COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Joel Friedlander, Esquire
Christopher M. Foulds, Esquire
Friedlander & Gorris, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

R. Montgomery Donaldson, Esquire
Polsinelli PC
222 Delaware Avenue, Suite 1101
Wilmington, DE 19801

Re: *3850 & 3860 Colonial Blvd., LLC v. Griffin*
C.A. No. 9575-VCN
Date Submitted: October 3, 2014

Dear Counsel:

Plaintiff was a seed investor in a limited liability company ("LLC"). The company's sole director pursued a recapitalization that reduced Plaintiff's economic interest. Later, the director oversaw the company's conversion into a corporation. Plaintiff brings fiduciary duty and contractual claims against the director and the corporate successor to the company. Before the parties can reach the merits of their dispute, the proper forum for resolving the claims must be established. The company's operating agreement provides for arbitration

(following mediation); the successor corporation's charter calls for litigation in this Court. Defendants have moved to dismiss this action for lack of subject matter jurisdiction under Court of Chancery Rule 12(b)(1) because arbitration is required and provides an adequate remedy.

* * * * *

Defendant Christopher E. Griffin ("Griffin") formed Rubicon Media, LLC ("Rubicon LLC") in 2007 as part of a plan to build a business combining social networking and online betting in international markets.[1] Plaintiff 3850 & 3860 Colonial Blvd., LLC ("Colonial" or the "Plaintiff") contributed to that effort.[2] Griffin, the sole director and managing member of Rubicon LLC, later arranged

[1] First Am. Verified Compl. ("Complaint" or "Compl.") ¶ 2. The Court draws the facts from the Complaint, incorporated letters, and the organizational documents presented by the parties to establish jurisdiction. Defendants challenge certain of Plaintiff's factual characterizations, but the Court need not resolve those disputes here.

[2] Compl. ¶¶ 3, 11. Colonial, a New York LLC, continues to hold shares in the successor corporation. *See* Compl. ¶ 53.

for its conversion into a corporation, Defendant Rubicon Media, Inc. ("Rubicon Inc.," and collectively with Griffin, the "Defendants"), in March 2013.[3]

Griffin planned to use funds raised by Rubicon LLC to acquire a majority interest in Collisse Group Limited ("Collisse") and operate through a Collisse subsidiary named Betable, Ltd. ("Betable").[4] Colonial invested $500,000 in July 2008 and obtained a 7% interest in the Class A units of Rubicon LLC.[5] The initial seed round left Griffin with 76.9% of the Class A units of Rubicon LLC, corresponding to a 76.1% economic interest in Collisse. In 2011, Griffin decided to pursue a different business strategy.[6]

In connection with this new strategy, Griffin made changes to Rubicon LLC's capital structure. At some point in 2011, Betable (or Collisse) returned a

[3] Compl. ¶¶ 13, 53. Rubicon LLC was a Delaware LLC. Transmittal Aff. of R. Montgomery Donaldson in Supp. of Defs.' Mot. to Dismiss Pl.'s Compl. ("Donaldson Aff.") Ex. A, at 1; Ex. B, at 1. Rubicon Inc. is a Delaware corporation. Compl. ¶ 12.
[4] Compl. ¶ 14. Griffin currently serves as CEO and a director of Rubicon Inc., CEO and a director of Collisse, and CEO of Betable. Compl. ¶ 13.
[5] Compl. ¶¶ 3, 18-19.
[6] Compl. ¶ 22.

$3 million investment to a venture capital firm.[7] Later, on November 30, 2011, Griffin effected a recapitalization, creating Recap A Common Units and Recap B Common Units ("Recap A" and "Recap B," respectively).[8] The Recap A had an aggregate liquidation preference of $200,000 and no part of any other distributions. The Recap B shared "operating distributions and any distributions from any sale, liquidation, merger or other capital transactions" exceeding the $200,000.[9] Griffin received 96% of the Recap B, and the other shareholders received a combination of 100% of the Recap A and 4% of the Recap B.[10] Griffin also approved the Second Amended and Restated Limited Liability Company Agreement of Rubicon Media LLC, dated November 30, 2011 (the "New LLC Agreement").[11] Despite language in the Amended and Restated Limited Liability Company Agreement of Rubicon

[7] Compl. ¶ 23; *see also* Oral Arg. Tr. 16.
[8] Compl. ¶¶ 25, 30.
[9] Compl. ¶ 30.
[10] Griffin did not contribute new capital in the recapitalization. Compl. ¶ 33.
[11] Compl. ¶ 26.

