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Case No. 7599-VCP

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

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| BRUCE A. DUFF, EDWARD J. CARP, and DELAWARE DOCUMENT IMAGING, LLC, | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. 7599-VCP |
| INNOVATIVE DISCOVERY LLC, a Delaware limited liability company, | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION**

Submitted: September 13, 2012
Decided: December 7, 2012

Arthur G. Connolly, III, Esq., Christos T. Adamopoulos, Esq., CONNOLLY GALLAGHER LLP, Wilmington, Delaware; *Attorneys for Plaintiffs.*

Philip Trainer, Jr., Esq., Toni-Ann Platia, Esq., ASHBY & GEDDES, P.A., Wilmington, Delaware; *Attorneys for Defendant Innovative Discovery LLC.*

**PARSONS, Vice Chancellor.**

This action was filed against a Delaware limited liability company by two of its former members who sold their interests back to the company under equity redemption agreements. The former members have filed breach of contract claims, a request for an accounting, and a request for a declaratory judgment. Some of the breach of contract claims relate to a warranty in the redemption agreements limiting the total income distributed to the former members. The former members allege that the company breached that warranty. The former members also assert that the company breached a licensing agreement and consulting agreement entered into at the same time as the redemption agreement.

The defendant has moved to dismiss all of Counts I through V of the Complaint for lack of subject matter jurisdiction, Counts I through III for failure to state a claim upon which relief can be granted, and Count IV for improper venue.

Having considered the parties' briefing and heard argument on the defendant's motion, I find that this Court has subject matter jurisdiction under the Delaware Limited Liability Company Act[1] (the "LLC Act") and the cleanup doctrine. I also hold that the plaintiffs have stated a claim for reformation of contract and that this Court is a proper venue for Count IV.

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[1] 6 *Del. C.* § 18-101 to -1109.

## I. BACKGROUND[2]

### A. The Parties

Defendant, Innovative Discovery LLC ("Innovative"), is a Delaware limited liability company that provides document imaging and support services in connection with litigation. Innovative has its principal place of business in Arlington, Virginia.

Plaintiffs Edward J. Carp and Brian A. Duff are former members of Innovative. Carp was a member of Innovative from the time of its formation in 2005. Duff became a member effective February 22, 2006. Until the redemption of their interests on February 23, 2012, Duff and Carp each owned 17.5% of Innovative.

Plaintiff Delaware Document Imaging, LLC ("DDI" and, together with Carp and Duff, "Plaintiffs") is a Delaware limited liability company with its principal place of business in Wilmington, Delaware.

### B. Facts

#### 1. The Redemption Agreement

During the period in which Duff and Carp were both members of Innovative—February 22, 2006 through February 23, 2012—Allen C. Outlaw was the largest unit holder of Innovative, owning approximately 25% of the equity interests. Around June 2011, Outlaw began discussing with Duff and Carp the possibility of his buying their

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[2] Unless stated otherwise, the facts recited herein are derived from Plaintiffs' Verified Complaint (the "Complaint") and certain documents the Complaint incorporates by reference, and are assumed to be true for purposes of the pending motion to dismiss.

membership interests in Innovative. Negotiations ensued and continued through the fall of 2011 and into February 2012.

On February 23, 2012, Duff and Carp each entered into separate but identically termed redemption agreements (the "Redemption Agreements") with Innovative. The Redemption Agreements allowed them each to redeem their individual membership interests in exchange for a payment of $1,300,000.

The parties also agreed to certain other terms and conditions. Specifically, both Redemption Agreements contain a warranty by Innovative relating to Duff and Carp's tax liability for the years 2011 and 2012. Section 8(i) in the Redemption Agreements states that the "total dollars . . . distributed or paid" by Innovative to Duff and Carp for 2011 was $105,000 each, and that the "total dollars . . . distributed or paid" to Duff and Carp for 2012 would total $0 each. In relation to those warranties, Section 8(i) further provides that "[t]he Company shall file, or cause to be filed, all tax filings, disclosures and returns of the Company . . . consistent with those amounts."[3]

Throughout the negotiations that resulted in the Redemption Agreements, Duff and Carp purportedly discussed Section 8(i) with Innovative in great detail. For example, Duff and Carp allege that in late January 2012 they conferred with F. Steven Ogurno, Innovative's chief representative in the negotiations, during a conference call. In the course of that conversation, Duff and Carp maintain that they explained to Ogurno that Section 8(i) was intended to cap their 2011 *taxable income* at $105,000 and, further, that

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[3] Compl. Exs. B & C, Redemption Agreements, § 8(i).

the parties understood that, as a result, Innovative would be responsible for any additional tax burden incurred by them beyond that amount. Duff and Carp assert that Ogurno understood and agreed to the warranty as they explained it during that discussion. Moreover, Duff and Carp contend that neither Innovative nor its representatives disagreed or resisted rendering the warranty they sought.

On April 13, 2012, Innovative issued 2011 Schedule K-1s to Duff and Carp, which allocated $231,354 in taxable income to each of them. This allegedly caused Duff and Carp to incur over $40,000 each in additional federal and state taxes. They both paid the additional amount in full because their taxes were due a few days after they received their Schedule K-1s.

Later, in April 2012, Carp called Outlaw to discuss Carp's view that Innovative had violated Section 8(i). Carp asserts that Outlaw admitted that he shared Carp and Duff's understanding of the warranty made in Section 8(i). Carp also avers that Outlaw conceded that his attorneys had determined *after* the signing of the Redemption Agreements that the warranty at issue potentially could be read differently to the benefit of Innovative and Outlaw and to the detriment of Duff and Carp.

