EFiled: Feb 08 2016 04:08PM EST
Transaction ID 58542068
Case No. 10681-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN BONANNO,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 10681-VCN**
	:	
VTB HOLDINGS, INC.,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: December 4, 2015
Date Decided: February 8, 2016

Thomas W. Briggs, Jr., Esquire and Lindsay M. Kwoka, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Plaintiff.

Garrett B. Moritz, Esquire and Benjamin Z. Grossberg, Esquire of Ross Aronstam & Moritz LLP, Wilmington, Delaware, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

In January 2011, Plaintiff's shares of Series B Preferred stock in one company converted into Series B Preferred stock in Defendant, a holding company. Defendant's certificate of incorporation provides that Plaintiff may redeem his Series B Preferred shares if one of a number of triggering events occurs. Plaintiff claims that a strategic merger Defendant underwent in 2014 qualifies as just such a trigger, but Defendant has yet to redeem Plaintiff's shares. Plaintiff has since brought this action alleging breach of contract and seeking damages, specific performance, and a declaration that Plaintiff is entitled to redemption.

Defendant moved to dismiss Plaintiff's complaint on the grounds that multiple forum selection clauses located in various contracts—but not Defendant's certificate of incorporation—require the parties to litigate this dispute in either New York state court or the United States District Court for the Southern District of New York. For reasons that follow, Defendant's Motion to Dismiss is granted.

II. BACKGROUND[1]

In 1996, Voyetra Technologies and Turtle Beach, Inc., combined to form Voyetra Turtle Beach, Inc. ("VTB"), an entity that became a leading designer, developer, and marketer of premium audio peripherals for video gaming, personal computer and mobile platforms.[2] Before September 2010, seven shareholders owned all of VTB's common stock,[3] including VTB's founders, Carmine Bonanno and Frederick Romano (the "Founders"),[4] and the plaintiff in this case, Dr. John Bonanno ("Plaintiff").[5] Between 2010 and 2014, VTB would carry out a series of transactions—a financing in 2010, a reorganization in 2011, and a merger in 2014—that would change its capital and ownership structures.

---

[1] Defendant brings this Motion under Court of Chancery Rules 12(b)(1) for lack of subject matter jurisdiction and 12(b)(3) for lack of venue. Under either rule, the Court may look to evidence outside the complaint to decide the Motion. *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LCC*, 922 A.2d 417, 429 n.15 (Del. Ch. 2007) (Rule 12(b)(1)); *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007) (quoting *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *4–5 (Del. Ch. Oct. 19, 2000)) (Rule 12(b)(3)). Accordingly, this fact section draws from the Verified Complaint ("Complaint" or "Compl."), documents the Complaint incorporates, and limited additional evidence provided in connection with the filing of this Motion.

[2] Compl. ¶ 7; *see also* Transmittal Aff. of Benjamin Z. Grossberg in Supp. of Def. VTB Holdings, Inc.'s Opening Br. in Supp. of its Mot. to Dismiss Pl.'s Verified Compl. ("Grossberg Aff.") Ex. 17 at 3.

[3] *See* Grossberg Aff. Ex. 1 (Stock Purchase Agreement) at 1, Ex. 2 (Stock Purchase Agreement Schedule 2.1) (listing shareholders).

[4] *See* Stock Purchase Agreement § 1; Stock Purchase Agreement Schedule 2.1.

[5] Stock Purchase Agreement Schedule 2.1.

A. *A Private Equity Firm Finances VTB in 2010*

In September and October 2010, the Stripes Group, a private equity firm, provided financing to VTB through a leveraged equity investment that made it VTB's majority shareholder.[6] The parties executed a Stock Purchase Agreement ("SPA"), dated September 28, 2010, that set forth the general terms of sale and attached a number of form contracts the parties could modify and execute later.[7] On October 12, 2010, the stock purchase transaction closed, accompanied by the execution of a battery of contracts.[8]

The SPA provided that the Stripes Group would acquire a majority position in VTB through two newly-formed companies: SG VTB Holdings, LLC ("SG VTBH") and its wholly-owned subsidiary, SG VTB Merger Sub, Inc. ("Merger Sub").[9] Merger Sub's sole director was Kenneth Fox (the head of the Stripes Group) and SG VTBH was a Stripes Group affiliate.[10] Accordingly, the SPA, a document memorializing what was essentially a Stripes Group-VTB deal, named

---

[6] Compl. ¶ 8.

[7] *See* Stock Purchase Agreement at 1, Ex. A–F.

[8] *See* Grossberg Aff. Ex. 3 (2010 ROFR), Ex. 4 (2010 Stockholders Agreement), Ex. 5 (Loan and Security Agreement), Ex. 6 (Written Consent of Sole Director), Ex. 7 (Letter Agreement), Ex. 8 (VTB Amended Certificate).

[9] *See* Stock Purchase Agreement at 1.

[10] Compl. ¶¶ 8–9; Written Consent of Sole Director. The Stock Purchase Agreement's recitals provided that Merger Sub's sole shareholders were SG VTBH, Michael J. Rowe, and Ron Doornink. Stock Purchase Agreement at 1. Ronald Doornink is a partner in the Stripes Group. Compl. ¶ 9.

four constituencies as parties: SG VTBH, Merger Sub, VTB, and VTB's stockholders.[11] The basic terms of the SPA envision that Merger Sub would buy specified numbers of shares from VTB's common stockholders, using a mix of cash and Merger Sub's stock.[12]

Both the SPA and several form contracts attached to the SPA as exhibits include a provision containing a choice of law clause, a forum selection clause, and a carve-out from the forum selection clause (the "Forum Selection Provision" or the "Provision"). The portion of the Forum Selection Provision addressing choice of law reads as follows:

> This Agreement is made pursuant to, and **shall be construed and enforced in accordance with, the laws of the State of New York (and United States federal law, to the extent applicable)**, irrespective of the principal place of business, residence or domicile of the parties hereto, and without giving effect to otherwise applicable principles of conflicts of law.[13]

The portion addressing forum selection reads as follows:

> Each of the parties hereto hereby irrevocably submit[s] to the jurisdiction of the courts of the State of New York and the . . . United States District Court for the Southern District of New York solely in respect of the interpretation and enforcement of the provisions of this Agreement and of the documents referred to in this Agreement, and in respect of the transactions contemplated hereby and thereby. Each of the parties hereto irrevocably agrees that **all claims in respect of the interpretation and enforcement of the provisions of this Agreement and of the documents referred to in this Agreement,**

[11] Stock Purchase Agreement at 1.
[12] *Id.* § 2; Stock Purchase Agreement Schedule 2.1.
[13] Stock Purchase Agreement § 12.8 (emphasis added).

> **and in respect of the transactions contemplated hereby and thereby, or with respect to any such action or proceeding, shall be heard and determined in such a New York State or federal court**, and that such jurisdiction of such courts with respect thereto shall be exclusive, except solely to the extent that all such courts shall lawfully decline to exercise such jurisdiction.[14]

The portion providing the carve-out to forum selection reads as follows:

> Nothing contained herein or in any Transaction Document shall prevent or delay the Buyer and the Parent from seeking, in any court of competent jurisdiction, specific performance or other equitable remedies in the event of any breach or intended breach by any Seller **of any of its obligations hereunder**.[15]

The SPA has six exhibits: a Form of Stockholders Agreement, a Form of Right of First Refusal ("ROFR"), a Form of Merger Agreement, a Form of Escrow Agreement, an exhibit containing two Form of Employment Agreements, and a Form of Bonus Agreement.[16] Four of these exhibits—the Form of Merger Agreement, Form of Escrow Agreement, Form of Employment Agreements, and the Form of Bonus Agreement—either omit or contain a modified version of the

[14] *Id*. (emphasis added).

