IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICKAEL FLAA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	*Civil Action No. 8632-VCG*
	)	
DANIEL C. MONTANO, VIKTORIYA T. MONTANO, JOHN W. JACOBS, ERNEST C. MONTANO, ERNEST MONTANO III and JOONG KI BAIK,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 26, 2013
Date Decided: October 4, 2013

Richard P. Rollo, of Richards, Layton & Finger, P.A.; Of Counsel: Barry F. Cannaday, of Dentons US LLP, Attorneys for the Plaintiff.

David L. Finger of Finger & Slanina, LCC, Attorneys for the Defendants.

GLASSCOCK, Vice Chancellor

The Plaintiff brings the action before me under 8 *Del. C.* § 225. He seeks to confirm the removal of members of the board of CardioVascular BioTherapeutics, Inc. ("Cardio") by written stockholder consent, supposedly effective as of June 7, 2013.[1] The Defendants, directors purportedly displaced by the written stockholder consent (the "Consent Action"), challenge the validity of the consents (the "Vizier Consents") filed on behalf of shares held by Vizier Investment Capital Limited. The parties have filed cross-Motions for Summary Judgment on the validity of the Vizier Consents. Because I find that the Vizier Consents were invalidly executed, and because, without those shares counting in favor, the Consent Action fails, the Defendants' Motion for Summary Judgment must be granted.

This issue before me involves, at its core, a dispute between a formerly married couple, Defendant and former director Daniel C. Montano—the founder and CEO of Cardio—and Victoria "Vicki" Montano.[2] Daniel and Vicki own a large block of stock in Cardio, which is held in a Bahamian corporation, Vizier Investment Capital Limited ("Vizier"). Upon their divorce in 2001, Vicki was granted the right to receive the first $2,000,000 generated by any future sale of

[1] Pl.'s Op. Br. at 6. I note that the Vizier Consents were delivered electronically on June 7, 2013 and by hand on June 8, 2013. A written consent is effective when delivered. *See* 1 R. Franklin Balotti & Jesse A. Finkelstein, Del. L. of Corp. and Bus. L. § 7.29 ("The action is effective when a legally sufficient consent (or consents) is delivered to the corporation at either its registered office in the State of Delaware or its principal place of business."). As explained below, I need not reach the question of whether the electronic delivery was effective, and consequently whether the Consent Action became effective only when the Vizier Consents were hand-delivered on June 8, 2013.

[2] I use first names in this Opinion to refer to the numerous individuals surnamed Montano.

Vizier stock, and Daniel and Vicki each hold a 50% interest in proceeds above that amount. By written consent, the stockholders of Cardio purported to remove most of the Cardio directors—including Daniel—as part of a deal to infuse Cardio with needed cash. On June 7, 2013, Vicki voted all the Cardio shares held by Vizier in favor of the consent. It is that action that is challenged, and dispositive, here.

I. BACKGROUND

A. Cardio

Cardio is a Delaware corporation developing drug candidates for treating coronary artery disease, peripheral artery disease, venous ulcers, and diabetic foot ulcers. Prior to June 7, 2013, when approximately 62% of Cardio shares voted by stockholder written consent to remove the defendant directors, Cardio's board of directors consisted of Defendants Daniel Montano, Viktoriya ("Vika") Montano, John Jacobs, Ernest Montano, Ernest Montano III, and Joong Ki Baik, Plaintiff Mickael Flaa, and non-party Grant Gordon. Directors Daniel and Vika Montano are currently married. Ernest Montano is Daniel Montano's brother, and Ernest Montano III is Daniel Montano's nephew. Grant Gordon is married to Amy, a child of Daniel's first marriage to Vicki.

B. The Wallen Loans

Because the company has yet to develop a marketable drug, Cardio has been insolvent since 2006.[3] In need of capital to pay rent on office and storage space, patent filing fees, utility bills, employee wages, and other business-related expenses, Cardio entered into two agreements with Calvin Wallen in which the company issued $500,000 and $1,000,000 in debt under a 2009 Subscription Agreement and Promissory Note and a 2010 Term Loan Facility and Promissory Note, respectively.[4] These loans were not secured by Cardio's assets, but were personally guaranteed by Daniel Montano.[5] Cardio defaulted on the loans, and in June 2012, Wallen sent Grant Gordon a letter requesting that, instead of instituting legal proceedings, the debt be converted to stock at $0.30 per share.[6] That request was denied.

