IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WILLIAM PRYOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 6884-CS
	)	
IAC/INTERACTIVECORP,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: April 5, 2012
Date Decided: June 7, 2012

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STRINE, Chancellor.

I.

The plaintiff in this case, William Pryor, is a co-founder, the former chief operating officer, and a stockholder of Shoebuy.com, Inc. In 2006, defendant IAC/InterActiveCorp acquired Shoebuy and entered into a "Stockholders' Agreement" with Shoebuy's four founding stockholders (the "Stockholders"). Under that Agreement, the Stockholder with the most number of shares (the "Stockholder Representative") had the right to require IAC to purchase all of the Stockholders' shares under certain circumstances (the "Stockholder Group Put").[1] The Stockholders' Agreement required that, upon exercise of the Stockholder Group Put, IAC purchase these shares at the "Appraisal Value" of Shoebuy.[2] Any dispute relating to the determination of the Appraisal Value, including disputes related to the selection of the "Valuation Firm" that would be the final arbiter of the Appraisal Value, were required to be submitted to arbitration according to the terms and procedures set forth in § 2.5(c) of the Stockholders' Agreement.[3]

In January 2011, Scott Savitz, the Stockholder Representative, exercised the Stockholder Group Put on behalf of the other Stockholders, including Pryor.[4] But, Savitz and IAC could not agree on the Appraisal Value of Shoebuy, so they followed the arbitration procedures set forth in the Stockholders' Agreement. Because Savitz and IAC could not agree on the selection of the Valuation Firm, they first submitted that dispute to

[1] Compl. Ex. A (the "Stockholders' Agreement") § 2.5(a)(ii).
[2] *Id.* § 2.5(a)(v).
[3] *Id.* § 2.5(c).
[4] Compl. ¶ 14.

a jointly selected "Arbitrator," Allan van Gestel of JAMS, who is a retired Massachusetts Superior Court judge.[5] On May 6, 2011, Arbitrator van Gestel issued and delivered by email to Savitz and IAC a written award selecting IAC's proposed Valuation Firm, Houlihan Lokey (the "Firm Selection Award").[6] Subsequently, Savitz and IAC each offered opening and rebuttal submissions to Houlihan Lokey supporting their respective valuations of Shoebuy. On June 24, 2011, Houlihan Lokey issued and emailed its written award in favor of the Appraisal Value proposed by IAC (the "Valuation Award").[7] Additionally, both Awards were sent to IAC and Savitz by courier service shortly after their email delivery.[8]

In Count I of the complaint, Pryor seeks to vacate these two Awards on the grounds that both Arbitrator van Gestel and Houlihan Lokey exceeded their authority by considering and relying upon certain market evidence in violation of the terms of the Stockholders' Agreement.[9] In Counts II and III of the complaint, Pryor brings breach of contract and breach of fiduciary duty claims against IAC for introducing this allegedly impermissible evidence.[10] IAC moves to confirm the two Awards and to dismiss Pryor's claim for vacatur in Count I because Pryor's complaint was not timely served under the statutorily-prescribed period set forth in the Federal Arbitration Act (the "FAA"), and is thus time barred. In addition, IAC moves to dismiss the remaining contract and fiduciary

[5] Stockholders' Agreement § 2.5(c)(i)(B).
[6] Cheah Aff. ¶ 9; Cheah Aff. Ex. H (the Firm Selection Award).
[7] Cheah Aff. ¶ 16; Cheah Aff. Ex. W (the Valuation Award).
[8] *See* Cheah Reply Aff. ¶ 4-5.
[9] *See* Compl. ¶ 33; P. Ans. Br. 9-16.
[10] *See* Compl. ¶¶ 37-40 (breach of contract in Count II), 41-46 (breach of fiduciary duty in Count III).

duty claims in Counts II and III under Rule 12(b)(1) because the terms of the Stockholders' Agreement provide that questions of arbitrability are left in the first instance to the arbitrator, and therefore the court lacks subject matter jurisdiction over them. IAC also argues that the breach of contract claim constitutes an impermissible collateral attack on the Awards and thus should be dismissed for that separate reason.

In this decision, I find for IAC on Count I because Pryor did not serve his motion to vacate within the three-month deadline prescribed in the FAA, and on Counts II and III because the arbitrability of Pryor's claims for breach of contract and fiduciary duty is a matter for the arbitrator, and Pryor may not bypass the arbitrator's contractually delegated authority over questions of arbitrability. I also agree with IAC that the breach of contract claim in Count II fails for the independent reason that it is an impermissible collateral attack on the Awards, the validity of which may only be challenged through the means provided by the FAA. I therefore dismiss Counts I and II with prejudice, and Count III without prejudice to allow Pryor to re-file that Count in the event that the arbitrator determines that the fiduciary duty claim is not arbitrable. I also grant IAC's motion to confirm the Awards.

II.

