EFiled: Sep 14 2011 11:24AM EDT
Transaction ID 39800837
Case No. 6562-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ASDC HOLDINGS, LLC, ALL SMILES DENTAL CENTER, INC., AS PROPERTY HOLDINGS, VALOR MANAGEMENT CORP., ANTONIO GRACIAS, JUAN SABATAR, AND JONATHAN SHULKIN Plaintiffs, v. THE RICHARD J. MALOUF 2008 ALL SMILES GRANTOR RETAINED ANNUITY TRUST and RICHARD J. MALOUF, Defendants.	)	C.A. No. 6562-VCP

MEMORANDUM OPINION

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PARSONS, Vice Chancellor.

This action arises from a transaction involving the sale of equity in a Texas-based dental practice management company to a Chicago-based private equity firm. Shortly after consummating the deal, the purchasers soured on their investment and initiated arbitration proceedings against the sellers. In response to the arbitration filing, the sellers commenced litigation in Texas state court against the purchasers, alleging their own claims related to the transaction. Contending that the sellers are required by the forum selection clause governing the transaction to bring all litigation relating to the transaction exclusively in Delaware, the purchasers seek a preliminary injunction to prevent the sellers from prosecuting their action in Texas. In response, the sellers have moved to dismiss the purchasers' claims for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

Resolution of the pending motions depends primarily on whether the purchasers' ability to raise the forum selection clause issue in Texas provides them with an adequate remedy at law, undermining the basis for equity jurisdiction, and if not, whether the terms of the forum selection clause are broad enough to reach the Texas claims. For the reasons stated in this Memorandum Opinion, I conclude that the forum selection clause does not provide purchasers an adequate remedy at law and, therefore, this Court has subject matter jurisdiction over their claims. I further find that the forum selection clause here, which applies to any claims arising under or relating to the transaction, is sufficiently broad in scope that the purchasers are likely to succeed in showing that it provides exclusive jurisdiction in Delaware over the claims brought by the sellers in Texas. Accordingly, I grant the purchasers' motion for a preliminary injunction.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff All Smiles Dental Center, Inc. ("All Smiles") is a Texas-based dental practice management company incorporated in Delaware. Plaintiff AS Property Holdings, LLC ("AS Property") is a Delaware limited liability company.

Plaintiff Valor Management Corp. ("Valor") is the management company of a Chicago-based middle market private equity firm, Valor Equity Partners. ASDC Holdings, LLC ("ASDC Holdings") is a Delaware limited liability company formed by Valor for the purpose of investing in All Smiles. ASDC Holdings owns approximately 8,000 shares of All Smiles preferred stock and 61,000 shares of All Smiles common stock, giving it about 71% of the total equity in All Smiles.

Individual plaintiff Antonio Gracias is the CEO and a director of Valor. He is also the manager of ASDC Holdings and the Chairman of All Smiles. Juan Sabater is a managing director of Valor and a director of All Smiles. Jonathan Shulkin is also a managing director of Valor, as well as an officer and director of All Smiles. The individual plaintiffs, Gracias, Sabater, and Shulkin, will be referred to collectively as the "Individuals" and all of the plaintiffs in this action will be referred to collectively as the "Plaintiffs."

Defendant Dr. Richard J. Malouf is a Texas resident and the founder, former President, and a current director of All Smiles. Before the transaction at issue, he was All Smiles's controlling shareholder. Currently, he owns approximately 14,000 shares of All

Smiles common stock. The Richard J. Malouf 2008 All-Smiles Grantor Retained Annuity Trust is a trust established and controlled by Malouf. It owns approximately 10,000 shares of All Smiles common stock. Because Malouf controls the trust, references to him herein include the Trust.