**2. License Agreement**

Following the redemption of Duff and Carp's membership interests, Duff and Carp caused DDI to enter into a licensing agreement with Innovative (the "License

Agreement").[4] Through the License Agreement, DDI licensed certain document processing software used to prepare documents obtained in discovery for loading in electronic databases to Innovative in exchange for a monthly license fee based on usage. Plaintiffs allege that Innovative failed to pay the invoiced license fees for February and April 2012. The License Agreement also contains a forum selection clause that states in relevant part:

> The sole jurisdiction and venue for actions related to the subject matter hereof shall be the state and U.S. federal courts located in California, and both parties consent to the jurisdiction of such courts.[5]

### 3. Consulting Agreements

In conjunction with the Redemption Agreements, Duff and Carp also entered into separate consulting agreements with Innovative (the "Consulting Agreements").[6] The

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[4] The License Agreement was an exhibit to both Redemption Agreements. Accordingly, it was "made a part [of the Redemption Agreements] for all purposes," because the Redemption Agreements specify that "the expression 'this Agreement' means the body of this Agreement and such Exhibits; and the expressions 'herein,' 'hereof,' 'hereunder,' and other words of similar import refer to this Agreement and such Exhibits as a whole and not to any particular part or subdivision thereof." Redemption Agreements § 11.

[5] Redemption Agreements Ex. G, License Agreement, § 13.

[6] Because the Consulting Agreements were exhibits to both Redemption Agreements, they too are incorporated in those agreements by way of Section 11 of the Redemption Agreements. *See supra* note 4. Plaintiffs attached a copy of a Redemption Agreement as an exhibit to the Complaint. Therefore, this Court may consider the terms of the Redemption Agreement and its exhibits in analyzing Defendant's motion to dismiss. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) ("The complaint generally defines the universe of

Consulting Agreements oblige Innovative to pay Duff and Carp each $5,555.55 per month from February 2012 through January 2015. Innovative originally refused to make the February 2012 payments at all. In May 2012, it partly reversed course, however, and agreed to make the February payment, but reduced the amount of that payment by $5,097 to reimburse Innovative for certain 2011 Virginia state taxes it allegedly paid on behalf of Duff and Carp. Duff and Carp objected to that deduction, claiming that "Innovative has always paid these taxes in the past on behalf of its members."[7] Indeed, Plaintiffs further allege that, aside from this particular instance, Innovative has never in its seven years of existence attempted to obtain reimbursement for tax payments from any of its members.

### C. Procedural History

On June 6, 2012, Plaintiffs commenced this action by filing their Complaint. The Complaint contains five counts, which assert claims for: (1) breach of the Redemption Agreements; (2) an accounting; (3) a declaratory judgment with respect to Plaintiffs' rights under the Redemption Agreements; (4) breach of the License Agreement; and (5) breach of the Consulting Agreements. The Complaint further states that this Court has jurisdiction over all five counts under 6 *Del. C.* § 18-111.

On July 2, 2012, Innovative filed the pending motion to dismiss pursuant to Court of Chancery Rules 12(b)(1) for lack of subject matter jurisdiction, 12(b)(6) for failure to

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facts that the trial court may consider in ruling on a Rule 12(b)(6) motion to dismiss.").

[7] Compl. ¶ 18.

state a claim, and 12(b)(3) for improper venue. I heard argument on that motion on September 13, 2012. This Memorandum Opinion constitutes the Court's decision on Innovative's motion.

### D. Parties' Contentions

Innovative first argues that Plaintiffs have an adequate remedy at law and that, therefore, this action should be dismissed for lack of subject matter jurisdiction. Specifically, Innovative contends that Plaintiffs' requests for monetary damages for the alleged breaches of the Redemption, License, and Consulting Agreements and a declaratory judgment as to Plaintiffs' rights under the Redemption Agreements seek purely legal relief that can be obtained in a court of law.

Next, Innovative contends that the terms of the exhibits attached to Plaintiffs' pleadings, namely, the Redemption Agreements and Schedule K-1, contradict the allegations relevant to Counts I, II, and III. Accordingly, Innovative seeks dismissal of these claims under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Finally, Innovative asserts that the claims arising under Count IV claiming a breach of the License Agreement and seeking monetary damages must be dismissed under Rule 12(b)(3) for improper venue. Defendant argues that the License Agreement provides that California is the sole jurisdiction for actions under that agreement.

In response, Plaintiffs maintain that this Court has jurisdiction over Count I because it relates to the Redemption Agreements and, therefore, comes under 6 *Del. C.* § 18-111. Plaintiffs further argue that because this Court has subject matter jurisdiction

over at least Count I, the remaining counts may be heard under the "cleanup doctrine." In regard to the 12(b)(6) motion, Plaintiffs note that a strict application of the Redemption Agreements' language is inappropriate because it does not reflect what the parties understood to be their agreement. According to Plaintiffs, Section 8(i) was intended to be a warranty capping Duff and Carp's taxable income in 2011 and 2012. They further contend that, if this Court construes Section 8(i) differently, it should reform the Redemption Agreements to reflect the true understanding of the parties. Finally, Plaintiffs resist the dismissal of Count IV under Rule 12(b)(3) because the Redemption Agreements list Delaware as the jurisdiction the parties have consented to for the purpose of any suit, action, or other proceeding arising out of any rights, remedies, or obligations stemming from the Redemption Agreements or relating to the transactions contemplated therein. Plaintiffs further assert that to the extent those provisions conflict with a provision in the related License Agreement, the forum selection clause that specifies forums in California is not sufficiently clear in the context of the relevant agreements to warrant a dismissal for improper venue under Rule 12(b)(3).

## II. ANALYSIS

### A. This Court Has Subject Matter Jurisdiction Over Count I

This Court will grant a 12(b)(1) motion to dismiss "if it appears from the record that the Court does not have jurisdiction over the claim."[8] The Court of Chancery is one of limited jurisdiction; it can acquire subject matter jurisdiction over a case by three

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[8] *AFSCME Locals 1102 & 320 v. City of Wilm.*, 858 A.2d 962, 965 (Del. Ch. 2004).

different means: "(1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction."[9] This Court "will not exercise subject matter jurisdiction 'where a complete remedy otherwise exists but where plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic open sesame to the Court of Chancery.'"[10]

The burden rests with the plaintiff to establish jurisdiction.[11] In making such a determination, "the Court must review the allegations of the complaint as a whole to determine the true nature of the claim."[12] Moreover, "[i]n deciding whether or not equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really

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9 *Israel Disc. Bank of N.Y. v. First State Depository Co.*, 2012 WL 4459802, at *4 (Del. Ch. Sept. 27, 2012) (citing *ASDC Hldgs., LLC v. Richard J. Malouf 2008 All Smiles Grantor Annuity Trust*, 2011 WL 4552508, at *4 (Del. Ch. Sept. 14, 2011)).