Media LLC (the "Old LLC Agreement"), Colonial was not given the option to consent to these changes.[12]

Colonial received notice of the recapitalization through a November 5, 2012, letter from Griffin.[13] The letter claimed that "Betable was not a viable business model"[14] and that the $200,000 liquidation preference had origins in an "independent 3rd party valuation" of Collisse's remaining assets, conducted in connection with the redemption of the venture capital firm's shares.[15] Griffin claimed to have conducted the recapitalization "in lieu of liquidating the remaining assets and dissolving the company."[16] He did not mention significant business developments postdating the recapitalization.[17]

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[12] Compl. ¶ 32. According to Section 11.5.1 of the Old LLC Agreement, "no amendment that materially reduces the distributions which may be made to a Member . . . may be made without such Member's consent." Donaldson Aff. Ex. A, at 20.
[13] Compl. ¶ 42. The letter is attached as Exhibit A to the Complaint.
[14] Compl. ¶ 44 (internal quotation marks omitted).
[15] Compl. ¶ 43 (internal quotation marks omitted). A board resolution related to the recapitalization stated that members would be given a distribution or liquidation preference based on a valuation involving a third-party consultation. Compl. ¶ 28.
[16] Compl. ¶ 27 (internal quotation marks omitted).
[17] Compl. ¶ 45.

Griffin sent another letter to investors in October 2013[18] to inform them of an initial closing of a "[f]inancing in March 2013, [in which] the new Series A investors required Rubicon Media LLC to convert from a limited liability company into a corporation."[19] The letter also made several claims relating to the earlier recapitalization, including that (1) an independent valuation "valued the entire company at approximately $100,000 to $150,000"[20] and (2) "[f]rom the time of the reorganization forward, Rubicon Media began a completely new business with a new business model, new employees, new licenses and new technology."[21] Griffin also provided a copy of the Amended and Restated Certificate of Incorporation of Rubicon Inc., dated July 3, 2013 (the "Certificate of Incorporation"), and stock certificates.[22]

The incorporation changed certain rights of investors. In particular, Rubicon LLC had adopted a dispute resolution process of arbitration preceded by mediation; Rubicon Inc. implemented a litigation-only approach. Article Twelfth

[18] Compl. ¶ 52.
[19] Compl. Ex. B, at 1. Paragraph 52 of the Complaint incorporates the letter.
[20] Compl. ¶ 54 (internal quotation marks omitted).
[21] Compl. ¶ 55 (internal quotation marks omitted).
[22] Compl. ¶ 53.

of the Certificate of Incorporation designates this Court as the exclusive forum for dispute resolution (the "Charter Provision"):

> Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery in the state of Delaware will be the sole and exclusive forum for any stockholder . . . to bring . . . any action asserting a claim of breach of fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders . . . or . . . any action asserting a claim against the Corporation, its directors, officers or employees governed by the internal affairs doctrine, except for . . . which the Court of Chancery does not have subject matter jurisdiction.[23]

The corresponding provision in the LLC Agreements (the "LLC Provision") calls for mediation, followed by arbitration:

> 11.10.1 *Mediation/Arbitration.* In the event of any dispute arising under or relating to this Agreement, the parties hereby agree to mediate any such dispute before a mediator from Judicial Dispute Resolution, LLC or Judicial Arbitration and Mediation Services [("JAMS")] in New York, New York. If the dispute is not resolved within sixty (60) days from the request for mediation, such dispute shall be submitted to arbitration under the Commercial Arbitration Rules before an arbitrator appointed by the American Arbitration Association [(the "AAA")] in New York, New York.

[23] Transmittal Aff. of Benjamin Chapple Ex. A, at 26.