B. Facts

On June 30, 2010, Malouf entered into an agreement with ASDC Holdings under which ASDC Holdings invested approximately $65 million in All Smiles in exchange for 71% of the company's stock (the "Transaction"). As part of the Transaction, Malouf and ASDC Holdings executed several contracts, including the five at issue here (the "Agreements").[1] AS Property, Valor, Valor Equity Partners, and the Individuals are not signatories to these Agreements. In each of the relevant contracts under the Agreements, the parties agreed to virtually identical arbitration clauses which provide, in pertinent part, that "any dispute regarding [the] Agreement[s] [would be resolved] through binding arbitration."[2] They also agreed to identical forum selection clauses that require the parties to submit "to the exclusive jurisdiction of any state court within New Castle County, Delaware or, if it can obtain jurisdiction, the United States District Court for the

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[1] The agreements at issue include the (1) Note and Stock Purchase Agreement, (2) All Smiles Dental Center, Inc. Stockholders' Agreement, (3) Employment Agreement between All Smiles and Malouf, (4) Director Agreement between All Smiles and Malouf, and (5) Restrictive Covenant Agreement between All Smiles and Malouf.

[2] Compl. Ex. A at 57, B at 37, C at 13, D at 13, E at 9.

District of Delaware sitting in Wilmington, Delaware . . . with respect to any claim or cause of action arising under or relating to th[e] Agreement[s] . . . ."[3]

After the Transaction closed, the relationship between Malouf and ASDC Holdings quickly soured. As a result, on February 22, 2011, ASDC Holdings and All Smiles submitted an arbitration demand against Malouf to the American Arbitration Association ("AAA"). In their demand, ASDC Holdings and All Smiles asserted various claims against Malouf, including breaches of contract, representations, warranties, and fiduciary duties, as well as fraud related to the Transaction and the Agreements. In response, Malouf filed his own claims in the arbitration against ASDC Holdings and All Smiles.

On March 22, 2011, Malouf sued All Smiles, Valor Equity Partners, AS Property, and the Individuals in Dallas County District Court in Texas (the "Texas Action"). In the Texas Action, Malouf makes various claims against Valor Equity Partners and the Individuals, including claims for fraud and fraud in the inducement, breach of fiduciary duties, negligent misrepresentation, and tortious interference with contract. In addition, Malouf also asserts claims against All Smiles for reimbursement of certain expenses he incurred before the Transaction closed.

There are three other plaintiffs besides Malouf in the Texas action: 2009 Strait Lane Family Limited Partnership ("Strait Lane"); Camelia Family Limited Partnership ("Camelia"); and Deal Time Auto Group, LLC ("Deal Time"). These entities seek

[3] Compl. Ex. A at 58, B at 37-38, C at 14, D at 13, E at 9-10.

declaratory judgments on the validity of various leases they executed with AS Property and All Smiles.

All Smiles, Valor Equity Partners, AS Property, and the Individuals filed their Answer to the Texas Action on May 2, 2011, and, on May 9, filed a motion to dismiss the Texas Action on the ground that the forum selection clause conferred exclusive jurisdiction over Malouf's claims in Delaware. Although these defendants in the Texas Action did not submit a brief with their motion, Malouf and the other plaintiffs in the Texas Action filed a brief in opposition to the motion to dismiss on or about July 8, 2011.

C. Procedural History

Plaintiffs filed their initial Complaint in this action on June 13, 2011, and on June 20, moved for a preliminary injunction enjoining Malouf from proceeding with the Texas Action. Defendants answered the Complaint on June 30 and, on July 6, moved to dismiss it for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs filed an amended Complaint (the "Complaint") on July 18, which Defendants again moved to dismiss on the same grounds. A hearing on the motions was held on August 11, 2011.

Following that hearing, Malouf made a motion to compel discovery in the Texas Action. The Texas court set a hearing date on or about September 16, 2011 to hear arguments on both Malouf's motion to compel and the motion to stay the arbitration. This Memorandum Opinion reflects my rulings on Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss.

D. Parties' Contentions

In the Complaint, Plaintiffs ask for specific performance, a declaratory judgment, and a preliminary injunction in two counts. Count I seeks an order from this Court directing Defendants to honor and specifically perform their obligations under the Agreements to litigate exclusively in Delaware any claims relating to the Transaction or the Agreements, including the claims in the Texas Action. Count II seeks a declaratory judgment that Defendants must litigate exclusively in Delaware, if at all, any claims arising from the Transaction or the Agreements. Plaintiffs also sought preliminarily and permanently to enjoin Defendants from further prosecuting the Texas Action.