As a result, on September 29, 2012, Wallen sought and obtained a default judgment in the Eighth Judicial District Court in Clark County, Nevada against Daniel for $2,153,507, reflecting the principle and interest on the loans that Daniel had personally guaranteed.[7] That court held a hearing on April 22, 2013 to

[3] Pl.'s Op. Br. Ex. 3.
[4] Defs.' Op. Br. Ex. 9.
[5] Dep. of Calvin Wallen at 10:25-11:2.
[6] Defs.' Op. Br. Ex. 8.
[7] Pl.'s Br. Opposing Defs.' Mot. for Status Quo Ex. 10. Wallen also filed a derivative action against Cardio and various board members on March 11, 2013 in Nevada. That action is currently pending. Defs.' Op. Br. at 11.

determine whether Daniel had any assets to satisfy the debt.[8] At that hearing, Daniel Montano testified that his only assets were his joint interest in the Cardio stock held by Vizier, but that according to his divorce agreement with Vicki, "unless she gets two and a half million dollars, I don't have access to the [stock held by Vizier]."[9] Daniel also testified that he did not know where the Cardio stock certificates were located. At a subsequent hearing on May 13, 2013 to inquire into the status of those stock certificates, Daniel testified that he still did not know where the physical stock certificates were located, but he believed that Vicki had access to them and she was reluctant to cooperate in the litigation because "her two and a half million [was] in jeopardy."[10]

C. The Financing Proposal

Unable to collect on the default judgment, and seeking to recoup some of his investment, on January 15, 2013, Wallen sent a letter to Cardio's board of directors, explaining:

> As you are aware, I have made numerous attempts to settle my debt while helping CardioVascular BioTherapeutics, Inc. (the "Company") to position itself for future success. Despite multiple attempts to contact Daniel C. Montano ("Montano") and the Board of Directors ("BOD") of the Company and resolve my situation, I have been ignored and passed off as a non-threat. Clearly my attempts to amicably work with the Company have been proven unsuccessful. I

---

[8] Defs.' Op. Br. Ex. 16.
[9] *Id.* at 6:8; 6:16-17.
[10] *Id.* Ex. 17 at 4:23-5:12.

> have thus been left no choice but to move forward in the manner set out in this letter.[11]

The letter included a financing proposal on behalf of himself, Clark Reinhard, and William Mullins ("WRM"). That proposal included an offer to purchase $3,000,000 in Cardio convertible notes by Clark Reinhard and Calvin Wallen; an offer to purchase $500,000 in Cardio preferred stock by Calvin Wallen; and an offer to purchase an additional $5,000,000 in Cardio convertible notes by WDM Investments International, a group of accredited investors associated with Mullins.[12] The proposal was conditioned on the immediate resignation of Daniel Montano as CEO; the immediate resignation of all Cardio board members except Mickael Flaa and Grant Gordon; and the appointment of five new directors designated by WRM.[13] Unsurprisingly, the Cardio board rejected this proposal. Daniel claimed that, because Mullins "had made financial overtures in the past but seldom delivered," the board could not be convinced that WRM would deliver unless WRM was willing to place the entire $8.5 million in escrow.[14]

D. Vizier

Vizier is a Bahamian company that was formed in 1998 for the sole purpose of holding the 30 million shares of Cardio jointly owned by Daniel and Vicki, who

---

[11] Pl.'s Op. Br. Ex. 19 at 1.
[12] *Id.*
[13] *Id.* at 1-2.
[14] Defs.' Op. Br. Ex. 1.1.

at that time were still married. Daniel's purpose in creating Vizier was to insulate the couple's shares from creditors.[15] Vizier was initially incorporated by Grant Gordon, and at an initial meeting for which no minutes could be produced, Gordon, Daniel, Vicki, and Ernest Montano were named as directors.[16] The Defendants claim that at that meeting the board resolved to vest Daniel, as President, with exclusive authority to vote Vizier's shares of Cardio, and that at subsequent board meetings, Daniel proceeded to vote Cardio proxies without objection from the other directors.[17] Cardio's Schedule 14A filing dated March 31, 2005 also states that "Mr. Montano has sole voting and investing power" over Vizier's shares of Cardio.[18] Vizier has no principal place of business, and no day-to-day operations: it exists only to hold Cardio stock.

The parties dispute who held officer positions in Vizier as of June 7, 2013, when Vicki voted the Vizier Consents. An undated Register of Officers provided by Grant Gordon identifies Daniel as President, Vicki as Vice President and director, Ernest Montano as Vice President and director, and Gordon as Chairman and Co-Secretary.[19] A recent Register of Officers dated August 12, 2013 identifies Daniel as President, Vicki as director, Ernest Montano as director, and Gordon as

---

[15] Defs.' Op. Br. at 4.
[16] *Id.*
[17] *Id.*
[18] Defs.' Op. Br. Ex. 6.
[19] Pl.'s Op. Br. Ex. 12.

Co-Secretary.[20] The parties disagree as to whether Gordon remains a director of Vizier—Vicki asserts that he is still a director, while Daniel claims that he was removed "four or five years ago" as a result of not wanting to disclose his relationship with Vizier in Cardio's SEC filings.[21] However, the Defendants have presented no evidence indicating that Vicki ever resigned from her initial position as Vice President, assuming that the undated Register of Officers presented by Gordon dates back to Vizier's formation.