10 *Christiana Town Ctr., LLC v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003), *aff'd*, 841 A.2d 307 (Del. 2004) (TABLE).

11 *Israel Disc. Bank of N.Y.*, 2012 WL 4459802, at *4; *Yancey v. Nat'l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993) ("The plaintiff bears the burden of establishing this Court's jurisdiction, and where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof.").

12 *Christiana Town Ctr.*, 2003 WL 21314499, at *3 (quoting *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991)).

seeks to gain by bringing his or her claim."[13] Stated differently, "the court must assess the nature of the wrong alleged and the remedy available in order to determine whether a legal, as opposed to an equitable remedy, is available and sufficiently adequate."[14]

To that end, "[t]he Court of Chancery . . . routinely decides controversies that encompass both equitable and legal claims."[15] "[I]f a controversy is vested with 'equitable features' which would support Chancery jurisdiction of at least a part of the controversy, then the Chancellor has discretion to resolve the remaining portions of the controversy as well."[16] "Once the Court determines that equitable relief is warranted, even if subsequent events moot all equitable causes of action or if the court ultimately

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13 *Candlewood Timber Gp. v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004); *see also Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 588 (Del. 1970) ("The subject-matter jurisdiction of the Chancery Court depends solely, at this stage, upon the allegations of the complaint and a determination of what the plaintiff really seeks by the complaint; for it is settled that the existence of jurisdiction is to be ascertained as of the time of the filing of the complaint.").

14 *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

15 *Nicastro v. Rudegeair*, 2007 WL 4054757, at *2 (Del. Ch. Nov. 13, 2007) (citing Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery §§ 2-4 (Supp. 2006) ("It is not at all unusual for cases properly within the subject matter jurisdiction of the Court of Chancery to involve both legal and equitable claims.")).

16 *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978), *aff'd*, 407 A.2d 533 (Del. 1979).

determines that equitable relief is not warranted, the court retains the power to decide the legal features of the claim pursuant to the cleanup doctrine."[17]

Plaintiffs have accused Innovative of breaching the Redemption Agreements (Count I) by creating Schedule K-1s for Duff and Carp that show their taxable income for 2011 as $231,354 each, rather than $105,000, as referenced in the Redemption Agreements. Plaintiffs seek damages in the amount of the additional taxes they paid and an accounting (Count II) to determine whether Innovative had sufficient cash available at the relevant time for distribution to Duff and Carp pursuant to Section 4.2 of the Operating Agreement to reimburse them for the extra amount they paid in taxes. Plaintiffs also seek a declaratory judgment that Innovative has warranted under Section 8(i) of the Redemption Agreements that the taxable income of Duff and Carp from Innovative for 2012 will be $0, and that Innovative will be responsible for any damages caused by a breach of this warranty (Count III). Finally, Plaintiffs claim that Innovative breached the License and Consulting Agreements by failing to pay certain amounts owed under those agreements and seek to recover the resulting damages (Counts IV and V).

Innovative asserts that Counts I, IV, and V merely seek damages for its alleged breaches of the Redemption, License, and Consulting Agreements and, therefore, provide no basis for this Court's exercise of equity jurisdiction. Similarly, Innovative argues that because Count III's demand for a declaratory judgment raises no equitable concerns or

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[17] *Prestancia Mgmt. Gp. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *11 (Del. Ch. May 27, 2005) (internal quotation marks omitted) (quoting *Beal Bank SSB v. Lucks*, 2000 WL 710194, at *2 (Del. Ch. May 23, 2000)).

claims, Plaintiffs may obtain the relief they seek through an action at law in the Superior Court.[18]

Plaintiffs respond by invoking this Court's jurisdiction under 6 *Del. C.* § 18-111, arguing that Count I involves the internal affairs of a Delaware limited liability company. Section 18-111 provides:

> Any action to interpret, apply or enforce the provisions of a limited liability company agreement, or the duties, obligations or liabilities of a limited liability company to the members or managers of the limited liability company, or the duties, obligations or liabilities among members or managers and of members or managers to the limited liability company, or the rights or powers of, or restrictions on, the limited liability company, members or managers, or any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of this chapter, may be brought in the Court of Chancery.[19]

Plaintiffs assert that Count I falls within several of Section 18-111's clauses. First, Plaintiffs argue that Count I qualifies as an action brought by two former members of an LLC to enforce "the duties, obligations or liabilities of a limited liability company to [its] members." In addition, Plaintiffs contend that subject matter jurisdiction exists over

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[18] Innovative characterizes the relief sought in Count III as a "non-fiduciary accounting," and asserts that, standing alone, such an accounting does not justify Chancery jurisdiction. Def. Innovative Discovery LLC's Mot. to Dismiss ("Def.'s Opening Br.") ¶ 17 (quoting *Metro Ambulance, Inc. v. Eastern Med. Billing, Inc.*, 1995 WL 409015, at *3 (Del. Ch. July 5, 1995)). In addition, Innovative argues that Plaintiffs can inquire into Innovative's cash availability for certain distributions through discovery in an action at law, thereby making a proceeding in Chancery unnecessary. *Id.* ¶ 18.

[19] 6 *Del. C.* § 18-111.

Count I under Section 18-111 because it seeks to enforce the Redemption Agreements against Innovative and, thus, constitutes an action to enforce "any instrument, document, agreement or certificate contemplated by any provision of this chapter."[20] The Redemption Agreements, according to Plaintiffs, unequivocally are accounted for in 6 *Del. C.* § 18-702, which states that: "[A] limited liability company may acquire, by purchase, redemption or otherwise, any limited liability company interest or other interest of a member or manager in the limited liability company."