Defendants challenge this Court's subject matter jurisdiction over Plaintiffs' claims on the grounds that Plaintiffs have an adequate remedy at law because they can raise the forum selection clause as an affirmative defense in the Texas Action. In addition, Defendants contend that Plaintiffs have not satisfied their burden for a preliminary injunction because they have not established that they will suffer imminent and irreparable harm if the Texas court were to decide whether the forum selection clause applies to the Texas Action or shown a reasonable probability of success on the merits of the underlying claims in this action.

II. ANALYSIS

A. Does This Court Have Subject Matter Jurisdiction over Plaintiffs' Claims under *El Paso*?

Malouf begins his defense by claiming this Court does not have subject matter jurisdiction over Plaintiffs' motion for a preliminary injunction and, therefore, the Complaint should be dismissed under Rule 12(b)(1).[4]

This Court is one of limited jurisdiction. The Court of Chancery can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right;[5] (2) a request for an equitable remedy when there is no adequate remedy at law;[6] or

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[4] The Court of Chancery will dismiss an action under Rule 12(b)(1) "if it appears from the record that the Court does not have subject matter jurisdiction over the claim." Ct. Ch. R. 12(b)(1).

[5] *See* 10 *Del. C.* § 341 ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity."); *Christiana Town Ctr. LLC v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003) ("Equitable rights are rights that have traditionally not been recognized at common law. The most common example of equitable rights in this court are fiduciary rights and duties that arise in the context of trusts, corporations, other forms of business organizations, guardianships, and the administration of estates."); *Azurix Corp. v. Synagro Techs., Inc.*, 2000 WL 193117, at *2 (Del. Ch. Feb. 3, 2000).

[6] *Christiana Town Ctr.*, 2003 WL 21314499, at *3 ("Equitable remedies . . . may be applied even where the right sued on is essentially legal in nature, but with respect to which the available remedy at law is not fully sufficient to protect or redress the resulting injury under the circumstances.") (internal quotation marks omitted).

(3) a statutory delegation of subject matter jurisdiction.[7] Moreover, where there is an adequate remedy available at law, jurisdiction will not lie with this Court.[8]

Malouf argues that Plaintiffs had the ability to raise the forum selection clause as an affirmative defense in the Texas Action and that constitutes an adequate remedy at law that deprives this Court of subject matter jurisdiction over this action. In support of this position, Malouf relies heavily on the Delaware Supreme Court's decision in *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*[9] In that case, the Supreme Court affirmed this Court's holding that it lacked subject matter jurisdiction to enjoin an action pending in Texas state court, even though the parties previously had agreed to a forum selection clause that conferred exclusive jurisdiction on the Delaware Court of Chancery. The Supreme Court explained that "[w]here, as here, the forum selection clause may be asserted as a defense in the Texas Action, El Paso has an adequate legal remedy. El Paso would not be forced to litigate on the merits in Texas and thus lose the benefits of the bargained-for-forum selection clause."[10]

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7 *See Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC,* 859 A.2d 989, 997 (Del. 2004).

8 10 *Del. C.* § 342 ("The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.").

9 1994 WL 248195 (Del. 1994).

10 *El Paso*, 1994 WL 248195, at *3.

While at first blush *El Paso* may seem quite similar to this case, a closer comparison of the facts indicates that decision is inapposite. Specifically, the Supreme Court's ruling in *El Paso* is distinguishable on two key grounds. First, the Supreme Court found the forum selection clause in *El Paso* to be unenforceable as to the claims in the Texas proceedings because the parties impermissibly had attempted to confer by agreement subject matter jurisdiction on the Court of Chancery over all claims between the parties, legal and equitable.[11] The Supreme Court held that "El Paso's specific performance claim [to enforce the forum selection clause] . . . is only viable if the parties' underlying disputes are cognizable in this Court" and that the claims in the Texas action were all legal in nature.[12] Accordingly, as to those claims, no enforceable forum selection clause existed between the parties.

The unenforceability of the forum selection clause in *El Paso* is important because it made the *McWane* doctrine more critical to that decision. In this case, there is no comparable question about the enforceability of the forum selection clause between Malouf and ASDC Holdings. The clause here validly confers exclusive jurisdiction on certain Delaware state courts and the Federal District Court in Wilmington. Therefore, the clause is fully enforceable as to any claim, legal or equitable, between the parties.