Vizier's Articles of Association provide that, "in the absence of any specific allocation of duties, it shall be the responsibility of . . . the President to manage the day to day affairs of the Company, [and] the Vice Presidents to act in order of seniority in the absence of the President."[22] The only other officer positions created by the Articles are Chairman of the Board of Directors, Vice Chairman, Secretary, and Treasurer.[23]

E. The Divorce Agreement

Daniel and Vicki divorced in March 2001. Under their divorce agreement, Daniel was to pay $7,000 per month to Vicki for spousal support,[24] but Vicki testified in her deposition that she has not received regular spousal support

[20] *Id.* Ex. 13.
[21] Defs.' Op. Br. Ex. 16.
[22] *Id.* Ex. 1.
[23] *Id.*
[24] Pl.'s Op. Br. Ex. 16.

payments for five years.[25] The divorce agreement also provided that "Daniel C. Montano and Victoria G. Montano [were to] remain[] business partners in the financial affairs of Vizier Investment Capital Ltd," but "any and all spousal support [would] terminate upon Victoria G. Montano receiving the sum of $2,000,000.00 from Vizier Investment Capital Ltd."[26] Both parties agree that this provision entitles Vicki to receive the first $2,000,000, after taxes, generated from a sale of Vizier stock. However, as explained above, Daniel could not say in the debt collection action whether he or Vicki has authorization to vote the Vizier shares, stating that "my first wife controls everything until she gets two and a half million dollars," and "when we got divorced [the Vizier shares were] all under her control," but that "I assume that [Vicki] and I have equal voting rights."[27]

F. The Consent Action

When the board rejected WRM's financing proposal, Wallen initiated a written stockholder consent seeking to (1) amend Cardio's bylaws with respect to the removal of directors and appointment of directors to vacancies, (2) remove Daniel, Vika Montano, John Jacobs, Ernest Montano, Ernest Montano III, and Joong Ki Baik as directors, and (3) direct the remaining board to consider and act

[25] Dep. of Victoria Montano at 32:4-5.
[26] Pl.'s Op. Br. Ex. 16.
[27] *Id.* Ex. 26; Defs.' Op. Br. Ex. 17.

on the financing proposal submitted by Wallen.[28] Wallen, Grant Gordon, and Plaintiff Mickael Flaa contacted stockholders via email and Facebook, encouraging them to support the Consent Action.[29]

The written consents that stockholders received provided three methods for consenting: delivering a completed consent card to Cardio's registered agent by hand delivery or certified mail; calling a toll-free number and making a voting selection on the telephone keypad according to menu instructions; or completing an electronic consent on the Internet.[30] In order to access either electronic procedure, stockholders were required to input a unique, encrypted "control number," which was provided to each stockholder on his or her printed consent card.[31] Votes received electronically via telephone or Internet were tabulated by an independent tabulating agency, Ellen Philip Associates, Inc. At the end of each day consents were received, electronic votes were compiled on a spreadsheet, which was printed and delivered to Cardio's registered agent. The spreadsheets did not include the control numbers assigned to stockholders, and did not reproduce a screen shot of the Internet consents. In essence, the spreadsheets summarized the results of the consents but did not present a copy of the consents as the voters experienced them as they were electronically voting.

---

[28] Pl.'s Op. Br. Ex. 2.
[29] Defs.' Mot. for Status Quo Order Ex. 2F-G.
[30] Pl.'s Op. Br. Ex. 1.
[31] *Id.*

G. Vicki Montano Executes the Vizier Consents

In anticipation of the Consent Action, Vicki directed Grant Gordon to update Vizier's mailing address in Cardio's records.[32] The Vizier address in Cardio's files was a residence where Daniel formerly, but no longer, resided. Daniel claims that mail sent to that address was forwarded to his current residence, but admits that he had not lived at the former address for at least two years. At Vicki's behest, Gordon contacted Cardio's mailing agent, instructing that future communications with Vizier be sent to his own address.[33] When he received the Vizier Consents, he provided them to Vicki.[34] Vicki did not inform Daniel that she had changed Vizier's mailing address,[35] nor did she inform him that she was in possession of the Vizier Consents. She did not call a board meeting to determine whether it was in Vizier's interests to vote the Vizier Consents.

Daniel, however, had been aware of the Consent Action's existence as early as April 2012.[36] In fact, he had seen a copy of the consent, but apparently did not question why he had not received the Vizier Consents in the mail, nor did he call a

---

[32] Defs.' Op. Br. at 15.
[33] Dep. of Victoria Montano at 46:1-6.
[34] *Id.* at 44:13.
[35] When asked why she did not notify Daniel that she planned to vote the Vizier Consents, Vicki Montano responded that "[Daniel] would have tried to browbeat me," and that "I was just really afraid that he'd just get really upset and mad and yell, and I didn't want to go there." Dep. of Victoria Montano at 58, 60.
[36] Dep. of Daniel Montano at 98.

Vizier board meeting to discuss whether or not the Vizier Consents should be voted.