I first turn to IAC's motion to confirm the Firm Selection Award and the Valuation Award. As a preliminary matter, I must determine whether the FAA or the Delaware Uniform Arbitration Act (the "DUAA") applies. Although in his complaint

Pryor moves to vacate the Awards under the statutory provisions of the DUAA,[11] IAC points out that the FAA presumptively governs where, as here, the agreement providing for arbitration involves interstate commerce.[12] Pryor has not rebutted that presumption by attempting to show that the DUAA applies,[13] and indeed briefed the matter as if the FAA applies, and has failed to assert any argument to the contrary.[14] Thus, I must apply the FAA.

IAC has filed a timely application to confirm the Awards, and the FAA provides that a court "must grant" a timely order to confirm "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]."[15] In order to vacate an arbitration award, the movant must notify the adverse party within the statutorily-prescribed time period. Specifically, the FAA provides that "notice of a motion to vacate, modify, or correct an award *must be served* upon the adverse party or

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[11] *See* Compl. at 12 (moving to vacate under 10 *Del. C.* § 5714(a)).

[12] 9 U.S.C. § 2 (providing that the FAA applies to a "contract evidencing a transaction involving commerce …."). Here, the Stockholders' Agreement involves the rights of security holders of different states. *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) ("Because the LLC Agreement involves interstate commerce, the Federal Arbitration Act [] governs.").

[13] Because the Stockholders' Agreement is an arbitration agreement that predates the July 2009 amendments to the DUAA, the DUAA could otherwise displace the FAA's application to the Stockholders' Agreement in one of two ways, neither of which is satisfied here: the Stockholders' Agreement does not call for arbitration to take place in Delaware, *see Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *4 (Del. Ch. Nov. 13, 2009), and the parties have not "clearly evidence[d] a desire to be bound" by the DUAA either through their contractual language or by their dealings. *Pers. Decisions, Inc. v. Bus. Planning Sys. Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008), *aff'd*, 970 A.2d 256 (Del. 2009) (TABLE); *see also Lefkowitz*, 2009 WL 3806299, at *4.

[14] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

[15] 9 U.S.C. § 9.

his attorney *within three months* after the award is filed or delivered."[16] When a party fails to issue a timely motion to vacate, it "waive[s] any defenses to confirmation that [otherwise] might be asserted."[17] Here, IAC argues that Pryor's complaint, which qualifies as a "notice of [a] motion to vacate,"[18] was served outside the three-month deadline and thus is time barred.[19] I agree.

For his part, Pryor does not address or challenge IAC's persuasive argument that the relevant "end" date for purposes of the three-month deadline is the date when Pryor served his complaint, rather than filed it,[20] and thus Pryor has waived any argument to that effect. Rather, Pryor rests his argument on the notion that the Awards were not "delivered" to him until September 21, 2011 at the earliest, because he did not personally receive a copy of the Valuation Award until then, and thus the statutory period did not commence to run before that date. I reject this position, for the following reasons.

First, it is undisputed that both IAC and Savitz received the Firm Selection Award by email on May 6, 2011,[21] and the Valuation Award by email on June 24, 2011.[22] The

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[16] *Id.* § 12 (emphasis added); *see also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) ("There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.").
[17] *Domino Group, Inc. v. Charlie Parker Mem'l Found.*, 985 F.2d 417, 419 (8th Cir. 1993); *see also Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) ("A party to an arbitration award who fails to comply with the statutory precondition of timely service of notice forfeits the right to judicial review of the award.") (citing *Int'l Bhd. of Elec. Workers, Local Union No. 969 v. Babcock & Wilcox*, 826 F.2d 962, 966 (10th Cir. 1987)).
[18] 9 U.S.C. § 12
[19] The complaint was served on IAC on September 28, 2011. *See* Cheah Aff. Ex. 6.
[20] *See Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 572 (7th Cir. 2007) ("[W]e clarify now and for purposes of future cases that *service* of a motion to vacate is the act that stops the three-month statute of limitations. Unless and until Congress amends § 12 and makes filing the critical date, we will continue to enforce the plain language of the statute.") (emphasis in original).
[21] *See* Cheah Aff. Ex. H.

few courts that have addressed the meaning of the word "delivery" in the statutory context of the FAA have interpreted "delivery" to mean the date of receipt, rather than date of mailing.[23] I need not distinguish between the date of "mailing" and the date of "receipt" in this case, because when something is sent by email the mailing and the receipt occur simultaneously.

Pryor's argument that "legal delivery" means "the placing of the award or a true copy thereof in the mail" – an interpretation which is drawn from a case that involved the application of the procedures of the American Arbitration Association (the "AAA")'s rules for the Resolution of Employment Disputes as in effect in 2005,[24] is not convincing for two reasons. First, the Stockholders' Agreement does not call for the application of the AAA rules for arbitrations related to the determination of the Appraisal Value of Shoebuy. Rather, the Stockholders' Agreement creates two arbitration schemes, each

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[22] *See* Cheah Aff. Ex. W.

