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OF THE
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RE: *Rick Scott v. E.H. Fortitude, Inc., et al.,*
C.A. No. 2022-0933-LWW

Dear Counsel,

I write regarding the plaintiff's Motion for Reargument on Count I of the Verified Complaint (the "Motion").[1] Count I sought declaratory relief regarding purported defaults on obligations to repay promissory notes that came due in 2014. In a March 3, 2023 bench ruling, I dismissed Count I as time barred.[2] The plaintiff

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[1] Pl.'s Mot. for Reargument on Count I of the Verified Compl. (Dkt. 61) ("Pl.'s Mot.").

[2] Tr. of March 3, 2023 Ruling Regarding Defs.' Mot. to Dismiss (Dkt. 67) ("Bench Ruling Tr."); *see also* Dkt. 68.

asks me to reconsider, arguing that my decision was based on a flawed premise that the plaintiff "actually seeks to collect on a debt" and on a misapplication of Texas law. For the reasons explained below, I conclude that the plaintiff has failed to assert valid grounds for reargument.

I. RELEVANT BACKGROUND

Cat Island L.L.C. (the "Company") is a Delaware limited liability company formed in 2006 to develop a luxury golf resort in the Bahamas.[3] Its members are plaintiff Rick Scott and defendants Billy Cagle and E.H. Fortitude, Inc. ("Fortitude").[4] Its managers are Scott and Fortitude.[5]

In 2009, Scott, Cagle, and Fortitude "decided to restructure the Company's capital structure."[6] The Company's $30 million of outstanding debt owed to Scott was reclassified as equity contributions, with $10 million coming from each member. Cagle and Fortitude funded their contributions through loans from Scott; they "executed promissory notes payable to the order of Scott" and "a security agreement, pledging their Series A membership units in the Company as collateral

[3] Verified Compl. for Breach of the Co.'s Operating Agreement, Breach of Fiduciary Duty, and Declaratory Relief (Dkt. 1) ("Compl") ¶¶ 1, 19.

[4] *Id.* ¶¶ 18, 20, 22.

[5] *Id.* ¶¶ 18, 20.

[6] *Id.* ¶ 3.

for their respective loans."[7] The security agreements allegedly "empowered Scott to take immediate possession of the collateral in the event of default."[8] Cagle and Fortitude each executed a Membership Certificate Power that authorized Scott to "take such steps as may be necessary to endorse or otherwise transfer" their Series A membership units to himself if they defaulted.[9]

Fortitude and Cagle defaulted in 2014 when the notes matured.[10] Rather than attempt to collect on the notes, Scott says the parties "engaged in a multiyear process to renegotiate the terms of the debt and the Company's capital structure."[11]

On October 13, 2022—eight years after the notes came due and thirteen years after their execution—Scott sent Cagle and Fortitude notices of default and a proposal to accept their membership interests in satisfaction of the notes.[12] Scott then executed an Assignment and Amendment Agreement on behalf of himself—and purportedly on behalf of Fortitude and Cagle, based on the powers of attorney

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[7] *Id.* ¶¶ 50-51, 90; *see* Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss (Dkt. 35) ("Pl.'s Answering Br.") Exs. B & C (together, the "Notes").

[8] Compl. ¶ 51; Pl.'s Answering Br. Exs. D & E.

[9] Compl. ¶ 52; *see* Pl.'s Answering Br. Exs. F & G (giving Scott the power of attorney to "make and take such actions as are necessary to transfer the Series A Membership Units and shall continue until the [Notes have] been paid in full").

[10] Compl. ¶ 53; *see* Notes at 1.

[11] Compl. ¶¶ 5, 53; *see also* Pl.'s Mot. ¶ 10.

[12] Compl. ¶¶ 58-59; *see* Pl.'s Answering Br. 14.

granted to him in the Membership Certificate Powers.[13] Scott believes that the Assignment and Amendment Agreement effectively transferred Fortitude and Cagle's Series A membership units to him.[14]

On October 17, Scott filed a Verified Complaint in this court that advanced five claims.[15] Count I is titled "Declaratory Relief—Default of Promissory Note" and is brought against Fortitude and Cagle.[16] As relief for Count I, Scott seeks declarations that (1) "Fortitude and Cagle each defaulted on their $10 million loans owed to Scott"; (2) "Scott lawfully took possession of Fortitude's and Cagle's membership interests in the Company in compliance with the [Company's] Operating Agreement, each Security Agreement and Membership Certificate Power, and applicable law"; and that (3) "Scott is the sole Series A Member of the Company."[17]

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[13] Compl. ¶¶ 58-59; Pl.'s Answering Br. Exs. F-G & K.