> 11.10.2 *Jurisdiction and Venue.* Any mediation, arbitration or lawsuit involving any dispute or matter arising under this Agreement may only be brought before the appropriate tribunal or court in Sussex County, Delaware.[24]

Plaintiff commenced litigation, and not mediation or arbitration, by filing its Complaint in this Court. Plaintiff seeks reformation of Rubicon Inc.'s capital structure to restore it to its position before the recapitalization, as well as rescissory damages against Griffin. Defendants have moved to dismiss the Complaint for lack of subject matter jurisdiction.

* * * * *

In the Complaint, Plaintiff alleges that Griffin (1) breached his fiduciary duties of loyalty and care as a director and manager of Rubicon LLC by effecting the recapitalization;[25] (2) breached the Old LLC Agreement through "conferr[ing] upon himself equity interests to which he was not entitled" and amending the Old

[24] Donaldson Aff. Ex. A, at 21; Ex. B, at 22. The language in Sections 11.10.1 and 11.10.2 of the Old and New LLC Agreements is identical. For convenience, the Court sometimes refers to the "LLC Agreement" when there is no reason to distinguish between the two agreements.
[25] Compl. ¶ 57.

LLC Agreement to reduce distributions to Colonial without its consent;[26] and (3) breached his fiduciary duties of loyalty, care, and candor as an officer and director of Rubicon Inc. through the October 2013 letter making "false and misleading statements in bad faith to effectuate his scheme of seizing the upside of the seed investors' investment."[27] Rubicon Inc. presumably has been made a party because Plaintiff seeks reformation of its capital structure.[28]

Defendants contend that the Court must dismiss the Complaint for lack of subject matter jurisdiction because the parties agreed to arbitrate, including arbitration of issues of substantive arbitrability.[29] They submit that the LLC Provision "potentially" applies as the dispute is "based entirely around a single transaction entered into by Rubicon LLC."[30] They also highlight the LLC

[26] Compl. ¶¶ 63-64.
[27] Compl. ¶ 67.
[28] *See* Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss the Verified First Am. Compl. ("Pl.'s Answering Br.") 14.
[29] Defendants ask for dismissal and focus their opening brief on the argument that an arbitrator should decide the threshold issue of arbitrability.
[30] Defs.' Opening Br. in Supp. of Their Mot. to Dismiss Pl.'s Compl. ("Defs.' Opening Br.") 2 (emphasis omitted).

Provision's broad language on arbitration and its specific reference to the AAA rules.[31]

Plaintiff, in contrast, asserts that this Court is the sole and proper forum for its Complaint. Plaintiff emphasizes that there is no presumption in favor of arbitration when, as an initial matter, it is unclear that the parties have agreed to arbitrate.[32] To that end, Plaintiff highlights the Charter Provision because "[t]he relief sought for all counts is 'against the Corporation' and all counts are 'governed by the internal affairs doctrine.'"[33] According to Plaintiff, the forum selection clause that Griffin "caused Rubicon Inc. to adopt" serves to "ensur[e] that all claims affecting the current stockholders of Rubicon Inc. are litigated in the Court of Chancery, regardless of when the claims arose."[34] Plaintiff also argues that the

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[31] *Id.* at 14-15.
[32] Pl.'s Answering Br. 11-13.
[33] *Id.* at 14. Plaintiff also points out language about breach of fiduciary duty. *Id.* at 16.
[34] *Id.* at 17. The Court observes some incongruity, at least in the fact that Griffin directed the process of adopting the Certificate of Incorporation and now seeks the protection of the LLC Agreement. Along similar equitable lines, Plaintiff encourages the Court to resolve any ambiguity about forum selection against Defendants as drafters. The Court does not reach this canon of interpretation in its analysis.