[23] *See Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 531 (D.C. Cir. 1989) (interpreting the word "delivery" in the context of the FAA to mean the date of receipt, rather than the date of mailing); *Silicon Power Corp. v. Gen. Elec. Zenith Controls, Inc.*, 2009 WL 1971390, at *5 (E.D. Pa. July 7, 2009) (concluding that "the word 'delivery' is used in [§] 12 of the FAA to mean 'receipt.'"); *Nordahl Dev. Corp. v. Salomon Smith Barney*, 309 F. Supp. 2d 1257, 1269 (D. Or. 2004) (noting that to interpret the word "delivery" as "'receipt' … comports with ordinary meaning"); *Possehl, Inc. v. Shanghai Hia Xing Shipping*, 2001 WL 214234, at *3 (S.D.N.Y. Mar. 1, 2001) (holding that the word delivery as used in § 12 of the FAA "means receipt of the award"); *see also Pfannenstiel v. Merrill Lynch, Pierce, Fenner, & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (where the court assumed that the three-month period began to run when the plaintiff "received" the award (five days after it was issued)).

[24] *See Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 573 (7th Cir. 2007) (arbitration award in an employment dispute was "delivered," and thus commenced the statutory period under the FAA for filing a motion to vacate the award, on the date that the arbitrator placed the award in the mail, rather than on the date that the parties opened the email regarding the award or on the date the parties received the arbitrator's award in the mail, where the parties agreed to arbitrate under certain AAA procedures, and those AAA rules equated "legal delivery" with "placement in the mail").

with its own set of rules and procedures. The first scheme applies to arbitrations related to the Appraisal Value of Shoebuy, the terms of which are provided in § 2.5(c) of the Stockholders' Agreement. The second scheme applies to all other claims subject to arbitration and is governed by the procedures set forth in Article IV of the Stockholders' Agreement. Only arbitrations proceeding under Article IV are to be conducted under the "Commercial Arbitration Rules … then in effect for the AAA."[25] Indeed, the Stockholders' Agreement exempts from Article IV's arbitration procedures "the determination of the Appraisal Value of any Shares," and provides that such determination "shall be governed by the provisions of [§] 2.5(c)" of the Agreement[26] – *i.e.*, the first scheme. In § 2.5(c), the arbitration rules are unspecified.[27] When arbitration rules are unspecified, courts have held that the date of delivery means the date of receipt.[28]

Second, even if the AAA rules did apply, the AAA's Commercial Arbitration Rules in effect since 2009 (the subset of AAA rules that would be implicated here) clearly provide that:

> Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or *electronic service* of the award, or the filing of the award in any other manner that is permitted by law.[29]

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[25] Stockholders' Agreement § 4.3(a).
[26] *Id.* § 4.1(d).
[27] *See id.* § 2.5(c).
[28] *E.g.*, *Silicon Power Corp. v. Gen. Elec. Zenith Controls, Inc.*, 2009 WL 1971390, at *5 (E.D. Pa. July 7, 2009).
[29] Rule 45 of the Commercial Arbitration Rules of the American Arbitration Association (emphasis added).

Thus, electronic service of the Awards would count as "delivery" under the AAA rules applicable to this arbitration, assuming counterfactually that such AAA rules applied. Therefore, under either scheme, the Awards were delivered to Savitz on dates that would render Pryor's complaint outside the three-month window prescribed by the FAA.[30]

The key question, therefore, is whether Savitz as Stockholder Representative was authorized to accept delivery of the Awards on Pryor's behalf. Typically, a stockholder representative is authorized to act on a group of stockholders' behalf as an attorney-in-fact for certain purposes delineated by the relevant agreement. IAC points to a number of cases that stand for this principle, including one that notes that "any judgment by or against the [s]tockholder [r]epresentative binds other stockholders."[31] But, in each of the cases cited by IAC, the agreement appointing the stockholder representative contained provisions conferring broad, express authority on that person to act on behalf of the stockholders for matters arising out of that agreement and designating that person as an attorney-in-fact for certain limited purposes.[32] Here, the Stockholders' Agreement does not contain a general authorizing provision to that effect. Accordingly, I look closer at

[30] In any event, both Awards were sent by courier service to IAC and Savitz as well shortly after the Awards were sent by email. *See* Cheah Aff. Ex. H (Proof of Service); Cheah Reply Aff. ¶¶ 4-5. Pryor's main gripe is that no Award was sent to him personally – whether by email or by ground mail – as opposed to being sent to Savitz, the Stockholder Representative, exclusively.

[31] *Ballenger v. Applied Digital Solutions, Inc.*, 2002 WL 749162, at *11 (Del. Ch. Apr. 24, 2002).

[32] *E.g.*, *id.* at *10 (where the stockholders' representatives had the "full power and authority to represent the [s]tockholders and their successors with respect to all matters arising under [the merger] [a]greement."); *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1173 (Del. Ch. 2009) (where the merger agreement contained a similarly broad contractual provision).

the role of Savitz as Stockholder Representative in the context of the exercise of the Stockholder Group Put as provided for by the terms of the Stockholders' Agreement.