Innovative disputes Plaintiffs' reading of Section 18-111 as overly expansive, emphasizing that actions falling within its scope "may," but are not required to, be brought in the Court of Chancery. In other words, this Court's jurisdiction over such claims may be concurrent with that of the Delaware Superior Court, for example. In addition, Innovative asserts that this Court has discretion to entertain an action falling within 6 *Del. C.* § 18-111 only "if the subject matter involved is equitable in nature."[21]

Innovative's motion to dismiss, therefore, requires this Court to interpret and apply 6 *Del. C.* § 18-111. Specifically, this Court must determine whether Section 18-111, which Plaintiffs contend gives this Court subject matter jurisdiction over at least Count I, encompasses membership interest redemption agreements.

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20 *Id.*

21 Def. Innovative Discovery LLC's Reply in Further Supp. Of Its Mot. to Dismiss ("Def.'s Reply Br.") 3 & n.2.

When interpreting a statute, "[t]he threshold question is whether the provision in question is ambiguous."[22] "Generally, where a statute is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words."[23] On the other hand, if a statute is reasonably susceptible to various conclusions or interpretations, it is ambiguous.[24] If a statute is ambiguous, "the Court must rely upon its methods of statutory interpretation and construction to arrive at a meaning."[25] When interpreting an ambiguous statute, "[t]he fundamental rule . . . is to ascertain and give effect to the intent of the Legislature."[26]

Based on the briefing and oral argument, Innovative appears to assert two grounds of potential ambiguity. First, Innovative suggests that the statutory language that "Any action [of the kind enumerated in Section 18-111] . . . may be brought in the Court of Chancery" means that this Court may hear such actions provided "the subject matter involved is equitable in nature." In a related vein, Defendant seems to argue that this Court has discretion to decline to accept jurisdiction of an action that meets the

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22 *Techmer Accel Hldgs., LLC v. Amer*, 2010 WL 5564043, at *6 (Del. Ch. Dec. 29, 2010) (internal quotation marks omitted) (quoting *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010)).

23 *In re Digex Inc. S'holders Litig.*, 789 A.2d 1176, 1199 (Del. Ch. 2000).

24 *Id.* at 1200.

25 *Id.* at 1199–200.

26 *Id.* at 1200.

requirements of 6 *Del. C.* § 18-111. Second, Innovative appears to dispute whether any of the counts of the Complaint, including Count I for breach of the Redemption Agreements, comes within the scope of Section 18-111. Notably, however, Innovative cites no case law or other authority in support of any of these contentions.

Regarding the purported ambiguity as to whether Section 18-111 requires that this Court also have an independent basis for exercising its equitable jurisdiction, I reject Innovative's argument. Nothing in the statute suggests that it is limited in that way. Indeed, such a limitation would be contrary to the Legislature's explicit intent to authorize members or managers of limited liability companies to bring the identified categories of actions in the Court of Chancery.

Innovative's related argument that this Court could decide, in its discretion, not to entertain an action that meets the requirements of Section 18-111 is similarly without merit. Defendant is correct that the statute's use of the word "may" means that the jurisdiction it authorizes is concurrent, as opposed to exclusive. Consequently, litigants such as Duff and Carp, who state a claim under 6 *Del. C.* § 18-111, have a choice of pursuing that claim in the Court of Chancery or in another appropriate forum. But, Innovative has not cited any authority, nor does the Court know of any, that would imply that once such a plaintiff has chosen to bring its claim here, this Court still would have the discretion to refuse to hear it. As I read the statute, this Court does not have such discretion.

I turn next to the second alleged ambiguity in Section 18-111, *i.e.*, whether the statute would cover Count I of the Complaint here. As indicated by Plaintiffs, Section

18-702 explicitly contemplates that redemption agreements may be entered into by members or managers of an LLC as part of their internal dealings with the LLC.[27] Accordingly, I conclude that redemption agreements are agreements contemplated by the LLC Act. Thus, Section 18-111 confers jurisdiction on this Court to hear an "action to interpret, apply, or enforce" the Redemption Agreements at issue in this case. In that regard, I note also that the Redemption Agreements relate to the duties and obligations of the LLC vis-à-vis certain of its members.[28]

Innovative further argues that any LLC membership rights Duff and Carp had under the Operating Agreement as members of Innovative ceased to exist when Duff and Carp entered into the Redemption Agreement.[29] To that point, while a redemption agreement is formed with the intent of eliminating a member interest, it is technically an agreement among current members of an LLC and the LLC as to how they are going to

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[27] *See* 6 *Del. C.* § 18-702.

[28] Having reached that conclusion, I need not address the broader question posed by Defendant's counsel as to whether any type of business agreement of the kind permitted in *6 Del. C.* § 18-106(c) that is entered into by an LLC similarly would fall within this Court's jurisdiction. *See* Tr. 3 (Defendant's Counsel: "And if we are to take that argument that the defendants make and the Court is putting out there, logically to its end . . . 18-106 gives the LLC the power to enter into business agreements. So is it any sale agreement with an LLC? Does that give this Court jurisdiction over it?"). Even assuming the proffered reading of Section 18-106 is correct, which is dubious, the latter issue is not before me on the facts of this case.

[29] *See* Def.'s Opening Br. 7 n.3 ("[A]ny rights Plaintiffs may have had under the Operating Agreement no longer existed as of the sale of their membership interest back to the Company.").

order their business in connection with and after the repurchase of the members' interests. Consistent with that paradigm, the Redemption Agreements were negotiated with Innovative beginning in June 2011, when Duff and Carp were still members. Thus, the Redemption Agreements constitute documents formulated between participants in an LLC that clearly are contemplated by the LLC Act.