Charter Provision superseded the earlier adopted, conflicting LLC Provision "[a]s a matter of contract law."[35] Finally, Plaintiff claims that the Court must resolve any substantive arbitrability dispute because the LLC Provision has been superseded, is "internally inconsistent" regarding venue, and does not specify rules guiding a mediator.[36]

* * * * *

A. *The Motion to Dismiss Standard*

Pursuant to Court of Chancery Rule 12(b)(1), this Court will dismiss a complaint if it lacks subject matter jurisdiction based on the record.[37] "The party seeking a court's intervention bears the burden of establishing the court's subject matter jurisdiction, and the court may consider evidence outside the pleadings in resolving that issue."[38] One reason why the Court might lack subject matter

[35] *Id.* at 18.
[36] *Id.* at 26-28.
[37] *E.g.*, *Pitts v. City of Wilmington*, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009).
[38] *Id.* (footnote omitted).

jurisdiction is that the parties have agreed to arbitrate the dispute.[39] "[A] Rule 12(b)(1) motion will be granted if the parties contracted to arbitrate the claims asserted in the complaint."[40]

B. *Does the Court Have Jurisdiction Over Plaintiff's Claims?*

1. The Standard for Determining Substantive Arbitrability

Arbitration rights are created by contract, and where there is a dispute about whether the parties have an agreement to arbitrate, it is generally a decision for a court.[41] There is a presumption "that the parties intended issues of substantive

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[39] *See, e.g.*, *Li v. Standard Fiber, LLC*, 2013 WL 1286202, at *4 (Del. Ch. Mar. 28, 2013) ("A Delaware court lacks subject matter jurisdiction to resolve disputes that litigants have contractually agreed to arbitrate[,] because arbitration provides an adequate remedy." (alteration in original) (footnote and internal quotation marks omitted)).

[40] *Id.*

[41] *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) ("It is . . . well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."). The parties did not focus on the issue of whether the Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1-16, or the Delaware Uniform Arbitration Act ("DUAA"), 10 *Del. C.* §§ 5701-5725, should apply as the governing law, but the distinction is not material to the Court's analysis here.

arbitrability to be decided by a court."[42] One can rebut the presumption, however, with "evidence that the parties 'clearly and unmistakably' intended otherwise."[43] Under the test established in *Willie Gary*, this evidence is found "where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability."[44] Yet even if these two elements are met, the Court must resolve issues of substantive arbitrability if the party seeking to avoid arbitration makes "a clear showing that its adversary has made essentially no non-frivolous argument about substantive arbitrability."[45] The Court's analysis of whether there is any non-frivolous argument is limited—"a court must not delve into the scope of the

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See Julian v. Julian, 2009 WL 2937121, at *3 n.18 (Del. Ch. Sept. 9, 2009) (analyzing "relevant decisions of the Delaware courts, whether they arose in the context of the DUAA or the FAA").

[42] *Avnet, Inc. v. H.I.G. Source, Inc.*, 2010 WL 3787581, at *4 (Del. Ch. Sept. 29, 2010). Substantive arbitrability refers to the issues of whether there is a valid agreement to arbitrate and the scope of that agreement.

[43] *Id.* (citing *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006)).

[44] *Willie Gary*, 906 A.2d at 80.

[45] *Li*, 2013 WL 1286202, at *5 (internal quotation marks omitted).

arbitration clause and the details of the contract and pending lawsuit."[46] Once the Court has found an agreement to arbitrate, "Delaware courts generally favor arbitration of particular disputes and 'ordinarily resolve any doubts in favor of arbitration.'"[47]

2. Is There an Enforceable Agreement to Arbitrate?

Plaintiff contends that the Charter Provision is the operative agreement and that there is no agreement to arbitrate its claims. Defendants argue that the LLC Provision embodies the agreement to arbitrate issues of substantive arbitrability (not to mention the entire dispute). As with standard contract analysis, the Court looks for guidance in the text of the organizational documents offered by the parties.[48] If a contract is not ambiguous, the Court gives effect to its plain

[46] *Id.* (internal quotation marks omitted).
[47] *Julian*, 2009 WL 2937121, at *4 (quoting *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155-56 (Del. 2002)).
[48] *See, e.g.*, *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) ("A certificate of incorporation is viewed as a contract among shareholders, and general rules of contract interpretation apply to its terms."); *Kelly v. Blum*, 2010 WL 629850, at *7 & n.43 (Del. Ch. Feb. 24, 2010) ("As with all contracts, when interpreting the 2008 LLC Agreement, the Court seeks to give full effect to the parties' intent as expressed in that document.").