First, § 2.5(a)(ii) states that the "Stockholder Representative … shall have the right *on behalf of all Stockholders* … to require [IAC] to purchase all … of the Shares, which right shall be exercisable by delivery to [IAC] of a written notice from the Stockholder Representative of the intention to consummate such sale … at such times and under such circumstances as set forth below."[33] One of the "times" and "circumstances as set forth below" was the ability to exercise this Stockholder Group Put during the 60-day window following the fourth anniversary of the merger closing, in which case the "price to be paid for each Share pursuant to a Stockholder Group Put exercised pursuant to this paragraph … shall be the Appraisal Value thereof."[34]

Second, § 2.5(a)(ii) goes on to state that "upon written notice by the Stockholder Representative to the other Stockholders …, *all of the Stockholders* … shall be deemed to *have consented to the exercise of the Stockholder Group Put and shall be bound thereby*."[35] Furthermore, in the provisions related to the "Determination of the Appraisal Value" for purposes of the Stockholder Group Put, the Stockholder Representative is given the exclusive role to act on behalf of the other Stockholders in the valuation and arbitration proceedings. For example, the Stockholder Representative is given the authority to select an Appraisal Value for Shoebuy,[36] to agree on an Appraisal Value with

[33] Stockholders' Agreement § 2.5(a)(ii) (emphasis added).
[34] *Id.* §2.5(a)(ii)(A).
[35] *Id.* § 2.5(a)(ii) (emphasis added).
[36] *Id.* § 2.5(c)(i)(A).

IAC,[37] to jointly select (along with IAC) a Valuation Firm,[38] to submit the selection of a Valuation Firm to an Arbitrator,[39] to jointly select the Arbitrator to decide that question,[40] and to present his Appraisal Value to the Valuation Firm.[41] Importantly, only the Stockholder Representative is contractually entitled to receive notice of the Valuation Firm's award.[42] The Valuation Firm's selection of the Appraisal Value "shall be deemed to be the Appraisal Value … and shall be final for purposes hereof."[43]

Taken together, these contractual provisions make clear that the determination of the Appraisal Value, and the contemplated arbitration procedure in furtherance of that determination, are part and parcel of the delegated agency to the Stockholder Representative to exercise the Stockholder Group Put "on behalf of all Stockholders,"[44] which requires that the selected Appraisal Value be paid out by IAC to the Stockholders. And, Pryor is deemed to have "consented" to this exercise by the Stockholder Representative and is "bound" by the Stockholder Representative's actions.[45] Critically, Savitz as Stockholder Representative is granted exclusive authority to participate in such arbitration proceedings on behalf of Pryor and the other Stockholders. Thus, the Stockholders' Agreement clearly does provide "a written authorization granting someone

[37] *Id.* § 2.5(c)(i)(B).
[38] *Id.*
[39] *Id.*
[40] *Id.* § 4.1(a).
[41] *Id.*
[42] *Id.* § 2.5(c)(i)(B) (following the selection of the Valuation Firm, "the Valuation Firm shall, within 30 days, notify all of the foregoing parties [here, IAC and the Stockholder Representative] of its selection of one of the two original determinations of the Appraisal Value.").
[43] *Id.*
[44] *Id.* § 2.5(a)(ii).
[45] *Id.* § 2.5(a)(ii).

authority to act as agent or attorney-in-fact for the grantor,"[46] albeit for the specific purpose of exercising the Stockholder Group Put and enforcing the right to determine the Appraisal Value in arbitration. Moreover, as our Supreme Court has noted, "absent statutory requirements, no form or method of creation [of a power of attorney] is mandated."[47]

Vesting the Stockholder Representative with this authority makes sense in light of the definition of the Stockholder Representative as the Stockholder who "hold[s] the most shares,"[48] and thus the person who has the largest financial stake in the matter. Therefore, the Agreement works to ensure that the Stockholder Representative is an adequate and responsible champion of smaller investors like Pryor, because the Stockholder Representative has the most powerful economic interest to obtain the highest value for the shares in an arbitration proceeding. Thus, the Agreement sets up an incentive scheme that ensures that the remaining Stockholders will be fairly represented.

Under basic agency principles, "[a] notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification …."[49] Pryor is therefore charged with the notice received by Savitz as Stockholder Representative. Moreover, at oral argument counsel for Pryor conceded that

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[46] *Black's Law Dictionary* 551 (3d ed. pocket edition 2006) (defining power of attorney); *see also Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 454 (Del. 1982) ("A power of attorney is a written authorization used to evidence an agent's authority to a third person.").

[47] *Realty Growth Investors*, 453 A.2d at 454.

[48] Stockholders' Agreement § 2.5(a)(ii).