With respect to the remaining counts, I agree with Plaintiffs that they should be heard by this Court under the cleanup doctrine. The cleanup doctrine states that "[i]f a controversy contains any equitable feature by means of which a court could acquire cognizance of it, the court may go on to a complete adjudication."[30] The doctrine is discretionary in nature. It stems from the assumption that a court—having resolved substantive issues in a matter—is fully capable of deciding any remaining issues, "and that it may therefore be appropriate as a matter of judicial and litigants' economy for a Chancery Court judge *to exercise discretion* to retain jurisdiction and decide the remaining legal issues in such a case."[31] Having determined that this Court has

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30 *Bennett v. Plantation East Condo. Ass'n, Inc.*, 2010 WL 3065228, at *3 (Del. Ch. July 22, 2010); *see also Nicastro v. Rudegeair*, 2007 WL 4054757, at *2 (Del. Ch. Nov. 13, 2007) ("The Court of Chancery . . . routinely decides controversies that encompass both equitable and legal claims."). As I understand the doctrine, it applies equally where, as here, this Court has jurisdiction over a matter based on a statute.

31 *Bennett*, 2010 WL 3065228, at *3 (emphasis added); *see also Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978) ("It seems clear that if a controversy is vested with 'equitable features' which would support Chancery jurisdiction of at least a part of the controversy, then the Chancellor *has discretion* to resolve the remaining portions of the controversy as well.") (emphasis added), *aff'd*, 407 A.2d 533 (Del. 1979).

jurisdiction over Count I and that the other counts are closely related to Count I, I consider it appropriate for this Court to hear the entire action.[32]

I am not persuaded by Defendant's contention that it would be inappropriate to apply the cleanup doctrine in this case. According to Innovative, the doctrine should not be applied when, as here, "the facts involved in the equitable counts and in the legal documents are not intertwined as to make it undesirable or impossible to sever them."[33] The existence of jurisdiction in this Court over even a single count, however, is sufficient for the exercise of jurisdiction over the remaining counts under the cleanup doctrine.[34] Moreover, invoking the cleanup doctrine to obtain jurisdiction over additional parts of a controversy may be warranted for "any of several reasons, including to resolve a factual issue which must be determined in the proceedings; to avoid multiplicity of suits; to

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[32] Because the cleanup doctrine applies in this case, I do not reach Plaintiffs' additional contention that the request for an accounting in Count II provides an independent basis for upholding this Court's jurisdiction. Specifically, Plaintiffs argued that equitable jurisdiction exists for an accounting "where a fiduciary relationship exists between the parties and a duty rests upon the defendant to render an account." *Digiacobbe v. Sestak*, 1998 WL 684149, at *4 (Del. Ch. July 7, 1998). Plaintiffs further assert that because Delaware recognizes the existence of a fiduciary relationship between owners of an LLC and its management, and Innovative's Operating Agreement states that Innovative has a duty to render an accounting, this Court has equitable jurisdiction over Count II. *See* Compl. Ex. A, Operating Agreement, § 4.2. Innovative disagrees, characterizing Plaintiffs' claim as one for seeking a "non-fiduciary accounting," which would not invoke the jurisdiction of this Court. Def.'s Opening Br. 6.

[33] *Getty Ref. & Mktg. Co.*, 385 A.2d at 150.

[34] *See, e.g.*, *CML V, LLC v. Bax*, 6 A.3d 238, 239 (Del. Ch. 2010) ("[I]f one of the first three counts goes forward, then jurisdiction over Count IV exists under the clean-up doctrine."), *aff'd*, 28 A.3d 1037 (Del. 2011).

promote judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law."[35] Because the breach of the Redemption Agreement claims are closely intertwined with Plaintiffs' claims for an accounting, declaratory judgment, breach of the Licensing Agreement, and breach of the Consulting Agreement, I am convinced that severing those claims would undermine judicial efficiency.

For all of these reasons, Innovative's motion to dismiss one or more of the counts of the Complaint for lack of subject matter jurisdiction is denied.

### B. Do Counts I, II, and III Fail to State a Claim?

Under Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief.[36] As reaffirmed by the Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[37] That is, when considering such a motion, a court must:

> [A]ccept all well-pleaded factual allegations in the complaint as true, including even vague allegations if they provide the

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35 *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008).

36 *See Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *4 (Del. Ch. Mar. 5, 2010) (stating that a court should deny a motion to dismiss under Rule 12(b)(6) "unless it can determine with reasonable certainty that the nonmoving party could not prevail on any set of facts reasonably inferable from the pleadings and any documents incorporated therein or integral to the Complaint").

37 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

> defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[38]

This reasonable "conceivability" standard inquires whether there is a "possibility" of recovery.[39] If the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court is obligated to deny the motion to dismiss.[40] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[41]

Innovative contends that the exhibits attached to the Complaint, including the Redemption Agreements and Schedule K-1s—are dispositive of Counts I, II, and III, and accordingly, those counts should be dismissed under Rule 12(b)(6) for failure to state a claim.[42] In regard to Counts I and III, Innovative contends that the plain language of Section 8(i) of both the Duff and Carp Redemption Agreements demonstrates that the

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38 *Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *3 (Del. Ch. Dec. 9, 2011).

39 *Id.*

40 *Id.*

41 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

42 Documents outside of the pleadings generally may not be considered in ruling on a Rule 12(b)(6) motion to dismiss unless the document is integral to a plaintiff's claim and incorporated into the complaint or is not being relied upon to prove the truth of its contents. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

company merely agreed that the $105,000 and $0 amounts, respectively, would be the "total dollars distributed" to Duff and Carp in 2011 and 2012, as opposed to the "total income allocated" to them for those years. In further support of that assertion, Innovative cites the Schedule K-1s furnished to Duff and Carp for 2011, which reported "distributions" to each in the amount of $105,000.[43] Finally, Innovative argues the Complaint's reliance on Duff and Carp's discussions with Ogurno are irrelevant because their Redemption Agreements each contained an integration clause.[44]

Innovative further asserts that the allegations underlying Count II are contradicted by Duff and Carp's respective Schedule K-1 filings. To that end, Innovative avers that the distribution of $105,000 in 2011 was more than sufficient to cover any taxes Plaintiffs incurred on the $231,354 of ordinary income attributed to Duff and Carp for that year.[45] Innovative also disputes Duff and Carp's contention that the distributions made to them in 2011 cannot be treated as compensation for 2011 tax liability because that amount had to be paid using 2012 funds. According to Innovative, that would be contrary to Section

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43 *See* Compl. Exs. D & E, 2011 Schedule K-1s (Form 1065).