meaning.[49] "[A] new contract, as a general matter, will control over [an] old contract with respect to the same subject matter to the extent that the new contract is inconsistent with the old contract or if the parties expressly agreed that the new contract would supersede the old one."[50] Courts, however, have found that arbitration provisions can continue to apply to actions taken while the original contract was effective, even if the original contract has since been replaced by another.[51] Furthermore, there may be circumstances when a prior entity agreement

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[49] *E.g.*, *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) ("A court must accept and apply the plain meaning of an unambiguous term in the context of the contract language and circumstances, insofar as the parties themselves would have agreed *ex ante*.").

[50] *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *5 (Del. Ch. Jan. 31, 2007).

[51] *See, e.g.*, *Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 679 N.E.2d 624, 626 (N.Y. 1997) ("Generally, a broad arbitration clause in an agreement survives and remains enforceable for the resolution of disputes arising out of that agreement subsequent to the termination thereof and the discharge of obligations thereunder . . . ."); *see also Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1124 (11th Cir. 2014) (distinguishing its holding because of a new agreement in which "the parties agreed to apply the terms of the [new agreement] retroactively"), *cert. denied*, 135 S. Ct. 144 (2014).

continues to govern the rights and obligations of a signatory and a successor entity despite the existence of a new entity agreement.[52]

Here, the LLC Agreement and the Certificate of Incorporation are the critical documents. Based on a plain reading of the agreements, the Court cannot find that the Charter Provision supersedes the LLC Provision with respect to the resolution of disputes related to the recapitalization.[53] First, there is no language explicitly replacing the LLC Provision with the Charter Provision. Second, although they use broad mandatory language and might have some overlap, the LLC Provision and the Charter Provision maintain independent existence to the extent that (generally speaking) they relate to the LLC Agreement and corporate governance, respectively.[54] Of course, the internal affairs of an LLC can be

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[52] *See, e.g.*, *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1005, 1008-10 (Del. Ch. 2007) (invoking 6 *Del. C.* § 18-216(h)).

[53] The Court draws this conclusion generally but does not decide, at this point, whether all of the allegations fall within the scope of the LLC Provision. Matters of scope are for the arbitrator to decide, as explained *infra*.

[54] Plaintiff cites several cases where later agreements superseded earlier agreements to arbitrate. *See* Pl.'s Answering Br. 18-21. In reaching their various conclusions, the courts looked for explicit language to supersede prior agreements and incompatible treatment of the same topics. *See, e.g.*, *Dasher*, 745 F.3d at 1121-23. Defendants, in contrast, focus on cases involving advancement and

governed by Delaware law, and Colonial, a shareholder, is filing suit against both Rubicon Inc. and an individual who happens to be Rubicon Inc.'s fiduciary. These observations, however, do not mean that the Charter Provision applies to claims about the internal affairs of Rubicon LLC or the duties its fiduciaries owed during the recapitalization.[55] Thus, the parties have an enforceable agreement to arbitrate for purposes of the pending motion.

3. Does the LLC Provision Meet the *Willie Gary* Test?

Given the agreement, the next question is whether issues of substantive arbitrability are for the Court or an arbitrator to decide. Defendants submit that the LLC Provision offers clear evidence that the parties agreed to arbitrate the

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indemnification obligations of predecessor and successor entities to argue that the LLC Provision applies. *See* Defs.' Reply Br. in Further Supp. of Their Mot. to Dismiss Pl.'s Compl. ("Defs.' Reply Br.") 7-10 (emphasizing *Bernstein*, 953 A.2d at 1005). The analogy is not perfect (the primary claims asserted here are against Griffin, as opposed to an entity indemnitor), but the analysis is useful regarding a successor entity's obligations.