[49] *Restatement (Third) Of Agency* § 5.02 (2006); *see also In re Am. Int'l Group, Inc. Consol. Deriv. Litig.*, 976 A.2d 872, 883 n.5 (Del. Ch. 2009), *aff'd*, *Teachers' Ret. Sys. Of La. v. Gen. Re Corp.*, 11 A.3d 228 (Del. 2010) (TABLE) ("Under basic agency principles, [the principal] is charged with the knowledge of its agents.").

Pryor had actual notice of the Valuation Award shortly after it was issued, because Savitz promptly notified him of it.[50] Accordingly, Pryor had until August 6, 2011 to serve notice of his motion to vacate the Firm Selection Award, which was delivered on May 6, 2011, and until September 24, 2011 to serve notice of his motion to vacate the Valuation Award, which was delivered on June 24, 2011. Pryor did not do so for either Award until September 28, 2011, and thus his motion to vacate the two Awards is untimely.

Although Pryor urges the court to overlook the FAA's timing restriction as a technicality, courts have strictly enforced this legislatively-determined limitations period.[51] Consistent with respect for the statute's deadline, distinguished federal courts analyzing whether a motion to vacate an arbitration award is timely have long held that equitable tolling is not available under the FAA.[52] I adhere to this authority. Even if, in

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[50] *E.g.*, Tr. at 14.

[51] *See Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984) ("No exception to this three month limitations period is mentioned in the statute. Thus, under its terms, a party may not raise a motion to vacate, modify, or correct an arbitration award after the three month period has run, even when raised as a defense to a motion to confirm."); *see also Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 574 (7th Cir. 2007) (affirming denial of motion to vacate arbitration award that was served one day late); *Waveform Telemedia, Inc. v. Panorama Weather N. Am.*, 2007 WL 678731, at *5 (S.D.N.Y. Mar. 2, 2007) (dismissing the plaintiff's cross-petition to vacate an arbitration award that was served three days late).

[52] *See Florasynth*, 750 F.2d at 175 ("[T]here is no common law exception to the three month limitations period on the motion to vacate."); *Waveform Telemedia*, 2007 WL 678731, at *5 n.2 (stating that "there is no recognized tolling exception to the three month time limit under the FAA."); *see also Triomphe Partners, Inc. v. Realogy Corp.*, 2011 WL 3586161, at *3 (S.D.N.Y. Aug. 15, 2011) (holding that equitable tolling was not available under the FAA, but noting that even if it were, the facts of the case would not warrant its application). Several courts have refused to apply equitable tolling on the merits assuming, but without deciding, that equitable tolling is permitted under the FAA. *See Fradella v. Petricca*, 183 F.3d 17, 21 (1st Cir. 1999) ("We need not consider whether the deadline prescribed in FAA § 12 is subject to such equitable tolling, since Fradella has not generated a trialworthy issue as to his entitlement to invoke tolling."); *Taylor v. Nelson*, 788 F.2d 220, 225-26 (4th Cir. 1986) (explaining that "[t]he existence of [an equitable tolling] exception[] to § 12 is questionable, for [it is] not implicit in the language of the statute, and cannot be described as [a] common-law exception[] because there

the alternative, I were to assume that the three-month limitations period prescribed in the FAA could be equitably tolled, the circumstances here would not merit it. That is, Pryor has shown no basis to be relieved of meeting his statutory obligation to serve notice of his motion to vacate on or before September 24, 2011. In order to benefit from equitable tolling, an untimely movant must show that he "pursu[ed] his rights diligently," and that "some extraordinary circumstance stood in his way and prevented timely filing."[53] Here, Pryor was indisputably notified of the Valuation Award by Savitz a mere four days after the Award was issued and delivered.[54] Moreover, one month after learning of Houlihan Lokey's adverse ruling, Pryor even expressed concerns about the arbitration process to counsel for IAC.[55] Apparently, Pryor did not choose to request a copy of the Awards promptly, despite the fact that he had ample opportunity to do so and marshal facts

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was no common-law analogue to enforcement of an arbitration award," but that "even if such [an] exception[] exist[s]," it would not be warranted on the merits); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 2004 WL 376493, at *3 (6th Cir. Feb. 26, 2004) ("[W]e need not resolve this issue [of whether equitable tolling is available under the FAA] today, because the facts of this case clearly do not merit [it]."); *but see Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 687 F. Supp. 7, 9 (D.D.C. 1988), *remanded on other grounds*, 882 F.2d 529, 533 (D.C. Cir. 1989) (applying equitable tolling to excuse a plaintiff's untimely service under the FAA).

[53] *Triomphe Partners*, 2011 WL 3586161, at *3 (S.D.N.Y. Aug. 15, 2011) (citing in part *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)).

[54] Cheah Reply Aff. Ex. 1 (Email from Micheal Cheah to Bill Pryor et. al. dated June 28, 2011); Tr. at 14 (counsel for Pryor conceding that Savitz notified Pryor of the Valuation Award).

