the Carfields struggled to set one up in Hong Kong.²⁰ Eventually, a Chinese citizen named Zhao Yu offered to let the Carfields use his Hong Kong entity (“Zhao’s Entity”).²¹ To facilitate the use of Zhao’s Entity and its bank account, Jonathan and Zhao entered into an April 2, 2019 “Cooperation Agreement” that allowed Zhao to retain legal ownership but gave control of its operations to Jonathan.²² Jonathan used Zhao’s Entity to process Next Level’s payments under

¹⁸ *See id.* § 4.

¹⁹ *Id.* § 4.2.

²⁰ J. Carfield Hr. 9; J. Carfield Dep. 65–67; H. Carfield Dep. 50.

²¹ H. Carfield Dep. 50–51; J. Carfield Hr. 9. Zhao named his entity Zijing Medical. D.I. 80 ¶ 20. The entity was later renamed AEG Holdings (HK) Ltd., and then finally AVD Holdings, Ltd. *Id.*

²² CAB Ex. 68; J. Carfield Dep. 66–67, 71–73.

the Distribution Agreement.²³ Jonathan also used Zhao's Entity to employ the Carfields' staff and issue their paychecks.²⁴

The business arrangement supported by the Distribution Agreement and the Cooperation Agreement had defined roles for AVID HK, Next Level, Zhao's Entity, and various factories in China. Next Level ordered products from AVID HK, which in turn placed orders with the factories. Next Level paid Zhao's Entity, which remitted a portion of those payments to the factories, with the balance going to fund Zhao's Entity's operations for the Carfields' benefit. The factories shipped the products to Next Level or Next Level's customers. At all relevant times, Next Level operated using the name AVD or Advanced Vapor Devices.²⁵ It operates a website with the domain name avd710.com,²⁶ and until September 2021, the domain avd.com forwarded to Next Level's website.²⁷

²³ J. Carfield Dep. 71–72.

²⁴ J. Carfield Hr. 19–20.

²⁵ A. Kwon Dep. 19–22.

²⁶ Am. Compl. ¶ 34.

²⁷ *Id.* ¶¶ 73–74.

A. The Relationship Between Next Level And AVID HK Deteriorates.

In mid-to-late 2021, the relationship between AVID HK and Next Level started deteriorating, and the Carfields sought ways to cause the termination of the Distribution Agreement and replace Next Level as AVID HK's distributor.²⁸ Because Next Level was accumulating a large debt to Zhao's Entity (which in turn owed large sums to the factories), the Carfields' initial approach was to issue a debt call letter, notify Next Level that it materially breached the agreement when it failed to pay the debt in full, and otherwise put pressure on the relationship until the Distribution Agreement was terminated.²⁹ On September 1, Jonathan sent Next Level a debt call letter for over \$10 million in past due payments and stated Next Level had thirty days to pay half of the amount due, and then sixty days to pay the balance.³⁰

The next day, Next Level responded with a letter addressed to Zhao's Entity contesting the alleged breach and claiming Zhao's Entity breached Distribution Agreement by failing to ship products requested in submitted purchase orders.³¹ The

²⁸ See CAB Ex. 77; CAB Ex. 79; POB Ex. 12A; see also POB Ex. 60 at ZS0006372 (explaining the Carfields and the Sweedlers' "goal was to have inventory stateside prepped for order fulfillment come October 9 (The day after Next Level termination [sic] is complete)").

²⁹ See POB Ex. 12A.

³⁰ POB Ex. 7 at NLV00259–0260.

³¹ *Id.* at NLV00232–0234.

letter appears to have confused AVID HK with Zhao's Entity: Zhao's Entity was not a signatory to the Distribution Agreement. An attorney representing Zhao's Entity responded on September 14, asserting that Next Level owed Zhao's Entity \$9,040,458.26 for Goods already shipped, and that Next Level had only until October 8, 2021 to pay the outstanding balance, or Zhao's Entity would terminate the Distribution Agreement.³² Thus, as of September 14, both AVID HK and Next Level had been accused of breaching the Distribution Agreement.

Next Level then moved to ensure it continued receiving the vaporization device components enumerated in the Distribution Agreement by working with the factories directly and cutting AVID HK and Zhao's Entity out of the venture. In September 2021, Next Level and a Shenzhen-based factory owner (the "First Factory") agreed that Next Level would purchase the accounts receivable Zhao's Entity owed the First Factory for \$7 million, the First Factory would ship all finished orders to Next Level,³³ and Next Level and the First Factory would "work in good faith to complete an exclusive supply agreement."³⁴ This arrangement established a direct relationship with the factory, obviating the need for AVID HK or another Carfield-controlled entity to serve as a middleman.

³² CAB Ex. 79.

³³ CAB Ex. 81 at NLV01454.

³⁴ CAB Ex. 82 § 3.

On October 5, 2021, Next Level initiated arbitration proceedings against Zhao's Entity, but then on October 22 filed an amended statement of claims against only AVID HK,³⁵ asserting that AVID HK breached the Distribution Agreement by, inter alia, failing to ship Goods.³⁶ AVID HK never appeared in arbitration: the Carfields knew it was proceeding, but Jonathan believed there was no need to defend against it.³⁷ The arbitration concluded on April 22, 2022 with a ruling in Next Level's favor.³⁸ Next Level has since filed a petition to confirm the arbitration award, which remains pending.³⁹

On October 11, 2021, Zhao removed the Carfields' access to Zhao's Entity, and therefore their bank account in Hong Kong.⁴⁰ The same day, Zhao emailed an

³⁵ PRB Ex. 107 at NLV01803–1804 (demand for arbitration against Zhao's Entity); D.I. 168, Ex. 135, at Amended Demand for Arbitration ¶ 52.

³⁶ D.I. 168, Ex. 135 ¶ 52.

³⁷ PRB Ex. 109 at ZS0013991 (message from Jonathan stating that “we didn't need to reply to” the arbitration brought by Next Level); PRB Ex. 108 at ZS0013898 (October 6, 2021, Whatsapp exchange between Jonathan and Zach, in which Jonathan posited that Next Level initiated the arbitration “simply to buy time or stretch the clock on termination,” as the thirty-day period to pay the first half of the outstanding balance had already passed); J. Carfield Hr. 59 (“Q. . . . You know that there's been an arbitration? A. Yeah. It's -- it was quite surprising, actually. Yes. Q. Well, you knew that the arbitration proceeding was -- was pending between Next Level Ventures and AVID Holdings, didn't you? A. We knew that it was filed, yes. We knew there was a complaint filed.”); D.I. 1, Ex. 3, at 2 (listing AVID HK's counsel in the arbitration proceedings as “none”); J. Carfield Dep. 77 (“Q. You knew that the arbitration was pending, didn't you? A. I did, yes.”).

³⁸ D.I. 1, Ex. 3 at 25–27.

³⁹ *Next Level Ventures LLC v. Avid Hldgs. Ltd*, C.A. No. 2:22-cv-01083-JCC, at D.I. 1 (W.D. Wash.).

⁴⁰ POB Ex. 38.

attorney representing the Carfields, informing the attorney that “Jonathan Carfield is no longer associated with [Zhao’s Entity] and has no authority or right to speak for or act on behalf of [Zhao’s Entity],” requesting that the attorney not “take any steps to collect any amounts from [Next Level],” and demanding “all emails, letters or other communication between [the attorney] and [Zhao’s Entity] or Mr. Carfield.”⁴¹

Jonathan continued to try to convince Next Level to terminate the Distribution Agreement, including by offering to write off a portion of Next Level’s outstanding debt.⁴² Jonathan also considered creating a new brand to compete with AVD, the very threat of which he believed would give him leverage in negotiating a settlement with Next Level. As Jonathan put it,

Because the contract with [Next Level] is simply with a trading company that has no ownership of the AVD trademark. We could just as easily set up a new trading company and create a new brand and it would avoid a costly lawsuit and customers would quickly see that this is the same product as AVD, if not better.⁴³

Jonathan concluded: “I’ve always said AVD was simply a proof of concept. We own the supply chain. We own the manufacturing.”⁴⁴

⁴¹ POB Ex. 8 at CARFIELD 000327–0328.

⁴² PRB Ex. 108 at ZS0013899–3900.

⁴³ *Id.* at ZS0013901 (formatting altered).

⁴⁴ *Id.* at ZS0013904 (formatting altered).

Jonathan also planned to apply pressure to the First Factory by notifying it that it was no longer authorized to “produce, sell or export any products that bear the AVD trademark” because AVID HK was the rightful owner and could bring suit to enforce its alleged rights.⁴⁵ Jonathan then planned to “essentially knock off the AVD brand,” positing that his new brand would be successful because “[i]t will be very obvious that this is another brand of ours” and because “AVD will no longer be able to fulfill orders.”⁴⁶ Jonathan also planned to “[s]top[] imported goods [bearing the] AVD Trademark at U.S. Customers & Border Patrol.”⁴⁷

B. The Carfields Move Forward With A New Business Partner.

The Carfields intended to replace Next Level by entering into a joint venture with an American private equity company called Windsong Global LLC (“Windsong”) or one of its affiliates.⁴⁸ William Sweedler, Windsong’s managing partner,⁴⁹ personally lent approximately \$300,000 to the Carfields to help launch the venture, which was sent to Zhao’s Entity’s bank account.⁵⁰ Throughout his dealings

⁴⁵ POB Ex. 36 at ZY00202.

⁴⁶ *Id.*

⁴⁷ POB Ex. 37.

⁴⁸ *See* POB Ex. 14; PRB Ex. 109 at ZS0013988; *see also* POB Ex. 12A; Z. Sweedler Dep. 139–40.

⁴⁹ *See* POB Ex. 23 at CARFIELD 000068.

⁵⁰ W. Sweedler Dep. 52 (testifying that the amount was approximately \$320,000); J. Carfield Hr. 41–42 (testifying that the amount was \$200,000); PRB Ex. 109 at ZS0013988 (“We wired 300k dollars out of trust! To show good faith that we were looking to create a partnership.”).

with Windsong, Jonathan primarily communicated with William's son, Zach Sweedler.⁵¹

While Jonathan was sparring with Next Level, Zach took steps to launch the new partnership between the Carfields and Windsong. Earlier in September 2021, Zach directed a Windsong employee to register a Delaware LLC named AVD Technologies, LLC; that entity was formed on September 23.⁵² Zach then directed that a bank account be opened in AVD Technologies' name and notified the Carfields when it was opened on October 7.⁵³ He also obtained a tax identification number and a business license for AVD Technologies.⁵⁴ Windsong set up another entity, Carfield Family Ventures LLC, to hold the Carfields' interest in AVD Technologies.⁵⁵

Jonathan contemplated adding a manufacturer to the partnership between the Carfields and Sweedlers. On October 12, Jonathan emailed William and an affiliate of a factory owner and operator called Shenzhen Yuto (the "Second Factory") proposing a joint venture under which Windsong would serve the role of "U.S. management, distribution and marketing"; Jonathan's company, which he refers to in the email as "AVD," would be "the brand, strategy, innovation and management

⁵¹ *See, e.g.*, POB Ex. 12A; POB Ex. 16; PRB Ex. 109.

⁵² Z. Sweedler Dep. 139–41; POB Ex. 13 at CARFIELD 000028.

⁵³ POB Ex. 59; POB Ex. 57.

⁵⁴ POB Ex. 59; POB Ex. 57.