[15] *Id*. (emphasis added). The SPA defines Merger Sub as "Buyer," VTB and its stockholders as "Sellers," and SG VTBH as "Parent." *Id*. at 1. Alternative versions of the carve-out refer to "parties hereto" instead of naming specific parties like "Buyer," "Parent," and "Seller." *See* Stock Purchase Agreement Ex. A (Form of Stockholders Agreement) § 9.7, Ex. B (Form of ROFR) § 5.6. These alternative versions also omit the phrase "or in any Transaction Document."

[16] *Id.* Ex. A–F.

Forum Selection Provision.[17] The remaining two contain language substantially similar to the Provision.[18]

Other SPA provisions previewed, to some extent, the shareholder ownership interests that would prevail after the October closing. The SPA's recitals provide that Merger Sub would merge with and into VTB.[19] Accordingly, the form ancillary documents provide that, upon closing, the various classes of Merger Sub's stock would convert into and be exchanged for similarly (but not identically) classified shares of the surviving entity (VTB). For present purposes, it is relevant to note that the Merger Sub Class B Common Stock given as consideration to Plaintiff would convert to Series B Preferred Stock in VTB.[20] Finally, the SPA's closing requirements and conditions precedent oblige VTB to deliver its certificate of incorporation to Merger Sub and Merger Sub to obtain secured financing.[21]

---

[17] *Id.* Ex. C (Form of Merger Agreement) (omitting), Ex. D (Form of Escrow Agreement) §§ 11.1–11.2 (modifying), Ex. E (Form of Employment Agreements) § 14.13 (modifying), Ex. F (Form of Bonus Agreement) § 3.6 (modifying by omitting the carve-out but including the other two passages quoted in text accompanying *supra* notes 13–14).

[18] *See supra* note 15.

[19] Stock Purchase Agreement at 1.

[20] *See* Form of Merger Agreement § 7(c) (contemplating the issuance of Series B Preferred Stock); Form of ROFR Ex. A (listing Plaintiff as the sole owner of Series B Preferred Stock).

[21] Stock Purchase Agreement §§ 7.2, 8.7.

On October 12, 2010, the stock purchase transaction closed. The Stripes Group owned about 47 million shares of VTB's Series A Preferred Stock and Plaintiff owned 1 million shares of VTB's Series B Preferred Stock with a "face value of $12.4 million."[22] VTB filed an amended and restated certificate of incorporation dated the same day providing that VTB "shall" redeem Plaintiff's Series B Preferred Shares under certain circumstances.[23] VTB and Plaintiff also executed a Right of First Refusal Agreement ("2010 ROFR") giving VTB the right to buy Plaintiff's Series B Preferred shares if Plaintiff decided to put them up for sale, subject to certain conditions.[24] The 2010 ROFR provides, however, that it would terminate "immediately upon the redemption of all of the Series B Preferred Shares."[25] It also contains the Forum Selection Provision.[26]

Another document executed in connection with the 2010 financing, a Loan and Security Agreement between VTB and several lenders hinted that a subsequent transaction was on the horizon. The Loan and Security Agreement, which has a North Carolina choice of law clause and nothing akin to the Forum Selection Provision,[27] allows VTB to transfer all of its equity interests to a parent holding

[22] Compl. ¶ 9.
[23] VTB Amended Certificate art. IV § D(2).
[24] 2010 ROFR art. III.
[25] *Id.* § 5.4.
[26] *Id.* § 5.6.
[27] Loan and Security Agreement § 13.2.

company.[28] By no small coincidence, five days before the October 12 closing, a company called VTB Holdings, Inc. ("VTBH" or "Defendant") had filed its original certificate of incorporation in Delaware.[29]

B. *VTB Reorganizes to Become VTBH's Wholly-Owned Subsidiary in 2011*

In January 2011, VTB reorganized into the holding company structure the Loan and Security Agreement had foreshadowed.[30] The rough mechanics of this deal involved VTB's three classes of shareholders—Common, Series A Preferred, and Series B Preferred—swapping their VTB shares for VTBH shares of like classification.[31] Accordingly, the Founders became VTBH's Common stockholders; Rowe, a Revocable Living Trust of which Doornink served as trustee, and SG VTBH became VTBH's Series A Preferred stockholders; and Plaintiff became VTBH's Series B Preferred stockholder.[32] VTB, in turn, became VTBH's wholly-owned subsidiary.[33] The document that accomplished this exchange, termed the Contribution Agreement, contains a New York choice of law clause but nothing akin to the Forum Selection Provision.[34]

---

[28] *Id.* § 7.2.
[29] Grossberg Aff. Ex. 12 (VTBH First Amended Certificate) (providing, in a certification, that VTBH's "date of filing of its original Certificate of Incorporation with the Secretary of State was October 7, 2010").
[30] *See* Compl. ¶ 9; Loan and Security Agreement § 7.2.
[31] *See* Grossberg Aff. Ex. 9 (Contribution Agreement) at 1, sched. A.
[32] *Id.*
[33] *See id.* at 1; *see also* Compl. ¶ 9.
[34] *See* Contribution Agreement art. V.

Other contracts executed in connection with the reorganization effected, to some disputed extent, the parties' contractually-articulated desire to

> replicate their existing rights, privileges and obligations with respect to [VTB] and the Company Stock, including, but not limited to, pursuant to the Stockholders Agreement dated October 12, 2010 . . . the Right of First Refusal Agreement dated October 12, 2010 . . . the Amended and Restated Certificate of Incorporation of [VTB,] and the Bylaws of [VTB].[35]

To wit, VTB's former Common and Series A Preferred stockholders entered into a new Stockholders Agreement ("2011 Stockholders Agreement")[36] with VTBH; VTB's former Series B Preferred stockholder entered into a new Right of First Refusal Agreement ("2011 ROFR")[37] with VTBH; and VTBH filed an Amended and Restated Certificate of Incorporation that largely mirrored VTB's.[38] These 2011 documents restate a number of provisions contained in their 2010 counterparts that are relevant to Defendant's Motion. Like their predecessors, the new ROFR and Stockholders Agreement contain the Forum Selection Provision[39] and VTBH's certificate does not.[40] Further, the new certificate included a redemption provision providing that VTBH "shall redeem each Series B Preferred

---

[35] *Id*. at 1–2. The Contribution Agreement defines the "Company Stock" as VTB's Common, Series A Preferred, and Series B Preferred Stock.
[36] Grossberg Aff. Ex. 11 (2011 Stockholders Agreement).
[37] Grossberg Aff. Ex. 10 (2011 ROFR).
[38] *See* Grossberg Aff. Ex. 18 (comparing the VTB Amended Certificate with the VTBH First Amended Certificate).
[39] 2011 Stockholders Agreement § 9.8; 2011 ROFR § 5.7.
[40] *See* VTBH First Amended Certificate.

Share" in the event of, *inter alia*, a "Liquidation Event" or a "Series B Redemption Event."[41] The 2011 ROFR again provides that it "shall terminate immediately upon the redemption of all of the Series B Preferred Shares."[42]

C. *VTBH Participates in a Merger in 2014, Giving Rise to a Dispute Over Redemption*[43]

On January 15, 2014, VTBH merged with an affiliate of Parametric Sound Corp. ("Parametric").[44] At the time, Parametric, an audio technology company, sought to expand into consumer markets in which VTB had traction.[45] In this stock-for-stock transaction, VTBH survived and became Parametric's less-than-wholly-owned subsidiary; although VTBH's Common and Series A Preferred shares converted into shares of Parametric common stock, Plaintiff retained his Series B Preferred shares in VTBH.[46] In connection with this merger, VTBH

---

[41] *Id*. art. IV § D(2). The definitions of these terms are not relevant to resolving the present motion to dismiss. VTBH filed a Second Amended and Restated Certificate of Incorporation on August 20, 2012, that contains the same language quoted above. Compl. Ex. A (VTBH Second Amended Certificate) art. IV § D(2). This certificate, as amended by a Certificate of Amendment, dated January 13, 2014, forms the basis of Plaintiff's redemption claim. *See* Compl. ¶¶ 2–4; Compl. Ex. B.