[14] *See* Pl.'s Answering Br. 14-15.

[15] The Complaint includes five counts: two declaratory judgment claims, a breach of contract claim, a breach of fiduciary duty claim, and a wrongful dissociation claim. *See* Compl. ¶¶ 88-130.

[16] *See id.* ¶¶ 88-98.

[17] *Id.* ¶ 98.

On November 8, the defendants filed a partial motion to dismiss.[18] Relevant to the Motion, they argued that Count I should be dismissed as time barred under Texas law, which governs the notes. Specifically, the defendants maintained that under Section 3.118(a) of the Texas Business and Commerce Code, "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note."[19] The plaintiff's attempt to enforce the notes and seize the underlying collateral over eight years after they came due exceeded that period.

Scott did not dispute that Texas law governs the notes but he disagreed that his claim fell within the statute of limitations in the Texas statute.[20] Disregarding the very title of Count I and his explicit request for a declaration that Fortitude and Cagle were in default,[21] Scott argued that he was not pursuing an "action to enforce the obligation of a party to pay a note."[22] Rather, he insisted that he was "seek[ing]

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[18] *See* Defs.' Opening Br. in Supp. of Their Partial Mot. to Dismiss (Dkt. 29) ("Defs.' Opening MTD Br.") at 7-8.

[19] *Id.* at 8.

[20] Pl.'s Answering Br. 15-16 (arguing that his declaratory judgment claim "accrued when the Assignment and Amendment Agreement was executed four days before Scott filed the Complaint" and that the claim is not an "'action to enforce' payment of the Promissory Notes").

[21] *See supra* note 16 and accompanying text.

[22] Pl.'s Answering Br. 15 (quoting Tex. Bus. & Com. Code § 3.118(a)).

a declaratory judgment that he is the sole Series A Member of the Company" under the Assignment and Amendment Agreement.[23]

Although Scott's recasting was clever, I ultimately disagreed that Count I was timely brought and dismissed it in a March 3, 2023 bench ruling.[24] I determined that Scott's attempt to distinguish between an action to enforce the notes and an action concerning foreclosure on the underlying collateral was immaterial in these circumstances.[25] I rejected Scott's argument that he was permitted by Texas law to take possession of the collateral at any time without judicial process.[26] And I

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[23] *Id.* at 15-16.

[24] Dkts. 54, 67-68.

[25] Bench Ruling Tr. 21 ("Scott seeks this Court's affirmation that his actions were legally valid. But enforcements of the note through the collection of collateral serves the same purpose as collecting on the primary loan. It is intended to make Scott whole.").

[26] *Id.* at 22. Specifically, I disagreed with Scott's argument that the parties' contractual arrangements gave Scott the power to unilaterally foreclose on the collateral at any time. *See* Pl.'s Answering Br. 18. In doing so, I cited to the Texas Supreme Court's decision in *Godoy v. Wells Fargo Bank*, which explains that the freedom of contract "does not include the authority to unqualifiedly waive statute of limitations" and that "[b]lanket pre-dispute waivers of all statutes of limitations are unenforceable, but waivers of a particular limitations period for a defined and reasonable amount of time may be enforced." 575 S.W.3d 531, 538 (Tex. 2019). Scott now contends that my reliance on *Godoy* "misconstrued the Membership Certificate Powers as an attempt to waive the statute of limitations." Pl.'s Mot. ¶ 25. The bench ruling says no such thing; it observes that Scott's view of the Membership Certificate Powers as granting him the right to foreclose on the collateral at any time is unsupported. *See* Bench Ruling Tr. 22-23. To the extent Scott avers that he seeks relief under the Membership Certificate Powers rather than the notes, the result would be the same under either Texas or Delaware law. *See* Tex. Civ. Prac. & Remedies Code Ann. § 16.051 ("Every action for which there is no express limitations period . . . must be brought not later than four years after the day the cause of action

concluded that Scott's theory of fraudulent concealment was unsupported by the allegations in the Complaint—not to mention insufficient under Rule 9(b).[27] I generally observed that:

> At bottom, Scott is asking this Court to order the seizure of collateral that secures promises made in a note. That note came due in 2014. He had years to attempt to obtain relief. He waited far too long, beyond what the statute of limitations allows, to do so. And because of that, I am going to dismiss this claim as time barred.[28]

The motion to dismiss was denied as to Count IV of the Complaint, which was pleaded in the alternative to Count I and asks the court to order "the immediate sale of Fortitude and Cagle's Series A Units" as a remedy for wrongful dissociation.[29]

On March 10, Scott moved for reargument on Count I.[30] The defendants opposed that Motion on March 17.[31] Trial on the remaining claims is scheduled for July 5 to 7, 2023.

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accrues"); 10 *Del. C.* § 8109 ("When a cause of action arises from a promissory note, bill of exchange, or an acknowledgment under the hand of the party of a subsisting demand, the action may be commenced at any time within 6 years from the accruing of such cause of action.").

[27] Bench Ruling Tr. 23; *see* Del. Ch. R. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.").

[28] Bench Ruling Tr. 24.

[29] Compl. ¶¶ 115-23.

[30] *See* Pl.'s Mot. ¶ 4.

[31] Dkt. 66.

II. ANALYSIS

"The proper purpose of a Rule 59(f) motion for reargument is to request the trial court to reconsider whether it overlooked an applicable legal precedent or misapprehended the law or the facts in such a way as to affect the outcome of the case, not to raise new issues."[32] "The movant bears a 'heavy burden.'"[33] "To succeed and obtain reargument, the moving party must demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law."[34] A Rule 59(f) motion is "not a mechanism to present new arguments or to relitigate claims already considered by the Court."[35]

None of Scott's averred grounds for reargument meet this high bar.

First, Scott argues that my bench ruling "conflates Texas law's distinction between debt collection pursuant to judicial process and foreclosure on collateral

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[32] *Chrin v. Ibrix Inc.,* 70 A.3d 205, 2012 WL 6737780, at *2 (Del. 2012) (TABLE).

[33] *ITG Brands, LLC v. Reynolds Am., Inc.*, 2022 WL 16825874, at *1 (Del. Ch. Nov. 7, 2022) (quoting *In re ML/EQ Real Est. P'ship Litig*., 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000)); *see also Manti Hldgs., LLC v. Authentix Acq. Co., Inc.* 2019 WL 3814453, at *1 (Del. Ch. Aug. 14, 2019) (observing that motions for reargument are "rarely fruitful").

[34] *Fisk Ventures, LLC v. Segal*, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008) (internal quotation marks omitted), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE).

[35] *Cabela's LLC v. Wellman*, 2018 WL 6680972, at *1 (Del. Ch. Dec. 19, 2018); *see also Quantlab Grp. GP, LLC v. Eames*, 2018 WL 5778445, at *1 (Del. Ch. Nov. 2, 2018) (observing that a motion for reargument will be denied where it seeks to either "rehash old arguments or invent new ones").

through non-judicial means."[36] He refers to the same statutory analysis he presented when opposing the motion to dismiss, arguing that the six-year limitations period in Section 3.118(a) of the Texas statute does not apply to Scott's attempt to collect on the membership interests.[37] I previously considered—and rejected—this position.[38]

Scott also argues that, because his actions occurred "entirely outside of the judicial process," neither the parties' agreements nor Texas law required him to take possession of the collateral securing the notes within otherwise applicable statutes of limitations.[39] He maintains that Section 9.620 of the Texas statute allows a creditor to accept the collateral in full satisfaction of the debtors' obligations through a strict foreclosure proposal.[40] According to Scott, he is "us[ing] non-judicial means to take possession" of the collateral.[41]

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[36] Pl.'s Mot. ¶ 14.

[37] *See id.* ¶ 15; *cf.* Pl.'s Answering Br. 15-19.

[38] *See supra* notes 22-24 and accompanying text.

[39] *See* Pl.'s Mot. ¶¶ 6-9.

[40] *Id.* ¶ 8 (citing Tex. Bus. & Com. Code §§ 9.609, 9.620 9.622, & 9.625).