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11 *Id.* at *2.

12 *Id.*

A second distinction between *El Paso* and this case further undermines Malouf's position. That distinction involves the fact that the forum selection clause in *El Paso*, even if it were enforceable, was narrower than the one here. Under Delaware law, jurisdictional clauses can be narrow or broad.[13] The case law dealing with the distinctions between narrow and broad jurisdictional clauses deals primarily with arbitration clauses, as opposed to forum selection clauses, but as Defendants note, this is a distinction without a difference.[14] This Court treats forum selection clauses "in the same spirit" as arbitration clauses; thus, the same general principles apply in determining the scope and level of deference to be given either kind of clause.[15] Similarly, the United States Supreme Court has held that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[16]

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13 *See Aveta Inc. v. Cavallieri*, 23 A.3d 157, 166 (Del. Ch. 2010) ("The Purchase Agreement contains a broad forum selection clause mandating that any action 'arising out of or relating to' the Purchase Agreement be brought exclusively in a Delaware court.").

14 Defs.' Br. at 18.

15 *See PPF Safeguard, LLC v. BCR Safeguard Hldg., LLC*, 2010 WL 2977392, at *5 (Del. Ch. July 29, 2010) ("In a similar spirit [as arbitration clauses], Delaware honors contractual choice of forum provisions. Thus, under Rule 12(b)(3), a court will grant a motion to dismiss for improper venue based upon a forum selection clause where the parties 'use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action.'[47] Delaware courts defer to forum selection clauses and routinely 'give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation.'").

16 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

In *Parfi Hldg. AB v. Mirror Image Internet*,[17] the Supreme Court set out a two-part test for determining whether claims are subject to an arbitration clause:

> First, the court must determine whether the arbitration clause is broad or narrow in scope. Second, the court must apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration. If the court is evaluating a narrow arbitration clause, it will ask if the cause of action pursued in court directly relates to a right in the contract. *If the arbitration clause is broad in scope, the court will defer to arbitration on any issues that touch on contract rights or contract performance.*[18]

Thus, narrow forum selection clauses only cover claims dealing directly with rights embodied in the relevant contract.[19] Broad forum selection clauses, on the other hand, which expressly cover, for example, all claims between the contracting parties that "arise out of" or "relate to" a contract, apply not only to claims dealing directly with the terms of the contract itself, but also to "any issues that touch on contract rights or contract performance."[20]

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17 817 A.2d 149 (Del. 2002).

18 *Id.* at 155 (emphasis added).

19 *See id.*

20 *See supra* note 13 and accompanying text; *see also Smyrna v. Kent Cty. Levy Court*, 2004 WL 2671745, at *2 (Del. Ch. Nov. 9, 2004) ("[T]here is no question that the arbitration clause found in the Agreement is broad, as it covers all claims 'arising out of' or 'related to' the Agreement."); *Parfi*, 817 A.2d at 155 ("The parties do not dispute that Section 20.2 of the Underwriting Agreement has a broad scope. By agreeing to submit to arbitration any dispute, controversy, or claim arising out of or in connection with the Underwriting Agreement, [the

Turning to the facts before me, the forum selection clauses in the Agreements Malouf has with certain of Plaintiffs provide that:

> [E]ach Party hereby (a) agrees to the exclusive jurisdiction of any state court within New Castle County, Delaware or, if it can obtain jurisdiction, the United States District Court for the District of Delaware sitting in Wilmington, Delaware (and the appropriate appellate courts) *with respect to any claim or cause of action arising under or relating to* this Agreement . . . .[21]

Here, the use of the phrase "arising under or relating to" in the Agreements demonstrates that this is a broad forum selection clause; therefore, any issues that "*touch on* contract rights or contract performance" should be subject to the exclusive jurisdiction agreed to under that clause.[22]

In contrast, the relevant forum selection clause in *El Paso* provided that:

> ALL ACTIONS TO ENFORCE OR SEEK DAMAGES, SPECIFIC PERFORMANCE OR OTHER REMEDY FOR THE ALLEGED BREACH OF THIS AGREEMENT OR THE OPERATIVE AGREEMENTS SHALL BE BROUGHT IN THE CHANCERY COURT OF THE STATE OF DELAWARE.[23]

That clause was narrow in scope and, therefore, only applied to claims directly pertaining to rights based on the contract at issue. Importantly, the complaint in *El Paso* only

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parties] have signaled an intent to arbitrate all possible claims that touch on the rights set forth in their contract.") (internal quotation marks omitted).