⁵⁵ H. Carfield Hr. 117; POB Ex. 60 at ZS0006369.

in China”; and the Second Factory would be “Chinese management for manufacturing and supply chain.”⁵⁶ Jonathan also contemplated that the Second Factory would purchase equity in the joint venture from the Carfields.⁵⁷

On November 1, Jonathan began using AVD Technologies’ bank account, requesting that an invoice for advisory services rendered for the benefit of the Carfields or one of their entities be made out to AVD Technologies.⁵⁸ Hanna used that bank account in November to invoice Next Level.⁵⁹

Despite this progress, AVID USA still did not have an executed operating agreement, and certain details of the partnership remained unresolved. On December 30, Zach sent Jonathan a draft term sheet regarding a joint venture between AVID HK and “Windsong Global and / or one of its affiliates.”⁶⁰ The term sheet stated that the intent of the joint venture was “to greatly expand the AVID portfolio of owned brands, including AVD, Good Carts, BRNR, and Kind Sciences in North America,” and that “[t]he purpose of the JV will be to set up a wholly owned distributor in North America.”⁶¹ The term sheet included bracketed text stating

⁵⁶ POB Ex. 14 at Windsong0000519.

⁵⁷ POB Ex. 15 at Windsong0000022; J. Carfield Dep. 165–66.

⁵⁸ POB Ex. 32.

⁵⁹ POB Ex. 33; POB Ex. 34.

⁶⁰ POB Ex. 16.

⁶¹ *Id.* § 1.

“[t]he business of the JV will commence upon either the termination and/or expiration of the Exclusive Distribution Agreement with Next Level.”⁶² The term sheet further contemplated that Windsong would contribute certain intellectual property and run the joint venture’s day-to-day operations, among other things, and AVID HK would “[c]ontribute its rights to [enumerated goods] on an exclusive basis.”⁶³ Jonathan elaborated on these partnership terms in a January 13, 2022 email, explaining that “[t]his business will be owned by Carfield Family Ventures LLC 51% and Windsong Global 49%.”⁶⁴

On February 14, Zach changed the name of AVD Technologies USA LLC to AVID USA Technologies LLC.⁶⁵ He did so at Jonathan’s direction.⁶⁶ This opinion generally refers to that entity as “AVID USA.”

On April 20, Zach sent Jonathan the first draft of an operating agreement for AVID USA.⁶⁷ The operating agreement stated that the purpose of AVID USA was “engaging in any lawful act related to the import, marketing, distribution and sale of vape devices and accessories in North America.”⁶⁸ The operating agreement further

⁶² *Id.*

⁶³ *Id.* § 2.

⁶⁴ POB Ex. 17 at CARFIELD 000104.

⁶⁵ POB Ex. 13 at CARFIELD 000029.

⁶⁶ J. Carfield Dep. 143.

⁶⁷ POB Ex. 20.

⁶⁸ *Id.* at CARFIELD 000140 § 2.

contemplated that “[AVID USA’s] business in North America will be run exclusively by AVID USA pursuant to a Distribution Agreement with AVID Shenzhen Technology, Ltd. . . ., a controlled affiliate of [Jonathan].”⁶⁹

On April 29, Zach sent William and William’s friend Christine Rigby, who was helping set up the joint venture, an email with the subject line “AVID USA Current Sales & Pipeline,” attaching a document titled “AVID Sales Volumes and Pipeline (4-29).”⁷⁰ The attached document listed six “[a]ctive [a]ccounts,” and included a table titled “Active Account Order History,” which listed order dates going back to December 15, 2021.⁷¹ The document listed nineteen additional accounts in a table with columns titled “Initial Contact” and “Expected Close.”⁷²

On May 4, Hanna and Zach corresponded about setting up the AVEO website and purchasing domain names.⁷³ Eventually, they purchased the domain aveo710.com, and Hanna owned the domain personally.⁷⁴

On May 6, Jonathan signed the operating agreement Zach had sent in April.⁷⁵ He signed both on behalf of Carfield Family Ventures LLC, and as the “Manager”

⁶⁹ *Id.* § 7.

⁷⁰ PRB Ex. 98.

⁷¹ *Id.* at CR0000209.

⁷² *Id.* at CR0000209.01.

⁷³ PRB Ex. 99.

⁷⁴ *See* D.I. 81 ¶ 5.

⁷⁵ POB Ex. 22 at CARFIELD 000204.

of AVID USA—a title Jonathan manually inserted himself.⁷⁶ Windsong never countersigned the agreement.

On May 12, Zach emailed a Windsong affiliate requesting assistance with “warehous[ing] inventory in the US.”⁷⁷ He explained that “Windsong Global just formed a partnership with a new company, AVID,” and that “AVID is a holdings company that owns a variety of cannabis ancillary brands,” including AVEO.⁷⁸

C. The Carfields Launch The AVEO Website And Make Public Statements Concerning Next Level.

On or around June 3, 2022, William decided Windsong was not going to move forward with the joint venture.⁷⁹ Nevertheless, Rigby intended to continue her involvement with the Carfields.⁸⁰ And Zach continued to work at the Carfields’ direction on the AVEO website.⁸¹ On June 7, Jonathan sent Zach a link to content he drafted for the AVEO website.⁸² In his message, he wrote that he also included “some suggestions for added content that we should take from the AVD website,”

⁷⁶ *Id.*; J. Carfield Hr. 45–46.

⁷⁷ PRB Ex. 100 at CR0000177.

⁷⁸ *Id.*

⁷⁹ *See* PRB Ex. 101 at ZS0009536; W. Sweedler Dep. 164–65; *see also* PRB Ex. 88.

⁸⁰ PRB Ex. 101 at ZS0009536.

⁸¹ *See* PRB Ex. 102; POB Ex 24.

⁸² *See* PRB Ex. 102.

adding, “[i]t’s our brand, we should simply take whatever content we want from their site.”⁸³

The AVEO website officially launched later in June, using the URL aveo710.com.⁸⁴ It listed “AVID USA Technologies, LLC” at the bottom of each page,⁸⁵ and stated that “[w]e’re the founders of **Advanced Vapor Devices (AVD)**. We’ve managed the production of over 40M cartridges and produce the lowest failure rates and cleanest test results. Many leading brands use our hardware with countless industry awards.”⁸⁶ All the AVEO website text was written by the Carfields or someone working for them, and all its content was approved by the Carfields.⁸⁷ The Carfields also caused the avd.com domain to redirect traffic to the AVEO website aveo710.com, rather than Next Level’s avd710.com.⁸⁸ Additionally, AVID HK’s website lists AVEO as one of its brands.⁸⁹

On June 29, the AVEO LinkedIn account posted about the launch of the AVEO brand (the “LinkedIn Post”):⁹⁰

⁸³ *Id.*

⁸⁴ POB Ex. 24 at ZY 00040; H. Carfield Dep. 170–71.

⁸⁵ Am. Compl. ¶ 63; *see also* POB Ex. 27; H. Carfield Dep. 171.

⁸⁶ Am. Compl. ¶ 63; D.I. 80 ¶ 18; D.I. 81 ¶ 14.

⁸⁷ Z. Sweedler Dep. 116–21.

⁸⁸ *See* H. Carfield Dep. 173–74.

⁸⁹ Am. Compl. ¶ 32; *Our Brands*, AVID Venture Development, <http://www.avd.com> (last visited Mar. 7, 2023).

⁹⁰ Am. Compl. ¶ 67.

What is AVEO? Why a new brand?

It's been a long time coming to share some perspective regarding the world of vape devices for cannabis.

In 2018, our founders moved from Seattle, WA to Shenzhen, China to make the best vape hardware based on their perspective of being former cannabis operators of cultivation, extraction and distribution.

Advanced Vapor Devices (AVD) was born and throughout the past years, AVD has been a success due to simple and thoughtful innovation, insane precision and overall reliability - earning the trust of many brands today.

In 2021, a major disruption would shake the core of AVD as it was listed as a leading brand being targeted by Smoore[, one of its competitors,] in an ITC complaint regarding potential IP infringement.

As the manufacturer, it was always our goal to comply with any potential concerns as we believe respecting intellectual property of those who developed innovation is simply good business practice.

Unfortunately, our US-based distributor didn't feel the same and has continued using our Registered Trademark (AVD) and marketing and selling designs accused by Smoore without our consent and permission - leading to split between manufacturer and seller.

In order to maintain their business, the seller has had to position themselves as the owner and manufacturer of our AVD brand, which couldn't be farther from the truth. While frustrating that so many of their employees could so easily support the "big lie," we also understand they have families and personal finances of their own. Sometimes, you're stuck between a rock and a hard place of doing what is honest versus the reality of mortgage payments and the rising costs of raising kids.

As our former distributor continues to utilize OUR trademark and brand, we were forced to rebrand - avoiding confusion and further legal liability due to the pending outcome of the ITC complaint.

Regardless, our team was inspired to focus more heavily on our own innovation and strengthening our own IP strategies moving forward.

This also gave us an opportunity to deliver on the initial goal of high precision, reliable and AFFORDABLE vapor devices intended for

cannabis consumption by eliminating markups that we thought were too high in the past.

So what is AVEO? We're proven industry leaders within the world of making the very best vape hardware for cannabis.

We're simply direct. We operate with truth and transparency and with a reenergized goal of delivering the best quality and best value for our industry partners.

Get to know us again at www.aveo710.com

#cannabis #founders #business #marketing #innovation #team #success
#brand #vape #avd #aveo⁹¹

Because Jonathan still had to pay back William's loan from the fall of 2022, he continued to update William on the business. On July 5, he emailed William a document titled "2022 AVEO Sales Highlights," and noted that he "expect[s] to be profitable by late August or September."⁹² That document includes AVEO sales history for the first and second quarters of 2022, and projections for the third quarter.⁹³ The same document also notes that various accounts are being led by certain distributors, including "Grow Cargo" and "FTLD."⁹⁴ Grow Cargo and FTLD are two of the "existing distribution relationships" that AVID USA was to manage when Zach sent the initial partnership terms in January of 2022.⁹⁵

⁹¹ *Id.* ¶ 67.

⁹² POB Ex. 42.

⁹³ *Id.*

⁹⁴ *Id.* at 2022 AVEO Sales Highlights.

⁹⁵ POB Ex. 17 at CARFIELD 000104.

On July 31, 2022, a post was made on a “public web board known as Future4200” (the “Future4200 Post”).⁹⁶ The post did not expressly identify the author. It read:

Regarding AVD and why we have changed our brand to AVEO:

1. Our former “exclusive distributor” Next Level Ventures was the importer of record for nearly all of AVD’s branded products and Smoore has evidence of roughly 30M units of cartridges with declared values that are far below the invoice amounts they paid us (the manufacturer) when importing. They are likely facing an enormous tax debt and penalty that will financially ruin them. Of course, the guys at Next Level won’t admit this, as nobody on earth would want to do business with them and start seeking other alternatives.

For this reason, we have stopped working exclusively with Next Level since September of 2019.

2. Next Level also continues to sell products under our AVD trademark without our permission because, well, if they stopped, they would also be out of business. They need to make money to pay off the tax bill that will soon be chasing them down as they continue to sell copies of the TH2 and M6T without the permission of the owners of AVD. As part of the settlement with Smoore, Jonathan and Hanna Carfield agreed to not use or import any products under their AVD trademark until after the ITC case and existing legal actions have been finalized.

This meant that our company had to rebrand simply to not take on added risk or liability due to Next Level continuing to sell products as AVD.

3. After extensive talks with Smoore, the Carfield’s [sic] have been officially removed from the settlement agreement and allowed to continue operating their business, after agreeing to not sell similar products of the TH2 or M6T. You will notice

⁹⁶ Am. Compl. ¶ 70.

on our website that we ONLY offer the EazyPress design that was created by us in late 2018.