[55] Cheah Reply Aff. Ex. 3 (Email from William Pryor to Michael Cheah dated July 25, 2011) ("Michael, ... I do understand that after the exercise of the put by the minority stockholders of Shoebuy and the subsequent appraisal process, I may have no rights with respect to those shares other than the right to receive the appropriate purchase price. As you know, Scott, as Stockholder Representative under the Stockholders Agreement, believes that the appraisal process was flawed and as a result the purchase price for the minority stockholders' Shoebuy shares is too low. At this time I do not know what action, if any, he may take in light of that belief.").

relevant to the dispute.[56] Instead, Pryor, according to his own story, waited until September 21, 2011 to request a copy of the Valuation Award.[57] In no way can this conduct be described as a "diligen[t]" pursuit of his rights.[58] In similar circumstances, courts have declined to apply equitable tolling assuming, as is not the case, that equitable tolling is available under the FAA.[59]

IAC has not argued that Pryor has no standing to seek to vacate the Awards. Candidly, it is not at all apparent to me that anyone other than Savitz as Stockholder Representative has standing to seek to vacate the Awards. But, that issue has not been

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[56] *See* Tr. at 14, 16. Indeed, at oral argument Pryor's counsel dug himself into an epistemological hole when trying to justify Pryor's failure to request the written decision of the Valuation Award, in the following way. Pryor's counsel constructed the argument that Pryor was not obligated to request a written copy of the Valuation Award upon notification of the ruling by Savitz because Pryor was not aware that the Valuation Award was decided in the form of a written opinion. *See id.* at 14 ("[I]'m not sure he was aware there was a decision at the time, that there was an actual piece of paper that had the arbitration award ….") But, the problem with that argument – particularly in terms of asking the court to excuse Pryor's untimely filing – is that if Pryor in fact believed that there was no written decision to request, then in that world Pryor *had* received the actual decision – some form of oral lore – at the moment he was notified of it by Savitz. And, if he had received the actual decision, then he had three months from the date of that receipt to serve notice of a motion to vacate as prescribed by the FAA. Thus, even the hypothetical world advocated for by Pryor's counsel fails to justify the application of equitable tolling (assuming, as is not the case, that equitable tolling is available under the FAA) because, even under these hypothetical circumstances, Pryor was late to serve his complaint.

[57] *See* Pryor Decl. ¶ 3.

[58] *Triomphe Partners,* 2011 WL 3586161, at *3.

[59] *E.g.*, *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (affirming the district court's refusal to apply equitable tolling and holding that equitable tolling was not justified on the merits, assuming that equitable tolling was available under the FAA, because "Pfannenstiel could have served the defendants before the expiration of the three-month time limit. He had approximately one month left after he learned that the evidence was no longer available in order to timely file his motion to vacate, but he did not file it within that time period. The one-month time period provided Pfannenstiel ample opportunity to serve the defendants in a timely fashion. Thus, equitable tolling does not apply."); *cf. Williams v. U.S. Dept. of Housing and Urban Development*, 2009 WL 742732, *1 (E.D.N.Y. Mar. 20, 2009) (refusing to apply equitable tolling to excuse the plaintiff's failure to comply with Rule 4(m) of the Federal Rules of Civil Procedure when the plaintiff's efforts to timely serve the complaint "can hardly be considered reasonable and diligent").

argued and I merely note that it is a question that Pryor's motion brings to mind in light of the Stockholder Representative's exclusive role in the arbitration process related to the Stockholder Group Put on behalf of all the other Stockholders.

In sum, Pryor's motion to vacate is untimely, and he has waived his ability to contest the Awards. "Absent a timely motion to vacate, in most cases the confirmation of an arbitration award is a summary proceeding that makes what is already a final arbitration award a judgment of the court."[60] Thus, I dismiss Count I of Pryor's complaint, which seeks to vacate the Awards, and I grant IAC's motion to confirm the Awards.[61]

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[60] *Domino Group, Inc. v. Charlie Parker Mem'l Found.*, 985 F.2d 417, 420 (8th Cir. 1993) (internal quotation marks omitted) (citing *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984)).

[61] In any event, Pryor has not demonstrated that this court should vacate the Awards under any of the grounds prescribed in the FAA. As a general principle, arbitration awards are not lightly disturbed, and "[c]ourts must accord substantial deference to the decisions of arbitrators." *Kashner Davidson Sec. Corp. v. Msciz*, 531 F.3d 68, 70 (1st Cir. 2008); *see also Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011). Indeed, a "court's review of an arbitration award is one of the narrowest standards of judicial review in all of American jurisprudence." *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 732 (Del. Ch. 2008) (citation omitted). Pryor argues that he is entitled to vacatur under § 10(a)(4) of the FAA, because both arbitrators "exceed[ed] their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." P. Ans. Br. at 2-3 (citing 9 U.S.C. § 10(a)(4)). When considering whether to vacate an award under § 10(a)(4), courts have "consistently accorded the narrowest of readings" to this section. *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009) (citation omitted); *see also DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997).