[21] Compl. Ex. A at 58, B at 37-38, C at 14, D at 13, E at 9-10 (emphasis added).

[22] *Parfi*, 817 A.2d at 155 (emphasis added); *see also Aveta Inc. v. Cavallieri*, 23 A.3d 157, 166 (Del. Ch. 2010); *Smyrna*, 2004 WL 2671745, at *2.

[23] *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 1994 WL 248195, at *1 (Del. 1994) (capitalization in original).

contained claims that related indirectly, if at all, to the agreements between the parties.[24] In fact, the plaintiff there amended its complaint to drop its claims for breach of contract. Thus, based on the narrow forum selection clause and the omission of any claim for breach of contract in the Texas action, it is highly unlikely that the forum selection clause in *El Paso* could have been applied to the contested claims in that dispute.

The forum selection clause in the Transaction between the parties in this case much more closely resembles the clause in a more recent case, *Ingres Corp. v. CA, Inc.*[25] In *Ingres*, the parties had entered into a contract with a valid forum selection clause. The clause provided that:

> Each party hereto agrees that it shall bring *any action or proceeding* in respect of *any claim* directly arising out of or *related to this Agreement*, whether in tort or contract or at law or in equity in any state or U.S. federal court sitting in The City of New York or in any state or U.S. federal court sitting in the State of Delaware . . . .[26]

In upholding the Court of Chancery's decision to enjoin the Appellant, Ingres, from prosecuting its claims in a California state court, the Supreme Court held that:

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[24] In its Texas complaint, the defendant in *El Paso* alleged: "(i) fraud, fraudulent inducement and fraudulent concealment in connection with the El Paso Settlement Agreement; (ii) tortious interference with existing and prospective business relationships; (iii) economic duress and coercion that allegedly caused TransAmerican to enter into the Settlement Agreement; (iv) civil conspiracy among the various defendants; and (v) violation of the Texas Anti-Trust Act." *Id.*

[25] 8 A.3d 1143 (Del. 2010).

[26] *Id.* at 1145 n.1 (emphasis in original).

> [W]here contracting parties have expressly agreed upon a *legally enforceable* forum selection clause, a court should honor the parties' contract and enforce the clause, even if, absent any forum selection clause, the *McWane* principle might otherwise require a different result. The reason is that the *McWane* principle is a default rule of common law, which the parties to the litigation are free to displace by a valid contractual agreement.[27]

The clause now before me clearly evidences the intent of the parties to the Transaction to litigate *any* dispute relating to the Agreements in Delaware, which would include, without limitation, disputes over whether the forum selection clause applies to the claims brought by Malouf in the Texas Action.

Malouf seeks to avoid this reasoning by asserting that Plaintiffs can litigate the issues regarding the forum selection and arbitration clauses in the earlier filed Texas Action and, therefore, have an adequate remedy at law. Couched as it is in terms of the *McWane* principle, I consider Malouf's argument contrary to *Ingres* and unpersuasive. *McWane* is not controlling here because the parties bargained for and agreed to a forum selection clause that explicitly committed them to litigating exclusively in Delaware. Unlike *El Paso*, this forum selection clause is valid and arguably broad enough to reach the Texas claims. In addition, there is no conflicting default presumption that otherwise

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[27] *Id.* at 1145-46 (emphasis added) (internal citations omitted). The *McWane* principle stems from the decision in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970). Under that principle, the Court has broad discretion to grant a stay "when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues." *In re Bear Stearns Cos. S'holder Litig.*, 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008) (quoting *McWane*, 263 A.2d at 283).

would cast doubt on the parties' intent to litigate exclusively in Delaware.[28] Forum selection clauses are presumptively valid in Delaware and *Ingres* holds that such a clause displaces the traditional default presumptions under *McWane*.[29] Therefore, requiring Plaintiffs to litigate the forum selection issue in Texas, when they bargained for a contractual provision that would avoid such a result, would deprive Plaintiffs of the benefit of their bargain and cannot be an adequate remedy at law. Therefore, I find this Court has subject matter jurisdiction over this action.