On June 7, 2013, the Vizier Consents were transmitted telephonically on behalf of Vizier's 30 million shares.[37] The next day, on June 8, 2013, a paper copy of the Vizier Consents was hand-delivered to Cardio's registered agent.[38] The Vizier Consents were signed by Vicki, indicating her position on the consent card as "Vice President." Prior to changing Vizier's mailing address, she had never before taken any action on behalf of Vizier in her capacity as Vice President, and had never signed any document, other than a check, identifying herself as Vice President of Vizier.[39] She testified in her deposition that no one had ever explained to her what the powers or duties of a Vice President in Vizier entailed.[40] Instead, Vicki stated in her affidavit that she voted in favor of the proposal as the "sole owner of the right to receive the first $2,000,000 of income from Vizier" due under her divorce settlement with Daniel.[41]

H. The Consent Action Removes the Cardio Board

At the time the Consent Action occurred, there were 180,510,013 shares of Cardio outstanding. Vizier owned roughly 16.6% of Cardio shares. In total,

---

[37] Pl.'s Op. Br. at 22.
[38] *Id.* Ex. 2.
[39] Dep. of Victoria Montano at 40.
[40] *Id.* at 39.
[41] Pl.'s Op. Br. Ex. 16.

111,157,236 shares consented to the proposal,[42] representing roughly 61.6% of shares outstanding.[43] Excluding all electronically submitted consents, but including the paper Vizier Consents, 92,462,611 written consents—roughly 51.22% of shares outstanding—were effectively delivered to Cardio.

Upon receipt of a majority of stockholder consents, the defendant directors were removed, and the two remaining directors, Grant Gordon and Plaintiff Mickael Flaa, appointed Calvin Wallen, Jon Ross, and Robert Schleizer to fill the vacancies. On June 8, 2013, the Plaintiff filed this action under 8 *Del. C.* § 225 to confirm the effectiveness of the Vizier Consents, and consequently the Consent Action.

II. STANDARD OF REVIEW

This case comes before me on the parties' cross-Motions for Summary Judgment. Court of Chancery Rule 56(c) permits a party to file a Motion for Summary Judgment when there exists "no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law."[44] Further, "[w]here the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent

---

[42] *Id.* Ex. 6.
[43] *Id.*
[44] Ct. Ch. R. 56(c).

of a stipulation for decision on the merits based on the record submitted with the motions."[45]

III. ANALYSIS

The Plaintiff has sought in this Section 225 action[46] to confirm the validity of the Vizier Consents executed by Vicki Montano, thereby confirming the effectiveness of the Consent Action on the whole, since, excluding the Vizier Consents, the Consent Action would have failed to obtain majority approval. The Consent Action proceeded in accordance with 8 *Del. C.* § 228(a).[47] The Defendants initially contested the effectiveness of the stockholder consent on the basis that the written consents executed electronically failed to satisfy the delivery requirements under 8 *Del. C.* § 228(d).[48] The parties now agree, however, that

---

[45] Ct. Ch. R. 56(h).

[46] *See* 8 *Del. C.* § 225 ("Upon application of any stockholder or director, or any officer whose title to office is contested, the Court of Chancery may hear and determine the validity of any election, appointment, *removal* or resignation of any director or officer of any corporation . . . .") (emphasis added).

[47] 8 *Del. C.* § 228(a) provides that:

> Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted and shall be delivered to the corporation by delivery to its registered office in this State, its principal place of business or an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded. Delivery made to a corporation's registered office shall be by hand or by certified or registered mail, return receipt requested.

[48] Defs.' Op. Br. at 31-35.

excluding all consents executed electronically, but including the hand-delivered Vizier Consents, the Consent Action obtained majority approval sufficient to compel the actions directed by the consents.[49] The parties are also in agreement that, absent the Vizier Consents, the Consent Action fails even if the electronic consents are included.[50] Thus, the Court is left to address only the validity of the Vizier Consents, which the Defendants argue were executed without authority.

The Plaintiff makes four arguments in favor of upholding the validity of the Vizier Consents. First, the Plaintiff argues that I should apply to this challenge to written consents the same standard the Court applies to a challenge to the validity of a proxy; according to the Plaintiff, that should result in the Court excluding extrinsic evidence of validity and upholding the Vizier Consents as facially valid. Second, the Plaintiff argues that Vicki had actual authority to vote the Vizier Consents. Third, the Plaintiff submits that, even if Vicki did not have actual authority to vote the Vizier Consents, she had apparent authority to vote the Vizier Consents, and Vizier should be bound by that authority. Fourth, the Plaintiff argues that, based on statements made by Daniel in the debt collection action, the

---

[49] Letter from Pl.'s Counsel dated Aug. 23, 2013.

[50] *Id.* A letter from Plaintiff's counsel dated August 23, 2013 states that 90,255,008 total consents were required in order for the Consent Action to be effective. Including those delivered electronically, 111,157,236 consents were received. If Vizier's 30,000,000 shares are to be excluded, however, only 81,157,236 consents—an insufficient number to compel the actions required by the consents—would have been delivered.

Defendants should be estopped from arguing that Vicki did not have authority to execute the written consent.