Regarding other companies listed:

About 50% of them have either gone out of business or settled with Smoore to either stop selling or resell CCELL products. We have been told that many companies ran out of money during several rounds of depositions that has been costly due to the amount of legal work required.

The remaining parties that have banded together and sharing legal costs [sic] were highly confident in the beginning that they could win this action by Smoore. After recent talks, they aren't nearly as confident, but still believe the argument around the ceramic heating core isn't a slam dunk for Smoore.

Regardless, the scramble for alternative heating cores is definitely happening at the factory level.

Our group has been contracted to work with a major factory on helping them develop a patented core that removes the need for an absorbent material that is nearing completion and have [sic] been in testing phases for the past month.

The REAL AVD is now AVEO⁹⁷

D. AVID Shenzhen

In addition to AVID HK and AVID USA, the Carfields have another operating entity, Avid (Shenzhen) Technology Co. Ltd. (“AVID Shenzhen”), which Jonathan formed in October 2021 and wholly owns.⁹⁸ Jonathan has described a similarly named company, Shenzhen AVID Technology Group, as “an American-owned consulting firm based in Shenzhen, China” which “provides management of supply

⁹⁷ Am. Compl. ¶ 70.

⁹⁸ D.I. 80 ¶ 13; POB Ex. 17 at CARFIELD 000104.

chain, production, quality controls, and basic R&D led by myself and team [sic].”⁹⁹ AVID Shenzhen was created to replace Zhao’s Entity after the Carfields lost access.¹⁰⁰ Hanna stated in an affidavit that, under Chinese law, AVID Shenzhen “is only allowed to provide services” and may not sell products.¹⁰¹ AVID Shenzhen’s employees were previously employed by Zhao’s Entity, and it appears their employment was transferred from Zhao’s Entity to AVID Shenzhen.¹⁰²

On August 24, 2022, Jonathan transferred 100% ownership of AVID Shenzhen to one of his employees, Marilyn Ma, for no consideration.¹⁰³ The Carfields maintain that Ma now owns AVID Shenzhen for the Carfields’ benefit pursuant to an oral understanding.¹⁰⁴ The Carfields “trust Ms. Ma because she was a long-standing employee of [theirs], and [they] believe[] that she shares [the understanding that she owns AVID Shenzhen for the Carfields’ benefit] and controls Avid Shenzhen subject to this understanding.”¹⁰⁵ The Carfields, at least in form,

⁹⁹ POB Ex. 17 at CARFIELD 000104.

¹⁰⁰ H. Carfield Dep. 191.

¹⁰¹ D.I. 81 ¶ 6.

¹⁰² J. Carfield Dep. 200–01; *See* D.I. 81 ¶ 6.

¹⁰³ D.I. 81 ¶ 7; H. Carfield Dep. 192–93; J. Carfield Dep. 53.

¹⁰⁴ D.I. 80 ¶ 15; D.I. 81 ¶ 8; H. Carfield Hr. 113–14.

¹⁰⁵ D.I. 81 ¶ 8.

became consultants for AVID Shenzhen,¹⁰⁶ but at least one document shows that they may still direct the company's operations and its employees.¹⁰⁷

E. This Litigation Begins.

Next Level filed its original complaint in this action on August 9, 2022, naming as defendants the Carfields and AVID USA (together, the “Defendants”), along with a motion for a temporary restraining order (the “TRO Motion”) and a motion to expedite.¹⁰⁸ The complaint asserted that the Carfields created AVID USA to insulate themselves from an adverse decision in the arbitration proceedings, and that AVID USA is the entity behind the AVEO brand and website. The complaint pressed claims for tortious interference with contractual relations, unjust enrichment, defamation, and violations of the DDTPA, and theories of successor liability or business continuation, alter ego, and conspiracy.¹⁰⁹ The DDTPA claim focused on the June LinkedIn Post and the July Future4200 Post, as well as “Defendants’ unlawful use of the [trademarks licensed in the Distribution Agreement], including without limitation in the use of the domain name avd.com that forwards web traffic to AVID USA’s website instead of NLV’s avd710.com website.”¹¹⁰ Next Level

¹⁰⁶ J. Carfield Hr. 6; H. Carfield Hr. 113.

¹⁰⁷ POB Ex. 28.

¹⁰⁸ D.I. 1; D.I. 2; D.I. 5.

¹⁰⁹ D.I. 1 ¶¶ 62–109.

¹¹⁰ *Id.* ¶ 69.

sought injunctive relief against both AVID USA and the Carfields to prevent them from marketing and selling vaporization device components subject to the Distribution Agreement, using the trademarks subject to the Distribution Agreement, “using the website and domains aveo710.com and avd.com,” and “using avd.com to direct web traffic to aveo710.com.”¹¹¹

On August 12, the Court scheduled a hearing on the motion to expedite and the TRO Motion.¹¹² On or around August 18, before the scheduled hearing, the AVEO website was edited to remove the reference to “AVID USA Technologies,” and it was replaced with “AVEO.”¹¹³ Days later, Jonathan emailed Zach, saying, “It appears you removed and made changes to the website. This is ridiculous. . . . Please do not do anything without telling me moving forward.”¹¹⁴

AVID USA did not appear to defend against the TRO Motion, and the Court entered a temporary restraining order on August 24 enjoining AVID USA and its managers from “(a) continuing to market and sell [vaporization devices and accessories] included in the Distribution Agreement, (b) continuing to use the Trademarks included in the Distribution Agreement, (c) using the website and

¹¹¹ D.I. 2.

¹¹² D.I. 11.

¹¹³ Am. Compl. ¶ 78; D.I. 26 ¶¶ 3–4.

¹¹⁴ POB Ex. 27 at Carfield 000034.

domain avd.com, and (d) using avd.com to direct web traffic to aveo710.com.”¹¹⁵

The TRO Motion was denied as to the Carfields specifically or in their personal capacities, although the order bound AVID USA’s managers, whoever they might be.

That same day, Jonathan transferred ownership of AVID Shenzhen to Ma.¹¹⁶

On September 8, the Court entered a scheduling order contemplating written discovery and depositions before a January 2023 preliminary injunction hearing.¹¹⁷

The Carfields filed a motion to dismiss the complaint on September 19.¹¹⁸ Also on September 19, Next Level served a subpoena duces tecum on Zhao.¹¹⁹ In response, Zhao produced 180 gigabytes of data from a laptop Jonathan used while working with Zhao’s Entity, and which had ongoing access to Jonathan’s email and other cloud services (the “Zhao Production”).¹²⁰

On October 18, 2021, Next Level filed an amended complaint (the “Amended Complaint”) based in part on the documents obtained from the Zhao Production.¹²¹

The Amended Complaint added additional allegations but generally asserted the

¹¹⁵ D.I. 30 ¶ 2.

¹¹⁶ D.I. 81 ¶ 7.

¹¹⁷ D.I. 39.

¹¹⁸ D.I. 40.

¹¹⁹ D.I. 42.

¹²⁰ D.I. 61 at 2–3; D.I. 112 at 5.

¹²¹ D.I. 57.

same claims. The Carfields filed a motion to dismiss the Amended Complaint on October 28, which the parties agreed would be fully briefed by December 9.¹²²

On December 9, the Carfields filed a motion for a protective order that would mandate the return of the documents from the Zhao Production or, alternatively, preclude Next Level from using them on the basis Zhao lacked the authority to access the laptop, its contents, and Jonathan’s accounts.¹²³ On December 23, I issued a letter decision ruling that factual disputes precluded me from determining ownership of the laptop and relevant email accounts, but that Next Level’s counsel’s inability to answer questions about how the laptop was accessed raised sufficiently serious concerns over whether that access was unauthorized.¹²⁴ I allowed Next Level to use the documents for purposes of depositions—which were ongoing at the time—but not for supporting its motion for a preliminary injunction.¹²⁵

Next Level filed its opening brief in support of its motion for a preliminary injunction on January 7, 2023.¹²⁶ Next Level seeks a preliminary injunction against AVID USA and the Carfields based solely on a subset of allegations relating to its

¹²² D.I. 64; D.I. 75.

¹²³ D.I. 96.

¹²⁴ D.I. 112.

¹²⁵ *Id.* at 8–9. The parties later came to an agreement allowing Next Level to use the documents for purposes of the preliminary injunction motion. D.I. 147 at 2.

¹²⁶ POB.

DDTPA claim.¹²⁷ Generally, Next Level argues that the Carfields formed AVID USA to circumvent the Distribution Agreement and any adverse arbitration outcome, that they are using AVID USA to conduct business and unfairly compete against Next Level through the AVEO website, and that they are actual or de facto managers of AVID USA. Specifically, Next Level argues that Defendants have violated the DDTPA by making public statements that: (1) “[Next Level] does not have exclusive distribution rights”; (2) “[Next Level] operated outside of its rights under the Distribution Agreement”; (3) “[Next Level] is in arrears [sic] due to tax debt”; and (4) “[Next Level] has wrongfully used the marks and has created a likelihood of confusion or misunderstanding with respect to the source, sponsorship, approval,

¹²⁷ Though the brief in support of the motion for a preliminary injunction presses both the intentional interference claim and the DDTPA claim, at the hearing, Next Level’s counsel clarified that the basis for the injunction was only the DDTPA claim. Hr. Tr. 138–39 (“THE COURT: Is there anything you wanted to say about intentional interference, or are we focusing on deceptive trade practices? ATTORNEY HEYMAN: We’re focusing on deceptive trade practices in parts [sic] because I think the intentional interference claim is really more of a damage claim than an injunctive relief claim. I’m not saying that we couldn’t get injunctive relief, but I think the more direct route is the deceptive trade practices. Although -- I mean, we absolutely think that the tortious interference is a viable claim here. But I guess I’m saying I think the most suited to injunctive relief would be deceptive trade practices.”).

Additionally, Next Level briefed the merits of its successor liability, alter ego, and conspiracy theories. But, as agreed at argument, these theories are not claims of wrongdoing, but rather are paths to holding a defendant liable for wrongdoing by another. Hr. Tr. 138 (“THE COURT: So then -- because when I was going through the counts, from my perspective, the sources of liability were deceptive trade practices and intentional interference. ATTORNEY HEYMAN: Correct. THE COURT: And then successor liability, alter ego, and conspiracy are sort of routes to that liability. Would you agree with that? ATTORNEY HEYMAN: I would agree with that, Your Honor.”).

affiliation, connection, association, and certification of the products sold by [Next Level].”¹²⁸ Next Level did not brief or argue in support of the aspects of its requested injunction based on any Defendant’s wrongful use of intellectual property licensed to Next Level under the Distribution Agreement.

Next Level also argues that the injunction should extend to the Carfields personally, as they directed and controlled AVID USA at all relevant times. It argues the Carfields are subject to personal jurisdiction in Delaware under 6 *Del. C.* § 18-109.

AVID USA has not appeared in this case and therefore has not contested the preliminary injunction motion, though Next Level has not moved for a default judgment against it. The Carfields filed their opposition to the preliminary injunction motion on January 17.¹²⁹ They primarily argue that they are not actual or de facto managers of AVID USA, and are therefore not subject to service under Section 18-109 and should not be bound by any injunction. They also raise the defense of unclean hands, based on Next Level’s establishing a direct relationship with the First Factory, and its extraction and production of the Zhao Production. The Carfields also incorporated the entirety of their motion to dismiss opening brief, which asserts the additional defense of res judicata based on the argument that Next

¹²⁸ POB at 30–31.

¹²⁹ D.I. 142.

Level should have raised the claims at issue in the arbitration proceeding against AVID HK.