B. ASDC Has Made the Required Showing for a Preliminary Injunction

I next address whether Plaintiffs are entitled to a preliminary injunction against Malouf's further prosecution of the Texas Action. This Court has broad discretion in granting or denying a preliminary injunction.[30] "A preliminary injunction may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of

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28 *Cf. Willy-Gary LLC v. James & Jackson*, 2006 WL 75309, at *6 (Del. Ch. Jan. 10, 2006) (holding that the presence of an arbitration clause alone does not displace the default presumption that a court should decide questions of substantive arbitrability).

29 *Ingres*, 8 A.3d at 1146 ("Forum selection [ ] clauses are presumptively valid and should be specifically enforced unless the resisting party [ ] clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching.").

30 *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citing *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49 (Del. 1952)).

the equities that tips in favor of issuance of the requested relief."[31] "The moving party bears a considerable burden in establishing each of these necessary elements. Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief will never be granted unless earned."[32] However, "there is no steadfast formula for the relative weight each deserves. Accordingly, a strong demonstration as to one element may serve to overcome a marginal demonstration of another."[33]

Malouf argues that Plaintiffs' motion for a preliminary injunction must fail because Plaintiffs have not shown any of the three required elements. In particular, Malouf contends Plaintiffs have not demonstrated either a reasonable probability of success on the merits of their contention that the forum selection clause applies to Malouf's claims in the Texas Action or that they will suffer irreparable harm by being forced to present their defense based on the forum selection clause in the Texas Action. In addition, Malouf asserts that the balance of equities weighs in his favor because allowing a Texas court to determine whether the forum selection clause applies to the claims in the Texas Action "will not harm Plaintiffs in any way," but to do otherwise will deny Malouf his choice of forum. I examine each of these arguments in turn.

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31 *Nutzz.com, LLC v. Vertrue, Inc.*, 2005 WL 1653974, at *6 (Del. Ch. July 6, 2005) (internal citations omitted); *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008).

32 *La. Mun. Police Empls.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (internal citations omitted).

33 *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Nov. 5, 2004) (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

1. Reasonable probability of success on the merits

Malouf's Texas claims can be divided into three categories.[34] The first includes claims clearly relating to the Agreements, but which are asserted against nonsignatories to the Agreements. The second category encompasses claims for breach of fiduciary duties that Malouf argues do not "arise out of" or "relate to" the Agreements. The final category consists of reimbursement claims against All Smiles that Malouf argues arose before the Transaction and therefore are not controlled by the terms of the Agreements.

a. Can Valor Equity Partners and the Individuals enforce the forum selection clause against Malouf?

In the Texas Action, Malouf alleges eight counts against Valor Equity Partners and the Individuals, including claims for fraud and fraud in the inducement, negligent misrepresentation, and tortious interference with contract. Even assuming these counts arise directly from the Transaction and the corresponding Agreements, Malouf argues that they are not subject to the forum selection clause because Valor Equity Partners and the Individuals were not signatories of the Agreements and, therefore, cannot enforce the obligations created thereunder.

In arguing that he can avoid the forum selection clause through artful pleading and suing nonsignatories to the Agreements, Malouf asks this Court to favor form over substance. The Supreme Court, however, considered and rejected such rigid formalism

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[34] Malouf also brought claims for attorney's fees and punitive damages in Texas. Because these counts depend on other more substantive counts, I do not consider them relevant to this analysis and, therefore, do not discuss them further.

in its decision in *Ashall Homes Ltd. v. ROK Entertainment Group Inc.*[35] Addressing claims similar to those made by Malouf here, the Supreme Court held that "officers and directors . . . have standing to invoke [a] Forum Selection Provision as parties *closely related* to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound."[36] Here, Valor Equity Partners is a subsidiary of Valor and the Individuals are officers and directors of both Valor and All Smiles who were intimately involved with the Transaction. Therefore, Valor Equity Partners and the Individuals are "closely related" to the signatories ASDC Holdings and All Smiles. As a result, they are entitled to invoke the forum selection clause against a party, such as Malouf, who is bound by that clause as a signatory. Thus, I find Plaintiffs have demonstrated a reasonable

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35 992 A.2d 1239 (Del. 2010).

