



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE RENCO GROUP, INC.,

Plaintiff,

v.

MacANDREWS AMG HOLDINGS LLC,
MacANDREWS & FORBES HOLDINGS INC.,
RONALD O. PERELMAN,

Defendants.

and

AM GENERAL HOLDINGS LLC,

Nominal Defendant.

C.A. No. 7668-VCN

REDACTED VERSION
Filed June 25, 2013

MEMORANDUM OPINION

Date Submitted: May 2, 2013

Date Decided: June 19, 2013

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LLC.

NOBLE, Vice Chancellor

This dispute is the latest in an ongoing feud among Plaintiff The Renco Group, Inc. (“Renco”) and Defendants MacAndrews AMG Holdings LLC (“AMG”), MacAndrews & Forbes Holdings Inc. (“M&F”), and Ronald O. Perelman.¹ Renco has moved for both a mandatory and prohibitory preliminary injunction against the Defendants. Specifically, Renco seeks an order (1) requiring AMG, the managing member of AM General Holdings LLC (“Holdco”), to return to Holdco all distributions or loans made by Holdco to AMG since October 12, 2012; and (2) prohibiting Holdco (and AMG) from making (or causing Holdco to make) any future distributions or loans to AMG or its affiliates pending the determination of the Revaluated Capital Accounts by qualified appraisers in accordance with the appraisal procedure in Holdco’s limited liability company agreement (the “Holdco Agreement”). Although the Court concludes that Renco is not entitled to the relief that it seeks, Renco has earned limited injunctive assistance to assure it a fair opportunity to challenge whether AMG makes the necessary reasonable determination of the Revalued Capital Accounts before it causes another distribution to be made by Holdco.

¹ For related proceedings between the parties, see *AM Gen. Hldgs. LLC v. The Renco Gp., Inc.*, 2012 WL 6681994 (Del. Ch. Dec. 21, 2012); *The Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 209124 (Del. Ch. Jan. 18, 2013); *AM Gen. Hldgs LLC v. The Renco Gp., Inc.*, 2013 WL 1668627 (Del. Ch. Apr. 18, 2013).

I. BACKGROUND

In 2004, Renco restructured its ownership interest in AM General LLC (“AM General”), which manufactures and sells a military vehicle commonly known as the Humvee. Pursuant to an agreement between Renco and M&F (*i.e.*, the Holdco Agreement), Renco transferred its ownership of AM General to a newly created limited liability company named Holdco. Renco and AMG, an affiliate of M&F, are the only members of Holdco, and AMG is the managing member. The Holdco Agreement also provides a measure—the Revalued Capital Accounts—for determining the members’ relative capital interests in Holdco.²

The Holdco Agreement expressly forbids Holdco from making any distributions to AMG if “it would cause [AMG’s] Revaluated Capital Account to be equal to or less than 20% of the aggregate Revalued Capital Accounts of all Members in [Holdco].”³ In that event, Section 8.3(b) of the Holdco Agreement allows Renco to require Holdco to distribute to Renco all distributions that would have otherwise been paid to AMG.⁴ These specific limitations, as well as others, were agreed upon by the parties to ensure that neither Renco nor Holdco would become exposed to the pension liabilities of the other.

² The members’ Revalued Capital Accounts are inversely related. If AMG’s Revalued Capital Account is 56 percent of the aggregate Revalued Capital Accounts, as AMG recently determined, then Renco’s Revalued Capital Account must be at 44 percent.

³ Transmittal Aff. of J. Peter Shindel, Jr. (“Shindel Aff.”) Ex. A (the Holdco Agreement) § 9.4(c); *see also AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *1.

⁴ Holdco Agreement § 8.3(b).

AM General, as well as various Renco-affiliated entities, is the sponsor of a defined-benefit pension plan under the Employee Retirement Income Security Act (“ERISA”). If a pension plan is terminated with unfunded benefit liabilities, then the Pension Benefit Guaranty Corporation (the “PBGC”), which administers the United States’ pension insurance program, can become the trustee of the terminated plan and also guarantee the payment of pension obligations.⁵ If that occurs, PBGC has the ability to recover unfunded benefit liabilities from not only the employer, but also from other members of the plan sponsor’s “controlled group.”⁶ A controlled group is generally defined as consisting of entities that share common ownership of 80 percent or more, by vote or by stock, or in the case of partnerships, by capital account interest or profits.⁷ Moreover, in certain limited circumstances, the PBGC can retroactively impose liability on a former controlled group member that departed the controlled group within five years before the termination of the plan.⁸ Thus, if Renco’s Revalued Capital Account is 80 percent or more of the members’ Revalued Capital Accounts in Holdco, then Renco would become part of AM General’s controlled group. As a member of AM General’s controlled group, Renco could potentially become liable for the unfunded pension

⁵ See 29 U.S.C. §§ 1322, 1361.

⁶ See 29 U.S.C. § 1362.

⁷ See 26 C.F.R. §§ 1.414(c)-2(b).

⁸ See 29 U.S.C. § 1369. This could occur if a member of an employer’s controlled group engaged in a transaction with the principal purpose of evading pension liability by exiting the controlled group. *Id.* at § 1369(a).

liabilities of AM General. Similarly, AM General could also potentially become liable for the unfunded pension liabilities of Renco and its affiliates.

The Revalued Capital Accounts are calculated based on a valuation of AM General if “all of the assets of [AM General] were sold for their respective gross fair market values . . . and the resulting Profits, Losses and all other items of income, gain, loss and deduction were allocated to the Members”⁹ Section 4.4 of the Holdco Agreement provides that the “Revalued Capital Accounts shall be reasonably determined by [AMG]; provided, however, that Renco may invoke the appraisal procedures in Section 15.12”¹⁰ If Renco invokes the appraisal procedure, AMG is required to obtain an appraisal of AM General from a qualified appraiser.¹¹ If it disagrees with the first appraisal, Renco has the right to select a qualified appraiser to obtain a second appraisal.¹² Finally, if AMG disputes the second appraisal, both Renco and AMG must jointly appoint a third appraiser to perform a final, binding, and conclusive appraisal.¹³

On October 12, 2012, Renco notified AMG that Renco believed that AMG’s Revalued Capital Account was less than 20 percent of the members’ Revalued

⁹ Holdco Agreement § 4.4.