[55] The LLC Provision purports to cover disputes that "aris[e] out of or relat[e] to" the LLC Agreement, and this type of language has been interpreted broadly by the Court. *See Carder v. Carl M. Freeman Cmtys., LLC*, 2009 WL 106510, at *5 (Del. Ch. Jan. 5, 2009) ("The dispute centers on the relative weight of adding to an arbitration clause, which includes a phrase like 'arising under,' language such as 'related to' or 'in connection with,' *i.e.*, a phrase that explicitly extends beyond the four corners of the contract.").

arbitrability of Plaintiff's claims. The arbitration test in *Willie Gary*, mentioned above, finds this clear and unmistakable evidence when the parties have an agreement that "generally provides for arbitration of all disputes" and refers to arbitration rules empowering the arbitrator to decide arbitrability.[56] The LLC Provision directs the parties to arbitrate "any dispute arising under or relating to this [LLC] Agreement" and specifies that arbitration will be governed by "the Commercial Arbitration Rules" of the AAA. This Court has found "arising out of or relating to" language sufficiently broad to meet *Willie Gary*'s first prong,[57] and the AAA's Commercial Arbitration Rules empower an arbitrator to rule on jurisdiction.[58] On its face, the LLC Provision meets the preliminary test for arbitration, which would take the substantive arbitrability analysis from the Court.

Plaintiff maintains that the LLC Provision does not "clearly and unmistakably" show an agreement to arbitrate arbitrability because of facially

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[56] *Willie Gary*, 906 A.2d at 80.
[57] *See Li*, 2013 WL 1286202, at *6 (internal quotation marks omitted).
[58] AAA Commercial Arbitration Rule R-7(a), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103; *cf. Li*, 2013 WL 1286202, at *6 (observing that a reference to JAMS rules satisfied *Willie Gary*'s second prong).

conflicting language about venue and a requirement to pursue mediation before arbitration.[59] More specifically, Section 11.10.1 of the LLC Agreement provides for "arbitration . . . before an arbitrator appointed by the [AAA] in New York, New York" and Section 11.10.2 mandates an "appropriate tribunal or court in Sussex County, Delaware."[60] However, this is not a situation "where there are various dispute resolution clauses in play in various contracts, [and] it is impossible to select one and say it applies generally to all disputes."[61] Some confusion about geographical location in this matter[62] does not compel the Court to ignore an otherwise clear agreement that provides for arbitration generally, including the arbitration of arbitrability. In *Riley v. Brocade Communications Systems, Inc.*,[63] for example, this Court confronted the question of whether its finding that the parties must submit their debate over arbitrability to JAMS required the parties to

[59] Pl.'s Answering Br. 26-28.
[60] *See supra* note 24 and accompanying text.
[61] *See TowerHill Wealth Mgmt., LLC v. Bander Family P'ship, L.P.*, 2008 WL 4615865, at *3 (Del. Ch. Oct. 9, 2008).
[62] *See* Defs.' Reply Br. 11 ("While, at first blush, Section 11.10.2 may create some ambiguity with respect to where that arbitration should take place – Delaware or New York – it does not change the overarching requirement that arbitration is required by the [LLC] Agreement." (emphasis omitted)).
[63] C.A. No. 9486 (Del. Ch. Sept. 4, 2014) (TRANSCRIPT).

proceed in the location named by the relevant agreement—as opposed to another location where JAMS had an office. The Court left the decision to the arbitrator.[64]

Additionally, simply because the agreement calls for mediation before arbitration (and there are no rules for how a mediator will determine her jurisdiction) does not preclude a finding of an agreement to arbitrate arbitrability.[65] Plaintiff has not offered authority suggesting otherwise. Perhaps the parties must wait sixty days before arbitrating arbitrability. Regardless, the Court is not persuaded that a commitment to mediate first nullifies the arbitration language in the LLC Provision.

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[64] *Id.* at 14-16. ("I see no risk of prejudice to [the party seeking to limit arbitration to the named location] from [declining to enjoin arbitration elsewhere] because I believe it has a full opportunity to present its . . . venue-related arguments to the arbitrator, and that should allow for a fair resolution . . . ."). Although an arbitrator had already been selected in that case, the holding is relevant for the proposition that an arbitrator fairly can decide the scope of her jurisdiction under the parties' agreement.