36 *Id.* at 1249 (emphasis added); *see also id.* ("Because defendants Kendrick and Renny solicited the Ashall Plaintiffs to participate in the investment, because Kendrick and Renny managed the Cyberfund acquisition and the reincorporation of ROK Delaware, and because they are being sued by the Ashall Plaintiffs as a result of acts that the Ashall Plaintiffs themselves contend directly implicate the negotiation of and performance under the Share Sale Agreements, it was foreseeable that the defendants would invoke the Forum Selection Provision of the Share Sale Agreements, and it would be inequitable to permit the Ashall Plaintiffs to escape their contractual promise to litigate all disputes arising under the Share Sale Agreements in England."); *id.* at 1249 n.51 (citing favorably decisions from other jurisdictions supporting the proposition that nonsignatory officers and directors can invoke forum selection clauses).

probability of success on the merits of their claim for preliminary injunctive relief as to Counts One, Two, Five, and Six of the Texas Action.[37]

b. Do the breach of fiduciary duty claims "arise out of" or "relate to" the Agreements?

Under Counts Three and Four of the Texas complaint, Malouf claims breach of fiduciary duties, and a related conspiracy, against Valor Equity Partners and the Individuals. In addition to having questioned the standing of Valor Equity Partners and the Individuals to enforce the forum selection clause, Malouf also contends that Counts Three and Four do not "arise out of" or "relate to" the Agreements and, therefore, are not subject to the forum selection clause. Malouf's argument, however, construes too narrowly the phrase "arising under or relating to this Agreement" in the forum selection clause.

As discussed at length *supra*, the forum selection clause here is broad as a matter of Delaware law, with the operative language explicitly covering any disputes that "relate

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[37] In challenging the rights of Valor Equity Partners and the Individuals to enforce the forum selection clause, Malouf relies heavily on *Capital Gp. Cos. v. Armour*, 2004 WL 2521295 (Del. Ch. Nov. 3, 2004). That case, however, dealt with a situation in which an allegedly "closely related" nonsignatory party had embraced the contract at issue and then tried to disclaim her obligations under the forum selection clause. The *Armour* court held that because the party previously had embraced and benefited from the contract, she was estopped from disclaiming her obligation to abide by the forum selection clause. Unlike *Armour*, this case involves an attempt by Malouf, a signatory, to disclaim the applicability of the forum selection clause after having benefitted from the Agreements.

to" the Agreements.[38] While the fiduciary duties owed to Malouf may "arise out of" the common law, there is a more than colorable argument that such claims "relate to" the Agreements, and particularly the Stockholders Agreement and Stock Purchase Agreement.[39] Therefore, Plaintiffs have shown a reasonable probability of success as to the merits of their claim to enjoin prosecution of Counts Three and Four of Malouf's Texas Action.

c. Do Malouf's reimbursement claims against All Smiles arise under or relate to the Agreements?

Counts Seven and Eight of the Texas Action are for breach of contract between Malouf and All Smiles and for unjust enrichment related to the alleged breach. In his Answering Brief, Malouf admits All Smiles signed the Agreements, but denies the

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[38] *See Milton Invs., LLC v. Lockwood Bros. II, LLC*, 2010 WL 2836404, at *6 (Del. Ch. July 20, 2010) ("The 'involving or relating to' language expands the reach of each of the four enumerated categories to such an extent that it is difficult to envision any dispute arising under the LLC Agreement that would not fit within one of these broad categories. Indeed, the Agreement may even require arbitration of claims that a Member breached its fiduciary duties, claims that did not fit under the broad arbitral language in *Parfi*.").