¹⁰ *Id.*

¹¹ *Id.* at § 15.12(a).

¹² *Id.* at § 15.12(b).

¹³ *Id.*

Capital Accounts.¹⁴ It also informed AMG that it was electing to receive all distributions from Holdco that would otherwise be distributed to AMG pursuant to Sections 8.3(b) and 9.3(a) of the Holdco Agreement.¹⁵ Thereafter, ILR Capital LLC, an affiliate of Renco and the managing member of Ilshar Capital LLC (“Ilshar”), refused to make certain distributions owed to Holdco that were required under the Ilshar Agreement (the “Retained Distribution”).¹⁶

On October 23, 2012, AMG caused Holdco to move for a preliminary injunction requiring Ilshar to distribute to Holdco the Retained Distribution. On December 21, 2012, the Court granted Holdco’s motion and ordered Ilshar to distribute to Holdco the Retained Distribution.¹⁷ On December 24, 2012, AMG notified Renco by letter that it intended to cause Holdco to make a quarterly tax distribution of \$5 million to AMG (the “Tax Distribution”).¹⁸ Three days later, Renco responded by letter. It reiterated its belief that AMG’s Revalued Capital Account was less than 20 percent of the members’ Revalued Capital Accounts.¹⁹ Renco also emphasized that it had made an “election” under Section 8.3(b), and

¹⁴ Renco first alleged that AMG’s Revalued Capital Account was less than 20 percent of the members’ Revalued Capital Accounts when it filed its Verified Complaint on June 29, 2012. Renco’s Verified Compl. ¶ 57. Renco again alleged that AMG’s Revalued Capital Account was less than 20 percent when it filed its Verified Amended Complaint on November 19, 2012. *See* Renco’s Verified Am. Compl. ¶ 58.

¹⁵ Shindel Aff. Ex. B (Rennert Letter dated October 12, 2012).

¹⁶ *See AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *2.

¹⁷ *Id.* at *7.

¹⁸ Shindel Aff. Ex. C (December 24, 2012 Letter from AMG to Renco).

¹⁹ Shindel Aff. Ex. D (December 27, 2012 Letter from Renco to AMG).

therefore, was entitled to receive the entire Tax Distribution. In the same letter, Renco invoked the appraisal procedure and warned AMG that Sections 9.4(c) and 8.3(b) of the Holdco Agreement prohibited distributions to AMG until the appraisal procedure is completed.²⁰

Notwithstanding Renco's letter, AMG caused Holdco to distribute to AMG both the Tax Distribution and the Retained Distribution on December 28, 2012 (the "December Distributions"). In response, Renco filed a motion for a preliminary injunction on December 31, 2012, contending (1) that AMG is prohibited from making any distributions until the Revalued Capital Accounts are determined in accordance with the appraisal procedure; and (2) that AMG did not make a reasonable determination of the Revalued Capital Accounts as required by Section 4.4 of the Holdco Agreement. Thereafter, AMG opposed Renco's efforts to obtain expedited proceedings. The Court granted Renco's motion for expedited proceedings in an opinion dated January 18, 2013. The Court also held that Renco was entitled to most of the limited expedited discovery it had requested.²¹

During December 2012, AMG made a determination of the members' Revalued Capital Accounts in connection with the December Distributions (the "December determination"). It summarized its determination in a memorandum

²⁰ *Id.*

²¹ *The Renco Gp., Inc.*, 2013 WL 209124, at *3.

dated December 24, 2012 (the “December Memo”). A brief overview of the December determination follows.

First, AMG estimated the fair market value of Holdco’s interest in Ilshar by adopting the value of Holdco’s interest in Ilshar provided by Renco.²² Second, AMG assessed the fair market value of AM General by using a discounted cash flow (“DCF”) model. It relied upon “AM General’s management’s most current revenue, EBITDA, depreciation, and amortization projections for 2013”²³ AMG assumed those projections were reliable based on the “status of the AM General business,” that the “projections were consistent with earlier projections” and that management “had out-performed its 2011 projections for 2012 EBITDA.”²⁴ To calculate the terminal value, AMG derived an EBITDA multiple from the acquisition of a “defense vehicle manufacturer”—Force Protection, Inc. (“Force Protection”)—that it contends closely resembles “the business characteristics of AM General.”²⁵ AMG then utilized the EBITDA multiple to calculate the terminal value in the DCF valuation.²⁶

The DCF analysis produced a fair market value for AM General of [REDACTED] billion. Holdco’s equity interest in AM General was valued at [REDACTED] billion.²⁷

²² Affidavit of Adam S. Ingber (“Ingber Aff.”) ¶ 6.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at ¶ 8.

AMG also determined that the December Distributions would not have caused AMG's Revalued Capital Account to be less than 56 percent of the members' Revalued Capital Accounts.²⁸

On February 28, 2013, AMG caused Holdco to distribute approximately \$19.2 million to AMG and \$7.4 million to Renco (the "February Distribution").²⁹ AMG described the February Distribution as a tax distribution for the first quarter of 2013 and a "true up distribution for 2012."³⁰ Renco alleges that AMG failed to give the required five-day notice to the distribution.³¹ AMG again calculated the members' Revalued Capital Accounts³² before authorizing the February Distribution (the "February determination").³³ AMG concluded that AM General had a value of █████ billion—approximately █████ million more than

²⁸ *Id.* at ¶ 9.

²⁹ Affidavit of Ari Rennert in Supp. of Renco's Mot. for a Prelim. Inj. ("Rennert Aff.") ¶ 11, Ex. 1.