[42] 2011 ROFR § 5.5.

[43] Nothing contained in this Memorandum Opinion should be construed as addressing whether VTBH in fact became obligated to redeem Plaintiff's Series B Preferred shares.

[44] Compl. ¶¶ 3, 10–11; Grossberg Aff. Ex. 15. After the merger, Parametric changed its name to Turtle Beach Corporation. Compl. ¶ 3 & n.1.

[45] *See* Compl. ¶ 10.

[46] Compl. ¶¶ 12–13.

amended its certificate once more.[47] This 2014 certificate contains a Series B Preferred redemption provision similar, but not identical, to those appearing in prior certificates.[48]

On February 19, 2015, Plaintiff filed a complaint alleging that the Parametric merger triggered VTBH's obligation to redeem his Series B Preferred shares but that VTBH had nonetheless failed to redeem them.[49] Thereafter, VTBH moved to dismiss the Complaint.

III. DISCUSSION

Defendant has moved to dismiss Plaintiff's complaint under Court of Chancery Rules 12(b)(1) and 12(b)(3)[50] on the grounds that the Forum Selection Provision appearing in multiple transaction documents requires the parties to litigate Plaintiff's redemption claim in New York. "The proper procedural rubric for addressing a motion to dismiss based on a forum selection clause is found under Rule 12(b)(3), improper venue."[51] Although Delaware courts have, in the past, framed a forum selection clause analysis as jurisdictional in some sense,[52]

---

[47] *See* Compl. Ex. C (VTBH Third Amended Certificate).
[48] *See id*. art. IV § C(2).
[49] Compl. ¶¶ 15–25.
[50] Def. VTB Holdings, Inc.'s Mot. to Dismiss Pl.'s Verified Compl.
[51] *Baker v. Impact Hldg., Inc.*, 2010 WL 1931032, at *2 (Del. Ch. May 13, 2010) (citing *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super. Jan. 16, 2007)).
[52] *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 & n.1 (Del. 1999); *Fitzgerald v. Cantor*, 1998 WL 842304, at *1 (Del. Ch. Nov. 5, 1998).

recent cases have all proceeded under Rule 12(b)(3),[53] the parties here do not dispute which standard is proper, and any differences between these two procedural standards are not outcome determinative in this case.[54]

Before assessing the applicability of the Forum Selection Provision, the Court must resolve two foundational issues that frame and potentially narrow the analysis: (1) which state's law applies to the Court's interpretation of the Forum Selection Provision and (2) whether VTBH can enforce Forum Selection Provisions in contracts to which it is not a party. Discussion addresses each in turn before turning to analysis of the Forum Selection Provision itself.

A. *Which State's Law Applies?*

"When a contract contains a forum selection clause, this court will interpret the forum selection clause in accordance with the law chosen to govern the

[53] *Baker*, 2010 WL 1931032, at *2; *Ashall Homes Ltd. v. ROK Entm't Gp*., 992 A.2d 1239, 1245 (Del. Ch. 2010); *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007) (holding that Rule 12(b)(3), not Rule 12(b)(6), provides the proper procedural platform for considering a motion to dismiss based on a forum selection clause); *Simon*, 2000 WL 1597890, at *4–7 (same); *cf. City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 237 (Del. Ch. 2014) (analyzing a forum selection bylaw using Rule 12(b)(3)); *Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *7 n.54 (Del Ch. May 27, 2005) (declining to explicitly rule on the applicability of Rule 12(b)(1) as compared with Rule 12(b)(3), but noting that any practical difference between the two standards would not affect the outcome).

[54] *See supra* note 1.

contract."[55] Choice of law provisions control so long as "the jurisdiction selected bears some material relationship to the transaction."[56] Delaware courts have found the existence of such a material relationship where a corporate party's principal place of business was in the contractually-designated state.[57] Another state's law cannot be used, however, to "interpret a contract provision in a manner repugnant to the public policy of Delaware."[58]

---

[55] *Ashall Homes*, 992 A.2d at 1245–46 & n.36 (analyzing a forum selection provision using Delaware law despite the presence of a choice of law clause selecting English law and the fact that "most of the relevant conduct occurred in England" for a number of reasons, including an apparent agreement between the parties that "there is no material difference between English and Delaware law in regard to the enforceability of forum selection clauses," the fact that "the parties have not cited to English law to an appreciable extent," and because the court "does not have and cannot pretend to have the same knowledge of English law or even access to English sources as the courts of England"); *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 719 (Del. Ch. 2014) (quoting *Ashall Homes*, 992 A.2d at 1245).

[56] *Annan v. Wilm. Trust Co.*, 559 A.2d 1289, 1293 (Del. 1989) (citing *Wilm. Trust Co. v. Wilm. Trust Co*., 24 A.2d 309, 313 (Del. 1942)) (holding that the Court of Chancery properly upheld a trust's Quebec choice of law provision because the trust "was created in Quebec and was initially administered in Quebec"); *see also* sources cited *infra* note 57.

[57] *See, e.g., Maloney-Refaie v. Bridge at Sch., Inc*., 958 A.2d 871, 879 & n.16 (Del. Ch. 2008) (applying a Maryland choice of law provision because a corporate defendant's principal place of business was in Maryland); *Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC*, 2006 WL 1375106, at *7 (Del. Ch. May 8, 2006) (applying a Utah choice of law provision because a corporate party's principal place of business was in Utah and because the "relevant provisions of Utah contract law [were] not repugnant to the public policy of Delaware").

[58] *J.S. Alberici Constr. Co., Inc. v. Mid-West Conveyor Co., Inc*, 750 A.2d 518, 520 (Del. 2000).

The Forum Selection Provision unambiguously conveys the parties' intent to make New York law, as well as applicable federal law, control interpretation of the contracts in which it appears. It reads, in relevant part:

> This Agreement is made pursuant to, and shall be construed and enforced in accordance with, the laws of the State of New York (and United States federal law, to the extent applicable), irrespective of the principal place of business, residence or domicile of the parties hereto, and without giving effect to otherwise applicable principles of conflicts of law.[59]

This language appears in contracts dated September 28, 2010, October 12, 2010, and January 7, 2011. No party questions the Forum Selection Provision's choice of law, and a cursory review reveals that individuals and entities who executed the agreements were located in New York.[60] This nexus is sufficient to satisfy the "material relationship" standard. Accordingly, New York law governs this Court's interpretation of the Forum Selection Provision.

Plaintiff does not argue that New York law does not apply; indeed, arguments premised on New York authority appear throughout Plaintiff's brief. Plaintiff does argue, however, that a particular tenet of Delaware law articulated in *Troy Corp. v. Schoon*—that "[i]f the contractual language is not crystalline, a court will not interpret a forum selection clause to indicate the parties intended to make

[59] Stock Purchase Agreement § 12.8; Form of Stockholders Agreement § 9.7; Form of ROFR § 5.6; 2010 Stockholders Agreement § 9.7; 2010 ROFR § 5.6; 2011 Stockholders Agreement § 9.8; 2011 ROFR § 5.7.

[60] *See* Stock Purchase Agreement § 12.4; 2010 ROFR § 5.8, Ex. A; 2011 ROFR § 5.9, Ex. A.

jurisdiction exclusive"[61]—applies even if New York law governs the Forum Selection Provision.[62] This argument fails for two reasons.