A. Facial Validity Standard

The Plaintiff argues that the Vizier Consents are valid on their face and that, by analogy to this Court's treatment of extrinsic evidence in the case of facially valid proxies, such evidence regarding Vicki's lack of authority to execute the Vizier Consents must be excluded here. He argues that, because the Vizier Consents identified Vicki as "Vice President" of Vizier, the Vizier Consents were "free of obvious irregularities," and should be deemed effective without further analysis.[51]

A proxy valid on its face is entitled to a presumption of validity.[52] A proxy is facially valid where it "bear[s] no facial indication that the person executing the proxy [is] unauthorized to do so" and where the lack of authority is not evident from the books and records of the company.[53] Our case law seems to be in some conflict as to the admissibility of extrinsic evidence where, analogous to the case here, a facially valid proxy is challenged on grounds that it was executed without authority. For example, in *Maniero v. Microbyx Corp.*, after noting generally that

[51] Pl.'s Op. Br. at 25.
[52] *Maniero v. Microbyx Corp.*, 699 A.2d 320, 323 (Del. Ch. 1996).
[53] *See Id.* at 325 (internal citations omitted); *Parshalle v. Roy*, 567 A.2d 19, 22 (Del. Ch. 1989) (holding that a proxy was facially valid where a general partner's lack of authority to vote the proxy could not be determined from the company's books and records).

"[i]t has long been the rule to exclude extrinsic evidence in resolving disputed proxy votes," then-Vice Chancellor Steele turned to a situation where authority to execute a facially valid proxy was challenged.[54] The Court held that "[a] proxy valid on its face . . . is entitled to a presumption of validity. . . . When the presumption is challenged the issue becomes the signer's authority to sign on behalf of the record holder."[55] The Court then examined the extrinsic evidence but found that the presumption of validity had not been rebutted. However, I need not attempt to resolve the question of whether extrinsic evidence would be admissible in an analogous proxy challenge, because our case law makes it clear that extrinsic evidence is admissible to challenge a facially valid consent.[56]

Once a challenge is made to the authority of the executor of the consent to exercise such consent, this Court will look beyond the face of the consent to determine its validity. The Court in *B.F. Rich Co., Inc. v. Gray*, for example, addressed the substantive issue of whether a defendant director had authority to execute written consents for shares owned by his children. The Court did not look

---

[54] *Id*. at 323, 325.
[55] *Id*. at 325-26 (quotations omitted).
[56] I doubt, however, that the outcome of this case would be any different if I did apply the general rule—excluding extrinsic evidence to challenge a facially valid proxy—to the consents here. It is not at all clear to me that the Vizier Consents were in fact facially valid, since Vicki's purported authority on the consent card was inconsistent with Cardio's own records—specifically, its SEC filings stating that Daniel had exclusive authority to vote Vizier's shares of Cardio. *See Maniero v. Microbyx Corp*., 699 A.2d 320, 323 (Del. Ch. 1996) (explaining that correction of proxy errors is limited to facial irregularities or errors obvious from the corporation's books and records).

only to the face of the consents to determine whether or not the defendant was authorized to vote the shares. Instead, the Court engaged in a detailed analysis, determining that a stipulation approved by a Connecticut family court granted the defendant authority to vote the shares, and that the stipulation was entitled to full faith and credit.[57] An earlier case, *Nycal Corp. v. Angelicchio*, addressed the question of whether a shareholder defendant was authorized to execute a written consent on behalf of shares that it undisputedly owned. There, the plaintiff corporation challenged the shareholder's authority to vote its shares based on an agreement between the shareholder and a creditor that purported to transfer voting rights to the creditor.[58] The Court rejected the corporation's claim, determining that, because the corporation's books and records did not "expressly empower" the creditor to vote the shares, the Court could not definitively "conclude that [the creditor] ha[d] the sole and exclusive right to vote [the defendant's] shares."[59] Having determined that extrinsic evidence is admissible to determine Vicki's authority to execute the consents, I turn now to that evidence.

B. Actual Authority

The Plaintiff next argues that, as Vice President of Vizier, Vicki had actual authority to execute the Vizier Consents. The Defendants dispute that Vicki had

---

[57] *BF Rich Co., Inc. v. Gray*, 2006 WL 4782419, at *5-12 (Del. Ch. Nov. 9, 2006).
[58] *Nycal Corp. v. Angelicchio*, 1993 WL 401874, at *854-55 (Del. Ch. Aug. 31, 1993).
[59] *Id*. at 855.

that authority.[60] Because Vizier is a Bahamian company, the issue of whether Vicki had authority to execute the Vizier Consents is controlled by Bahamian law. However, the parties agree that the analysis under Bahamian law is the same as the analysis under Delaware law.[61]

There is a genuine issue of fact as to whether Vicki is the Vice President of Vizier.[62] The Defendants contest Vicki's position as Vice President, noting that she is listed on the most recent Register of Officers only as a director. The Plaintiff responds that under the Register of Officers Grant Gordon produced, Vicki is identified as Vice President; that Bahamian law requires written resignation to forfeit that title; and that no such resignation was ever delivered. The Defendants respond that the Register of Officers Gordon produced does not contain an official seal, and its authenticity is therefore in doubt. Finally, the Plaintiff argues that, as Vicki is listed on the Register of Officers produced by the

[60] Vizier is not a party here. Daniel, however, is a 50% owner of Vizier as well as the CEO charged with the day-to-day operation of the company, including, as if find *infra.*, the voting of the Cardio stock. It is clear to me that he has standing to challenge Vicki's authority to execute the consents on behalf of Vizier. I need not consider, therefore, whether the ousted Cardio directors, as such, have standing to challenge Vicki's authority.