³⁰ *Id.*

³¹ The Holdco Agreement also contains certain notice provisions. Section 9.4(c) requires that Holdco notify AMG of "its intent to make a distribution [to AMG] . . . at least five days prior to such distribution." Similarly, under Section 9.4(b), Holdco "shall notify Renco of its intent to make a distribution [to Renco] . . . at least five days prior to such distribution." In its brief, Renco asserts that "Sections 9.4(b) and (c) of the Holdco Agreement provide that Holdco is required to notify both Renco and MacAndrews AMG 'of its intent to make a distribution . . . at least five days prior to such distribution.'" The Renco Gp., Inc's Mem. of Law in Supp. of its Mot. for a Prelim. Inj. ("Renco Br.") 9. This is incorrect. Under those provisions, Holdco is only required to notify Renco of a distribution if it intends to distribute funds to Renco. To the extent that Renco claims that AMG failed to provide the required notice under the Holdco Agreement, Renco has not established a reasonable probability of success on that claim.

³² The February determination is summarized in a memorandum prepared by AMG (the "February Memo"). Rennert Aff. Ex. 2 (the February Memo).

³³ Rennert Aff. ¶ 12.

AM General's estimated value in December.³⁴ The February determination is similar in many respects to AMG's December determination. The DCF analyses performed in both determinations relied upon cash flow projections obtained from AM General's management. Unlike the December determination, in which AMG used only a single year of cash flows in its DCF analysis, AMG used five-year cash flow projections in the February determination. Although both the December and February determinations relied on the same comparable transaction to derive an EBITDA multiple, AMG used a slightly higher EBITDA multiple in February than the one it used in December.

II. CONTENTIONS

Renco contends that the Court should grant its motion for a preliminary injunction for two reasons. First, it asserts that AMG did not reasonably determine the members' Revalued Capital Accounts before authorizing the December and February Distributions. Second, it contends that the Holdco Agreement requires completion of the appraisal procedure (if invoked) before any distributions are permitted. As to the former assertion, Renco asserts, among other things, that (1) AMG's cash flow projections were objectively unreasonable; (2) AMG's use of a single comparable transaction to derive an EBITDA multiple was unreasonable;

³⁴ *Id.* at ¶ 13, Ex. 2.

and (3) AMG's DCF analyses were unreasonable because they did not include hundreds of millions of dollars in retirement and pension obligations.³⁵

With respect to the latter contention, Renco asserts that the Holdco Agreement implicitly prohibits distributions until the appraisal procedure (if invoked) has been completed. Otherwise, Renco argues, it would potentially expose the parties to controlled group liability under ERISA and would undermine various provisions in the Holdco Agreement designed to protect Renco from exposure to AM General's pension obligations.

AMG, in response, contends (1) that the Holdco Agreement does not prohibit—explicitly or implicitly—distributions when the appraisal procedure is invoked and (2) that it made a reasonable determination of the members' Revalued Capital Accounts because it relied upon AM General's management's projections.

To establish an imminent threat of irreparable harm, Renco relies primarily on Section 15.14 of the Holdco Agreement to argue that AMG has waived its objections to the irreparable harm requirement. Renco also contends that absent an injunction, it will be deprived of its rights under the Holdco Agreement. Finally, Renco asserts that the balance of the equities favor granting a preliminary

³⁵ AMG informed the Court that these obligations were accounted for in the cash flow projections used in the December and February determinations. Oral Argument Tr. at 63. Renco also contends that AMG did not "tax effect" the cash flow projections. AMG has disputed this contention. *Id.* at 62-63. Neither party has provided any substantive evidence to support its positions.

injunction because AMG will suffer no serious harm from having Holdco, which it controls, hold the funds for distribution until the appraisal process is completed.

III. ANALYSIS

A. *Applicable Standard*

In order to succeed on its preliminary injunction motion, Renco must demonstrate: (1) a reasonable probability of success on the merits; (2) that it will suffer immediate and irreparable harm if an injunction is not granted; and (3) that the balance of the equities favors the issuance of an injunction.³⁶ “Although all three elements must be met, the standard is a flexible one, and ‘a strong showing on one element may overcome a weak showing on another element.’”³⁷ Because Renco also seeks a mandatory preliminary injunction, it “must demonstrate that it is ‘entitled to judgment as a matter of law on the merits of [its] claim, not just a reasonable likelihood of success on the merits as is generally required for a preliminary injunction.’”³⁸

³⁶ See *AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *3; *In re Massey Energy Co.*, 2011 WL 2176479, at *17 (Del. Ch. May 31, 2011).

³⁷ *AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *3 (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

³⁸ *Pitts v. City of Wilmington*, 2009 WL 1204492, at *3 (Del. Ch. Apr. 27, 2009) (quoting *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004)); see also *AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *3 (noting that a mandatory injunction “requires that the applicant clearly establish the legal right he seeks to protect or the duty he seeks to enforce”) (internal quotation marks omitted); *Brown v. Houston Ventures*, 2000 WL 713761, at *1 (Del. Ch. May 20, 2000) (noting that in order to prevail on a mandatory preliminary injunction, petitioners must “establish on *undisputed facts* that they are entitled to judgment as a matter of law on the merits of their claim”).

B. Are Distributions Prohibited Pending the Outcome of the Appraisal Procedure?

The Court’s analysis of Renco’s first claim is guided by several well-established Delaware contract interpretation principles. First, contracts must be construed as a whole, giving “each provision and term effect, so as not to render any part of the contract mere surplusage.”³⁹ Second, a court must “attempt to discern the meaning of the contract and the intent of the parties from the language that they used, as read from the perspective of a reasonable third party.”⁴⁰ Third, if a contract is unambiguous, then the plain language of the agreement governs, and “extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or create an ambiguity.”⁴¹ “It is . . . axiomatic that a court may not, in the guise of construing a contract, in effect rewrite it to supply an omission in its provisions.”⁴²

In light of the parties’ undisputed intention to protect against ERISA liability, Renco contends that the Holdco Agreement can only reasonably be interpreted as prohibiting distributions once the appraisal procedure has been

³⁹ *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010).

⁴⁰ *Shifan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928, 935 (Del. Ch. 2012).

⁴¹ *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). “There may be occasions where it is appropriate for the trial court to consider some undisputed background facts to place the contractual provision in its historical setting without violating this principle.” *Id.* at 1232 n.7. Because the parties agree that the Holdco Agreement was structured to avoid potential pension liabilities under ERISA, the Court considers these undisputed background facts for this limited purpose.