Pryor contends that both Arbitrator van Gestel and Houlihan Lokey (the "Arbitrators") acted in contravention of the express terms of the Stockholders' Agreement by improperly considering and relying upon evidence of "opinions on value or valuations of [Shoebuy]" proscribed by § 2.5(a)(v). *See Jock*, 646 F.3d at 122 ("[A]n arbitrator may exceed her authority [in part] by … reaching issues clearly prohibited … by the terms of the parties' agreement."). Specifically, Pryor takes issue with IAC's submission into evidence of third party bids for Shoebuy that were obtained during an M&A auction for the company that took place in 2010. He asserts that such third party bids qualify as an "opinion[] on value" or "valuation[]" of

Shoebuy because such bids convey the bidding party's view of Shoebuy's value. Pryor's argument is faulty for the following reasons.

First, Pryor has not demonstrated that either Arbitrator considered or relied on the auction data submitted by IAC. Although both Arbitrators noted in their Awards that they examined the parties' written materials, they also wrote that they followed the procedures set forth in § 2.5 of the Stockholders' Agreement, which includes the provision that Pryor contends was violated. *See* Cheah Aff. Ex. H; Cheah Aff. Ex. W. "A mere ambiguity in the opinion accompanying the award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

Second, even if the Arbitrators had considered this evidence, third party bids to acquire a company do not constitute an "opinion[] on value" or a "valuation[]" as contemplated by the Stockholders' Agreement. In common parlance, an "opinion" means "a view, judgment, or appraisal formed in the mind about a particular matter." *Merriam-Webster Dictionary*, *available at* http://www.merriam-webster.com/dictionary/ (last visited June 6, 2012). Similarly, a "valuation" refers to the "act or process of valuing," or "the process of determining the value of a thing or entity." *Id.* Thus, the terms "opinion on value" or "valuation" suggest an assessment or analysis of Shoebuy's value. Although a bid to acquire a company may be the strategic manifestation of that bidder's undisclosed, subjective opinion of the company's value to it, the bid itself is not that opinion – it is a price bid. Rather, the fact that a bid at a certain level was made is a matter of market evidence that a valuation expert may or may not take into account in rendering her own opinion on value. *E.g.*, Shannon P. Pratt & Alina V. Niculita, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 87 (5th ed. 2008) ("To the extent that past transactions in ownership interests were at arm's length, they provide objective *evidence* of value. Even if not accepted, a bona fide offer, particularly if submitted in writing, can at least *corroborate* the value.") (emphasis added). To assert otherwise conflates an input to the valuation with the valuation itself.

Third, even if the phrase "opinion[] on value or valuation[]" is ambiguous, which I do not find that it is, courts cannot vacate arbitration awards based on an arbitrator's good faith ruling on an ambiguity in the agreement. *See RBC Capital Markets Corp. v. Thomas Weisel Partners, LLC*, 2010 WL 681669, at *8 (Del. Ch. Feb. 25, 2010) (explaining that "'as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'") (brackets in original) (citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)); *see also Jock*, 646 F.3d at 122; *Federated Dept. Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990). Rather, it is only when the arbitrator acts in "direct contradiction to the express terms of the agreement" that a court may properly find grounds to vacate under § 10(a)(4) of the FAA. *Mansoory v. SC&A Const., Inc.*, 2009 WL 2140030, at *3 (Del. Ch. July 9, 2009), *aff'd*, 988 A.2d 937 (Del. 2010). To that end, a court may refuse to enforce an arbitration award on the grounds that the arbitrator exceeded his powers only if the court can "fin[d] no rational construction of the contract that can support [the award]." *RBC Capital Markets Corp.*, 2010 WL 681669, at *8. As long as the arbitrator had the power to interpret the ambiguous provision, a court will not disturb the arbitrator's finding because the court would have decided the matter differently. *See Jock*, 646 F.3d at 115; *Barnes v. Logan*, 1996 WL 310115, at *4 (N.D. Cal. May 29, 1996), *aff'd*, 122 F.3d 820 (9th Cir. 1997); *TD*

III.

In Counts II and III of the complaint, Pryor alleges that IAC breached its fiduciary duties and its contractual obligations in connection with the Appraisal Valuation by introducing evidence of third party bids for Shoebuy to Arbitrator van Gestel and Houlihan Lokey supposedly in contravention of § 2.5(c) of the Stockholders' Agreement.[62] For its part, IAC argues that Pryor may not assert these claims in this court, because the Stockholders' Agreement plainly provides that "[a]ny controversy concerning whether a matter is an arbitrable matter … shall be determined by the [a]rbitrator."[63] When "a contract clearly and unmistakably provides that an arbitrator will decide substantive arbitrability, then the contract controls."[64] Thus, the language in the Stockholders' Agreement governs and requires that the question of the substantive arbitrability of the fiduciary duty and contract claims be determined by the arbitrator, not this court.[65] Accordingly, I dismiss both counts for lack of subject matter jurisdiction.