[61] *See* Defs.' Op. Br. at 22, n. 13 ("[I]n the absence of any evidence to the contrary, the law of a foreign nation is presumed to be the same as local law."). The parties have explicitly agreed that Delaware law would apply by analogy to any analysis of Vicki Montano's breach of fiduciary duties. While the Plaintiff points out that Vicki's authority is governed by Bahamian law, he also states that "if the Court were to apply Bahamian law to the issue, it must first consider Vizier's operative corporate instruments." Pl.'s Op. Br. at 34. My analysis depends entirely on an analysis of Vizier's corporate instruments, as the parties have not pointed to any operative Bahamian law as controlling my analysis.

[62] I also note that, assuming Vicki is a Vice President of Vizier, it is unclear whether Vicki is senior to Ernest Montano, who also appears as Vice President on the Register of Officers.

Defendants, she is unquestionably an officer, even if there is some doubt as to which officer position she holds. Ultimately, however, I need not resolve the question of whether Vicki is the Vice President of Vizier, because, as I explain below, even assuming that she is the most senior Vice President of Vizier, she did not have actual or apparent authority to execute the Vizier Consents.

The Defendants argue, correctly in my view, that a Vice President does not have authority to vote written consents by virtue of her title alone, and that some other independent source must grant Vicki authority to execute the Vizier Consents. The Restatement (Third) of Agency, relied on by both the Plaintiff and Defendants, states that:

> The office of vice president by itself does not carry actual or apparent authority to bind the corporation. The designation of a person as a vice president does not have a standardized or customary meaning associating particular functions or authority with the position. . . . In contrast, some corporations define the vice president's position to carry full authority to act on behalf of the corporation when the president is unavailable. If a corporation permits a vice president to exercise significant transactional functions and to make or appear to be in control of operational decisions, it creates a basis on which actual or apparent authority may arise.[63]

Accordingly, although Vicki's position as Vice President does not in itself grant actual or apparent authority to vote the Vizier Consents, Vizier's organizational documents may have defined the Vice President's duties in such a way as to grant

[63] Restatement (Third) of Agency §3.02 cmt. 4.

her that authority. I therefore turn to Vizier's Articles of Association, which do speak to this issue.

While the Articles of Association are silent with respect to the specific authority to vote stock held by the company, they do grant Vizier's President the authority to "manage the day-to-day affairs of the Company."[64] The Articles further provide that the Vice Presidents may "act in order of seniority *in the absence of the President*."[65] Assuming that she is Vizier's most senior Vice President, Vicki therefore has the power, under authority of ¶ 116, to manage the day-to-day affairs of Vizier, but only in Daniel's absence. The parties dispute whether voting the Cardio stock was a part of the day-to-day operation of Vizier, and whether, at the time Vicki took that action, Daniel was absent within the meaning of ¶ 116.

Historically, Daniel has voted the Cardio stock on behalf of Vizier; the parties disagree, however, as to the source of his authority to do so. The Defendants argue that at Vizier's initial board meeting (for which no minutes have been produced), the board resolved to vest exclusive voting authority in Daniel. The Plaintiffs dispute the contention that Daniel had *sole* voting authority, but

---

[64] Pl.'s Op. Br. Ex. 10 (Articles of Association) at ¶ 116.
[65] *Id.*

contend that he had voting authority by virtue of his position as President.[66] Since no minutes were produced to evidence a resolution by Vizier's board granting Daniel exclusive—or, indeed, any—authority to vote Vizier's shares of Cardio, I find that Daniel's authority to vote the shares arises from the Articles of Association: the day-to-day operations of the company which he was authorized under the Articles to manage included voting the shares held by the company.

The Defendants briefly argue that voting Vizier's shares of Cardio cannot fall under the umbrella of day-to-day operations because the Consent Action was part of a contest for corporate control, and was therefore an "extraordinary" event.[67] I disagree. While the Consent Action may have been an extraordinary event from Cardio's perspective, voting Vizier's shares of Cardio was not extraordinary; in fact, as a holding company, Vizier's *only* day-to-day operations involve managing and voting its Cardio shares.

Under ¶ 116 of Vizier's Articles of Association, Vice Presidents are authorized to act—including, as I have found, voting the Cardio shares—only in the President's absence. Those constraints are consistent with the fact that, until the Vizier Consents, Daniel had been the only person to vote Vizier's shares of

---

[66] *See* Pl.'s Answering Br. at 21 ("Plaintiff is not arguing that Dan Montano did not have authority to vote the Cardio shares by virtue of his status as President of Vizier, but according to the Articles of Association, that power was not exclusive because it could be exercised by Vice Presidents in certain circumstances.").
[67] Defs.' Answering Br. at 8.

Cardio. The key factual determination, therefore, is whether Daniel was "absent" from Vizier such that authority fell on Vicki to vote the Vizier Consents.