[41] Pl.'s Mot. ¶ 3. Scott insists that the court's ruling "risks adding unintended creditor requirements to the Texas UCC statutory scheme (including forcing creditors to initiate judicial proceedings) and allowing defaulting debtors unintended financial windfalls." *Id.* Of course, I have no intention of adding requirements to Texas statutes and my ruling should not be construed as doing so. It bears noting that Scott opted to initiate a judicial proceeding in the first place.

This position is dubious. I read the relevant Texas law to provide that a statute of limitations expiring on an action to collect a debt does not bar the lender from using collateral to satisfy the debt if the lender already holds the debtor's personal property as collateral.[42] But Scott is seeking an order stating that the defendants defaulted on the notes and that he lawfully took possession of the collateral. Such relief necessarily requires judicial action. Scott simply waited too long to pursue it.

Next, Scott argues that I erred by "assuming other statutes of limitations apply and in finding that general policy concerns override the plain text of the Texas statutes."[43] Specifically, Scott believes that I improperly referenced other Texas statutory provisions as additional support for the conclusion that Count I is time barred.[44] Scott insists that these statutes are inapt because they apply to lawsuits, and that his declaratory judgment action pertains to a "self-help remedy . . .

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[42] *See Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree Nat'l Bank*, 894 S.W.2d 828, 829-30 (Tex. App. Dallas 1995) (noting that when a lender holds personal property as collateral to guarantee a debt, the running of the statute of limitations on an action to collect personally from the debtor does not bar the right of the lender to use the collateral to satisfy the debt); *but see McBryde v. Curry*, 914 S.W.2d 616, 619 (Tex. App. 1995) (explaining that "when a debt is barred by the statute of limitations, an action to foreclose on the security for the debt is also barred"); *see also* Pl.'s Mot. ¶ 11.

[43] *See* Pl.'s Mot. ¶¶ 21-25.

[44] In particular, he cites to Sections 16.004(a)(3) and 16.051 of the Texas Civil Practice & Remedy Code. *See id.* ¶¶ 21-23.

occur[ing] outside of the judicial system."[45] These arguments were discussed and considered at oral argument.[46] Regardless, the relief Scott seeks requires judicial action.[47]

Finally, Scott asserts that I "misapprehend[ed] Texas law by relying on general policy statements at the expense of the plain text of the statutes."[48] My bench ruling, however, questioned why Scott believed no statute of limitations applied given Texas's "public policy favor[ing] applying statutes of limitations to bar untimely claims."[49] To the extent Scott is arguing that Count I can proceed without regard to any statute of limitations, I have already concluded that such a position is unsupported by Texas law or public policy.[50]

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[45] *Id.* ¶ 23 (quoting *Broadway Nat'l Bank, Tr. of Mary Frances Evers Tr. v. Yates Energy Corp.*, 631 S.W.3d 16, 28 (Tex. 2021)). Notably, the *Broadway* case that Scott relies on concerned a situation where the parties sought "to correct a deed by agreement." *Id.* Scott is not seeking to amicably correct an error in a contract. He is asking this court to declare valid his exercise of a purported contractual right to collect on collateral underlying notes. *See Cosgrove v. Cade*, 468 S.W.3d 32, 39-40 (Tex. 2015) (holding that a seller's contract-based claims were barred because the sellers were "charged with notice" of its rights).

[46] *See* Dkt. 40 at 5, 34, 36-37.

[47] *See supra* notes 22-24, 38-39 and accompanying text.

[48] Pl.'s Mot. ¶ 24.

[49] Bench Ruling Tr. 21.

[50] *Compare* Pl.'s Answering Br. 18 *with* Bench Ruling Tr. 20-22.

III. CONCLUSION

The Motion largely repeats the same arguments Scott made in opposing the motion to dismiss. A motion for reargument that "merely rehashes arguments already made by the parties and considered by the Court when reaching the decision from which reargument is sought" is improper.[51] Further, Scott identifies no misapplication of law that would affect the dismissal of Count I as time barred.[52] Accordingly, the Motion is denied.

Sincerely yours,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor

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[51] *Feuer v. Zuckerberg*, 2021 WL 5174098, at *1 (Del. Ch. Nov. 8, 2021).

[52] *See Jafar v. Vatican Challenge 2017, LLC*, 2022 WL 630371, at *2 (Del. Ch. Mar. 4, 2022) ("Motions for reargument are designed to remedy a situation where the Court has misunderstood a material fact, or misapplied established law, in a way that affected the outcome of a decision.").