Ameritrade, 953 A.2d at 733 (Del. Ch. 2008) ("[T]he Court is not to pass an independent judgment on the evidence or applicable law, and [i]f any grounds for the award can be inferred from the facts on the record, the Court must presume that the arbitrator did not exceed his authority and the award must be upheld.") (internal quotation marks and citation omitted); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, — U.S. —, 130 S. Ct. 1758, 1767 (2010) (explaining that "in order to obtain … relief" under § 10(a)(4) of the FAA, a movant "must clear a high hurdle," because "[i]t is not enough for petitioners to show that the panel committed an error – or even a serious error," and it is "'only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable'" under § 10(a)(4) of the FAA) (citations omitted).

[62] *See* Compl. ¶¶ 37-40 (breach of contract), 41-45 (breach of fiduciary duty).

[63] Stockholders' Agreement § 4.3(d).

[64] *GTSI Corp. v. Eyak Tech., LLC*, 10 A.3d 1116, 1119 (Del. Ch. 2010).

[65] *Id.* at 1120 (interpreting similar contractual language as "dispositive and requir[ing] that I defer to the arbitrator to determine substantive arbitrability.").

Furthermore, Pryor's claim for breach of contract fails for a separate reason because, as IAC correctly points out, it constitutes an impermissible collateral attack on the Awards. "[W]here a party files a complaint … seeking damages for an alleged wrongdoing that compromised an arbitration award and caused the party injury, it is no more, in substance, than an impermissible collateral attack on the award itself."[66] Such a claim may not proceed because "the FAA provides the exclusive remedy for challenging acts that taint an arbitration award."[67] Here, Pryor alleges that, because of IAC's submission of the evidence of third party bids for Shoebuy in alleged breach of the Stockholders' Agreement, Pryor was "prejudiced in the appraisal and arbitration proceedings causing him to suffer substantial damages as a result."[68] Thus, Pryor's objective in this breach of contract claim is to remedy "the alleged harm [he] suffered by receiving a smaller arbitration award than [he] would have received in the absence of the [submission of the allegedly improper evidence]."[69] In order to obtain such relief, a plaintiff is limited to proceeding under the FAA.[70] Accordingly, for both of these

[66] *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 910 (6th Cir. 2000) (internal quotation marks and citation omitted) (affirming dismissal of claims related to the alleged breach of the contractual obligations owed to the plaintiff under the arbitration contract because they constituted an impermissible collateral attack on the arbitration award).
[67] *Id.* (citation omitted).
[68] Compl. ¶ 40.
[69] *Decker*, 205 F.3d at 910; *see also Corey v. New York Stock Exch.*, 691 F.2d 1205, 1212 (6th Cir. 1982) (affirming summary judgment against a plaintiff whose "allegations of wrongdoing … [were] squarely within the scope" of § 10 of the FAA); *Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp.*, 512 F.3d 742, 744 (5th Cir. 2008); *Nazar v. Wolpoff & Abramson, LLP*, 530 F. Supp. 2d 1161, 1169 (D. Kan. 2008); *Phillips Petroleum Co. v. Arco Alaska, Inc.*, 1988 WL 60380, at *6 (Del. Ch. June 14, 1988).
[70] *C.f. Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (Section 10(a) of the FAA provides the "exclusive grounds" by which an award may be vacated).

reasons, Pryor's breach of contract claim set forth in Count II of his complaint is dismissed.[71]

IV.

For the foregoing reasons, Count I is dismissed with prejudice, and IAC's motion to confirm the Awards is granted. Similarly, Count II is dismissed with prejudice because the flaw that this Count is an impermissible collateral attack on the Awards is not curable by proceeding before the arbitrator at this belated stage. Finally, I dismiss Count III without prejudice to allow Pryor to re-file in the event that the arbitrator concludes that the breach of fiduciary duty claim is not arbitrable.[72]

IT IS SO ORDERED.

[71] I note that IAC did not offer the argument relating to collateral attack until its reply brief. Normally, this court does not entertain arguments raised for the first time in a reply brief. *E.g.*, *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006). But, because the case law prohibiting collateral attacks on arbitration awards in the guise of breach of contract claims is straightforward, and because I find that it is "patently obvious" that Pryor cannot prevail on the facts alleged in his complaint, I conclude that dismissal under 12(b)(6) is nevertheless appropriate as an alternative grounds for dismissal of the contract claim. *Baker v. Dir., U.S. Parole Comm'n*, 916 F.2d 725, 727 (D.C. Cir. 1990); *see also N. Am. Dev., Inc. v. Shahbazi*, 1996 WL 306538, at *7 (S.D.N.Y. June 6, 1996). IAC did not argue that the fiduciary duty claim should also be considered an impermissible collateral attack on the Awards, so I do not address that argument, although I note that it seems to be a viable one.

[72] I doubt this will be the result, however, given the clear terms of the Stockholders' Agreement subjecting to mandatory arbitration "any claims … at law or in equity, … against or involving … [IAC] … arising from, relating to or otherwise in connection with … any alleged breach of any fiduciary duty … by [IAC] …." Stockholders' Agreement § 4.1(d).