The Court held a hearing on both the motion to dismiss and the preliminary injunction motion on January 27, 2023, at which Jonathan and Hanna testified.¹³⁰ On March 16, the Court issued a bench ruling and order granting in part and denying in part the Carfields' motion to dismiss. In relevant part, that ruling concluded Next Level adequately alleged grounds for asserting personal jurisdiction over the Carfields as managers of AVID USA, and stated a DDTPA claim. This decision resolves the preliminary injunction motion.

II. ANALYSIS

Next Level seeks an injunction against Defendants based on public statements that allegedly constitute violations of the DDTPA. Specifically, Next Level argues that Defendants' conduct violates 6 *Del. C.* § 2532(a)(2), (3), (8), and (12). Section 2532 reads, in relevant part:

¹³⁰ D.I. 166.

- (a) A person engages in a deceptive trade practice when, in the course of a business, vocation, or occupation, that person:
- ...
- (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- ...
- (8) Disparages the goods, services, or business of another by false or misleading representation of fact;
- ...
- (12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.¹³¹

To establish a violation of the DDTPA, “a complainant need not prove competition between the parties or actual confusion or misunderstanding.”¹³²

Section 2533 governs remedies for violations of the DDTPA, and provides “[a] person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable.”¹³³ “Proof of monetary damage, loss of profits, or intent to deceive, is not required” for a plaintiff to obtain an injunction for a violation of the DDTPA.¹³⁴

¹³¹ 6 *Del. C.* § 2532(a).

¹³² *Id.* § 2532(b).

¹³³ *Id.* § 2533.

¹³⁴ *Id.* § 2533(a).

From there, the time-tested preliminary injunction standard applies to claims seeking a preliminary injunction under the DDTPA.¹³⁵ To obtain a preliminary injunction, the movant must demonstrate: (i) a reasonable probability of success on the merits; (ii) a threat of irreparable injury if an injunction is not granted; and (iii) that the balance of the equities favors the issuance of an injunction.¹³⁶ But a preliminary injunction “is not granted lightly,” and “the moving party bears a considerable burden in establishing each of these necessary elements. Nevertheless, ‘[w]hile some showing is required as to each element, there is no steadfast formula for the relative weight’ each of these three factors deserves.”¹³⁷ “A party showing a ‘reasonable probability’ of success must demonstrate ‘that it will prove that it is more likely than not entitled to relief.’”¹³⁸

¹³⁵ *Smash Franchise P’rs, LLC v. Kanda Hldgs., Inc.*, 2020 WL 4692287, at *19–20 (Del. Ch. Aug. 13, 2020) (considering irreparable harm and balancing of the equities for DDTPA claim); *Copi of Del., Inc. v. Kelly*, 1996 WL 633302, at *6 (Del. Ch. Oct. 25, 1996) (providing the traditional preliminary injunction standard for DDTPA counterclaim, but resolving the claim on reasonable probability of success); *Draper Commc’ns, Inc. v. Del. Valley Broads. Ltd. P’ship*, 505 A.2d 1283, 1288–89 (Del. Ch. 1985) (applying irreparable harm and balancing of the equities analysis to claims for common law trademark infringement and violations of the DDTPA); 6 *Del. C.* § 2533(a) (“A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable.”).

¹³⁶ *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 179 (Del. 1986).

¹³⁷ *Fletcher Int’l, Ltd. v. ION Geophysical Corp.*, 2010 WL 1223782, at *3 (Del. Ch. Mar. 24, 2010) (alteration in original) (quoting *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004)).

¹³⁸ *C & J Energy Servs., Inc. v. City of Miami Gen. Emps.’*, 107 A.3d 1049, 1067 (Del. 2014) (quoting *Mitchell Lane Publ’rs*, 2014 WL 4925150, at *3).

This opinion first concludes that Next Level has met its burden to obtain a preliminary injunction against AVID USA. I then consider whether the Carfields are to be bound as AVID USA's managers: this opinion concludes they are.

A. Next Level Has Demonstrated A Preliminary Injunction Against AVID USA Is Warranted.

Next Level is entitled to a preliminary injunction against AVID USA. As a threshold matter, Next Level has sufficiently demonstrated that AVID USA is the operating entity behind the AVEO brand and website. Next Level has also shown a sufficient likelihood that it will prevail on its DDTPA claims against AVID USA, that it is likely to suffer imminent irreparable harm absent a preliminary injunction, and that the equities favor the issuance of an injunction. Because Next Level pressed only its DDTPA claims based on public statements made by or on behalf of AVID USA, only a targeted injunction barring further false or misleading statements concerning Next Level's rights under the Distribution Agreement is warranted.

1. Next Level Has Shown A Reasonable Probability Of Success On The Merits Against AVID USA.

Next Level seeks a preliminary injunction based on the Future4200 Post and the LinkedIn Post as violations of the DDTPA. They both advance AVEO's business interests, but neither post expressly mentions or credits AVID USA. Thus, for Next Level to demonstrate a reasonable probability of success on its injunction against AVID USA, it must show it is reasonably likely that AVID USA is the operating

entity behind the AVEO website and the AVEO brand. The Carfields have argued that AVID USA is an empty shell that never had any operations, and suggest that AVID Shenzhen is the entity behind AVEO.

It is reasonably likely that AVID USA was operational. AVID USA is an existing Delaware LLC.¹³⁹ It has an IRS employment identification number, and it has a bank account set up in its name that the Carfields used for invoicing in November of 2021.¹⁴⁰ A document Zach sent in April 2022 shows that AVID USA has a sales history dating back to December 15, 2021, and that it was making initial contact with prospective customers as early as December 4, 2021.¹⁴¹ The same document shows that AVID USA was taking orders as of April 15, 2022.¹⁴² Additionally, in January 2022, Zach was representing that he was about to close a deal on behalf of AVID USA.¹⁴³

It is also reasonably likely that the Carfields used AVID USA to support and promote the AVEO brand. When the Carfields and Sweedlers were first considering entering into a joint venture, their plan was for AVID USA to distribute AVD-branded products, but by early 2022 the joint venture was used to distribute

¹³⁹ POB Ex. 13.

¹⁴⁰ POB Ex. 48; POB Ex. 57.

¹⁴¹ PRB Ex. 98 at CR0000209–0209.01.

¹⁴² *Id.* at CR0000209.

¹⁴³ POB Ex. 59 at ZS0008916.

AVEO-branded products.¹⁴⁴ In May of 2022, Hanna and Zach were actively working on setting up the AVEO website and purchasing domain names on behalf of AVID USA.¹⁴⁵ These activities continued even after Windsong pulled out of the joint venture on or around June 3, 2022.¹⁴⁶ For example, only four days later, Zach was still actively involved in setting up the AVEO website and was taking direction from Jonathan as to the formatting and content of the website.¹⁴⁷ Additionally, a July 5 email from Jonathan to William attached sales for AVEO, which appears to show uninterrupted AVEO sales dating from the first quarter of 2022 through the second quarter of 2022, with a third quarter forecast.¹⁴⁸ Several accounts listed there also appear in an April 2022 document listing AVID USA's sales.¹⁴⁹

Responses to Next Level filing this litigation and the Court entering the temporary restraining order also support the conclusion that AVID USA is likely behind the AVEO brand. When this litigation began, the AVEO website listed “AVID USA Technologies, LLC” at the bottom of each page: that reference was

¹⁴⁴ See POB Ex. 14; POB Ex. 17 at CARFIELD 000104; POB Ex. 42 at 2022 AVEO Sales Highlights (showing AVEO sales dating back to the first quarter of 2022).

¹⁴⁵ See PRB Ex. 99.

¹⁴⁶ PRB Ex. 101.

¹⁴⁷ PRB Ex. 102.

¹⁴⁸ POB Ex. 42 at 2022 AVEO Sales Highlights.

¹⁴⁹ Compare PRB Ex. 98 at CR0000209–0209.01, with POB Ex. 42 at 2022 AVEO Sales Highlights.

replaced with “AVEO” after the temporary restraining order was entered against AVID USA.¹⁵⁰ The domain “avd.com” also stopped redirecting to aveo710.com at that time.¹⁵¹ The domain “avd.com” now directs to AVID HK’s website, which references AVID HK and lists both “AVEO” and “AVD” under “Our Brands.”¹⁵² Around the same time, Hanna directed various personnel to make changes to the AVEO website, including by “[r]emov[ing] any mention of ‘AVD’” and Advanced Vapor Devices.¹⁵³ Hanna admitted to directing these latter changes, but unconvincingly testified that the changes were made out of caution, not because AVID USA operated the AVEO website or because she believed the Carfields to be bound by the temporary restraining order.¹⁵⁴

The Carfields have been suspiciously equivocal on which entity owns or operates AVEO; their counsel described AVEO as an “entity agnostic brand.”¹⁵⁵ In arguing neither they nor one of their entities owns the AVEO brand, the Carfields

¹⁵⁰ Am. Compl. ¶ 78; D.I. 26 ¶¶ 3–4.

¹⁵¹ See Am. Compl. ¶¶ 73–74.

¹⁵² *Home*, AVID Venture Development, <http://www.avd.com> (last visited Mar. 7, 2023). The website explicitly references “AVID Venture Development” as well as AVID HK. Hanna testified that AVID Venture Development is another name for AVID HK, and Jonathan testified that AVID HK currently does no business. H. Carfield Dep. 118; J. Carfield Dep. 200–01. The website’s “Contact” page lists AVID HK as the entity visitors should contact with questions. *Contact*, AVID Venture Development, <http://www.avd.com/contact> (last visited Mar. 7, 2023).

¹⁵³ POB Ex. 28.

¹⁵⁴ H. Carfield Hr. 118–20.

¹⁵⁵ Hr. Tr. 179.

have invoked or relied on the fact that AVID Shenzhen was transferred to Ma.¹⁵⁶ To be sure, there is evidence that AVID Shenzhen, rather than AVID USA, is behind AVEO. Some documents suggest that AVID Shenzhen had operations as early as January 13, 2022,¹⁵⁷ and others suggest the Carfields were using an AVID Shenzhen bank account for certain business dealings relating to the Second Factory.¹⁵⁸

But the Carfields’ statements to this Court have strained credulity. In support of the proposition that “Avid Shenzhen has entered into distribution agreements,”¹⁵⁹ their answering brief includes misleading cites to agreements entered into by two similarly named but apparently distinct entities, AVID Technology (SZ) Limited¹⁶⁰ and AVID Shenzhen Technologies Ltd.¹⁶¹ The record is replete with references to similarly-named AVID entities that incorporate some version of “Shenzhen” into their name.¹⁶² Hanna affirmed that Chinese law prohibited AVID Shenzhen from

¹⁵⁶ D.I. 80 ¶¶ 5, at 10–12; CAB at 21–22.

¹⁵⁷ *See* POB Ex. 17.

¹⁵⁸ POB Ex. 58.

¹⁵⁹ CAB at 41.

¹⁶⁰ CAB Ex. 89.

¹⁶¹ CAB Ex. 90.

¹⁶² POB Ex. 17 (describing Shenzhen AVID Technology Group as an entity “100% owned by Jonathan Carfield”); CAB Ex. 89 (agreement entered into by AVID Technology (SZ) Limited); CAB Ex. 90 (agreement entered into by AVID Shenzhen Technologies Ltd.); D.I. 80 ¶ 10 (stating that Avid (Shenzhen) Technology Co., Ltd. is involved with the AVEO website); CAB Ex. A (listing Avid Shenzhen Technology as the entity that was transferred to Ma).

selling products, and that AVID Shenzhen never sold any products during the time Jonathan owned the entity, but their counsel stated that the Carfields were at times “taking orders for product and selling product from China through” AVID Shenzhen.¹⁶³

More broadly, the Carfields affirmed that AVID USA has no bank account:¹⁶⁴ but Jonathan said his “understanding is that the Sweedlers . . . opened a bank account,”¹⁶⁵ and both Carfields have directed payments to the AVID USA bank account.¹⁶⁶ The only documents that ostensibly evidence that AVID USA is an empty shell are emails and messages Jonathan sent after this litigation began, and all discuss AVID USA in the context of this litigation.¹⁶⁷ Finally, and significantly, after this litigation began, Jonathan sent Zach a proposed strategy to prevail in this matter:

¹⁶³ Hr. Tr. 180.