First, it is not clear that either of the cases Plaintiff cites in defense of its argument—*Troy* and *RWI Acquisition LLC v. Todd*[63]—supports this approach. The *Troy* court did not reach the question of which state's law applied because in that case, the court found it "indisputably clear" that under both Delaware and New York "basic hornbook principles of contract interpretation," the forum selection clause at issue did not control because a "factual requisite" to its applicability—availability of a federal tribunal—was absent.[64] And in *RWI*, the court applied Delaware law to every aspect of its forum selection clause analysis, not Delaware law in some respects and another state's law in others.[65] Plaintiff has not offered persuasive reasons to adopt his hybrid Delaware-New York approach that, in any event, seems at odds with the applicable legal framework set forth above.[66]

---

[61] *Troy*, 2007 WL 949441, at *2 (quoting *Prestancia*, 2005 WL 1364616, at *7) (internal quotation marks omitted).
[62] Pl.'s Answering Br. in Opp. to Def.'s Mot. to Dismiss Verified Compl. ("Answering Br.") 12.
[63] 2012 WL 1955279, at *6 (Del. Ch. May 30, 2012).
[64] *Troy*, 2007 WL 949441, at *3–4. Further, the *Troy* court cited both Delaware and New York's approach to determining a given forum selection clause's exclusivity. *Id.* at *2, 4.
[65] *RWI*, 2012 WL 1955279, at *6–8. The *RWI* court simply did not address the issue of what law to apply.
[66] The Court acknowledges, however, that Delaware allows for a hybrid analysis in the sense that Delaware law may govern procedural matters despite the presence of a choice of law clause. *Maloney-Refaie*, 958 A.2d at 879 n.16. The parties did not

Second, even if the Court heeded Plaintiff's request to apply *Troy*, it would not help his case. The *Troy* crystalline standard guides Delaware courts' analysis of whether a given forum selection clause is mandatory or permissive, not the scope of the forum selection clause.[67] And under either *Troy* or the less-exacting New York standard under which exclusivity follows from language reasonably indicating the parties' intent for an exclusive forum,[68] the Forum Selection Provision here is clearly mandatory. It provides that actions within its scope "shall be heard and determined in [New York state courts or the United States District

---

raise this issue and the Court need not address it in light of the second reason stated *infra*.

[67] This conclusion follows from both the crystalline standard's plain language and the case the *Troy* court supplied as its substantiating authority. By its terms, the standard requires the parties to be crystal clear about whether they "intended to make jurisdiction exclusive." *Troy*, 2007 WL 949441, at *2. Further, the case *Troy* cites in support of this principle, *Prestancia Management Group, Inc. v. Virginia Heritage Foundation, II LLC*, 2005 WL 1364616, at *7 (Del. Ch. May 27, 2005), provides legal standards addressing the question of exclusivity, not scope. *Id*. ("The issue, as a matter of contract, is whether the parties' forum selection clause is permissive or mandatory. In *Eisenbud v. Omnitech*, this Court, in determining whether a forum selection clause was permissive or mandatory, observed that 'parties must use express language clearly indicating the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action . . . . [A]bsent clear language, a court will not interpret a forum selection clause to indicate the parties intended to make jurisdiction exclusive.'" (footnotes omitted) (quoting *Eisenbud v. Omnitech*, 1996 WL 162245 (Del. Ch. Mar. 21, 1996))). In short, Plaintiff's understanding of the crystalline standard expands *Troy* beyond its original significance.

[68] *See Fitzgerald*, 1998 WL 842304, at *2 (quoting *Babcock & Wilcox Co. v. Control Components, Inc.*, 614 N.Y.S.2d 678 (N.Y. Sup. Ct. 1993)); *Del. Pharm., Inc. v. Access Pharm., Inc.*, 2004 WL 1631355, at *8–9 (Del. Ch. July 16, 2004) (following *Babcock*).

Court for the Southern District of New York], **and that such jurisdiction of such courts with respect thereto shall be exclusive**, except solely to the extent that all such courts shall lawfully decline to exercise such jurisdiction."[69] Accordingly, Plaintiff's invocation of *Troy* to limit the Provision's reach fails and analysis proceeds using New York law.

B. *VTBH's Standing to Enforce the Forum Selection Provision*

Plaintiff next argues that VTBH cannot enforce the Forum Selection Provision in the SPA because VTBH is not a party to that agreement. Under New York law, the general rule is that "parent corporations may not enforce, or have enforced against them, terms of a contract, including forum selection clauses, signed by their separately existing subsidiaries."[70] A nonsignatory might nonetheless enforce a forum selection clause, however, if one of three exceptions applies: (1) the nonsignatory is a third party beneficiary, (2) the contract in question is part of an "integrated, global transaction" involving related documents to which the nonsignatory is a party, or (3) the nonsignatory and a signatory share a "close relationship."[71] Defendant argues VTBH can enforce the SPA's Forum

[69] *See* sources cited *supra* note 59 (emphasis added).
[70] *Tate & Lyle Ingredients Americas, Inc. v. Whitefox Techs. USA, Inc.*, 949 N.Y.S.2d 375, 376 (N.Y. App. Div. 2012) (citation omitted).
[71] *Id*. at 376–77.

Selection Provision despite being a nonsignatory because VTBH is closely related to VTB, its wholly-owned subsidiary, under the third exception.[72]

New York courts apply the rule that "a non-signatory may invoke a forum selection clause if the relationship between the nonparty and the signatory is sufficiently close so that the nonparty's enforcement of the forum selection clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound."[73] This foreseeability test applies regardless of whether the nonsignatory is the party seeking or resisting enforcement of the forum selection clause.[74] Evidence supporting the existence a close relationship by virtue of foreseeability has included a nonsignatory's "intimate[] involve[ment]" in the decision making process underlying the agreement,[75] a nonsignatory's role as a

[72] Def. VTB Holdings, Inc.'s Reply Br. in Further Supp. of its Mot. to Dismiss Pl.'s Verified Compl. ("Reply Br.") 11.

[73] *Freeford Ltd. v. Pendleton*, 857 N.Y.S.2d 62, 68 (N.Y. App. Div. 2008) (citing *Direct Mail Prod. Servs. Ltd. v. MBNA Corp.*, 2000 WL 1277597, at *3–5 (S.D.N.Y. Sept. 7, 2000)); *see also Elec. Mobile Cars, LLC v. Elec. Mobile Cars, Inc.*, 2012 WL 5264454, at *1 (S.D.N.Y. Oct. 17, 2012) ("[I]t is well-settled that forum selection clauses are effective as between signatories and 'closely related' parties.").

[74] *See, e.g., Tate*, 949 N.Y.S.2d at 377–78 (applying the foreseeability test to determine whether a signatory could enforce a forum selection clause against a nonsignatory); *Dogmoch Int'l Corp. v. Dresdner Bank AG*, 757 N.Y.S.2d 557, 558 (N.Y. App. Div. 2003) (applying the foreseeability test to determine whether a nonsignatory could enforce a forum selection clause against a signatory).

[75] *Tate & Lyle*, 949 N.Y.S.2d at 377–78.

"dominating principal" of the signatory,[76] and participation in negotiations surpassing "peripheral" involvement[77] or a mere arm's length relationship with a signatory.[78] For example, in *Tate & Lyle*, the court found the existence of a close relationship between a parent-nonsignatory and subsidiary-signatory where the parent's involvement "was far more than a parent company's mere approval of a contract," as evidenced by the fact that the parent, largely through its CEO, made "all the critical decisions for its subsidiary from the signing of the contract to the commencement of litigation."[79] Similarly, in *Freeford Ltd. v. Pendleton*, the court allowed a nonsignatory to enforce a forum selection clause because it had an indirect hand in bringing about the instrument at issue—it induced a signatory to enter the contract by executing a conversion notice.[80]

[76] *Elec. Mobile Cars*, 2012 WL 5264454, at *1 (finding the existence of a close relationship in light of allegations that an individual nonsignatory who often "[held] himself out as CEO or CFO of the [corporate signatory]" was a "dominating principal").
[77] *Freeford*, 857 N.Y.S.2d at 68–69.
[78] *ComJet Aviation Mgmt. LLC v. Aviation Investors Hldgs. Ltd.*, 303 A.D.2d 272, 273 (N.Y. App. Div. 2003) (holding that no close relationship existed where a non-party seeking to enforce a forum selection clause had no relationship with one party to the contract at issue and "only an arm's-length" relationship with the other).
[79] 949 N.Y.S.2d at 377–78.
[80] 857 N.Y.S.2d at 68–69.

