**COURT OF CHANCERY**
**OF THE**
**STATE OF DELAWARE**

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**MASTER IN CHANCERY**

**NEW CASTLE COUNTY COURTHOUSE**
**500 NORTH KING STREET, SUITE 11400**
**WILMINGTON, DE 19801-3734**

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Submitted: September 30, 2013

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Re: *Todd Allan Printing Co., Inc., et al. v. David J. Burke, et al.*
C.A. No. 7532-ML

Dear Counsel:

The only dispute that presently remains between the parties in this case is the plaintiffs' motion for leave to file an amended complaint. The defendants resist that motion on the basis of futility, contending the claims the plaintiffs seek to add are barred by *res judicata* under Court of Chancery Rule 41(a) or its Maryland counterpart, because the plaintiffs previously filed three lawsuits relating to the same claims and later dismissed those actions. For the reasons that follow, I conclude the claims the plaintiffs seek to add are not barred by *res judicata* and therefore recommend the Court grant the motion to amend.

## FACTUAL BACKGROUND

The parties to this action have been engaged in litigation of some form or another since at least 2009. Their disputes stem from a joint venture that was formed between David J. Burke ("Burke") and Todd Allan Printing Co., Inc. ("TA Printing"). Burke and TA Printing were the two 50% members of defendant Todd Allan Mailing, LLC ("TA Mailing"), a Delaware LLC they formed to provide mailing services, including services to TA Printing, which is a mid-size offset printing company based in Maryland. TA Mailing was formed in 2006, but the economic downturn proved difficult for the company to weather. TA Printing and Burke eventually deadlocked over the management of TA Mailing, and the plaintiffs allege that Burke appropriated control over TA Mailing in breach of TA Mailing's operating agreement (the "Operating Agreement") and excluded the plaintiffs from their management positions at the company.[1]

This case was filed on May 30, 2012 by the plaintiffs, who are TA Printing, Allan Kullen, a former director of TA Mailing and the current president of TA Printing, Kathleen Stryjewski, the former treasurer and secretary of TA Mailing, and Kenneth Popp, a former vice president of TA Mailing. In this suit, the plaintiffs initially sought declaratory judgment regarding certain claims Burke and TA Mailing were threatening to bring – and eventually did bring – against them in Maryland. The plaintiffs in this action sought a declaratory judgment regarding Burke and TA Mailing's claims that TA Printing, Kullen, Stryjewski, and Popp breached certain contractual obligations, common

[1] Proposed First Amended Compl. ¶ 11.

law duties, and fiduciary duties owed to Burke and TA Mailing. In July 2013, the plaintiffs filed a motion for partial summary judgment seeking a declaration that certain claims Burke alleged against Kullen, Stryjewski, and Popp in the Maryland action lacked merit. After briefing and arguing that motion for partial summary judgment, Burke and TA Mailing eventually stipulated to entry of judgment in favor of Kullen, Popp, and Stryjewski.

This case was preceded by several other actions filed by both sides in both Delaware and Maryland. On December 28, 2009, TA Printing filed a direct and derivative suit against Burke that sought judicial dissolution of TA Mailing and alleged claims for breach of contract, breach of fiduciary duty, and other misconduct allegedly committed by Burke (the "First Delaware Action").[2] The parties attempted settlement negotiations on several occasions, to no avail. Finally, with trial looming, the parties stipulated to the dismissal of the First Delaware Action. This Court entered that stipulation of dismissal as a court order on February 7, 2012.

Shortly before the dismissal of the First Delaware Action, TA Printing, Kullen, and Stryjewski filed direct and derivative claims against Burke and TA Mailing (as nominal defendant) in Maryland (the "First Maryland Action"). The First Maryland Action alleged claims against Burke for breach of fiduciary duty, interference with business relations, invasion of privacy, conversion, and intentional interference with contract. The fiduciary duty claims alleged Burke caused TA Mailing to pay

[2] *See* Defs.'s Opp'n. To Pls.'s Mot. for Leave to File Am. Compl., Ex. B.

compensation to Burke's father, Edward Burke, without withholding taxes, and that Burke concealed that compensation as independent contractor fees, which caused TA Mailing to incur tax penalties and Stryjewski to face liability for those penalties as TA Mailing's treasurer. The interference with business relations, conversion, invasion of privacy, and intentional interference with contract claims stemmed from allegations that Burke wrongfully withheld TA Printing's materials and disseminated falsehoods about TA Printing and Kullen to TA Printing's employees and customers.

TA Printing, Kullen, Popp, and Stryjewski also filed a separate direct and derivative action against Edward Burke (the "Second Maryland Action"). The Second Maryland Action alleged claims against Edward Burke for allegedly conspiring with his son to interfere with and "commandeer" TA Mailing. The claims against Edward Burke included claims that he committed tax fraud in connection with the compensation he received from TA Mailing, that he intentionally interfered with the Operating Agreement and aided and abetted his son's breach of the Operating Agreement, and that Edward Burke maintained and assisted in his son's lawsuits against TA Printing, Kullen, Popp, and Stryjewski, even though he had no interest in those suits.