⁴² *Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 868 (Del. 1969).

invoked.⁴³ Renco further asserts that the various provisions in the Holdco Agreement that protect the parties from potential exposure to pension liability under ERISA would be rendered meaningless if the appraisal process (once invoked) does not stay distributions.⁴⁴

Renco relies upon various provisions in the Holdco Agreement to support its contention that the appraisal process prohibits any future distributions.

- Section 4.4 defines “Revalued Capital Accounts” as a measure of the capital interest of each member of Holdco if all of the assets of Holdco were sold at their respective gross fair market values.⁴⁵
- Section 4.4 also provides a process for determining the Revalued Capital Accounts: “The Revalued Capital Accounts shall be reasonably determined by [AMG]; provided, however, that Renco may invoke the appraisal procedures in Section 15.12”⁴⁶ The parties agree that the appraisal process, once completed, supersedes AMG’s determination.
- Section 9.4(c) prohibits Holdco from making any distributions to AMG “if it would cause [AMG’s] Revalued Capital Account to be equal to or less than 20% of the aggregate Revalued Capital Accounts of all Members in [Holdco].”⁴⁷ Renco asserts that this prohibition bars any future distributions once the appraisal process is invoked.
- Section 8.3(b) gives Renco the conditional right to require AM General to distribute “any AM General Available Cash” to Holdco and Holdco to then distribute “any Cash Available for Distribution to Renco to reduce or eliminate the excess of Renco and its Affiliates’ aggregate Revalued

⁴³ Renco Br. 28.

⁴⁴ When viewed as a whole, Renco contends, the Holdco Agreement shows that the parties could not have intended for AMG to have the unilateral ability to cause Renco’s Revalued Capital Account to equal or exceed 80 percent and to plunder Holdco without restraint.

⁴⁵ Holdco Agreement § 4.4.

⁴⁶ *Id.*

⁴⁷ *Id.* at § 9.4(c).

Capital Account over the Renco 80% Capital Account Cap⁴⁸
Renco contends that this clause further evinces the parties' intent not to allow Renco's Revalued Capital Account to exceed 80 percent.

- Section 8.3(e) contains an “early-warning system” that requires Renco’s consent before AMG receives distributions from Holdco if the distributions would result in Renco’s Revalued Capital Account being equal to or greater than 70 percent and certain other conditions are satisfied.⁴⁹
- Finally, Section 8.3(a) prohibits the distribution of profits and losses when such distributions would cause Renco’s Revalued Capital Account to equal or exceed 80 percent of the members’ Revalued Capital Accounts.⁵⁰

When viewed together, these provisions confirm that the parties intended to protect (1) Holdco from exposure to the pension liabilities of Renco and its affiliates and (2) Renco from exposure to the pension liabilities of AM General. However, none of these provisions explicitly prohibits distributions after the appraisal process has been invoked. Section 9.4(c) is particularly illustrative of AMG’s concern that AM General and Holdco might become part of Renco’s controlled group and become subject to Renco and its affiliates’ pension liabilities under ERISA. To guard against that risk, Section 9.4(c) confers upon AMG the right to stop any distribution that Holdco intends to distribute to AMG:

⁴⁸ *Id.* at § 8.3(b). Section 8.3(b) also requires that distributions to Renco “shall be made prior to any distributions or Company Loans pursuant to Article IX.” Article IX governs the distributions and loans to members of Holdco.

⁴⁹ *Id.* at § 8.3(e).

⁵⁰ *Id.* at § 8.3(a).

The Company shall not make any distributions to [AMG], (i) if [AMG] so elects or (ii) if it would cause [AMG's] Revalued Capital Account to be equal to or less than 20% of the aggregate Revalued Capital Accounts of all Members in the Company. The Company shall notify [AMG] of its intent to make a distribution pursuant to Section 9.1 at least five days prior to such distribution. The Company shall not make such distribution to [AMG] unless [AMG] notifies the Company of its determination that the Company may make such distribution pursuant to this Section 9.4(c). [AMG] shall be given access to all information it reasonably requires to make its determinations under this Section 9.4(c).⁵¹

Importantly, Section 9.4(c) affords AMG rights to protect itself against distributions that might reduce its Revalued Capital Account to 20 percent or lower. Section 9.4(b) affords the exact same rights to Renco as Section 9.4(c) affords to AMG, thereby protecting Renco from receiving any distributions that might reduce its Revalued Capital Account to 20 percent or lower and becoming subject to the pension liabilities of AMG and its affiliates.⁵²

Renco argues that AMG's interpretation would render the various provisions in Section 8.3 meaningless. However, Section 8.3 is consistent with, and provides support to, AMG's interpretation. As described above, Section 8.3 includes

⁵¹ *Id.* at 9.4(c).

⁵² *Id.* at 9.4(b). Section 9.4(b) provides:

The Company shall not make any distribution to Renco . . . if such distribution would cause Renco and its Affiliates to have an aggregate Revalued Capital Account of less than 20% of the aggregate Revalued Capital Accounts. The Company shall notify Renco of its intent to make a distribution pursuant to Section 9.1 at least five days prior to such distribution. The Company shall not make such distribution to Renco unless Renco notifies the Company of its determination that the Company may make such distribution pursuant to this Section 9.4(b). Renco shall be given access to all information it reasonably requires to make its determinations under this Section 9.4(b).

several “fail-safe mechanisms” to protect Renco’s Revalued Capital Account from equaling or exceeding the 80 percent threshold. Those mechanisms only become operative after a determination has been made that Renco’s Revalued Capital Account has reached or is approaching the 80 percent threshold. Given Section 9.4(c), a reasonable third party would surmise that AMG had a predominate interest in controlling distributions to itself and ensuring that Renco’s Revalued Capital Account did not equal or exceed the 80 percent threshold. In this way, “Section 9.4(c) is consistent with Section 8.3(b) and can be read together without rendering any term superfluous.”⁵³ With respect to Section 8.3(e) in particular, the inclusion of “precise circumstances under which distributions to [AMG] are prohibited” reasonably suggests “that the parties would have included an express prohibition on distributions pending the appraisal, if they in fact had intended to agree to such a prohibition.”⁵⁴

Renco, in effect, requests that the Court bootstrap a supposedly “implicit” term into the Holdco Agreement. Regardless of whether Renco’s implicit term is consistent with the contract as a whole, the Court should not read into the contract an ambiguity where none exists or rewrite the contract to add a limitation that the parties presumably did not agree upon. Because the relevant provisions in the

⁵³ *The Renco Gp., Inc.*, 2013 WL 209124, at *3.