The parties to the SPA are SG VTBH, Merger Sub, VTB, and VTB's shareholders. Although VTBH is not a party—indeed, it filed its original certificate of incorporation on October 7, 2010, several days after the SPA's date of September 28, 2010[81]—and the SPA contains language limiting the extension of the rights and obligations it confers to "the parties [t]hereto,"[82] VTBH may invoke the SPA's Forum Selection Provision under New York's close relationship exception.[83] In short, it was foreseeable that the Stripes Group, which is related in

[81] VTBH First Amended Certificate at 1.

[82] Stock Purchase Agreement §§ 12.8, 12.13.

[83] The SPA contains a "No Third Party Beneficiaries" clause that prevents the Agreement from conferring "any rights, benefits, remedies, obligations, or liabilities hereunder upon any Person other than the parties hereto and their respective successors an assigns . . . ." Stock Purchase Agreement § 12.13. This sort of limiting language might inform *Freeford*'s prong (1) inquiry of whether a nonsignatory may invoke a clause by virtue of being a third party beneficiary, but does not preclude analysis of *Freeford*'s prong (3) close relationship inquiry. Courts applying a close relationship test akin to New York's have done so despite the presence of such limiting language. *Ashall Homes*, 992 A.2d at 1248–49; *Baker*, 2010 WL 1931032, at *4 & n.19; *cf. CIS Fin. Servs. Inc. v. Brooks*, 2014 WL 1234153, at *4–5 & n.7 (N.D. Ala. Mar. 25, 2014) (recognizing that applicable law "potentially allow[ed]" a nonsignatory to invoke a forum selection provision under a close relationship theory but noting the presence of a "No Third-Party Beneficiaries" clause); *Capital Gp. Cos. v. Armour*, 2004 WL 2521295, at *6–7 (Del. Ch. Oct. 29, 2004) (noting the "subtle, but important, distinction" between third-party beneficiary analysis and close relationship analysis before enforcing a forum selection clause in a contract that expressly excluded third-party beneficiaries against a nonsignatory who met a close relationship test). The one case the Plaintiff cites for the contrary proposition is inapposite because the court in that case neither applied the close relationship exception nor explicitly ruled on whether the nonsignatory could invoke the forum selection clause at issue. *See APA Excelsior III L.P. v. Premiere Techs., Inc.*, 49 F.Supp.2d 664, 671–72 (S.D.N.Y. 1999). To the contrary, in *APA Excelsior*, the presence of explicit

varying degrees to SG VTBH, Merger Sub, and VTB, could sue under the SPA through one of its entities because it was intimately involved in the fall financing.[84]

During oral argument, Plaintiff's counsel recognized that certain transactions at issue involved "the same individuals . . . just wearing slightly different hat[s]."[85] Fox, the head of Stripes Group, was Merger Sub's sole director and SG VTBH's President, Secretary, and Treasurer during the fall financing.[86] He then became VTBH's President and director.[87] Doornink, a Stripes Group partner, was one of Merger Sub's three shareholders (along with SG VTBH) and later became the chairman of VTBH's board of directors.[88] SG VTBH was a Stripes Group affiliate.[89] Both the 2010 Stockholders Agreement and the 2010 ROFR define "Stripes Group" as "[SG VTBH] and its transferees and assigns."[90] The 2011 Stockholders Agreement provides that Stripes Group controlled three of VTBH's

---

contractual language limiting the allocation of rights and benefits to signatories did not settle the nonsignatory standing issue. Accordingly, the Court proceeds with the nonsignatory standing analysis under the close relationship exception despite the SPA's limiting language.

[84] *See Freeford*, 857 N.Y.S.2d 68–69; *see also Ashall Homes*, 992 A.2d at 1249 n.51 (collecting cases).

[85] Tr. of Oral Arg. on Def's Mot. to Dismiss the Verified Compl. ("Tr.") 39.

[86] Compl. ¶ 8; Written Consent of Sole Director; 2010 Stockholders Agreement.

[87] 2011 Stockholders Agreement; *id.* § 6.1(a).

[88] Compl. ¶ 9; Stock Purchase Agreement at 1; 2011 Stockholders Agreement § 6.1(a).

[89] Compl. ¶ 9.

[90] 2010 Stockholders Agreement § 1.1; 2010 ROFR § 1.1.

five board seats. VTB became VTBH's wholly-owned subsidiary.[91] This is not a case where a parent sat by idly as its subsidiary transacted deals with third parties—Stripes Group played a direct role in consummating the financing through entities that pervaded the deal's structure and personnel who signed key documents. Although VTBH did not and could not have engaged in negotiating the SPA, VTBH's invocation of the SPA's Provision was foreseeable by virtue of its interconnectedness with Stripes Group.

These facts are sufficient to establish a close relationship between signatories to the SPA and VTBH. Accordingly, VTBH may invoke the SPA's Forum Selection Provision. The next section addresses whether the SPA's Forum Selection Provision, as well as those in other agreements, require that this claim be litigated in New York.

C. *Whether a Forum Selection Provision Applies to Plaintiff's Redemption Claim*

Forum selection clauses in contracts governed by New York law are prima facie valid.[92] The Court may refuse to enforce such a clause, however, if "it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for

[91] Compl. ¶ 9.
[92] *Triple Z Postal Servs., Inc. v. United Parcel Serv., Inc.*, 2006 WL 3393259, at *5 (N.Y. Sup. Ct. Nov. 24, 2006).

all practical purposes, be deprived of its day in court."[93] The scope of a valid forum selection clause derives from its language.[94] Accordingly, normal tenets of contract interpretation apply.[95]

Defendant points to five agreements that contain a potentially applicable Forum Selection Provision: the SPA (including three of its six attached form documents), the 2010 Stockholders Agreement, the 2010 ROFR, the 2011 Stockholders Agreement, and the 2011 ROFR. Defendant fails to identify any language within either Stockholders Agreement, however, indicating that claims arising from a Series B redemption fall within its Forum Selection Provision. Further, the parties terminated the 2010 ROFR upon executing the 2011 ROFR.[96] Accordingly, this Court's analysis is limited to the Forum Selection Provisions in (1) the SPA and (2) the 2011 ROFR.

---

[93] *Molino v. Sagamore*, 963 N.Y.S.2d 355, 357 (N.Y. App. Div. 2013) (quoting *KMK Safety Consulting, LLC v. Jeffrey M. Brown Assocs., Inc*. 897 N.Y.S.2d 649 (N.Y. App. Div. 2010)); *Babcock*, 614 N.Y.S.2d at 681.

[94] *Couvertier v. Concourse Rehab. & Nursing, Inc.*, 985 N.Y.S.2d 683, 684 (N.Y. App. Div. 2014); *see also Bernstein v. Wysoki*, 907 N.Y.S.2d 49, 55–56 (N.Y. App. Div. 2010) (determining the scope of a forum selection cause by analyzing its plain text).

[95] *See, e.g.*, *Triple Z*, 2006 WL 3393259, at *5 (applying the general rule that "when certain language is omitted from one provision but placed in other provisions, it is assumed the omission was intentional" to determine the scope of a forum selection clause).

[96] 2011 ROFR § 5.1.

To reiterate, the Forum Selection Provision included in the SPA and 2011 ROFR provides, in relevant part, that:

> all claims in respect of the interpretation and enforcement of the provisions of this Agreement and of the documents referred to in this Agreement, and in respect of the transactions contemplated hereby and thereby, or with respect to any such action or proceeding, shall be heard and determined in [New York state courts or the United States District Court for the Southern District of New York] . . . .[97]

This language indicates that the Provision is, in some sense, exportable. That is, the Provision applies not only to disputes over the terms of its "home contract" (*i.e.*, the contract in which it appears), but also to disputes over transactions contemplated in foreign documents to which the home contract "refers." Defendant argues that the SPA's Forum Selection Provision migrates in this way to Plaintiff's redemption claim through at least two textual pathways: (1) the SPA's reference to the Form of Merger Agreement, and (2) the SPA's reference to VTB's certificate, read in light of other transactional documentation. Alternatively, Defendant posits a third theory of scope that does not require migration: (3) the 2011 ROFR's reference to "the redemption of all of the Series B Preferred Shares"[98] of VTBH. Theory (1) does not provide viable grounds for dismissal, but theory (2) probably does. Theory (3) succeeds, however, even if theory (2) fails.