The plaintiffs in the First Maryland Action dismissed that action by notice of dismissal on September 11, 2012. The plaintiffs dismissed the Second Maryland Action by notice of dismissal on May 16, 2012. Plaintiffs filed their motion to amend the complaint in this case on July 10, 2013 (the "Motion to Amend").

If the Motion to Amend is granted, the amended complaint will assert two new counts against Burke and TA Mailing. In Count IV, TA Printing alleges that Burke breached the Operating Agreement and his employment agreement by taking action without the unanimous consent of the members by (1) paying himself bonuses and other compensation not authorized by the employment contract, (2) hiring his father as an employee, and (3) hiring attorneys to represent the company in litigation. In Count V, TA Printing alleges that TA Mailing breached Section 6(H) of the Operating Agreement, which required any business dealings between TA Mailing and any of its members to be conducted at "arm's length and on commercially reasonable terms." TA Printing contends that TA Mailing breached that "arm's length terms" requirement by charging TA Printing far in excess of market rates charged by third party vendors.

The defendants initially contested the Motion to Amend on the basis that the claims were barred both by the statute of limitation and by *res judicata* under the "two dismissal" rule memorialized in Court of Chancery Rule 41(a) and its Maryland counterpart. The defendants withdrew their statute of limitations argument during oral argument on the motion,[3] but continue to contend the proposed amended claims are barred by *res judicata*. I asked the parties to submit brief supplemental letters regarding the proper interpretation of the rule on which the defendants rely. This decision follows my review of those supplemental submissions.

[3] *Todd Allan Printing Co., Inc. v. Burke*, C.A. No. 7532-ML (Sept. 10, 2013) (TRANSCRIPT) (hereinafter "Transc.") at 11.

**ANALYSIS**

The defendants contend that the counts the plaintiffs seek to add to the complaint through their Motion to Amend are barred because the plaintiffs previously dismissed the First Delaware Action, the First Maryland Action, and the Second Maryland Action, which, according to the defendants, alleged the same or similar claims against Burke and TA Mailing. The defendants argue the effect of those serial dismissals was to render the later dismissals as "with prejudice." The parties agree Maryland Rule 2-506(c) controls this question. Rule 2-506 relevantly provides:

> Rule 2-506. Voluntary dismissal
>
> (a) By notice of dismissal or stipulation. Except as otherwise provided in these rules or by statute, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer or (2) by filing a stipulation of dismissal signed by all parties to the claim being dismissed.
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> * * *
>
> (c) Effect. Unless otherwise specified in the notice of dismissal, stipulation, or order of court, a dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits when filed by a party who has previously dismissed in any court of any state or in any court of the United States an action based on or including the same claim.*[4]

Court of Chancery Rule 41(a) and Federal Rule of Civil Procedure 41(a)(1)(B) are substantially similar to the Maryland rule, and the Maryland courts consider federal authority interpreting FRCP 41(a)(1)(B) as persuasive authority.[5]

[4] Md. R. 2-506 (emphasis added).
[5] *New Jersey ex rel. Lennon v. Strazzella*, 627 A.2d 1055, 1059 (Md. 1993).

Under the "two dismissal" rule memorialized in Rule 2-506(c) and its Delaware and federal counterparts, a second voluntary dismissal of an action serves as an "adjudication on the merits" and the doctrine of *res judicata* applies to bar a later action "based on or including the same claim."[6] The party invoking the rule bears the burden of proving its applicability.[7]

Before applying the "two dismissal" rule to the actions previously filed by the plaintiffs, it is necessary to identify the actions to which the rule applies. Although the defendants contend the First Delaware Action should be considered in the Court's analysis, that action was dismissed by stipulation of the parties and order of this Court, rather than by a unilateral notice of dismissal filed by the plaintiffs. Dismissals by stipulation of the parties or by order of a court do not fall within Federal Rule 41(a)(1)(B), the rule on which the Maryland rule was based.[8] As the U.S. Court of Appeals for the Second Circuit explained, the "primary purpose of the 'two dismissal' rule is to prevent an unreasonable use of the plaintiff's unilateral right to dismiss an action prior to the filing of a defendant's responsive pleading," a concern that diminishes when the first dismissal was by stipulation based on mutual agreement of all parties.[9] The defendants do not address this federal authority or argue that the Maryland rule

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[6] *St. Clair Intellectual Prop. Consultants, Inc. v. Samsung Elecs. Co. Ltd.*, 291 F.R.D. 75, 77 (D. Del. 2013) (*citing Manning v. South Carolina Dept. of Highway & Public Transp.*, 914 F.2d 44, 47 (4th Cir. 1990)).
[7] *Id*. at 78-79.
[8] *ASX Inv. Corp. v. Newton*, 183 F.3d 1267, 1267-68 (11th Cir. 1999); *Manning*, 914 F.2d at 47 n.3; *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (2d Cir. 1976).
[9] *Poloron Prods., Inc.*, 534 F.2d at 1017.

requires a contrary interpretation. Accordingly, because the First Delaware Action was dismissed by stipulation of the parties and order of the Court, it does not factor into the application of the "two dismissal" rule to the proposed amended complaint.