¹⁶⁴ D.I. 64 at 18–19.

¹⁶⁵ D.I. 80 ¶ 7.

¹⁶⁶ H. Carfield Hr. 121–22; POB Ex. 32; POB Ex. 33; POB Ex. 34.

¹⁶⁷ POB Ex. 43; POB Ex. 46; POB Ex. 47; PRB Ex. 97.

Hey Zach, I'm assuming [William] has likely given direction to no longer have any interaction with us regarding the lawsuit that next level [sic] tried to file against the Delaware company that never came to existence. Hanna and I have had to respond personally while the Delaware company has simply ignored it since there is nothing to defend and its pretty stupid overall.

However, for our request and motion to dismiss personally, our lawyers have question [sic] regarding the signed operating [sic] that we showed them, but it was never signed and completed. I presume as long as that document is never presented, in the even [sic] you are deposed, which is likely then the case is really a closed issue and we can be done with this.

1) have you or your dad had any discussion or contact with next level [sic] or their legal team?

2) do we agree that we simply ignore that an operating agreement was ever presented at all, so we can simply attempt to dismiss as easily as possible?¹⁶⁸

I read Jonathan's message to propose that the Carfields and Zach should refrain from discussing, or even producing in discovery, the draft AVID USA operating agreement—which Jonathan signed as “Manager”—for tactical litigation gain.¹⁶⁹

On balance, and giving very little weight to the Carfields' statements, I find it sufficiently likely that Next Level will be able to demonstrate that AVID USA was operational and the operating entity behind the AVEO brand and website. Accordingly, it is also reasonably likely that Next Level can show at trial that the June 2022 LinkedIn Post and the July 2022 Future4200 Post promoting AVEO were

¹⁶⁸ PRB Ex. 97.

¹⁶⁹ *Id.* (formatting altered).

made by or on behalf of AVID USA. Both posts explicitly reference AVEO and claim ownership of the AVEO brand at a time when AVID USA was operational. Both posts are written in the first person and claim ownership of the AVD trademark¹⁷⁰ and refer to Next Level as “our” former distributor.¹⁷¹ Both posts also cast AVEO as a mere rebranding of the entity that owned AVD.¹⁷² Despite Hanna claiming ownership of the AVD mark, it was AVID HK that licensed it to Next Level.¹⁷³ And Next Level is AVID HK’s distributor.¹⁷⁴ Thus, Next Level is likely to demonstrate at trial that AVID USA was and is operational, and that AVID USA supported the AVEO brand. I turn to whether Next Level is likely to demonstrate that AVID USA committed DDTPA violations.

¹⁷⁰ Am. Compl. ¶ 67 (“[O]ur US-based distributor didn’t feel the same and has continued using our Registered Trademark (AVD)”); *id.* (“In order to maintain their business, the seller has had to position themselves as the owner and manufacturer of our AVD brand, which couldn’t be farther from the truth.”); *id.* (“As our former distributor continues to utilize OUR trademark and brand, we were forced to rebrand”); *id.* ¶ 70 (“Next Level also continues to sell products under our AVD trademark without our permission”).

¹⁷¹ *Id.* ¶ 67 (referring to Next Level as “our US-based distributor”); *id.* (“As our former distributor continues to utilize OUR trademark and brand, we were forced to rebrand”); *id.* ¶ 70 (“Our former ‘exclusive distributor’ Next Level Ventures”); *id.* (“[W]e have stopped working exclusively with Next Level since September of 2019.”).

¹⁷² *Id.* ¶ 70 (“The REAL AVD is now AVEO”).

¹⁷³ Dist. Agr. § 6.

¹⁷⁴ *Id.* § 1.

2. Next Level Is Likely To Succeed On Its DDTPA Claims Against AVID USA.

To secure a preliminary injunction, Next Level must show it is reasonably likely to succeed on its claim that the LinkedIn Post and the Future4200 Post were violations of the DDTPA. One commits a deceptive trade practice when she carries out certain acts enumerated in the DDTPA, including when that person “[d]isparages the goods, services, or business of another by false or misleading representation of fact.”¹⁷⁵ Next Level argues that Defendants have violated the DDTPA by making public statements that: (1) “that [Next Level] does not have exclusive distribution rights”; (2) that [Next Level] operated outside of its rights under the Distribution Agreement”; (3) “that [Next Level] is in arrears [sic] due to tax debt”; and (4) “that [Next Level] has wrongfully used the marks and has created a likelihood of confusion or misunderstanding with respect to the source, sponsorship, approval, affiliation, connection, association, and certification of the products sold by [Next Level].”¹⁷⁶

The first DDTPA violation appears to be based on the LinkedIn Post and the Future4200 Post, which referred to Next Level as “[o]ur former distributor.”¹⁷⁷ Next Level asserts these posts falsely describe Next Level as a former exclusive

¹⁷⁵ 6 *Del. C.* § 2532(a)(8).

¹⁷⁶ POB at 30–31.

¹⁷⁷ Am. Compl. ¶¶ 67, 70.

distributor, or otherwise imply that Next Level does not have exclusive distribution rights to AVD. These statements are disparaging because they imply that Next Level is violating Hanna’s trademarks by selling AVD-branded products. The record sufficiently shows that the Distribution Agreement is still in effect, meaning Next Level holds exclusive rights to distribute AVD-branded products.¹⁷⁸ Therefore, Next Level has a reasonable likelihood of demonstrating at trial that these statements are false or misleading.

Two additional alleged violations reference language in the LinkedIn Post and the Future4200 Post to the effect that Next Level was selling products using the AVD trademark “without our consent and permission.”¹⁷⁹ The Distribution Agreement granted Next Level an exclusive license “to use all [AVID HK’s] trademarks for the Goods [including ‘AVD.’”¹⁸⁰ Next Level has AVID HK’s consent to distribute AVD-branded products and use the AVD mark in connection with such sales. These statements disparage Next Level’s business because they state that Next Level is continuously infringing on Hanna’s intellectual property. Defendants have offered no opposition on this point, aside from the Carfields stating that they have no affiliation with AVID USA and that the statements are not attributable to the

¹⁷⁸ See, e.g., D.I. 1, Ex. 3 at 26–27.

¹⁷⁹ Am. Compl. ¶¶ 67, 70.

¹⁸⁰ Dist. Agr. § 6.

Carfields. It is reasonably likely that Next Level will demonstrate these statements were disparaging and false or misleading.¹⁸¹

Finally, Next Level points to statements made in the Future4200 Post that Next level is “likely facing an enormous tax debt and penalty that will financially ruin them,” and that they are selling infringing products because “they need to make money to pay off the tax bill that will soon be chasing them down.”¹⁸² Next Level has failed to demonstrate that these statements are untrue or otherwise misleading—and indeed has not argued that they are—and so they cannot constitute the basis for a DDTPA claim.

3. Next Level Has Shown A Sufficient Likelihood Of Immediate And Irreparable Harm Absent An Injunction Against AVID USA.

Irreparable injury is “the *sine qua non* of preliminary injunctive relief.”¹⁸³ “Irreparable injury exists ‘when a later money damage award would involve speculation,’ and irreparable harm to a corporation has been found to include harm

¹⁸¹ Jonathan conceded that he believed the Distribution Agreement granted Next Level the right to use the name AVD. J. Carfield Dep. 142–43 (“So we have -- originally it’s AVD Technologies USA Limited; and then, in February it’s changed from AVD Technologies to Avid Technologies. A. Uh-huh. Q. Why was the name changed? A. Because we knew that part of the argument with Next Level was maintaining the distribution agreement, which gave them rights to AVD trademark. That’s very clear in the distribution agreement.”).

¹⁸² Am. Compl. ¶ 70.

¹⁸³ *Kingsbridge Cap. Grp. v. Dunkin’ Donuts Inc.*, 1989 WL 89449, at *4 (Del. Ch. Aug. 7, 1989).

to a corporation’s reputation, goodwill, customer relationships, and employee morale.”¹⁸⁴ “[T]he danger of losing valuable revenue-generating relationships is a harm that may not be compensable in any manner other than injunctive relief.”¹⁸⁵ Making false or misleading statements in violation of the DDTPA can constitute irreparable harm.¹⁸⁶ Additionally, a plaintiff must demonstrate that an injury “is likely to occur prior to the time by which a final order following trial can be secured.”¹⁸⁷

As the AVEO brand was launching, two separate posts in separate forums promoting AVEO made statements about Next Level that were likely false or misleading. The record demonstrates that the Carfields sought to create a new brand

¹⁸⁴ *In re Shawe & Elting LLC*, 2015 WL 4874733, at *28 (Del. Ch. Aug. 13, 2015) (footnote omitted) (quoting *Hollinger Int’l, Inc. v. Black*, 844 A.2d 1022, 1090 (Del. Ch. 2004), *aff’d*, 872 A.2d 559 (Del. 2005)); *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1341 (Del. Ch. 1987) (“[I]rreparable harm warranting injunctive relief is appropriate in cases where damages would be difficult to assess.”).

¹⁸⁵ *ZRii, LLC v. Wellness Acq. Grp., Inc.*, 2009 WL 2998169, at *13 (Del. Ch. Sept. 21, 2009); *see also Arkema Inc. v. Dow Chem. Co.*, 2010 WL 2334386, at *5 (Del. Ch. May 25, 2010) (“Arkema’s failure to reliably provide its customers orders will strike a blow to its reputation in the marketplace—a reputation it has sought to build over the past decade. Moreover, it would be very difficult, if not impossible, to quantify the extent of the likely harm to Arkema’s goodwill and reputation. Thus, in light of these considerations, I find that Arkema has made a sufficient showing of an imminent threat of irreparable harm to warrant at least partial relief in the form of a TRO.” (footnote omitted)).

¹⁸⁶ *See Smash Franchise P’rs*, 2020 WL 4692287, at *19.

¹⁸⁷ Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.03[b][3], at 14-21 (2d ed. 2022) [hereinafter “Wolfe & Pittenger”]; *In re COVID-Related Restrictions on Religious Servs.*, 285 A.3d 1205, 1225 (Del. Ch. 2022) (“To earn a TRO or a preliminary injunction, therefore, a plaintiff must show imminent irreparable harm.”).

and benefit from the AVD brand at Next Level’s expense, notwithstanding its rights under the Distribution Agreement: disregard for Next Level’s contractual rights was an inherent part of AVID USA’s business strategy since its inception.¹⁸⁸ The Carfields’ conduct once this litigation began reinforces the conclusion that AVID USA habitually disregards Next Level’s rights under the Distribution Agreement.¹⁸⁹ The two statements at issue were made in the months preceding this litigation, and I find it reasonably likely that AVID USA would continue making such statements absent an injunction.