[97] Stock Purchase Agreement § 12.8; 2011 ROFR § 5.7.
[98] 2011 ROFR § 5.5.

First, Defendant argues that the SPA's Forum Selection Provision reaches Plaintiff's redemption claim through two transactions the Form of Merger Agreement contemplates: issuing VTB's Series B Preferred stock and amending VTB's certificate. The Form of Merger Agreement, which does not contain a Forum Selection Provision, includes the following provision on the issuance of VTB's Series B Preferred stock:

> [E]ach share of Class B Common Stock of Merger Sub issued and outstanding immediately prior to the Effective Time shall be converted into and exchanged for one share of Series B Preferred Stock of [VTB] . . . ."[99]

Further, the Form of Merger Agreement contains the following provision on amending VTB's certificate:

> The Certificate of Incorporation of VTB shall, at the Effective Time, be amended and restated in its entirety to read as set forth in Exhibit A to this Plan of Merger . . . .[100]

Accordingly, Defendant argues, because the Form of Merger Agreement is a "document[] referred to in" the SPA and "contemplates" those two "transactions," the Forum Selection Provision applies to Plaintiffs' redemption claim.

Neither of these two provisions, however, completes the textual bridge between the SPA's Forum Selection Provision and Plaintiff's redemption claim because the Form of Merger Agreement itself does not contemplate a redemption.

---

[99] Form of Merger Agreement § 7(c).
[100] *Id*. § 4 (emphasis in original).

Although the redemption of VTB shares is surely described in VTB's Amended Certificate,[101] the SPA's Forum Selection Provision cannot reach Plaintiff's claim through that two-step migration—(i) from a document "referred to in" the SPA (the Form of Merger Agreement) to "transactions contemplated" by the Form of Merger Agreement (issuing Series B shares and amending VTB's certificate); and (ii) from those two transactions to a transaction contemplated thereby (the redemption)—because the Provision's text does not allow for step (ii). Because the redemption of Plaintiff's shares is conceptually distinct from both issuing those shares and amending VTB's certificate, and because the Provision cannot leap-frog to foreign transactions *ad infinitum*, the SPA's reference to the Form of Merger Agreement does not support dismissal of this action.

Defendant's second argument, also based on the SPA's Provision, is more direct because it only involves a single-step migration: (i) from a document "referred to in" the SPA (VTB's certificate) to a "transaction contemplated" by that document (the redemption).[102] This textual pathway probably supports

[101] VTB Amended Certificate art. IV § D(2). The significance of the fact that Plaintiff's redemption claim requires interpretation of VTBH's certificate, not VTB's, is discussed below.

[102] Defendant avoids arguing that any and all claims arising under the certificate fall within the Forum Selection Provision, but offers no plausible limitations to the Forum Selection Provision's scope in this regard aside from the fact that "[i]t only applies to stockholders, like Dr. Bonanno, who signed contracts containing the forum selection language." Reply Br. 16. The Court need not address, however,

dismissal. Although a strictly literal reading of the SPA renders this argument flawed in some sense, consideration of other documents allows it to survive.

A literal reading of the SPA and its Forum Selection Provision suggests that claims concerning VTB's certificate—not VTBH's—fall within its scope. To wit, the SPA "refers to" VTB's certificate in its list of closing requirements.[103] Although Defendant admits that the SPA does not refer to the same piece of paper that forms the basis of allegations in the Complaint,[104] Defendant argues that this distinction might only be academic for two reasons. First, the redemption language that Plaintiff seeks to enforce is essentially identical to the redemption language articulated in the VTB certificate referenced in the SPA.[105] And although Plaintiff's claim does not "arise out" of VTB's certificate, the Forum Selection Provision does not require that strong of a connection; it requires only that Plaintiff's claim be "in respect of" the VTB certificate's redemption transaction.[106] Thus, because the Forum Selection Provision uses the latter, more inclusive

---

whether the Forum Selection Provision applies to all claims arising under the certificate.

[103] That Section provides that "the Company . . . shall deliver or cause to be delivered to the Buyer . . . (b) The certificate of incorporation of the Company certified as of the most recent practicable date by the Secretary of State of its jurisdiction of incorporation." Stock Purchase Agreement § 7.2(b). The "Company" is VTB. The "Buyer" is Merger Sub.

[104] Tr. 14–15; *supra* note 41.

[105] *Compare* VTB Amended Certificate art. IV § D(2) *with* VTBH Second Amended Certificate art. IV § D(2).

[106] *See* Tr. 14–15.

phrasing, and because VTB's and VTBH's contractual redemption mechanisms are the same, Defendant argues that the SPA's failure to specifically reference VTBH's certificate is immaterial.

Alternatively, Defendant argues that the SPA's Provision extends to a redemption claim based on VTBH's certificate because the parties agreed to litigate VTB-based redemption claims in New York and expressed a general desire to preserve preexisting rights and obligations upon completing the holding company transaction:[107]

> WHEREAS, the [VTB] stockholders and [VTB] desire to replicate their existing rights, privileges and obligations with respect to [VTB] and the [VTB] Stock, including, but not limited to, pursuant to the Stockholders Agreement dated October 12, 2010 . . . the Right of First Refusal dated October 12, 2010 . . . the Amended and Restated Certificate of Incorporation of [VTB] and the Bylaws of [VTB].[108]

The parties debate whether this recital—which appears in the Contribution Agreement—shows that the parties intended to preserve a mutual obligation arising from the SPA despite the fact that the SPA does not appear in the list of four agreements specifically pegged for renewal. But given use of the phrase "including, but not limited to" and the fact that it would make little sense to renew the whole SPA because the deal it structured differed markedly from the 2011 reorganization, this recital's language at least permits certain SPA obligations to

[107] Def. VTB Holdings, Inc.'s Opening Br. in Supp. of its Mot. to Dismiss Pl.'s Verified Compl. ("Opening Br.") 14–15.
[108] Contribution Agreement at 1–2.

transfer.[109] More importantly, redemption is a right and obligation "with respect to" VTB and the VTB Series B Preferred shares and thus seemingly falls within the category of rights the parties intended to preserve under the terms of this recital. Because the parties expressed a general desire to replicate all rights and obligations previously in place between VTB and VTB stockholders, it would make little sense to detach and leave behind a mutual forum obligation attached to a right (the redemption) that in fact transferred upon Plaintiff's transition to a Series B Preferred shareholder of VTBH.[110] In short, there are good text-based reasons to conclude that the SPA's Provision applies to Plaintiff's redemption claim.

Yet, other evidence of the parties' intent muddies the waters. The parties' failure to account for forum selection in VTBH's Second Amended Certificate, a document of central importance to the 2011 reorganization, perhaps indicates a conscious decision to omit such a provision. Pouring meaning into the parties' other selective omissions, however, is a dubious project. Out of the seven transaction documents executed in fall 2010 and January 2011 that this Court can

[109] The Court need not comprehensively determine which SPA obligations transfer and which do not—only whether the SPA Forum Selection Provision's applicability to Plaintiff's VTB Series B Preferred shares transfers.