⁵⁴ The MacAndrews Parties’ Mem. of Law in Opp’n to The Renco Group, Inc.’s Mot. for a Prelim. Inj. (“AMG’s Br.”) 18-19.

Holdco Agreement are unambiguous, the plain language of the Holdco Agreement controls as the best evidence of the parties' intent. That intent is clear: the Holdco Agreement does not contain the limitation that Renco seeks to impose. Accordingly, Renco has not established a reasonable probability that the invocation of the appraisal procedure prohibits any future distributions until the appraisal process is completed.

C. Reasonable Determination of the Revalued Capital Accounts

In its second claim, Renco asserts that AMG did not reasonably determine the value of the Revalued Capital Accounts before it made the December and February Distributions. Specifically, Renco asserts that: (1) the cash flow projections were objectively unreasonable; (2) the use of only a single year of projected cash flows in the December DCF valuation was *per se* unreasonable; (3) the EBITDA multiples used in the DCF valuations were unreasonable because they (a) were derived from a single comparable transaction and (b) were significantly higher than the average EBITDA multiples for comparable companies; and (4) AMG assigned a much greater value to AM General's commercial vehicle assembly business than was justified.

1. Cash Flow Projections

AMG contends that its DCF analyses were reasonable because it employed AM General's management's most current cash flow projections.⁵⁵ AM General's management presumably had some level of confidence in the projections used in the December determination because it utilized them in a presentation to lenders on December 14, 2012 in an effort to refinance its debt.⁵⁶ AMG asserts that it was reasonable to rely upon those projections because they "were consistent with earlier projections" made by management during 2012 and because management "had out-performed its 2011 projections for 2012 EBITDA."⁵⁷

"Delaware courts generally accord greater weight to contemporaneous management forecasts prepared in the ordinary course of business."⁵⁸ In those circumstances, reliance on management projections is generally reasonable because "management ordinarily has the best first-hand knowledge of a company's operations."⁵⁹ However, where management's projections are hopelessly

⁵⁵ AMG also argues that Renco has relied upon "inapposite case law involving statutory appraisal actions." AMG's Br. 35. However, AMG has failed to persuade the Court why cases involving statutory appraisal actions are not relevant here, where the reasonableness of AMG's determination of corporate value is at issue.

⁵⁶ Ingber Aff. ¶ 6(b). Similar projections were provided to rating agencies in April 2012. *Id.* at Ex. D (December Memo).

⁵⁷ *Id.*

⁵⁸ *In re United States Cellular Operating Co.*, 2005 WL 43994, at *12 n.65 (Del. Ch. Jan. 6, 2005); *see also Cede & Co. v. Technicolor, Inc.*, 1990 WL 161084, at *23 (Del. Ch. Oct. 19, 1990) ("I am of the view that management projections done for real-world purposes are deserving of substantial weight.").

⁵⁹ *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *5 (Del. Ch. May 20, 2004).

optimistic and have no reasonable probability of being achieved, management's projections are entitled to less weight.⁶⁰

In the past year eight years, AM General has derived most of its revenue from the manufacturing and sale of the Humvee to the United States military.⁶¹ With the wars in Iraq and Afghanistan winding down, the U.S. Army announced in February 2010 that it would no longer be purchasing Humvees.⁶² That reality ultimately forced AM General to close several of its assembly plants, including the Humvee plant, and furlough hundreds of employees.⁶³ However, AM General's servicing business is expected to continue to obtain a substantial amount of revenues in the near future.⁶⁴

In light of the changing landscape, AM General has aggressively pursued other near-term sources of revenue, including the sale of military vehicles to foreign governments and the development of a commercial vehicle assembly business. In the long-term, AM General is currently a strong contender to procure the contract to produce the next generation light tactical vehicle for the U.S. military.

⁶⁰ *See id.* (noting that management's projections were not justified in part because the market uncertainty made it difficult to forecast the next quarter, let alone a five-year period).

⁶¹ Shindel Aff. Ex. G (Aff. of Ari Rennert in Opp'n to AM General Holdings LLC's Mot. for a Prelim. Inj.) at ¶ 25.

⁶² *Id.* at ¶ 26.

⁶³ *Id.* at ¶ 31.

⁶⁴ AM General's servicing business includes providing spare parts, logistics, and servicing for the thousands of Humvees in service today. Rennert Aff. Ex. 2 (February Memo).

Predicting AM General's future cash flows under the present circumstances is arguably similar to forecasting a start-up company's future cash flows.⁶⁵ The predictions are inherently speculative and necessarily dependent upon future assumptions.⁶⁶ Unlike a start-up company, however, AM General has a strong record of past performance. Indeed, AM General "has consistently achieved, and has generally outperformed, its projections."⁶⁷ Moreover, unlike a start-up company with an unproven track record and product, AM General boasts an extremely successful product line, expertise obtained from years of experience, and a robust infrastructure. Thus, it is highly probable that AM General is well-positioned to be competitive in the global military vehicle market.

When viewed from that perspective, AMG's reliance on management's cash flow projections seems reasonable, especially where, as here, the forecasts were made in the ordinary course of AM General's business. AMG also observed that AM General has "significant international production opportunities" for direct sales in [REDACTED]—to name a few countries.⁶⁸ Nonetheless, Renco contends that AMG unreasonably relied on management's projections because they were unsupported by any firm Humvee

⁶⁵ See *TV58 Ltd. P'ship v. Weigel Broad. Co.*, 1993 WL 285850, at *4 (Del. Ch. July 22, 1993) (noting that because the company did not have an earnings history, a "discounted cash flow analysis must be based purely on speculation as to the company's future performance.").