44 Specifically, both Redemption Agreements contain the following provision:

> This Agreement contains the entire understanding of the parties with respect to the sale of the Units of the Seller to the Company and supersedes all prior agreements, arrangements and understandings, whether written or oral, relating to the subject matter hereof and all of them are merged into this Agreement.

Redemption Agreements § 14.

45 Def.'s Opening Br. 10 n.5.

8(i) of the Redemption Agreement, which states that, "the total dollars . . . distributed [to Plaintiffs] from [Innovative] . . . in calendar year 2012 was $0."[46] Finally, Innovative reasons that any rights Plaintiffs had to a distribution for tax purposes ceased to exist when they relinquished their membership on February 23, 2012, thereby eliminating any entitlement to benefits they previously might have held under the Operating Agreement.

Duff and Carp respond that it would be inequitable for this Court to apply strictly the contract's language, and urge the Court to reform the Redemption Agreements to achieve the "real agreement" of the parties.[47] Plaintiffs also argue that their proposed interpretation of the contract reflects the "real understanding" of the parties to it.[48] For

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[46] Redemption Agreements § 8(i). In further support of this point, Innovative cites to Section 4.2 of the Operating Agreement, which states that any distribution made to its members in compensation for tax liability "shall be applied as a credit towards any subsequent distribution which is otherwise distributable to [Plaintiffs]," meaning that if Plaintiffs were to be given a distribution in 2012 to cover 2011 tax liability, any amounts would be treated as a 2012 distribution. Operating Agreement § 4.2(i). According to Innovative, therefore, because Duff and Carp agreed they would receive $0 in distributions in 2012, they cannot receive a distribution pursuant to Count II without violating Section 8(i) of the Redemption Agreements.

In addition, based on the existence of a current, concrete dispute on this issue, I consider Defendant's ripeness argument as to Count III unpersuasive.

[47] Pls.' Answering Br. in Opp'n to Def.'s Mot. to Dismiss ("Pls.' Answering Br.") 9 (citing *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2012 WL 1869416, at *13 (Del. Ch. May 16, 2012)). In addition, Plaintiffs acknowledge that they may not explicitly have pled a cause of action for "reformation" of contract, but nonetheless request leave to amend their Complaint to add such a claim. *Id.* at 10 n.3.

[48] For example, Duff and Carp allege that Ogurno and Outlaw shared their understanding of Section 8.1's warranty. *See* Compl. ¶¶ 14, 16.

similar reasons, Duff and Carp also resist dismissal of Count III's request for declaratory relief regarding the application of Section 8(i) for 2012. Innovative, on the other hand, denies that the Complaint pleads a claim for reformation and consideration of any such claim for purposes of its motion to dismiss. Defendant also asserts, based on Rule 15(aaa), that Plaintiffs have waived any right to amend their Complaint.[49]

I begin my analysis by focusing on the language of Section 8(i) which states:

> Distributions for 2011 and 2012. The Company hereby covenants and agrees that the total dollars (including value of all kind) *distributed or paid* to Seller from the Company and/or IDNY in calendar year 2011 was $105,000. The Company hereby covenants and agrees that the total dollars (including value of all kind) *distributed or paid* to Seller from the Company and/or IDNY in calendar year 2012 was $0. The company shall file, or cause to be filed, all tax filings, disclosures and returns of the Company and IDNY consistent with those amounts.[50]

As previously noted, Innovative distributed $105,000 to both Duff and Carp in 2011 and issued a Schedule K-1 to each of them that reflected an allocation to each of $231,354 in ordinary business income for 2011.

One way to read the Complaint is that Duff and Carp believed Section 8(i) was ambiguous and sought a declaratory judgment that their interpretation, *i.e.*, that the

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[49] *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *13 n.83 (Del. Ch. Jan. 11, 2010) (citing Ct. Ch. R. 15(aaa)) ("Under Rule 15(aaa), a party cannot use its brief as a mechanism to informally amend its complaint."); *Stern v. LF Capital P'rs, LLC*, 820 A.2d 1143, 1146 (Del. Ch. 2003) ("Rule 15(aaa) must be read as a limit on the otherwise broad rights and powers of amendment plaintiffs enjoy under Rule 15(a).").

[50] Redemption Agreements § 8(i) (emphasis added).

section meant that their respective taxable income from Innovative for 2011 and 2012 would be $105,000 and $0, respectively, was the correct reading. While the Complaint arguably alluded to ambiguity, it made no reference to reformation.

Any claim of ambiguity that Plaintiffs might have included in their Complaint, however, was disclaimed explicitly at oral argument.[51] Instead, Plaintiffs' counsel framed the issue as being whether or not facts sufficient to support granting reformation of contract had been pled.[52] In support of this contention, Plaintiffs emphasized the allegation in their Complaint regarding "specific conversations, where [Section 8(i)] was discussed and all sides shared the understanding of what it meant, which was to protect [Duff and Carp] for tax liability for having income allocated to them above $105,00."[53] In that respect, the Complaint at least arguably provides notice to Innovative that Plaintiffs' claim that the parties mutually agreed to the terms to be reflected in Section 8(i) of their respective Redemption Agreements, but that the terms "were not so included,

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51 Tr. 26–27 (Plaintiffs' counsel: "What we allege in our complaint is that all of the parties when they negotiated this provision negotiated it as a warranty that income allocated to these gentlemen [Duff and Carp] would be capped at $105,000, and what wound up happening was the provision was worded to say cash distributed to Duff and Carp will equal $105,000. But, of course, as Your Honor understands, that does not mean that taxable income allocated to them is at all limited. In other words, the warranty should have been worded differently.").

52 Tr. 29 (Plaintiffs' counsel: "It's an evidentiary issue after all and not one that would be susceptible to decision here today on a 12(b)(6) motion.").