[39] *See Julian v. Julian*, 2009 WL 2937121, at *8 (Del. Ch. Sept. 9, 2009) ("[T]here is at least a colorable argument that the [defendants'] claims relate to their respective LLC agreements. To the extent there is any basis for doubt about these findings, I conclude that, consistent with the holding in *McLaughlin*, this Court should defer to arbitration, leaving the arbitrator to determine what is or is not before her.") (internal quotation marks omitted); *see also Brown v. T-Ink, LLC*, 2007 WL 4302594, at *15 (Del. Ch. Dec. 4, 2007) (holding that a broad arbitration clause applied to certain breach of fiduciary claims because those claims arose "at least in part, by virtue of specific obligations created by the terms of the LLC Agreement rather than arising by virtue of any statutory, common law, or other requirement that imposes fiduciary duties upon Plaintiff as a consequence of the formation of [the company] without regard to the specific terms of the LLC Agreement.").

applicability of the forum selection clause as to these claims because they involve a dispute that arises from an oral reimbursement agreement between him and All Smiles made prior to the closing of the Transaction. Plaintiffs counter by pointing to the integration clause in Section 14(b) of the Employment Agreement between Malouf and All Smiles and arguing that that clause extinguished any pre-existing claims Malouf may have had against All Smiles based on his prior employment relationship.

Plaintiffs have the burden of establishing a reasonable likelihood of success on the merits of their contention that these claims arise out of or relate to the Agreements.[40] Resolution of that issue will require careful consideration of the Employment Agreement and both Plaintiffs' integration clause argument and Malouf's untested allegations as to the existence of an oral agreement between himself and All Smiles. Under the forum selection clause threshold, issues of this nature should be decided by a court in Delaware or the arbitrator, because Plaintiffs have at least a colorable claim that they arise out of or relate to the Agreements.[41] Accordingly, I find that Plaintiffs have satisfied their burden on the merits as to their motion for a preliminary injunction regarding Counts Seven and Eight.

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40 *La. Mun. Police Empls.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (internal citations omitted).

41 *See Brown*, 2007 WL 4302594, at *11 ("Because this Court, and not the arbitrator, should hear questions of substantive arbitrability, this Court has subject matter jurisdiction over the questions of substantive arbitrability raised by Brown's complaint and her renewed motion for a preliminary injunction.").

2. Irreparable harm

The parties negotiated and agreed to a broad forum selection clause that anticipated that any litigation arising from the Agreements would occur exclusively in Delaware. If Plaintiffs are forced to prosecute any claims falling within that clause in a different forum, they will be deprived irreparably of the benefit of that bargain, regardless of whether they later prevail on the merits of that action. This Court consistently has held that the procession of a claim in an unwarranted forum poses a threat of irreparable harm warranting a preliminary injunction.[42] To hold otherwise in the circumstances of this case would render the broad language of the forum selection clause meaningless and deprive Plaintiffs of the benefit of their bargain. Therefore, I find that ASDC has shown a sufficient threat of irreparable harm to warrant a preliminary injunction.

3. The Equities favor Plaintiffs

Malouf's half-hearted contention that the equities favor him rests on the same erroneous belief that Plaintiffs will not suffer any harm by being forced to litigate the forum selection clause issues in Texas. As discussed *supra*, this argument is unpersuasive. Both parties agreed to submit all litigation arising out of or relating to the Agreements to the exclusive jurisdiction of Delaware courts. Therefore, Malouf is not entitled to any deference for his alternative choice of forum for his claims and the balance

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[42] *See Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *2 n.5 (Del. Ch. Nov. 13, 2009) (citing *Brown*, 2007 WL 4302594, at *13; *HDS Inv. Hldg., Inc. v. Home Depot, Inc.*, 2008 WL 4604262, at *9 (Del. Ch. Oct. 17, 2008); *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1259 (Del. Ch. 2004)).

of equities weighs in favor of giving meaning to the forum selection clause bargained for and agreed upon between the parties.[43]

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I hold that Plaintiffs have satisfied their burden of proving the elements necessary to warrant the grant of a preliminary injunction against Malouf. Accordingly, I will grant Plaintiffs' motion to preliminarily enjoin Dr. Richard J. Malouf and the Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust from further prosecuting their claims against Plaintiffs in Texas or otherwise pursuing litigation within the scope of the forum selection clause in a forum outside of Delaware. An Order consistent with this Memorandum Opinion is being entered this date.

[43] *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) ("Forum selection [ ] clauses are presumptively valid and should be specifically enforced unless the resisting party [ ] clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching. Courts should assess the reasonableness of a forum selection clause on a case-by-case basis.") (internal quotation marks omitted).