⁶⁶ See *id.*

⁶⁷ Ingber Aff. Ex. D (December Memo) at 2. As one example, AM General's 2012 revenue exceeded management's projections by \$383 million. Rennert Aff. Ex. 2 (February Memo) at 2.

⁶⁸ Ingber Aff. Ex. D (December Memo).

orders from foreign governments. When AMG made its determinations of the Revalued Capital Accounts, it was well aware that AM General had no firm orders for the purchase of a substantial number of vehicles. AM General had only received a “Letter of Request” from the government of ██████ indicating an interest in purchasing ██████ Humvees.⁶⁹

In the December determination, AMG relied upon AM General’s management’s projection of roughly ██████ billion in revenue in 2013—█████ million of which was expected to be revenue from Humvee sales. Without any definitive purchase orders, AMG’s forecast was presumably based on AM General’s expectation that it would both (1) receive a substantial amount of foreign vehicle orders and (2) be able to fulfill those orders in 2013.

Renco points out that even if the ██████ order materializes—which is still uncertain⁷⁰—and even if all ██████ Humvees were produced and sold in 2013—which AM General acknowledged in January 2013 would not occur⁷¹—AM General would receive at most ██████ million in revenue, well short of ██████ million.⁷² Not blind to this reality, AM General revised its 2013 total revenue

⁶⁹ Aff. of Edward P. Taibi (“Taibi Aff.”) ¶ 6.

⁷⁰ A Letter of Request is not a contract or a binding commitment to purchase Humvees. Furthermore, the Letter of Request was not even released until April or May. AM General also needs approval by the United States government to complete the sale. Shindel Suppl. Aff., Exs. K-M.

⁷¹ In the January 2013 business review report, AM General estimates that it will sell only ██████ of the ██████ Humvees to ██████ in 2013. Rennert Aff. Ex. 6.

⁷² Taibi Aff. ¶ 6.

projection to █████ million and its Humvee sales forecast to █████ million and AMG relied upon these estimated projections in the February determination.⁷³

Without being skewed improperly by hindsight bias (*i.e.*, the sharp revision downward in 2013 Humvee sales), the question remains whether AMG unreasonably relied on management's forecast in the December determination? That question turns in part on the reasonableness of AM General's foreign sales expectation. Except for █████ letter of request, however, neither party has provided any contemporaneous indication of the likelihood that those future sales opportunities would occur. Without more, and given AM General's management's proven track record and the deference afforded to management's projections made in the ordinary course of business, Renco has not set forth a reasonable probability that AMG was unreasonable in relying on management's projections in the December determination.⁷⁴

With respect to AM General's servicing business, AMG forecasted revenues of █████ million in the December determination and █████ million in the February determination.⁷⁵ Renco contends that those projections are unreasonable because, pursuant to AM General's management's own projections *as of March 28, 2013*,

⁷³ Rennert Aff. Ex. 2 (February Memo) at Ex. B; Ex. 18.

⁷⁴ The subsequent downward revision in the Humvee sales projections does not necessarily show that AMG was unreasonable in relying upon those projections. However, the revisions cast some doubt on whether AMG is warranted in relying on management's future forecasts that are not supported by reliable data.

⁷⁵ *Id.* at Exs. 2, 9; *see also* Shindel Aff. Ex. F (December Memo) at 3.

██████████ dollars in servicing revenues were expected either not to materialize at all or be negatively affected by the United States government's sequestration.⁷⁶ However, once again, Renco is relying on subsequent revisions to AM General's forecast to assert that the prior projections were unreasonable. While the subsequent revisions do not necessarily prove that AMG's reliance on the initial projections was unreasonable, the downward revisions do undermine the reasonableness of relying on management's future projections.

2. One Year Cash Flow Estimate

Renco also complains that AMG calculated the December DCF valuation based on a single year of projected cash flows. Renco argues that the forecasting of only a single year of cash flows is *per se* unreasonable. AMG contends that it reasonably relied on AM General's model which also utilized a single year of projected cash flows. While a "five-year period typically is used, . . . a shorter or longer period may be adopted if it would produce a more accurate valuation."⁷⁷ AMG's use of only a single year had the practical effect of making AM General's enterprise value almost entirely derived from the terminal value (*i.e.*, 92.3 percent). A "DCF is meaningless where a projection time period becomes irrelevant because

⁷⁶ Rennert Aff. Ex. 19.

⁷⁷ 1 R. Franklin Balotti & Jesse A. Finkelstein, *Delaware Law of Corporations & Business Organizations* ("Balotti & Finkelstein") § 9.45(B) at 9-137 (3d ed. 2013 Suppl.); *see also Crescent/Mach I P'ship, L.P. v. Turner*, 2007 WL 1342263, at *10 (Del. Ch. May, 2, 2007) ("Delaware courts frequently use a five-year period.").

it is essentially nothing more than an extension of one year's financial results.”⁷⁸

Notably, AMG forecasted cash flows for five-years in the February determination.

3. EBITDA Multiple⁷⁹

Renco also takes issue with the 11.5x EBITDA multiple relied upon in the December determination and the 12.5x EBITDA multiple used in the February determination. Those multiples were based on a single comparable transaction—the acquisition of Force Protection for \$360 million by General Dynamics Corp. in December 2011—which represented a multiple of 11.9x the last twelve months (“LTM”) EBITDA. Renco criticizes AMG’s use of a single comparable transaction. It also asserts that the EBITDA multiples used were unreasonable because: (1) market professionals actually valued the transaction at a multiple of 4x to 4.9x of estimated EBITDA;⁸⁰ (2) Bloomberg FY1 EBITDA and FY2 EBITDA multiples for comparable companies were 5.75x and 5.29x,

⁷⁸ *Highfields Capital, Ltd. V. AXA Fin., Inc.*, 939 A.2d 34, 53 n.54 (Del. Ch. 2007) (citing *Dobler v. Montgomery Cellular Hldg. Co.*, 2004 WL 2271592, at *10 (Del. Ch. Sept. 30, 2004), *aff’d in part, rev’d in part on other grounds sub nom., Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206 (Del. 2005)).