53 Tr. 30.

and that such terms having been agreed on, they must be considered now in order that the Court may arrive at the essence of the entire agreement between the parties."[54]

Reformation implies that judicial intervention is needed for the purpose of changing the written contract to reflect the true intent of the parties.[55] "In order to gain reformation, the party seeking such form of relief must plead with particularity the ingredients on which it is based, namely mutual mistake or fraud, Rule 9(b)."[56]

Here, Plaintiffs have alleged mutual mistake in the Complaint and, upon that basis, seek reformation as a form of equitable relief. Court of Chancery Rule 9(b) states that "[i]n all averments of fraud or *mistake*, the circumstances constituting fraud or mistake shall be stated with *particularity*."[57] Specifically, "particularity" in this context means that the facts upon which a plaintiff relies in pleading reformation must be set forth "with at least some particularity" in order to put the defendant on notice of what is charged against him, but does not go so far as to require a "textbook pleading or the use of

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54 *Gracelawn Mem'l Park, Inc. v. E. Mem'l Consultants, Inc.*, 280 A.2d 745, 747 (Del. Ch. 1971), *aff'd*, 291 A.2d 276 (Del. 1972).

55 *Jefferson Chem. Co. v. Mobay Chem. Co.*, 253 A.2d 512, 516 (Del. Ch. 1969) (citing *Hessler, Inc. v. Ellis*, 167 A.2d 848, 850 (Del. Ch. 1961)).

56 *Gracelawn*, 280 A.2d at 748.

57 Ct. Ch. R. 9(b) (emphasis added).

specific words or phrases."[58] Additionally, the party seeking reformation ultimately must prove the contents of the parties' actual agreement by clear and convincing evidence.[59]

While the parties must allege mutual mistake, it is not necessary to include in the pleading an explanation of how or why the mistake occurred.[60] Thus, a complaint for reformation based on mutual mistake will withstand a motion to dismiss for failure to comply with the requirements of Rule 9(b), if it alleges: "(i) the terms of an oral agreement between the parties; (ii) the execution of a written agreement that was intended, but failed, to incorporate those terms; and (iii) the parties' mutual—but mistaken—belief that the writing reflected their true agreement and (iv) the precise mistake."[61]

Although Innovative disputes whether Duff and Carp pled reformation with the required level of particularity, I am satisfied that the reformation claim withstands a motion to dismiss under both Rules 9(b) and 12(b)(6). The Complaint alleged the terms of an oral agreement between the parties, the first element required for a claim of mutual

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58 *Jefferson*, 253 A.2d at 516 (internal quotation marks omitted).

59 *James River-Pennington Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *7 (Del. Ch. Mar. 6, 1995).

60 *Joyce v. RCN Corp.*, 2003 WL 21517864, at *5 (Del. Ch. July 1, 2003).

61 *Id.* at *4; *see also Great-W. Investors LP v. Thomas H. Lee P'rs, L.P.*, 2011 WL 284992, at *11 (Del. Ch. Jan. 14, 2011) ("A claim for reformation based on a mutual mistake will survive a motion to dismiss under Court of Chancery Rule 12(b)(6) only if it alleges: (i) that the parties reached a definite agreement before executing the final contract; (ii) that the final contract failed to incorporate the terms of the agreement; (iii) that the parties' mutually mistaken belief reflected the true parties' true agreement; and (iv) the precise mistake the parties made.").

mistake. The Complaint describes, for example, conversations Duff and Carp had with representatives of Innovative, *viz.*, Outlaw and Ogurno, that could support a reasonable inference that both parties had a common understanding that $105,000 would be the cap on Duff and Carp's taxable income for 2011. The Complaint first references a conference call with Ogurno in late January 2012, during which Ogurno allegedly assured Duff and Carp that he shared their understanding that Section 8(i) capped their taxable income for 2011 at $105,000. Importantly, for the second requirement of mutual mistake, this allegedly shared intention is not incorporated in the Redemption Agreements in that Section 8(i) provides that the "total dollars . . . *distributed or paid* to Seller [Duff or Carp] from the Company . . . in calendar year 2011 was $105,000."[62] A plain reading of this language indicates that the $105,000 figure probably refers to a "distribution" or payment, not to an allocation of taxable income. Thus, while the parties conceivably intended Section 8(i) of the Redemption Agreements to limit the tax liability of Duff and Carp, as Plaintiffs allege, the Agreements failed to accomplish that purpose because they refer to an amount that was "distributed" as opposed to "allocated" as income. Thus, the facts alleged conceivably could support a finding of mutual mistake.

The allegations regarding the conference call with Ogurno and Duff and Carp's conversation with Outlaw also could satisfy the third element, *i.e.*, that the parties had a "mutual-but-mistaken" belief that the Redemption Agreements reflected their true agreement. First, as discussed above, the Complaint avers that Ogurno assured Duff and

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[62] Redemption Agreements § 8(i) (emphasis added).

Carp that their reading of Section 8(i) was accurate. Second, in the conversation between Duff and Carp and Outlaw in mid-April 2012, Outlaw allegedly admitted that he shared Duff and Carp's understanding of the warranty provided in Section 8(i).

Finally, Plaintiffs sufficiently have pled facts to support the fourth element for a mutual mistake, because the purported mistake is specifically identified in the Complaint. In particular, Plaintiffs assert that:

> Under the Redemption Agreements, Innovative warranted that the total income distributed to Duff and Carp in 2011 equaled $105,000 for each of them. Further, Innovative warranted that its tax filings would be issued "consistent with those amounts," so that Duff and Carp's taxable income from Innovative for 2011 would be equal to the $105,000 distributed to each of them. This warranty is set forth in Section 8(i) of each Redemption Agreement.[63]

Because the Complaint expressly alleges sufficient facts to support a claim for mutual mistake at the pleading stage, and because reformation of a contract is a well-recognized remedy for mutual mistake as to a term of a contract,[64] I conclude that Plaintiffs have stated a claim for reformation.[65] Therefore, I deny the portion of Innovative's motion to dismiss based on Rule 12(b)(6).

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63 Compl. ¶ 20.

64 *See Burris v. Wilm. Trust Co.*, 301 A.2d 277, 279 (Del. 1972) ("It is well established that mutual mistake or unilateral mistake accompanied by fraud is needed to support a bill for reformation.").