I must therefore determine whether the plaintiffs' dismissals of the First Maryland Action and the Second Maryland Action operate as an adjudication on the merits regarding the claims alleged in those actions. The two dismissal rule is strictly construed[10] and its application is limited to cases in which the defendants in the two actions were the same, substantially the same, or in privity.[11] In addition, the rule only applies to actions "based on or including the same claim" alleged in the previously dismissed actions.

Under Maryland law, two parties are in privity when there is a close or significant relationship between successive defendants that justifies including the second defendant within the claim preclusion.[12] Although TA Mailing was named as a nominal defendant in both Maryland actions, it was named as such solely for purposes of the derivative claims, and no judgment was sought against TA Mailing. Because TA Mailing was not a true defendant in either action, the dismissals of the two Maryland actions do not bar the claims the plaintiffs seek to bring against TA Mailing in this case. As to David Burke and Edward Burke, those defendants were not in privity with respect to the claims alleged

[10] *Manze v. State Farm Ins. Co.*, 817 F.2d 1062, 1066 (3d Cir. 1987); *St. Clair Intellectual Prop. Consultants, Inc.*, 291 F.R.D. at 79.
[11] *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 17 (1st Cir. 2004) (citing 5 *Moore's Federal Practice* § 41.04 (2d ed. 1996)). *See also* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, 9 *Federal Practice & Procedure*, § 2368 (3d ed.).
[12] *Nash County Bd. of Educ. v. Biltmore Co.*, 650 F.2d 484, 494 (4th Cir. 1981).

in the two Maryland complaints. Although they share a parent-child relationship, that relationship, without more, does not generally create privity for purposes of determining *res judicata*.[13] Although the defendants contend that, under Maryland law, "parties are in contractual privity when they have an employee/employer relationship and are sued for the same conduct,"[14] the rule in Maryland is in fact far more nuanced. As the Maryland Court of Appeals explained in *Warner v. German*, the scope of privity:

> includes all persons who have a direct interest in the subject matter of the suit, and have a right to control the proceedings, make defense, examine the witnesses, and appeal if an appeal lies.... So, where persons, although not formal parties of record, have a direct interest in the suit, and in the advancement of their interest take open and substantial control of its prosecution, or they are so far represented by another that their interests receive actual and efficient protection, any judgment recovered therein is conclusive upon them to the same extent as if they had been formal parties.[15]

In *Warner*, the Maryland court concluded that a police officer was not in privity with his employer and therefore not barred from bringing a personal injury action against a motorist who was involved in a motor vehicle accident with the officer while he was operating his police vehicle, even though the police officer's employer previously sued the motorist and lost that action based on the officer's contributory negligence.[16] Applying Maryland law, the Fourth Circuit has explained that three categories of non-parties are considered in privity with a party to a prior action: (1) a "non-party who controls the original action," (2) a "successor-in-interest to a prior party," or (3) a "non-

[13] *See Orloff v. Shulman*, 2005 WL 3272355, at *9 (Del. Ch. Nov. 23, 2005).
[14] Letter from Ryan M. Ernst, Esq. dated Sept. 30, 2013, p. 4.
[15] 642 A.2d 239, 242-43 (Md. 1994).
[16] *Id*. at 241.

party whose interests were adequately represented by a party to the original action," a narrow concept the Fourth Circuit has termed "virtual representation."[17] The defendants have not demonstrated that Edward Burke and David Burke fall within these three carefully defined categories, and it is not otherwise apparent from the record before me that David Burke's interests were adequately represented by Edward Burke in the Second Maryland Action or otherwise met the narrow parameters that constitute privity in Maryland. Accordingly, the defendants have not carried their burden of establishing that Edward Burke and David Burke were in privity for purposes of applying the "two dismissal" rule.

## CONCLUSION

For the foregoing reasons, I recommend that the Court grant the plaintiffs' Motion to Amend. This is my final report and exceptions may be taken in accordance with Court of Chancery Rule 144. The parties are hereby directed to submit a stipulated scheduling order governing discovery and pre-trial proceedings within thirty days after the Court enters an order regarding the Motion to Amend.

Sincerely,

/s/ *Abigail M. LeGrow*
Master in Chancery

[17] *Martin v. Am. Bancorp. Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005).