⁷⁹ The terminal value in the December determination represented over 90 percent of the value of AM General. The Court has observed that where a terminal value represents upwards of 80 percent of the total DCF value—the DCF analysis is in “reality a comparable companies analysis packaged in a different form.” *Prescott Gp. Small Cap, L.P. v. Coleman Co., Inc.*, 2004 WL 2059515, at *24-25 (Del. Ch. Sept. 8, 2004). Thus, if the comparable transaction analysis is unreliable, then the December DCF valuation—which relies upon the comparable transaction to derive an EBITDA multiple for the terminal value—is also unreliable.

⁸⁰ Renco argues that utilizing the LTM EBITDA artificially inflates the multiple derived because Force Protection’s second quarter 2011 results were artificially low. Shindel Supp. Aff. Exs. N-P.

respectively;⁸¹ and (3) AMG's own analysis determined that the mean and median multiples for comparable companies were 7.7x and 7.2x, respectively.⁸²

“The comparable acquisition approach is a valuation methodology in which a company's potential sale price is derived by identifying similar transactions.”⁸³ Notably, Renco has not attacked the size, timing, or comparability of the transaction. Instead, it offers other multiples as more reliable.

The use of a single transaction in the comparable acquisition approach is not *per se* unreasonable. With respect to cases where only a single comparable transaction was used, the Court's decisions were driven in part because the company or market circumstances were dissimilar from the subject company or the market conditions of the subject transaction.⁸⁴ Those circumstances are not present here. Similar to AM General, Force Protection is a defense vehicle manufacturer that receives substantial servicing revenues.⁸⁵ Although Force Protection had declining sales and a “significantly lower installed base of vehicles compared to

⁸¹ Shindel Aff. Ex. H.

⁸² Rennert Aff. Ex. 2 (February Memo).

⁸³ Balotti & Finkelstein § 9.5(B) at 9-143.

⁸⁴ See *Henke v. Trilithic Inc.*, 2005 WL 2899677, at *6 (Del. Ch. Oct. 28, 2005), *opinion modified on reconsideration*, 2005 WL 3578094 (Del. Ch. Dec. 20, 2005) (noting that the use of a single transaction that occurred four years before the valuation date unreasonable in part because the companies were dissimilar); *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *16 n.66 (Del. Ch. Aug. 19, 2005) (finding a comparable transaction analysis that relied on a single transaction unreasonable in part because the “market bubble of 1999 had burst by 2003”).

⁸⁵ Shindel Aff. Ex. F (December Memo) at 6-7.

AM General's installed base,"⁸⁶ AMG reasonably determined that the acquisition of Force Protection was a comparable transaction.

While Renco has created some doubt as to whether other EBITDA multiples would have been more appropriate, those multiples do not necessarily show that the multiples AMG used were unreasonable.⁸⁷ Renco's most cogent argument is that Force Protection's EBITDA multiple should not have been calculated using a last twelve month EBITDA because Force Protection's second quarter results were artificially low, which inflated the multiple derived. If true, AMG's use of the LTM EBITDA multiple may not have been reasonable.

4. AM General's Commercial Vehicle Assembly Business

Renco further criticizes the February determination by arguing that AMG assigned a much greater value to AM General's commercial assembly business than is justified. In the February determination, AMG valued the commercial assembly business at [REDACTED] million, roughly [REDACTED] percent of AM General's enterprise value.⁸⁸ Renco contends that valuation is unreasonable because (1) the [REDACTED]
[REDACTED]; (2) [REDACTED]
[REDACTED]; (3) the business has lost

⁸⁶ *Id.*

⁸⁷ The EBITDA multiples obtained from the comparable companies analyses of Bloomberg and AMG may or may not be more appropriate than the multiple used by AMG. The comparable companies approach is more often used in appraisal proceedings to determine the value of a company's stock price. Here, AMG is obligated to determine the value of AM General if it was sold.

⁸⁸ Rennert Aff. ¶ 21, Exs. 20-22, 23-27.

more than [REDACTED] million in the past four years; and (4) [REDACTED]

[REDACTED]⁸⁹.

While the evidence presented by Renco raises questions about the reliability of these projections, management's anticipation of future growth for this business cannot be entirely discounted. However, given that AM General's commercial vehicle business lacks a proven record of success, AMG's reliance on these projections may be unreasonable. Moreover, AMG has not presented any evidence to bolster the reliability of these projections. Thus, the factual record does not support that AMG was reasonable in relying on management's projections in this regard.⁹⁰

In sum, Renco has undermined the reasonableness of portions of AMG's determinations. However, Renco's criticisms do not demonstrate that AMG failed to make a reasonable determination. If Renco has carried its burden to show a reasonable probability of success on its reasonable determination claim, it has done so only by the slimmest of margins. The better inference, however, from the record is that it has fallen just short of satisfying that standard. Nevertheless, Renco has shown that AMG's blind reliance on management's projections may not be warranted in the future. Having made two questionable determinations, there is

⁸⁹ *Id.* ¶¶ 20-21.

⁹⁰ Unlike the projected sales of Humvees, AMG has not shown that the past or current track record of the commercial vehicle business warrants any deference to future projections.

a reasonable probability that AMG will continue to do so in the future. Because Renco may not be notified of any future distribution to AMG, it has little protection against its Revalued Capital Account reaching the 80 percent threshold. Accordingly, Renco may be entitled to some injunctive relief that would guard against this risk.

D. Will Renco Suffer Irreparable Harm?

To satisfy the irreparable harm requirement, Renco must demonstrate that it will suffer imminent irreparable harm if an injunction is not issued.⁹¹ Renco relies on Section 15.14 of the Holdco Agreement to assert that AMG has contractually waived its objections to the irreparable harm requirement.⁹² It also asserts that it will be “irreparably harmed by a denial of its contractually bargained for rights under the Holdco Agreement.”⁹³

Renco has not established that the Holdco Agreement prohibits future distributions when the appraisal process is invoked. Moreover, Renco has not shown with any degree of certainty that its Revalued Capital Account is in danger

⁹¹ *AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *3.