Determining what it means to be "absent" in a holding company with essentially no day-to-day operations, however, is a difficult inquiry. On one hand, because the company had no purpose other than to hold Cardio shares, the only responsibility with respect to the day-to-day operation of the company was to vote those shares. The Plaintiff points out that although Daniel knew of the attempted Consent Action, he took no action on behalf of Vizier. The Plaintiff cites this fact as evidence of Daniel's absence from the affairs of the company.[68] Moreover, although aware of the Consent Action, Daniel failed to provide his current mailing address to Cardio's registered agent. As a result, he could not have reasonably expected to receive the Vizier Consents in the mail, or any other mailed communications from Cardio to Vizier. Daniel argues that this was not "absence": he relied on the Postal Service to forward mail pursuant to his written instructions. The record indicates that this notice was stale and ineffective, however.[69] With respect specifically to the Vizier Consents, Daniel testified at deposition that, because he believed he was the only person with authority to vote the shares and

[68] Pl.'s Op. Br. at 34, n. 93.

[69] *See* Dep. of Daniel Montano at 93:1-13 (explaining that prior to the address change, Cardio's records reflected Vizier's address as Daniel's former home address, where he ceased living "approximately two years ago"); Pl.'s Answering Br. Ex. 2 ("As long as you move within the United States, the USPS will forward your mail for up to one year to your new address.").

intended *not* to vote them, he was not concerned when he did not receive the Vizier Consents.[70] Still, a faithful fiduciary likely would have maintained a current address with the registered agent, and on learning of a Consent Action in which his own tenure was involved, would have called a board meeting to discuss whether or not it was in Vizier's best interests to vote the consents.

Still, I cannot conclude that Daniel was "absent" from Vizier such that a Vice President would be justified in usurping his responsibilities. Vicki and the other Vizier directors—his brother and son-in-law—did have a means of communicating with Daniel, and could have informed him of the opportunity to vote the Vizier Consents. What happened instead was telling. Upon learning of the Consent Action, Vicki directed the registered agent to send the Vizier Consents to her ally, Grant Gordon, instead of to Daniel. She was therefore able to receive and execute the Vizier Consents without Daniel's knowledge. Aware that Daniel was the President of Vizier, with authority to vote the shares, Vicki could have had the registered agent send the Vizier Consents to his current address, or could have forwarded them herself. She could have convened a Vizier board meeting, with notice to Daniel, to determine whether to make a timely election with respect to the Consent Action. That she chose not to do so, and instead arrogated to herself the

[70] Dep. of Daniel Montano at 99-100.

authority to vote the Vizier Consents without Daniel's knowledge, does not make him "absent" from Vizier.

Vicki testified that she chose not to communicate with Daniel about the Vizier Consents for fear that he would "browbeat" her. It is clear to me that Vicki diverted the Vizier Consents because she knew her ex-husband would not support them, *not* because he was unavailable or "absent." Clearly the parties' interests were at odds: Vicki presumably wished to maximize the value of the Cardio shares in the short term so that she could realize the $2,000,000 due to her under the divorce agreement, while Daniel wished to maintain his board position at Cardio. The fact that Daniel and Vicki disagreed about how best to manage Vizier does not suggest to me that Daniel was absent, but rather that Vicki knew exactly where he stood with respect to the Consent Action, and did not want to confront him about it.

Vizier had no day-to-day operations, apart from the occasional voting of the Cardio stock. As President of Vizier, the authority to vote the stock vested in Daniel under the Articles of Association.[71] Although Vicki manipulated the

[71] I make no determination here whether Daniel's fiduciary duty to Vizier would have allowed him to withhold the Vizier Consents, or whether the vote was properly a matter for the Vizier board as opposed to its conflicted executive officer. The important point is that Vicki's only authority to take the actions she did was under the Articles of Association, acting as senior Vice President in Daniel's absence from Vizier. Since he was not absent, she lacked authority.

I also note that according to the Defendants, as of July 1, 2013, neither party has the right to vote Vizier's shares of Cardio pending resolution of the Nevada debt collection action. Defs.' Op. Br. at 11. The documentation submitted by the Defendants, however, is insufficient to situation to mask her actions, she and Grant Gordon, who actually received the Vizier Consents, knew how to reach Daniel. I therefore cannot conclude that Daniel was "absent" from Vizier, and instead find that Vicki did not have actual authority to vote the Vizier Consents, regardless of whether or not she held the position of Vice President.

C. Apparent Authority

The Plaintiff alternatively argues that even if Vicki did not have actual authority to vote the Vizier Consents, she had apparent authority to do so. Such a theory is unavailing, and does not require deep analysis. To show that Vicki acted with apparent authority, the Plaintiff must demonstrate that she did not act with actual authority to vote the consent, but that Vizier, by placing her in the position of Vice President, held her out as having authority, and that Cardio reasonably relied on that act by Vizier.[72] However, the Plaintiff has not shown that Cardio "relied" on the consent card's representation that Vicki was Vizier's Vice

---

determine whether that interpretation of the Nevada court's order is accurate. *See* Defs.' Op. Br. Ex. 10 at 3 ("*[I]f ordered*, the shares would be placed with the County Clerk so that no one can get a single share ordered, sold, or voted without this Court's written consent.") (emphasis added).