[65] In *West IP Communications, Inc. v. Xactly Corp.*, the Superior Court considered whether it had jurisdiction over claims arguably covered by an alternative dispute resolution process that called for negotiation, mediation, and arbitration. 2014 WL 3032270, at *3 (Del. Super. June 25, 2014). The defendant filed a motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction, noting that the plaintiff had not pursued the alternative dispute resolution process. The Superior Court did not focus on the mediation issue but ultimately left the substantive arbitrability decision to an arbitrator. *Id*. at *7-10.

Although the LLC Provision facially satisfies the elements discussed in *Willie Gary*, the Court still must determine whether Plaintiff has shown that "its adversary has made essentially no non-frivolous argument about substantive arbitrability."[66] It would not make sense, for example, to require arbitration on arbitrability "if Company A and Company B entered an emergency-vehicle purchase agreement containing a broad arbitration clause that referenced the AAA Rules" and later disagreed about "a business tort claim stemming from a different nucleus of operative facts."[67] Nonetheless, the Court must be careful not to conflate this analysis with the ultimate question of "whether the underlying claims relate to or arise out of the agreement."[68]

At oral argument, Plaintiff suggested that Defendants lack a non-frivolous argument for arbitration because Plaintiff's claims fall within the plain language of the Charter Provision.[69] However, the lines are not that clear-cut. Counts I and II allege Griffin's breach of fiduciary duties and breach of contract as a manager and

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[66] *Li*, 2013 WL 1286202, at *5 (internal quotation marks omitted).
[67] *Julian*, 2009 WL 2937121, at *7.
[68] *Id.*
[69] *See* Oral Arg. Tr. 40-41.

director of Rubicon LLC. It is at least colorable that these claims against Griffin relate to the agreement memorialized in the LLC Provision. It is tempting to differentiate the claims against Griffin in Count III because the October 2013 letter postdates incorporation. Nevertheless, Defendants argue that the LLC Provision governs because Count III is better viewed as a dispute about the "efficacy of the Recapitalization" than as "a single incident of alleged post-Conversion conduct."[70] At this point, it is unclear whether the alleged cover-up was a continuation of the pre-incorporation conduct or a separate act,[71] and there is no liability for Count III unless Griffin's conduct in the recapitalization was wrongful. Plaintiff has not established that there is no non-frivolous argument about substantive arbitrability as against Griffin; thus, an arbitrator must decide whether Plaintiff's claims are arbitrable.

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[70] Defs.' Opening Br. 10-11. In a footnote, Defendants suggest that Count III "could be dismissed separately under Rules 12(b)(6) and 9(b)." *Id.* at 10 n.18. Defendants also observe that Plaintiff's requested remedies focus on the (pre-incorporation) recapitalization rather than any subsequent harms. As Plaintiff notes, Defendants' suggestion is not a motion to dismiss.

[71] There is a colorable argument, for example, that Griffin made certain statements in his letter to continue carrying out a scheme to enrich himself. Plaintiff's Complaint can be read to suggest this link. *See* Compl. ¶ 67.

4. Does Rubicon Inc. Have a Duty to Arbitrate?

The argument for requiring Rubicon Inc. to arbitrate the dispute generally or to arbitrate arbitrability is more complex. Rubicon Inc. never signed an agreement to arbitrate. It is a defendant primarily because of Griffin's conduct before incorporation; it was not in existence when the offending recapitalization occurred. On the other hand, no liability could be imposed (even for the post-incorporation letter) unless the recapitalization (implemented during the time of Rubicon LLC) was improperly carried out.