⁹² Section 15.14 provides:

The parties hereto agree that any party by whom this Agreement is enforceable shall be entitled to specific performance in addition to any other appropriate relief or remedy. Such party may, in its sole discretion, apply to a court of competent jurisdiction for specific performance or injunctive or such other relief as such court may deem just and proper in order to enforce this Agreement or prevent any violation hereof and, to the extent permitted by applicable law, each party waives any objection to the imposition of such relief.

⁹³ Renco Br. 41.

of exceeding the 80 percent threshold. At best, the only harm that Renco might suffer from an “unreasonable” determination is a temporary delay in having a reasonable estimate of the Revalued Capital Accounts. That is hardly the type of harm that warrants injunctive relief. With consideration of AMG’s contractual waiver of its objections to the irreparable harm requirement, the Court concludes that Renco has satisfied this burden, if only barely.⁹⁴

E. *Balance of the Equities*

Finally, Renco must show that the harm it will suffer if the injunction is denied will exceed the harm to AMG if the injunction is issued.⁹⁵ Renco has raised serious questions about the reasonableness of AMG’s determinations. However, because there is little basis in the record for concluding that Renco’s Revalued Capital Account has reached or is near the 80 percent threshold, Renco may not be

⁹⁴ In a prior dispute between the parties, the Court observed that an identical provision in another related agreement could “reasonably be construed to waive the requirement of irreparable harm on a motion for a preliminary injunction.” *AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *5. Relying in part on this provision, the Court held that Holdco (or AMG) had demonstrated that it would suffer some harm absent an injunction because AMG would be deprived of its contractual rights under the Holdco Agreement to determine the Revalued Capital Accounts and to distribute the funds to Holdco’s members. Although the harm was “admittedly unimpressive,” the Court nonetheless granted Holdco’s motion for a preliminary injunction because Holdco had established—by clear evidence—that it would be successful on the merits of its claim. *Id.* at *5.

The facts of this case are different. Renco has not established by clear evidence that it will be successful on the merits of its claims. Moreover, the harm Renco may suffer absent an injunction is even less than the harm that AMG would have suffered without an injunction in the prior dispute.

⁹⁵ See *In re Plains Exploration & Prod. Co. S’holder Litig.*, 2013 WL 1909124, at *4 (Del. Ch. May 9, 2013).

seriously harmed by AMG's potentially unreasonable determinations.⁹⁶ In contrast, granting the relief Renco seeks would deprive AMG of its rights to cause Holdco to disburse funds to it. Accordingly, Renco has not established the equitable basis for the extraordinary relief it seeks.⁹⁷

F. Has Renco Earned Any Injunctive Relief?

With respect to its claim that invoking the appraisal procedure stays all future distributions, Renco has not established that it is entitled to judgment on the merits or that there is a reasonable probability that it would be successful. Renco has not quite established a reasonable probability that AMG did not make "reasonable" determinations in December and February. Moreover, the harm Renco will suffer and the balance of the equities do not warrant granting Renco the relief it requests.

On the other hand, the relative ease with which AMG could manipulate future distributions in its favor⁹⁸ cautions against leaving Renco without a timely

⁹⁶ If Renco could show that AMG's "unreasonable" determination of the capital accounts is likely to cause Renco pension liability exposure, that harm, for balancing purposes, would be substantial. Renco has been unable to demonstrate that there is a likelihood that such exposure has been, or will soon be triggered, and, accordingly, a balancing of the equities does not favor awarding Renco the relief which it has sought.

⁹⁷ The granting of a preliminary injunction is an extraordinary remedy. "It is therefore not surprising that interlocutory injunctive relief is granted 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." Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 10.02(a), at 10-5 (2012).

⁹⁸ AMG's control over AM General and the uncertain future prospects of AM General make it much easier for AMG to manipulate the determinations in its favor. As one example, AMG

opportunity to protect itself from greater harm.⁹⁹ Indeed, Renco may not be given notice of future distributions to AMG or the facts necessary to challenge the reasonableness of any supporting determination. The better and justified relief under these circumstances is to allow Renco, pending completion of the appraisal process, a meaningful opportunity to challenge AMG's "unreasonable" determinations before any distribution is made, especially if there is a reasonable probability that Renco's Revalued Capital Account would approach the 80 percent threshold.¹⁰⁰

Accordingly, the Court will grant an interim injunction requiring AMG to provide Renco a summary of its determination of the Revalued Capital Accounts fifteen calendar days before making any distributions. Fifteen days should give Renco enough time to challenge the reasonableness of AMG's determination and to seek appropriate relief before a distribution is made. If Renco is able to show

recently caused AM General to withhold from Renco a monthly business review report it had customarily received. *See* Letter to the Court from Kevin G. Abrams, Esq., dated May 23, 2013.

⁹⁹ Precluding future distributions now may not be warranted because current conditions might change. Projections that may have seen improvidently optimistic in February may be quite reasonable in the future. Depriving Renco of both necessary information (as AMG is doing) and a solid opportunity to secure prompt repayment of funds that should not have been distributed (difficult to achieve through a preliminary injunction for the reasons set forth above) is inconsistent with the co-venture relationship that the Holdco Agreement anticipated. On the current facts, there is not the degree of certainty essential to the grant of mandatory injunctive relief (*i.e.*, repayment), but the unavoidable skepticism about the capital account projections merits a mechanism to protect the members' rights and expectations pending completion of the appraisal process.

¹⁰⁰ The balance of the equities favors Renco under these circumstances. AMG will not be materially harmed by having to notify Renco of its intention to cause Holdco to distribute funds to itself and by having to provide Renco a summary of its determination.

that there is a reasonable probability that (1) AMG made an unreasonable determination and (2) Renco's Revalued Capital Account is near the 80 percent threshold,¹⁰¹ Renco may be entitled to an order enjoining all distributions until the appraisal process is completed (or an intervening reasonable determination supports a proposed distribution).

IV. CONCLUSION

For the foregoing reasons, Renco has demonstrated that it is entitled to a limited injunction, pending completion of the appraisal process, requiring that AMG provide a summary of its determination of the Revalued Capital Accounts to Renco at least fifteen calendar days before making any distribution.

An implementing order will be entered.

¹⁰¹ Under those circumstances, the Court would likely be unable to avoid a more thorough examination of the appropriate valuation of the Revalued Capital Accounts.