[72] *See B.A.S.S. Grp., LLC v. Coastal Supply Co., Inc.*, 2009 WL 1743730, at *5 (Del. Ch. June 19, 2009) ("Apparent authority is that authority which, though not actually granted, the principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing. To find apparent authority, the party seeking to show the existence of such authority must show reliance on indicia of authority originated by the principal, and such reliance must have been reasonable.") (internal quotations omitted); *Szambelak v. Tsipouras*, 2007 WL 4179315, at *6 (Del. Ch. Nov. 19, 2007) ("[W]here a third party relies on the agent's apparent authority in good faith and is justified in doing so by the surrounding circumstances, the principal is bound to the same extent as if actual authority had existed.") (internal quotations omitted).

President. While the Plaintiff contends that "[t]he facially valid Vizier Written Consent submitted to Cardio made it reasonable for Cardio to believe that Vicki had authority to execute the consent on Vizier's behalf," there is no indication that Cardio "believed" that Vicki was the Vice President of Vizier, or was aware that Vizier's Articles of Association granted its Vice President the authority to conduct the day-to-day affairs of the company in the absence of the President.[73] It is unclear who, if anyone, from Cardio scrutinized the consent card or Vizier's organizational documents to determine whether the Vizier Consents were authorized. However, if Cardio "knew" anything at all with respect to officer authority at Vizier, it was that Daniel had represented in Cardio's *own* Schedule 14A that he had "sole voting and investing power" for Vizier.[74] Whether or not that contention was correct, Cardio certainly would have had reason to doubt Vicki's authority to vote Vizier's shares. Nothing in the record indicates that Cardio relied, reasonably or not, on some action by Vizier. In fact, since Cardio as an entity is indifferent to the outcome of the Consent Action, the appropriateness of the entire concept of reliance is questionable here.

Without a showing that Cardio actually relied on Vicki's status as Vice President when accepting the Vizier Consents, the Plaintiff cannot show that she acted with apparent authority.

[73] Pl.'s Answering Br. at 15.
[74] Defs.' Op. Br. Ex. 6.

D. Estoppel

Finally, the Plaintiff claims that the Defendants should be estopped from challenging Vicki's authority to vote the Vizier Consents because Daniel stated on the record in the debt collection action that "when we got divorced [the Vizier shares were] all put under [Vicki's] control."[75] I reject that argument.

"[U]nder the doctrine of judicial estoppel, a party may be precluded from asserting in a legal proceeding a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding" in order to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[76]

However, Daniel's statements in the debt collection action do not amount to an unambiguous declaration that Vicki had authority to vote the Vizier Consents. In the debt collection action, Wallen was attempting to execute on a debt personally guaranteed by Daniel; in context, Daniel's reference to "control" indicated that Vicki had a right to dispose of the shares in order to collect the

[75] Pl.'s Op. Br. Ex. 26; Defs.' Op. Br. Ex. 17.

[76] *Capaldi v. Richards*, 2006 WL 3742603, at *2 (Del. Ch. Aug. 9, 2006).. (internal citations omitted). I would also note that, to the extent that the Plaintiff is asserting equitable estoppel, such a defense requires a showing that "(i) [the party claiming estoppel] lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) they reasonably relied on the conduct of the party against whom estoppel is claimed; and (iii) they suffered a prejudicial change of position as a result of their reliance." *Nevins v. Bryan*, 885 A.2d 233, 249 (Del. Ch. 2005) (internal citations omitted). An argument under this standard is inappropriate here, since the Plaintiff has not suggested that Cardio—the party asserting estoppel—relied on Daniel's statements in the debt collection action.

proceeds in accordance with the parties' divorce agreement, under which she had a right to the first $2,000,000. Daniel's testimony indicated that, pursuant to the divorce agreement, he did not have a right to transfer ownership of any shares to Wallen, since such a transfer would violate the terms of the divorce agreement. That assertion is not inconsistent with the idea that Daniel still had authority as Vizier's President to vote the Vizier Consents, and is entirely consistent with his statement in the same transcript that "I assume that [Vicki] and I have equal voting rights" with respect to the Vizier shares themselves.[77]

Because Daniel did not unambiguously state in the debt collection action that Vicki was entitled to vote the Vizier Consents, the "integrity of the judicial process" does not require foreclosing arguments that Vicki lacked authority to vote these Consents.

IV. CONCLUSION

As explained above, I find that Vicki Montano lacked authority to execute the Vizier Consents. Further, I find that the Defendants are not judicially estopped from challenging her authority to vote the Vizier Consents. On that basis, I grant the Defendants' Motion for Summary Judgment and deny the Plaintiff's Motion for Summary Judgment. The parties should advise me whether any outstanding issues remain.

[77] Pl.'s Op. Br. Ex. 26; Defs.' Op. Br. Ex. 17.