65 Innovative argues that Plaintiffs failed to plead a claim for reformation and, therefore, should be barred by Court of Chancery Rule 15(aaa) from seeking to amend their Complaint now to add such a claim. In the circumstances of this case, that argument is unpersuasive. As indicated in the text, Plaintiffs have pled

### C. Is this Court a Proper Venue?

"The well-settled rule is that the court should 'give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation.'"[66] Moreover, "[i]f the contractual language is not crystalline, 'a court will not interpret a forum selection clause to indicate the parties intended to make jurisdiction exclusive.'"[67] "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[68] "An ambiguity can be found only if the contract is susceptible to two *reasonable* interpretations."[69]

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sufficient facts to put Innovative on notice of their claim for mutual mistake. Indeed, the briefing and argument on the motion to dismiss have clarified that Plaintiffs do not contend that the meaning of Section 8(i) of the Redemption Agreements is ambiguous. That is, Duff and Carp do not assert that the language of Section 8(i) reasonably can be read as supporting their claim for breach of contract. Rather, Plaintiffs' sole argument on the merits is that the Agreements, as written and executed, do not reflect the parties' true agreement. This clarification has narrowed the issues in this case significantly. In addition, because the Complaint was filed only six months ago, this matter is still at a relatively early stage. Therefore, I find that the Complaint provides Innovative with adequate notice of the nature of Plaintiffs' claim, and that no amendment of the Complaint is necessary to enable Duff and Carp to pursue the remedy of reformation in this action.

66 *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007).

67 *Id.* (quoting *Eisenbud v. Omnitech*, 1996 WL 162245, at *1 (Del. Ch. Mar. 21, 1996).

68 *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

Innovative contends that Count IV, which seeks monetary damages for breach of the License Agreement between Innovative and DDI, must be dismissed under Rule 12(b)(3) for improper venue. Innovative bases its argument on the following forum selection provision in the License Agreement: "[t]he sole jurisdiction and venue for actions related to the subject matter hereof shall be the state and U.S. federal courts located in California, and both parties consent to the jurisdiction of such courts . . . ."[70] This language, according to Innovative, precludes this or any other court not located in California from hearing DDI's claims.

In arguing to the contrary, Plaintiffs point out that the License Agreement was incorporated into the Redemption Agreements by way of Section 11 of those Agreements.[71] Delaware law holds that where a contract incorporates another contract by reference, the two contracts will be read together as a single contract.[72] In this case, the

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69 *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *7 (Del. Ch. Oct. 19, 2000).

70 License Agreement § 13.

71 Redemption Agreements § 11 ("The exhibits and schedules attached hereto or included herein are made a part hereof for all purposes."). The License Agreement is an exhibit to the Redemption Agreements. One of the Redemption Agreements is attached as an exhibit to the Complaint.

72 *See Royal Indem. Co. v. Alexander Indus., Inc.*, 211 A.2d 919, 920 (Del. 1965) ("Moreover, [appellant] concedes that the bond and the contract between the owner and the contractor must be read together in order to ascertain the intent of the parties, the contract being expressly incorporated by reference in the bond."); *State ex rel. Hirst v. Black*, 83 A.2d 678, 681 (Del. Super. 1951) ("It is, of course, axiomatic that a contract may incorporate by reference provisions contained in some other instrument.").

forum selection clause in the Redemption Agreement arguably could be applied to the attached License Agreement.

Plaintiffs contend that the choice of forum provisions in the Redemption Agreements and the License Agreement, when considered collectively, do not meet the "crystalline" standard set forth in *Troy Corp. v. Schoon*.[73] In contrast to Section 13 of the License Agreement, Section 13 of the Redemption Agreements states that:

> The parties hereto, to the extent they may legally do so, hereby consent to the jurisdiction of the courts of the State of Delaware for the purpose of any suit, action or other proceeding arising out of any of their rights, remedies or obligations hereunder or with respect to the transactions contemplated hereby, and expressly waive any and all objections they may have to venue in any such courts.[74]

Innovative responds by noting that, unlike the License Agreement's identification of California as the "sole jurisdiction and venue" "for actions related to the subject matter [of the License Agreement]," the forum selection clause in the Redemption Agreements is merely permissive, using language by which the parties "hereby consent to jurisdiction" in Delaware. Furthermore, Section 13 of the Redemption Agreements applies to "any suit, action or other proceeding arising out of any of [the parties'] . . . obligations hereunder or with respect to transactions contemplated hereby." Count IV of this action at least arguably arises out of Innovative's obligations under the Redemption Agreements. Therefore, one reasonable interpretation of Section 13 of the Agreement is

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[73] 2007 WL 949441 (Del. Ch. Mar. 26, 2007).

[74] Redemption Agreements § 13.

that Innovative has consented to jurisdiction in this Delaware Court and waived any objection it might have to venue here.

Thus, even if the Redemption Agreements' forum selection language is "permissive," as Innovative asserts, it conceivably could be controlling in this case. In any event, this Court has held that where a contract contains two conflicting provisions, the document is rendered ambiguous.[75] To that end, Delaware courts only will declare a forum selection clause "strictly binding" when 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."[76] To the extent the forum selection provisions in the Redemption Agreements and the License Agreement conflict, they make the parties' intent as to a contractual choice of forum here far from "crystalline."[77] Because Innovative has not met the "crystalline" standard, it has not shown that California is the "exclusive" forum for a claim such as Count IV. Therefore, Defendant's 12(b)(3) motion to dismiss also fails.

## III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I deny Defendant's motion to dismiss in its entirety. **IT IS SO ORDERED.**

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75 *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 836 (Del. Ch. 2007) ("[T]he conflicting provisions of this contract render it decidedly ambiguous.").

76 *Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found. II, LLC*, 2005 WL 1364616, at *7 (Del. Ch. May 27, 2005).

77 A standard dictionary defines "crystalline" as "strikingly clear or sparkling." *Merriam-Webster's Collegiate Dictionary* 302 (11th ed. 2004).