[110] *See Kass v. Kass*, 696 N.E.2d 174, 181 (N.Y. 1998) ("Where the document makes clear the parties' over-all intention, courts examining isolated provisions should then choose that construction which will carry out the plain purpose and object of the [agreement]." (alteration in original) (citations and internal quotation marks omitted)).

review,[111] five contain a Forum Selection Provision and two do not.[112] On the one hand, one might conclude that the parties viewed the 2011 reorganization as distinct for forum selection purposes because the two documents lacking a Provision happen to address VTB's reorganization to a holding company structure: the Loan and Security Agreement allows the reorganization and the Contribution Agreement actualizes it. On the other, the reorganization documents seem interconnected because contracts that contain a Provision contain recitals explicitly referencing the "reorganization transactions contemplated by . . . [the] Contribution Agreement."[113] Further, the parties' incessant use of the Provision, even in contracts that might not have needed one,[114] might indicate a desire for broad applicability.

[111] These include the SPA, the 2010 Stockholders Agreement, the 2010 ROFR, the Loan and Security Agreement, the 2011 Stockholders Agreement, the 2011 ROFR, and the Contribution Agreement. This list does not include any certificates of incorporation or the various form agreements attached to the SPA. None of the certificates contain the Forum Selection Provision. The only form agreements that contain the Provision are the Form of Stockholders Agreement and the Form of ROFR. *See supra* notes 17–18.

[112] The five that contain a Provision are the SPA, the 2010 Stockholders Agreement, the 2010 ROFR, the 2011 Stockholders Agreement, and the 2011 ROFR. The two that do not are the Loan and Security Agreement and the Contribution Agreement.

[113] 2011 ROFR at 1; 2011 Stockholders Agreement at 1.

[114] The 2010 Stockholders Agreement and 2010 ROFR, for example, arguably did not need Forum Selection Provisions because, per the Provision's exportability, the SPA's Provision encompassed the transactions those agreements contemplated.

Although the SPA Provision's capacity to encompass Plaintiff's redemption claim is unclear, Defendant's third theory, based on the 2011 ROFR's Provision, succeeds. Unlike the SPA, the 2011 ROFR sets forth the Plaintiff's rights and obligations vis-à-vis VTBH. Further, Section 5.5 of the 2011 ROFR provides that "[t]his Agreement shall terminate immediately upon the redemption of all of the Series B Preferred Shares."[115] A straightforward reading of this term and the Forum Selection Provision, Defendant argues, requires Plaintiff to litigate his redemption claim in New York because the "redemption" is a "transaction" the agreement "contemplates." The Court declines to torture and re-shape these terms to hold otherwise.[116]

Plaintiff disputes that the 2011 ROFR "contemplates" the redemption in light of both the dictionary meaning of "contemplate," which Plaintiff suggests as "to think deeply or carefully about something,"[117] and a bevy of cases generally extending "transactions contemplated" language to include claims based on related agreements entered into as part of a larger transaction.[118] Accordingly, Plaintiffs argue, the 2011 ROFR's cursory mentioning of the redemption, as well as the

[115] 2011 ROFR § 5.5.

[116] Under New York law, "[a] court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties." *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 869 N.Y.S.2d 511, 516 (N.Y. App. Div. 2008) (citing *Teichman v. Cmty. Hosp. of W. Suffolk*, 640 N.Y.S.2d 472, 474 (N.Y. 1996)).

[117] Tr. 36.

[118] Answering Br. 28–29; Tr. 36–37.

general failure of the financing and reorganization transactions to govern the redemption, render the 2011 ROFR's Forum Selection Provision inapplicable. Both legs of this argument falter under the weight of closer scrutiny. "Contemplate" has multiple definitions, one of which is "to view as contingent or probable or as an end or intention."[119] Although the 2011 ROFR's discussion of redemption occupies nothing more than a single sentence, it nonetheless views redemption as an "end." Further, Plaintiff's appeal to caselaw is unpersuasive because Plaintiff looks to cases in which courts *extended* the scope of forum selection provisions containing "contemplate" language to the claim(s) at issue.[120]

---

[119] *Merriam-Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary/contemplate (last visited February 8, 2016).

[120] *See Goldman, Sachs & Co. v. N.C. Mun. Power Agency No. One*, 2013 WL 6409348, at *7 (S.D.N.Y. Dec. 9, 2013) (slip op.); *Elec. Mobile Cars*, 2012 WL 5264454, at *1–2; *KTV Media Int'l, Inc. v. Galaxy Gp., LA LLC*, 812 F. Supp. 2d 377, 385–87 (S.D.N.Y. 2011); *Bristol Inv. Fund, Inc. v. Carnegie Int'l Corp.*, 310 F.Supp.2d 556, 558 n.1 (S.D.N.Y. 2003); *DIMON Inc. v. Folium, Inc.*, 48 F.Supp.2d 359, 364 (S.D.N.Y. 1999). Plaintiff also cites *Overseas Ventures, LLC v. ROW Mgmt., Ltd.*, 2012 WL 5363782, at *7–8 (S.D.N.Y. Oct. 26, 2012), a case where the court held that a forum selection clause applied to some claims and not others. This case is distinguishable, however, because the forum selection clause at issue applied to claims "arising out of any of the transactions contemplated under" the clause's home contract—not, as here, claims "in respect of." *See id.* at *7 ("To 'arise out of,' in turn, means 'to originate from a specified source, and generally indicates a causal connection. Those words do not encompass all claims that have some possible relationship with the contract, including claims that may only *relate to*, be *associated* with, or arise in connection with the contract. Therefore, for a claim to be covered by the forum selection clause, the Residence Agreement must be the source of the right that Overseas Ventures seeks to vindicate."). The remaining cases Plaintiff cites do not involve forum selection clauses containing the word "contemplate"; and in each case, the court held that

None substantiates Plaintiff's effort to constrain that word's meaning under New York law.

Finally, the carve-out built into the 2011 ROFR's Forum Selection Provision does not except Plaintiff's claim from the Provision's scope. The carve-out provides:

> Nothing contained herein or in any Transaction Document shall prevent or delay any party hereto from seeking, in any court of competent jurisdiction, specific performance or other equitable remedies in the event of any breach or intended breach by any party hereto **of any of its obligations hereunder**.[121]

The carve-out's applicability thus turns on whether the redemption of Series B Preferred shares is an "obligation under" the 2011 ROFR. Both common meaning and context clues suggest that it is not. The 2011 ROFR does not give rise to a redemption right, govern a redemption right, or oblige either party to redeem; it simply provides that redemption triggers termination. Further, later in the same provision, the parties define scope using the much broader category of "documents referred to in this Agreement, and in respect of the transactions contemplated hereby and thereby." Unambiguous semantic differences between those two scope clauses suggest that the parties intended the carve-out to apply to a narrower set of

---

the clause at issue applied. *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1359, 1361 (2d Cir. 1993); *RWI*, 2012 WL 1955279, at *3, 6–8; *Couvertier*, 985 N.Y.S.2d at 684; *Triple Z*, 2006 WL 3393259, at *5–9.

[121] 2011 ROFR § 5.7 (emphasis added).

claims.[122] Accordingly, contrary to Plaintiff's argument, Plaintiff's redemption claims can simultaneously fall within the Provision's exclusive forum requirement and outside of the Provision's carve-out.

D. *Whether the 2011 ROFR's Forum Selection Provision Contravenes Delaware Public Policy*

Plaintiff argues that dismissing this action by enforcing the Forum Selection Provision would offend Delaware public policy.[123] In particular, Plaintiff contends that enforcing a contractual forum selection clause that provides an exclusive forum for disputes concerning the internal affairs of a Delaware corporation would undermine Delaware's interest in regulating the relationships between and among a corporation and its directors, officers, and shareholders.

"A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[124] The 2011 ROFR's Forum Selection Provision is a "contractual choice-of-forum clause."

[122] Under New York law, "[t]he use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings." *NFL Enters. LLC v. Comcast Cable Commc'ns, LLC*, 851 N.Y.S.2d 551, 557 (N.Y. App. Div. 2008) (citing *Frank B. Hall & Co. of N.Y., Inc. v. Orient Overseas Assocs.*, 425 N.Y.S.2d 66 (N.Y. 1979)).

[123] Tr. 37–38.