As to whether the harm is irreparable, Next Level argues that it has and is suffering irreparable harm in the form of lost customers and “prospective contractual relationships,” as well as “[t]he risk of eroding [Next Level]’s image in the community and hampering [Next Level]’s effort [sic] to retrain and attract new

¹⁸⁸ See, e.g., POB Ex. 14 (email from Jonathan to prospective joint venture partners explaining that they will create a partnership that with “crush” Next Level); POB Ex. 37 (email from Jonathan sending “talking points” for conversation with Windsong, which includes “[s]topping imported goods with AVD Trademark at U.S. Customs & Border Patrol” under the heading “Stopping Cheng & [Kwon] from further business”); PRB Ex. 102 (message from Jonathan directing Zach to take certain content from Next Level’s website because “[i]t’s our brand, we should simply take whatever content we want from their site”).

¹⁸⁹ See PRB Ex. 97; *supra* notes 150–154.

customers.”¹⁹⁰ This Court has found these sorts of injuries to be irreparable.¹⁹¹ Next Level has shown a sufficient risk of irreparable harm.

4. Next Level’s Requested Injunction Is Overly Broad And Must Be Narrowed.

Next Level has briefed only its claim that Defendants violated the DDTPA by making certain public statements. Yet Next Level has requested an injunction against AVID USA that would prevent it from “(a) continuing to market and sell [vaporization devices and accessories] included in the Distribution Agreement, (b) continuing to use the Trademarks included in the Distribution Agreement, (c) using the website and domain avd.com, and (d) using avd.com to direct web traffic to aveo710.com.”¹⁹²

A preliminary injunction is an “extraordinary remedy” that may be “granted only sparingly and only upon a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently.”¹⁹³ Next Level has not

¹⁹⁰ POB at 36–37.

¹⁹¹ See *P.C. Connection, Inc. v. Synogy Ltd.*, 2021 WL 57016, at *22 (Del. Ch. Jan. 7, 2021); *Arkema*, 2010 WL 2334386, at *5; *ZRii, LLC*, 2009 WL 2998169, at *13; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Price*, 1989 WL 108412, at *4 (Del. Ch. Sept. 13, 1989).

¹⁹² D.I. 30 § 2.

¹⁹³ *Next Level Commc’ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 845 (Del. Ch. 2003) (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

attempted to demonstrate that any of the other acts that would be enjoined by its requested injunction, like continuing to market and distribute Goods covered by the Distribution Agreement, are occurring or are otherwise rooted in wrongful or irreparably harmful conduct. Next Level’s submissions in support of an injunction do not mention those acts at all. It follows that Next Level has failed to satisfy the burden of showing an injunction barring this conduct is necessary or otherwise supported by law.¹⁹⁴ Rather, any preliminary injunction must be tailored to Next Level’s claims that were briefed: false or misleading statements about Next Level’s rights under the Distribution Agreement.¹⁹⁵

5. The Balancing Of The Equities Favors An Injunction.

Finally, the Court must consider whether the potential “harm, discounted by its likelihood, is greater than harm to any other person that the granting of the relief would occasion, discounted by its probability of its occurring.”¹⁹⁶ Here, a targeted injunction preventing AVID USA from making false or misleading statements concerning Next Level’s rights under the Distribution Agreement is likely to cause little harm to AVID USA. On the other hand, public statements that Next Level is

¹⁹⁴ See *Kingsbridge Cap. Grp.*, 1989 WL 89449, at *4 (denying request for preliminary injunction where the movants “have not demonstrated the sine qua non of preliminary injunctive relief: the threat that irreparable harm will befall them between now and trial unless an injunction issues”).

¹⁹⁵ See *Revolution Retail Sys., LLC v. Sentinel Techs., Inc.*, 2015 WL 6611601, at *23–24 (Del. Ch. Oct. 30, 2015).

¹⁹⁶ *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *7 (Del. Ch. Feb. 28, 1990).

continuously selling products it has no right to sell can harm its business and reputation. The balance of equities favors Next Level.

* * * * *

The preliminary injunction standard “is a flexible one, and ‘a strong showing on one element may overcome a weak showing on another element.’”¹⁹⁷ As the forgoing demonstrates, Next Level has met all elements of the preliminary injunction standard. The showing on whether AVID USA operates the AVEO brand and website is porous. But the false statements fall squarely within the type of anticompetitive harm this Court routinely protects against, and AVID USA will suffer little to no harm from being enjoined from making such false statements. On balance, I conclude that a narrowly tailored injunction against AVID USA is warranted.

B. The Injunction Extends To The Carfields.

I will now address Next Level’s claims against the Carfields. The primary point of contention is whether the Carfields are managers of AVID USA and therefore subject to personal jurisdiction in Delaware under Section 18-109, and bound by the injunction against AVID USA. They also argue that a preliminary

¹⁹⁷ *AM Gen. Hldgs. LLC v. Renco Grp., Inc.*, 2012 WL 6681994, at *3 (Del. Ch. Dec. 21, 2012) (quoting *Cantor*, 724 A.2d at 579).

injunction should not issue against them because the requested relief is barred by unclean hands, and because the underlying claims are barred by res judicata.

1. Next Level Has Demonstrated A Sufficient Likelihood That The Carfields Are Subject To Personal Jurisdiction In Delaware Under Section 18-109.

I recently denied the Carfields' motion to dismiss under Court of Chancery Rule 12(b)(2), finding Next Level had made a prima facie showing that personal jurisdiction was appropriate under 6 *Del. C.* § 18-109 because it pled the Carfields are actual or de facto managers of AVID USA, and because the Carfields conceded that due process would be satisfied if Next Level pled they were AVID USA's managers. In opposing the preliminary injunction, the Carfields renewed their argument that they are not AVID USA managers, and renewed their concession that finding they are would satisfy the due process aspect of personal jurisdiction.

On a motion for a preliminary injunction, the Court considers the question of personal jurisdiction part of the question of reasonable likelihood of success on the merits.¹⁹⁸ To demonstrate the Court has personal jurisdiction over a defendant, the plaintiff must first show there is a statutory basis for service, and then that the exercise of personal jurisdiction comports with due process.¹⁹⁹ Section 18-109

¹⁹⁸ See *NOLU Plastics, Inc. v. Ledingham*, 2005 WL 5654418 ¶ 24 (Del. Ch. Dec. 17, 2005); see also *ACI Realty, Inc. v. Rollins Props., Inc.*, 1986 WL 4871, at *1 (Del. Ch. Apr. 18, 1986).

¹⁹⁹ See *In re P3 Health Grp. Hldgs., LLC*, 285 A.3d 143, 146 (Del. Ch. 2022); *PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *4 (Del. Ch. Feb. 26, 2010).

provides that managers of Delaware limited liability companies implicitly consent to personal jurisdiction in Delaware for certain claims.²⁰⁰ Section 18-109 defines a manager as: “(i) . . . a person who is a manager as defined in § 18-101 of this title and (ii) . . . a person, whether or not a member of a limited liability company, who, although not a ‘manager’ as defined in § 18-101 of this title, participates materially in the management of the limited liability company.”²⁰¹ A manager as defined in Section 18-101 is one who is “named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement or similar instrument under which the limited liability company is formed.”²⁰²

When interpreting jurisdictional statutes like Section 18-109, courts rely on the statute’s plain language.²⁰³ Thus, for claims to fall within Section 18-109, they

²⁰⁰ 6 *Del. C.* § 18-109(a).

²⁰¹ *Id.* § 18-109(a)(i)–(ii).

²⁰² *Id.* § 18-101(12).

²⁰³ *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 287–91 (Del. 2016) (rejecting a reading of corporate analogue 10 *Del. C.* § 3114 that limits service to claims relating to a corporation’s internal affairs and embracing a plain language interpretation of Section 3114); *Metro Storage Int’l LLC v. Harron*, 2019 WL 3282613, at *8 (Del. Ch. July 19, 2019) (applying plain meaning interpretation of Section 18-109); *see also Yu v. GSM Nation, LLC*, 2018 WL 2272708, at *10 (Del. Super. Apr. 24, 2018) (“In light of the General Assembly’s decision to write 6 *Del. C.* § 18–109 more broadly than 10 *Del. C.* § 3114, this conclusion is consistent with the Delaware Supreme Court’s exercise of personal jurisdiction over non-resident directors of Delaware corporations in non-breach of fiduciary duty claims.” (footnote omitted)).

must “relat[e] to the business of the limited liability company” or be “a violation by the manager . . . of a duty to the limited liability company.”²⁰⁴ Consistent with the plain language of the first clause, claims that relate to running an LLC’s day-to-day business can fall within the scope of Section 18-109.²⁰⁵ Because that clause is disjunctive from the second clause relating to managerial breaches, Section 18-109 claims may relate to the business of the limited liability company even if they do not allege breaches of fiduciary duty or relate to the LLC’s internal affairs.²⁰⁶

To be sure, earlier decisions rejected a plain language interpretation of Section 18-109, and in doing so collapsed the statutory authorization and due process inquiries. *See, e.g., Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *9 (Del. Ch. June 15, 2011), *aff’d*, 38 A.3d 1254 (Del. 2012). Those cases feared a plain language interpretation of Section 18-109 could result in “an unconstitutionally broad application of” the statute. *Id.* So instead, they relied on a three-part test drawn from this Court’s decision in *Assist Stock Management L.L.C. v. Rosheim*, 753 A.2d 974 (Del. Ch. 2000). *Id.* Those cases applied the same reasoning employed in *Hana Ranch, Inc. v. Lent*, which similarly interpreted 10 *Del. C.* § 3114 more narrowly than the plain meaning would suggest to avoid a constitutional infraction. 424 A.2d 28, 30–31 (Del. Ch. 2018), *abrogated by Hazout*, 134 A.3d 274. But in *Hazout v. Tsang Mun Ting*, our Supreme Court rejected *Hana Ranch*’s interpretation of Section 3114. 134 A.3d at 284–91. Instead, the Supreme Court explained that a plain language interpretation would be more consistent with a court’s duty to “giv[e] effect to our General Assembly’s enactments,” and that the minimum contacts analysis should be used “to ensure that the statute is not used in a situationally inappropriate manner.” *Id.* at 287, 291. In my view, the same logic requires interpreting Section 18-109 according to its plain meaning.

²⁰⁴ 6 *Del. C.* § 18-109(a).

²⁰⁵ *Cf. VTB Bank v. Navitron Projects Corp.*, 2014 WL 1691250, at *4 (Del. Ch. Apr. 28, 2014); *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *8 (Del. Ch. Dec. 1, 2009) (finding claims fell outside the scope of Section 18-109 because they did not “relate to the rights, duties and responsibilities Ho owes to Finance, or in any other way to the internal business affairs of Finance or to the running of Finance’s day-to-day operations”).

²⁰⁶ *See* 6 *Del. C.* § 18-109(a) (allowing for service for claims “involving or relating to the business of the limited liability company”); *Hazout*, 134 A.3d at 287–91 (rejecting a

Even if a claim falls within the plain meaning of Section 18-109, the defendant is not subject to personal jurisdiction unless the exercise of personal jurisdiction comports with due process.²⁰⁷ This inquiry is particularly important for claims that do not relate to the LLC’s internal affairs, which more readily support a due process analysis.²⁰⁸ For the exercise of personal jurisdiction to comport with due process, “the nonresident defendant’s contacts with the forum must rise to such a level that it should ‘reasonably anticipate’ being required to defend itself in Delaware’s courts.”²⁰⁹ “The focus of this inquiry is whether [the defendant] engaged in sufficient ‘minimum contacts’ with Delaware to require it to defend itself in the courts of this State consistent with the traditional notions of fair play and justice.”²¹⁰

reading of corporate analogue Section 3114 that limits service to claims relating to a corporation’s internal affairs, embracing a plain language interpretation of 10 *Del. C.* § 3114, and explaining that a separate due process inquiry is the appropriate manner to “police” concerns that the statute may reach too far); *see Yu*, 2018 WL 2272708, at *10 (“In light of the General Assembly’s decision to write 6 Del C. § 18–109 more broadly than 10 *Del. C.* § 3114, this conclusion is consistent with the Delaware Supreme Court’s exercise of personal jurisdiction over non-resident directors of Delaware corporations in non-breach of fiduciary duty claims.”).