As the Court noted in *Bernstein v. TractManager, Inc.*, "rights created by the LLC's operating agreement may be enforced against the corporation into which the LLC was converted."[72] Invoking 6 *Del. C.* § 18-216(h), the Court did not have difficulty finding that indemnification rights in an LLC agreement survived a conversion (although that was not the primary issue in contention).[73] In *Dasher v. RBC Bank (USA)*, the Eleventh Circuit observed "that where terms have been

[72] 953 A.2d at 1005.
[73] *Id.* at 1008.

applied retroactively, contractual language explicitly authorized that result."[74] Before distinguishing the contractual language relevant to the case before it, the Eleventh Circuit entertained the possibility that an arbitration clause in an agreement between defendant bank and plaintiff customer, effective when the alleged breaches occurred, continued to govern dispute resolution despite a superseding agreement between the bank's acquirer and the customer.[75] Furthermore, this Court has reasoned that "*Willie Gary* requires that a signatory to an agreement vesting questions of substantive arbitrability to the arbitrator must resolve disputes about arbitrability against a non-signatory before the arbitrator, unless the signatory can show that the non-signatory's contention that the underlying dispute is arbitrable is wholly groundless."[76] Decisions requiring arbitration of claims involving "affiliates of signatories" are "not unusual."[77] It can

[74] 745 F.3d at 1124.
[75] *See id.* at 1124-26 (emphasizing that the arbitration clause no longer governed because the parties agreed that the new agreement's terms would have retroactive effect).
[76] *McLaughlin v. McCann*, 942 A.2d 616, 626 (Del. Ch. 2008) (internal quotation marks omitted).
[77] *Id.* at 627. This Court has also considered whether the non-signatory has consented to arbitration. *See, e.g., id.* ("[I]t is harder for signatories to escape

be appropriate to require a non-signatory to comply with an agreement to arbitrate "'if so dictated by the ordinary principles of contract and agency.'"[78]

Rubicon Inc. is (1) the principal of corporate director and officer Griffin and (2) the successor to Rubicon LLC, the principal of LLC director and manager Griffin. Requiring Rubicon Inc. to arbitrate the arbitrability of the claims brought against Griffin (and, technically, itself) for conduct that preceded incorporation is not inequitable or impermissible.[79] Defendants have a colorable claim for arbitrating the arbitrability of these claims.

Perhaps Count III could be treated separately because Plaintiff is bringing suit against Rubicon Inc. for acts of its fiduciary occurring after the Charter Provision designated this Court as the exclusive forum for certain disputes.

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arbitration when, as here, the non-signatories consent."). Rubicon Inc.'s willingness to arbitrate, however, would not create a duty for Plaintiff to arbitrate claims it was not otherwise obligated to arbitrate.

[78] *Id.* at 627 n.42 (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)).

[79] Had Griffin attempted to incorporate to defeat Plaintiff's arbitration rights, the Court would not have difficulty ordering Rubicon Inc. to participate in arbitration proceedings. The fact that Plaintiff seeks litigation and Defendants seek arbitration, though somewhat out of the ordinary, does not make the argument to hold Rubicon Inc. to its predecessor's commitment frivolous.

Nonetheless, there is at least a colorable argument that Griffin's October letter was a part of his continuing scheme to take the value of Plaintiff's investment, a scheme that the LLC Provision possibly covers. Upon reaching this preliminary conclusion, the Court must cede to an arbitrator the question of whether Plaintiff must arbitrate its case against Rubicon Inc. The Court may not engage in a searching analysis of the scope of the arbitration agreement that it has found to be a binding contract.

Plaintiff has not persuaded the Court that Defendants' arguments in favor of substantive arbitration are frivolous; the Court should not delve into an analysis "[t]hat would turn *Willie Gary* on its head."[80] The LLC Provision requires an arbitrator to decide issues of substantive arbitrability. The Court therefore stays proceedings on all counts pending a decision by the arbitrator on substantive arbitrability (and perhaps the merits of the dispute).[81]

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[80] *See Julian*, 2009 WL 2937121, at *6.

[81] "This Court . . . possesses the inherent power to manage its own docket . . . ." *Legend Natural Gas II Hldgs., LP v. Hargis*, 2012 WL 4481303, at *4 (Del. Ch. Sept. 28, 2012). Dismissal is not warranted because of the uncertainty regarding the arbitrator's decision about whether the merits of the parties' dispute should be addressed in arbitration.

* * * * *

For the reasons above, Defendants' motion to dismiss is denied and proceedings in this Court are stayed pending arbitration.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K