[124] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see also Baker v. Impact Hldg., Inc.*, 2010 WL 1931032, at *2–3 (Del. Ch. May 13, 2010) (assessing whether "Delaware has a public policy that renders unenforceable contractual provisions that prevent Delaware courts from hearing matters related to the internal affairs of Delaware business entities").

Accordingly, this question reduces to whether a "strong public policy" of Delaware renders the 2011 ROFR's Forum Selection Provision's application in this context—that is, to envelop litigation over a right granted in VTBH's charter—unenforceable.

This Court answered "no" to a similar question in *Baker v. Impact Holding, Inc.*[125] In *Baker*, the court held that a Texas forum selection clause located in a stockholders agreement properly governed a dispute over whether an individual plaintiff was entitled to a position on a Delaware corporation's board of directors.[126] In so doing, the court rejected the *Baker* plaintiff's argument that applying the forum selection clause violated an alleged Delaware public policy of "forbid[ding] application of an exclusive forum selection clause that would oust Delaware courts of jurisdiction over a case involving the internal affairs of a Delaware corporation."[127] The Court reasoned:

> Delaware does not have an overarching public policy that prevents stockholders of Delaware corporations from agreeing to exclusive foreign jurisdiction of any matter involving the internal affairs of such entities. **Because there is no statute or other clear indication of a legislative intent to limit the scope of forum selection clauses with respect to corporations** and Delaware courts routinely enforce such forum selection clauses, even where they mandate exclusive foreign jurisdiction, I find that no public policy of the State of Delaware invalidates the [forum selection clause at issue].[128]

[125] 2010 WL 1931032, at *2–3.
[126] *Id.* at *4.
[127] *Id.* at *1.
[128] *Id.* at *2 (footnote omitted) (emphasis added).

Accordingly, the Court's focus now turns to post-*Baker* developments that might disturb this reasoning.

The clearest post-*Baker* guidance clarifying Delaware public policy on this issue arrived in the form of recent legislation that took effect on August 1, 2015.[129] That legislation enacts new Section 115 of the Delaware General Corporation Law, a provision that governs forum selection provisions contained in Delaware corporations' bylaws or certificates of incorporation. Section 115 provides:

> The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.[130]

Although Section 115 does not directly address forum selection provisions located in shareholder agreements and other contracts, a synopsis included in the bill enacting Section 115 states the following:

> Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would

[129] 80 Del. Laws ch. 40, § 5 (2015) (codified at 8 *Del. C.* § 115).
[130] 8 *Del. C.* § 115.

> preclude litigating such claims in the Delaware courts. **Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced**.[131]

Nothing about this statute suggests that *Baker*'s assessment of relevant Delaware public policy is no longer accurate. Although Section 115 precludes placing certain types of exclusive forum selection provisions in a corporation's charter or bylaws, it does not purport to impose this same restriction on forum selection provisions located outside those two governing documents. This omission is especially revealing given other DGCL provisions' distinct itemization of shareholder agreements as a class of documents that, in addition to corporate charters and bylaws, fall within the given regulatory ambit. For example, 8 *Del. C.* § 202(b) allows restrictions on the transfer of securities to be imposed "by the certificate of incorporation or by the bylaws or by an agreement among any number of security holders or among such holders and the corporation." Similarly, 8 *Del. C.* § 273(a) allows certain types of stockholders to, under certain circumstances, petition the Court of Chancery for dissolution "unless otherwise provided in the certificate of incorporation . . . or in a written agreement between the stockholders." The General Assembly's failure to write a similarly inclusive list into Section 115 cannot be ignored.

[131] Del. S.B. 75 syn., 148th Gen. Assem. (2015) (emphasis added).

The synopsis accompanying the bill that enacted Section 115 also supports *Baker*. "The synopsis of the Bill [is] a proper source from which to glean legislative intent . . . ."[132] Here, the synopsis clarifies that the General Assembly did not "intend[]" to preclude "any such provision" contained "in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced."[133] The phrase "any such provision" includes, at the very least, provisions that preclude litigating internal corporate claims in Delaware, as evidenced by two linguistic cues: (1) use of the expansive word "any"; and (2) use of the word "however," which in this context signals a forthcoming change in discursive direction from the preceding sentence's description of the sort of provisions the statute *does* invalidate: "a provision of the certificate of incorporation or bylaws . . . selecting the courts in a different State, or an arbitral forum [that] would preclude litigating such claims in the Delaware courts." Accordingly, the synopsis evidences our legislature's unwillingness to regulate the use of exclusive forum selection provisions in contracts signed by, and later enforced against, particular stockholders.

---

[132] *Zambrana v. State*, 118 A.3d 773, 778 n.28 (Del. 2015) (alterations in original) (quoting *Carper v. New Castle Cnty. Bd. of Educ.*, 432 A.2d 1202, 1205 (Del. 1981)).

[133] Del. S.B. 75 syn., 148th Gen. Assem. (2015).

The synopsis's proviso is squarely applicable here. Because Plaintiff brings his underlying redemption action to enforce certain rights set forth in VTBH's Second Amended Certificate under 8 *Del. C.* § 111,[134] which in turn confers jurisdiction of the action upon the Court of Chancery, Plaintiff's redemption action is an "internal corporate claim." For that reason, the 2011 ROFR's Forum Selection Provision is precisely the sort of contractual forum selection provision referenced in the synopsis: an agreement providing an exclusive foreign forum for an internal corporate claim signed by Plaintiff, the same stockholder against whom VTBH now seeks to enforce the Provision. Accordingly, enforcing the Provision will not contravene Delaware's public policy as expressed in its statutes and common law.[135]

Plaintiff resists this outcome by contending that enforcing the 2011 ROFR's provision would thwart Delaware's "strong public policy (now embodied by Section 115) of providing a Delaware forum to stockholders of a Delaware corporation," which in turn requires any waiver of one's ability to proceed in Delaware be "strikingly clear."[136] This is a thinly-veiled repurposing of Plaintiff's earlier argument that Delaware's crystalline standard ought to guide this Court's

[134] Compl. ¶ 1.
[135] This Memorandum Opinion need not, and therefore does not, address the issue of statutory retroactivity. *See Smith v. Guest*, 16 A.3d 920, 935–36 & n.96 (Del. 2011).
[136] Letter from Pl.'s Counsel dated Dec. 4, 2015, at 2–3.

analysis of the Provision's scope. Only now, instead of arguing that applicable law forbids enforcement of the 2011 ROFR's Forum Selection Provision because its scope is not crystalline, Plaintiff argues that Delaware public policy forbids it for the exact same reason. Thus, Plaintiff's newly-framed argument would have this Court decide whether Delaware public policy requires a forum selection provision in a writing signed by the stockholder against whom the provision is to be enforced to be "strikingly clear" as to the stockholder's intent to waive his ability to bring internal affairs claims in Delaware.

This case, however, does not provide a suitable factual vantage to address this question. In Part III.C of this Memorandum Opinion, this Court held that the Series B redemption is a "transaction" the 2011 ROFR unambiguously "contemplates" because the 2011 ROFR provides that it will "terminate immediately upon the redemption of all of the Series B Preferred Shares."[137] Accordingly, VTBH's motion to dismiss succeeds decisively: the 2011 ROFR's Forum Selection Provision governs Plaintiff's claim as a matter of New York law. Under circumstances where a contractual forum selection clause's applicability is

[137] *See supra* notes 115–16 and accompanying text.

less clear, a party may have proper grounds to raise this question.[138] But that is not this case.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff's redemption claims fall within the scope of the Forum Selection Provision. Accordingly, Defendant's Motion to Dismiss is granted and this action is dismissed without prejudice. The parties shall bear their own costs.

An implementing order will be entered.

[138] *See In re Tyson Foods, Inc.*, 2007 WL 2351071, at *1 (Del. Ch. Aug. 15, 2007) ("Judicial restraint suggests that a court should limit itself to the case or controversy placed before it . . . .").