²⁰⁷ *See In re P3 Health Grp.*, 285 A.3d at 157; *PT China*, 2010 WL 761145, at *4.

²⁰⁸ *Hazout*, 134 A.3d at 284–91 (explaining that the proper way to “police” concerns that the exercise of personal jurisdiction could offend due process despite statutory authorization of service is “to use the minimum contacts analysis”); *In re P3 Health Grp.*, 282 A.3d at 1072 (“[W]hen the action relates to a violation by the manager of a fiduciary duty owed to the LLC and its members, then the exercise of jurisdiction under Section 18-109 complies with due process.”).

²⁰⁹ *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 440 (Del. 2005) (citing *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

²¹⁰ *Id.* (citing *Int’l Shoe Co. v. Wash.*, 326 U.S. 310 (1945)).

In other decisions applying Section 18-109, our courts have found that service comported with due process where (1) “the allegations focused on the defendant’s rights, duties, and obligations as the manager of a limited liability company,” (2) “the matter was ‘inextricably bound up in Delaware law,’” and (3) “Delaware has a strong interest in providing a forum for disputes relating to the actions of managers of a limited liability company formed under its law in discharging their managerial functions.”²¹¹ But the Court may also find that due process is satisfied by applying the traditional minimum contacts analysis.²¹²

From there, “[o]nce a defendant is subject to personal jurisdiction under 6 *Del. C.* § 18-109(a) as to certain claims, the Court may exercise personal jurisdiction over the defendant with respect to any claims that are sufficiently related to the cause of action.”²¹³ “Sufficiently related claims are those predicated on the same set of

²¹¹ *PT China*, 2010 WL 761145, at *5 (quoting *Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974, 981 (Del. Ch. 2000)).

²¹² *See Metro Storage*, 2019 WL 3282613, at *26; *Yu*, 2018 WL 2272708, at *10.

²¹³ *Yu*, 2018 WL 2272708, at *11; *see also Lone Pine Res., LP v. Dickey*, 2021 WL 2311954, at *8 (Del. Ch. June 7, 2021) (“The Court of Chancery has held that once jurisdiction is properly obtained over a non-resident director defendant pursuant to [a consent statute], such non-resident director is properly before the Court for any claims that are sufficiently related to the cause of action asserted against such directors in their capacity as directors.” (alteration in original) (internal quotation marks omitted) (quoting *Infinity Invs. Ltd. v. Takefman*, 2000 WL 130622, at *6 (Del. Ch. Jan. 28, 2000))).

facts.”²¹⁴ This is so even where only some of the claims meet the plain meaning of Section 18-109.²¹⁵

a. Next Level Has Demonstrated There Is A Reasonable Likelihood That The Carfields Are De Facto Managers Of AVID USA.

An acting or de facto manager of an LLC “participates materially in the management of the limited liability company.”²¹⁶ “The plain language of Section 18-109(a)(ii) thus confers the status of an acting manager on an individual who has a significant role in managing an LLC or who plays a significant part in an activity or event that constitutes part of the management of the LLC.”²¹⁷ Managing the day-to-day operations of an LLC renders one a manager for purposes of Section 18-109(a)(ii).²¹⁸

²¹⁴ *Yu*, 2018 WL 2272708, at *11.

²¹⁵ *See Takefman*, 2000 WL 130622, at *6 (“Defendants resisted the preferred stock conversion in their capacity as directors for the alleged purpose of maintaining control of the Company, *i.e.*, to entrench themselves. The fact that defendants might also have resisted the conversion to prevent the dilution of their stock qua stockholders is sufficiently related to the breach of fiduciary duty claim to justify assertion of § 3114 personal jurisdiction over defendants for the tortious interference claim.”).

²¹⁶ 6 *Del. C.* § 109(a).

²¹⁷ *In re P3 Health Grp.*, 285 A.3d at 153.

²¹⁸ *Metro Storage*, 2019 WL 3282613, at *1 (“As president, he managed their day-to-day operations. That conduct satisfies the plain language of the statute.”); *see also Phillips v. Hove*, 2011 WL 4404034, at *22 (Del. Ch. Sept. 22, 2011) (holding the defendant was a manager under Section 18-109(a)(ii) in part because he “took over” the company’s day-to-day operations).

Next Level is reasonably likely to demonstrate that Jonathan is a de facto manager of AVID USA. When provided with a draft operating agreement, Jonathan signed it on behalf of AVID USA, listing his title as “Manager.”²¹⁹ Jonathan testified that he did so because he “did what [he] thought was accurate at the time.”²²⁰ Jonathan directed Zach to file a certificate of amendment to AVID USA’s certificate of formation, which Zach did.²²¹ Later, Jonathan dictated what content should appear on the AVEO website.²²² When “AVID USA Technologies LLC” was removed from the bottom of AVEO’s website, Jonathan told Zach to “[p]lease not do anything without telling [him] moving forward.”²²³ And Jonathan handled incoming invoices to at least some extent.²²⁴ He also appears to have been the primary point of contact for William in his capacity as a lender, and was responsible for developing and presenting plans for repayment.²²⁵

Hanna similarly materially participated in the management of AVID USA. When the AVEO website was being created, Zach answered to Hanna regarding

²¹⁹ POB Ex. 22 at CARFIELD 000204.

²²⁰ J. Carfield Hr. 45.

²²¹ POB Ex. 13 at CARFIELD 000029; J. Carfield Dep. 143.

²²² PRB Ex. 102.

²²³ POB Ex. 27 at CARFIELD 000032.

²²⁴ POB Ex. 32.

²²⁵ POB Ex. 42.

which domain names should be purchased.²²⁶ After the temporary restraining order was entered against AVID USA, Hanna directed various individuals to change certain product and brand references from AVEO's website and elsewhere, including removing "any mention of 'AVD'" and "Advanced Vapor Devices" from "invoices and customer facing marketing material[s]" and packaging, among other things.²²⁷ In giving these instructions, Hanna directed personnel in the areas of marketing, engineering, and other operations. And it was Hanna who made the determination to change the product names.²²⁸

There are additional indicia that both Carfields are de facto managers. When the AVID USA bank account was first set up, Zach notified the Carfields.²²⁹ When a payment was received for an order in February of 2022, Zach asked the Carfields whether the funds should be deposited into the AVID USA bank account.²³⁰ In the spring of 2022, Jonathan and Hanna were both attending regular meetings relating to AVID USA.²³¹ And Zach testified that all of the content on AVEO's website was either written by Jonathan or Hanna, or was otherwise written by someone working

²²⁶ PRB Ex. 99.

²²⁷ POB Ex. 28.

²²⁸ See H. Carfield Dep. 231–36; POB Ex. 28.

²²⁹ POB Ex. 56; POB Ex. 57.

²³⁰ POB Ex. 56.

²³¹ POB Ex. 62; POB Ex. 63; POB Ex. 64.

underneath Jonathan or Hanna.²³² I find that Next Level has demonstrated a reasonable likelihood that the Carfields are de facto managers of AVID USA.²³³

And the claims fall within the plain meaning of Section 18-109 because they relate to AVID USA's business. The DDTPA claim is based entirely on conduct promoting AVEO: the LinkedIn Post was made by the AVEO account and the Future4200 Post concluded with "The REAL AVD is now AVEO."²³⁴ As explained, promoting AVEO and selling AVEO-branded products is reasonably likely to be AVID USA's business. The Carfields are also reasonably likely to control or direct AVID USA's operations, including causing it to make the June and July posts that tell the story of the Carfields and the brand they want to build. Because these claims relate to AVID USA's business, personal jurisdiction is properly secured over the Carfields as de facto managers through Section 18-109.

b. The Carfields Concede Due Process Is Satisfied.

The Carfields' challenge to personal jurisdiction is narrow, focusing exclusively on whether they are de facto managers of AVID USA such that service was proper under Section 18-109. The Carfields explicitly concede that the due

²³² Z. Sweedler Dep. 116–21.

²³³ Because I have found Next Level has adequately established that the Carfields are de facto managers of AVID USA, I need not reach the issue of whether they are actual managers.

²³⁴ Am. Compl. ¶¶ 67, 70.

process prong would be satisfied if, as it has, the Court concludes they are managers of AVID USA.²³⁵ In view of that position, because I have found it is reasonably

²³⁵ D.I. 64 at 30 (“Absent status as a manager of AVID USA, the Carfield Defendants are not subject to personal jurisdiction in Delaware on the facts alleged.”); D.I. 95 at 9 (“Although the Court has jurisdiction over AVID USA as a Delaware limited liability company, it only has jurisdiction over the Carfields if they are (or were) managers of that entity or participated materially in its management . . .”). The Carfields contest the due process prong only by arguing that “[p]ublishing a website or posting on a public forum such as LinkedIn does not purposely avail the author of Delaware law sufficiently to establish personal jurisdiction consistent with the familiar constitutional requirements” only insofar as personal jurisdiction is found “[a]bsent status as a manager of AVID USA.” D.I. 64 at 30–31; *see Ross Hldg. & Mgmt. Co. v. Advance Realty Grp., LLC*, 2010 WL 1838608, at *11 (Del. Ch. Apr. 28, 2010) (reasoning challenges to personal jurisdiction may be waived).

The Carfields’ ties to Delaware are weaker than the fiduciary’s ties in *Hazout*, where the wrongdoing concerned the change of control of a Delaware entity and where contracts reflected the parties’ intention that Delaware would resolve any disputes: here, the claims at issue concern torts generally unrelated to AVID USA’s internal affairs and the Distribution Agreement does not include a Delaware forum selection clause. *Hazout*, 134 A.3d at 284, 292–93; Dist. Agr. § 30 (providing for arbitration of disputes arising out of or relating to the Distribution Agreement). Still, “by becoming [managers] of a Delaware [LLC], the [Carfields] purposefully availed [themselves] of certain duties and protections under our law,” and the claims against them “involve [their] actions in [their] official capacity.” *Hazout*, 134 A.3d at 292–93; *see Yu*, 2018 WL 2272708, at *11 (holding the exercise of personal jurisdiction was consistent with the Due Process Clause where fraudulently transferring money was a part of a scheme to defraud and which “[i]f proven, . . . would be in contradiction to [the defendant’s] obligations as a manager of a Delaware limited liability company and traditional notions of justice and fair play require the Court to hold [the defendant] accountable for misusing his position”); *see also In re P3 Health Grp.*, 285 A.3d at 158 (“When Mathur involved himself in the planning, negotiation, and execution of the merger, he took actions on behalf of the Company that were akin to what formal managers would do. By doing so, he subjected himself to suit in the courts of Delaware for claims relating to his actions.”); *VTB Bank*, 2014 WL 1691250, at *4 (reasoning the due process inquiry is satisfied where the claims at issue “relate to the ‘rights, duties and responsibilities’ that the manager owes to the company or to the manager’s involvement in the company’s ‘internal business affairs’ or ‘day-to-day operations’” (quoting *Vichi*, 2009 WL 4345724, at *8); *cf. Vichi*, 2009 WL 4345724, at *8 (reasoning the due process inquiry was not satisfied because “[n]one of these counts relate to the rights, duties and responsibilities Ho owes to Finance, or in any other way to the

likely that the Carfields are de facto managers of AVID USA, they have consented to personal jurisdiction in Delaware for purposes of this motion.

2. The Carfields' Arguments Against Issuing The Injunction Fail.

Because it is reasonably likely that the Carfields are de facto managers of AVID USA, they are bound by the injunction against AVID USA pursuant to Court of Chancery Rule 65(d). Still, the Carfields make several arguments relating to why the injunction should not issue against them, both in the injunction briefing and by,

internal business affairs of Finance or to the running of Finance's day-to-day operations"). Additionally, "Delaware has a powerful interest of its own in preventing the entities that it charters from being used as vehicles for fraud," and its "legitimacy as a chartering jurisdiction depends on it." *NACCO Indus., Inc. v. Applicia Inc.*, 997 A.2d 1, 26 (Del. Ch. 2009).

In denying the Carfields' motion to dismiss for lack of personal jurisdiction, I noted that Next Level met its burden with regard to due process by pleading the Carfields directed the formation of AVID USA, a Delaware entity, for purposes of circumventing the Distribution Agreement. *See Terramar Retail Centers, LLC v. Marion #2-Seaport Tr. U/A/D/ June 21, 2002*, 2017 WL 3575712, at *6 (Del. Ch. Aug. 18, 2017). With the benefit of discovery, Next Level has not shown it is reasonably likely that AVID USA was created for that tortious purpose. AVID USA was created on September 23, 2021. *Z. Sweedler* Dep. 139–41; POB Ex. 13 at CARFIELD 000028. Between August and October 2021, Jonathan and Zhao's Entity were attempting to cause Next Level to terminate the Distribution Agreement. CAB Ex. 77; CAB Ex. 79; POB Ex. 12A; POB Ex. 60 at ZS0006372 (explaining the Carfields and the Sweedlers' "goal was to have inventory stateside prepped for order fulfillment come October 9 (The day after Next Level termination [sic] is complete)"); POB Ex. 7 at NLV00259–0260; CAB Ex. 79 (giving Next Level until October 8, 2021, to pay the outstanding balance). The December 30 draft term sheet for the joint venture specified that "[t]he business of the JV will commence upon either the termination and/or expiration of the Exclusive Distribution Agreement with Next Level." POB Ex. 16 § 1. These facts support the inference that at the time AVID USA was created, Jonathan intended to compete free of the Distribution Agreement, not despite it.

confoundingly, incorporating their brief in support of their motion to dismiss. I will address those arguments that remain after my ruling on the motion to dismiss.

The Carfields make three arguments on the merits. First, they argue that the statements at issue are not attributable to them. But, as explained, both the LinkedIn Post and the Future4200 Post are reasonably attributable to AVID USA, and the Carfields were de facto managers of AVID USA.

Second, the Carfields assert Next Level's claims are precluded by the doctrine of res judicata. In ruling on the motion to dismiss, I held that res judicata could not apply because there is no indication that Next Level knew or should have known of the conduct underlying its claims until after the arbitration concluded. The Carfields have pointed to no documents or testimony indicating that Next Level knew of its claims sooner, and so res judicata does not bar the claims at issue on this motion.²³⁶

And third, the Carfields attempt to recast the DDTPA claims as libel claims over which this Court would lack jurisdiction. Not so. Next Level has pled, and is reasonably likely to prove at trial, a violation of the DDTPA.²³⁷ Claims brought

²³⁶ *RBC Cap. Mkts., LLC v. Educ. Loan Tr. IV*, 87 A.3d 632, 645–46 (Del. 2014); *see also LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 194–95 (Del. 2009).

²³⁷ D.I. 182; *see supra* Section II.A.2.

under the DDTPA are statutory and this Court may issue injunctive relief as a remedy.²³⁸

The Carfields also argue that Next Level will not suffer irreparable harm absent an injunction because, they suggest, Next Level has made more money by cutting out the Carfields and establishing direct relationships with factories. This speculation as to Next Level's broader strategy bears no relationship to the harm false statements about Next Level might cause. Regardless, the Carfields provide no evidence that Next Level is making more money than it was before or that it otherwise has suffered no financial harm. And Next Level is not obliged to prove monetary damage or lost profits to obtain an injunction for violation of the DDTPA.²³⁹

Finally, the Carfields argue that the equities weigh strongly in favor of denying the injunction. They generally argue that because Next Level has obviated the need for AVID HK to broker orders from the factories, they have had to build a new business from scratch and that any injunction should be viewed as an attempt "to restrain the Carfields from any form of competition."²⁴⁰ I disagree. Any injunction

²³⁸ See 6 Del. C. § 2533(a); *Smash Franchise P'rs*, 2020 WL 4692287, at *20 (granting request for preliminary injunction where plaintiff sufficiently pled violations of the DDTPA based on factually untrue statements).

²³⁹ See 6 Del. C. § 2533(a).

²⁴⁰ CAB at 49–50.

prohibiting false and misleading statements concerning Next Level’s rights under the Distribution Agreement does not endanger any legitimate competition by the Carfields.

The Carfields also press the affirmative defense of unclean hands. That doctrine “applies the maxim of equity that ‘[h]e who comes into equity must come with clean hands.’”²⁴¹ “Under the doctrine, the Court will refuse equitable relief ‘in circumstances where the litigant’s own acts offend the very sense of equity to which he appeals.’”²⁴² “The question raised by a plea of unclean hands is whether the plaintiff’s conduct is so offensive to the integrity of the court that his claims should be denied, regardless of their merit.”²⁴³ For unclean hands to apply, “the improper conduct must relate directly to the underlying litigation” and “the inequitable conduct must have an ‘immediate and necessary’ relation to the claims under which relief is sought.”²⁴⁴ “The timing of the alleged misconduct plays an important role

²⁴¹ *Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461, 484 (Del. Ch. 2022) (alteration in original) (quoting 1 John Norton Pomeroy, *Pomeroy’s Equity Jurisprudence* § 397, at 737 (4th ed. 1918)).

²⁴² *Wagamon v. Dolan*, 2013 WL 1023884, at *2 n.19 (Del. Ch. Mar. 15, 2013) (quoting *Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 522 (Del. Ch. 1998)).

²⁴³ *Gallagher v. Holcomb & Salter*, 1991 WL 158969, at *4 (Del. Ch. Aug. 16, 1991).

²⁴⁴ *Nakahara*, 718 A.2d at 523; *Claros Diagnostics, Inc. S’holders Representative Comm. v. OPKO Health, Inc.*, 2020 WL 829361, at *13 (Del. Ch. Feb. 19, 2020) (“The doctrine, therefore, only applies where there exists a close nexus between the wrongdoing of the plaintiff and the relief he seeks.”); 2 John Norton Pomeroy, *Pomeroy’s Equity Jurisprudence* § 399, at 97 (5th ed. 1941) (“The dirt on [the complainant’s] hands must be his bad conduct in the transaction complained of.”).

in determining whether the inequitable acts preclude relief; and the Court may therefore decline to apply unclean hands when the conduct occurs subsequent to the plaintiff's cause of action."²⁴⁵

The Carfields assert an unclean hands defense on the grounds that Next Level colluded with Zhao to cut AVID HK out of the enterprise, and then to disadvantage the Carfields in arbitration and this litigation. First, they argue that Next Level "coopted the payment processor within the overall enterprise, and its agent Mr. Zhao, and circumvented [AVID HK] to establish a direct relationship with [the First Factory]."²⁴⁶ Second, they argue that "[a]fter Next Level initiated an arbitration against [AVID HK], it appears to have used Mr. Zhao to claim ownership of [Zhao's Entity] (and even [AVID HK] . . .) and used him to induce [AVID HK]'s counsel to stand down."²⁴⁷ And third, they insist Next Level wrongfully obtained documents

²⁴⁵ *Mangano v. Pericor Therapeutics*, 2009 WL 4345149, at *8 (Del. Ch. Dec. 1, 2009); *Venture First L.P. v. DeKovacsy*, 1990 WL 186458, at *2 (Del. Ch. Oct. 19, 1990) (reasoning that the assertion of unclean hands was "without merit" because "the improper acts occurred after the transaction which is the gravamen of this suit (the removal of defendants) had been completed"); *Walter v. Walter*, 136 A.2d 202, 207 (Del. 1957) ("[T]he subsequent misconduct of the [plaintiff] is irrelevant to the enforcement of the agreement. Relief cannot be denied to plaintiff because of misconduct not affecting the agreement."); *Wolfe & Pittenger* § 15.08[c], at 15-106 ("The timing of allegedly improper conduct is also a crucial factor in assessing the degree of relation between such conduct and the issues in a suit.").

²⁴⁶ CAB at 32–33.

²⁴⁷ *Id.* at 33.

from Jonathan’s laptop and then waited two weeks to produce those documents to the Carfields.

All those actions lack the “immediate and necessary” relationship to Next Level’s claims required to support an unclean hands defense.²⁴⁸ The transactions underpinning injunctive relief are the public posts in June and July of 2022. Even assuming Next Level purchasing Zhao’s Entity’s accounts receivable was wrongful, it bears at best a tenuous and indirect connection to these posts; Next Level purchased those accounts and established a direct relationship with the First Factory because it claimed AVID HK breached the Distribution Agreement, and the posts concerned Next Level’s rights under that same agreement. This falls short of the requisite “close nexus” between Next Level’s allegedly wrongful act and the claims before the Court.²⁴⁹ The remaining conduct relates only to discovery in this action. This conduct has even less of a connection to the underlying transaction and occurred after the transaction at issue, which demonstrates the lack of a direct relationship.²⁵⁰ Accordingly, the Carfields’ unclean hands defense fails.

An injunction against the Carfields is appropriate. Next Level has demonstrated a reasonable likelihood of establishing that the Carfields are managers

²⁴⁸ See *Kousi v. Sugahara*, 1991 WL 248408, at *3 (Del. Ch. Nov. 21, 1991).

²⁴⁹ *OPKO Health*, 2020 WL 829361, at *13.

²⁵⁰ See *supra* note 245.

of AVID USA and used that position to wrongfully compete against Next Level. Next Level is reasonably likely to succeed on its DDTPA claims. The Carfields' defense of res judicata fails because there is no indication that Next Level could have brought the claims at issue prior to the arbitration proceedings' conclusion, and their unclean hands defense fails because the allegedly wrongful conduct lacks the requisite relationship to the underlying transactions.

D. Next Level's Request For Adverse Inferences

As a final matter, Next Level's reply brief presents a request for an adverse inference sanction against the Carfields for failing to meet their discovery obligations. This is based on the Court's December 23, 2022, letter ruling regarding certain discovery motions, which stated that the Carfields will face adverse inferences if they fail to comply with their discovery obligations.²⁵¹ Next Level argues the Carfields have failed to produce "thousands" of documents, stating that those documents were produced by other parties but not the Carfields.²⁵² While it remains true that the Carfields may subject themselves to adverse inferences if they fail to comply with their discovery obligations, a reply brief is not the place to make

²⁵¹ D.I. 112 at 8 n.32 ("Of course, by then, the Carfields must have met their discovery obligations or face adverse inferences.").

²⁵² PRB at 29–30.

such a request.²⁵³ Next Level’s request for an adverse inference sanction is denied without prejudice.

III. CONCLUSION

Next Level’s motion for a preliminary injunction is **GRANTED IN PART** and **DENIED IN PART**. The parties shall submit a stipulated revised proposed order providing for a preliminary injunction consistent with this decision within twenty days.

²⁵³ *Keen-Wik Ass’n v. Campisi*, 2020 WL 6162957, at *6 n.53 (Del. Ch. Oct. 19, 2020) (“Generally, arguments are waived if presented for the first time in a reply brief.”).