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Case No. 4712-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PPF SAFEGUARD, LLC, and SAFEGUARD STORAGE PROPERTIES, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 4712-VCS
BCR SAFEGUARD HOLDING, LLC, and BRUCE C. ROCH, JR.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: May 6, 2010
Date Decided: July 29, 2010

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STRINE, Vice Chancellor.

I. Introduction

In this case, one of the members of an LLC has sued the LLC's managing member and the managing member's equity owner, who was the LLC's CEO, for breach of the LLC agreement and breach of fiduciary duties. Using the contractual freedom left to them by our law, the members of the LLC conjured up an LLC agreement and key employment agreements that provided that certain disputes had to be litigated in the courts of Louisiana, other disputes had to be arbitrated, and other disputes might be litigated in the courts of Delaware. This inefficient and convoluted exercise of bargaining liberty has led the quarreling members to have disputes simultaneously pending in both Delaware and Louisiana.

The defendants have moved to dismiss this action on the grounds that the plaintiff member's claims all implicate either a mandatory arbitration provision in the LLC agreement (the "Arbitration Clause") or a mandatory Louisiana forum selection provisions in the key employment agreements (the "Forum Selection Clause"). In this decision, I grant the motion to dismiss because it is clear that the alleged misconduct that is the basis for the plaintiff's beef with the defendants falls squarely within the mandatory Arbitration Clause and the mandatory Forum Selection Clause, and often implicates both Clauses. The plaintiff is bound to honor its contractual promise and to press any of these claims in the mandated forums it freely selected.

II. Factual Background

The following facts are drawn from the complaint, and the documents that the complaint incorporates.

A. Safeguard Is Formed To Operate Self-Storage Facilities

Safeguard Storage Properties LLC ("Safeguard") owns and operates self-storage properties in eight states, including Louisiana. Safeguard was formed by plaintiff PPF Safeguard LLC ("PPF"),[1] defendant BCR Safeguard Holding LLC ("BCR"), and two other limited liability companies that are not parties to this action — JAC Safeguard Holding LLC and Safeguard Development Group II LLC (collectively, the "Members").[2] Until May 14, 2009, PPF had a 94% stake in Safeguard, while the other Members had a combined stake of 6%.[3] Defendant Bruce C. Roch, Jr. is the sole and managing member of BCR.[4]

The practical arrangement between BCR and PPF was fairly straightforward and familiar. BCR would, in exchange for Roch's sweat equity as an executive, get its share in and have responsibility for the day-to-day affairs of Safeguard.[5] For being the money, PPF would get the lion's share of the equity and have co-equal authority, as we shall see, over certain major decisions and related

[1] Both PPF and Safeguard are named as plaintiffs in this action. Because the claims are brought primarily on behalf of PPF and derivatively on behalf of Safeguard, I refer to PPF as the plaintiff in this case.
[2] Amended Complaint ("Compl.") ¶ 6.
[3] *Id.* ¶ 8.
[4] *Id.* ¶ 7.
[5] *Id.* ¶ 10.

party transactions.[6] In many situations like this, things do not always work out as the parties initially intended.

Happily, I suppose, the arrangement between the parties also gave PPF the right to invoke a buy-sell provision (the "Buy/Sell Provision") and to end any stalemate in the management of Safeguard's affairs by giving PPF total control.[7] Less happily, since PPF invoked that Provision on May 14, 2009, it and BCR have been entangled in a number of disputes in various forums.[8] I now proceed to explain why I grant the defendants' motion to dismiss and simplify the parties' situation by eliminating one forum as a situs for aspects of their feud.

B. Safeguard's LLC Agreement

Safeguard was formed on May 31, 2005 through the Amended & Restated Limited Liability Company Agreement of Safeguard Storage Properties LLC (the "LLC Agreement").[9] The LLC Agreement divided the management authority of Safeguard between BCR as the Administrative Member, and a four-member management committee (the "Management Committee").[10]

The LLC Agreement gave BCR the contractual authority to appoint two members to the Management Committee, and the other two members were

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[6] *Id.* ¶ 7.
[7] Roch Aff. Ex. 1 (Amended and Restated Limited Liability Company Agreement of Safeguard Storage Properties LLC) ("LLC Agreement") § 11.03.
[8] Compl. ¶ 14. For example, whether PPF properly complied with the Buy/Sell Provision is a question before this court in a separate case, which overlaps with issues that are being litigated in Louisiana. *PPF Safeguard LLC v. BCR Safeguard Holding LLC*, C.A. No. 4594-VCS.
[9] Compl. ¶ 6.
[10] *Id.* ¶ 10.

appointed by the managing agent of PPF's parent entity. As to BCR's appointees, the LLC Agreement required that "the members appointed by BCR [to the Management Committee] . . . at all times be Executive Officers of [Safeguard]."[11] Thus, BCR selected Roch, who also served as Safeguard's President and CEO, and Jack Chaney, who was Safeguard's Chief Operating Officer, as its Management Committee appointees.[12] As we shall see, Safeguard entered into employment contracts with Roch and Chaney addressing their duties and remuneration for these roles.

The LLC Agreement also set forth the responsibilities and authority of the Administrative Member and Management Committee. As Administrative Member, BCR was given the "full right, power and authority to manage [Safeguard], and conduct [Safeguard's] business and affairs," except for those areas that required the approval of the Management Committee.[13] The approval of the Management Committee was required for "Major Decisions" including: (1) expenditures by Safeguard in excess of Safeguard's approved operating budget; (2) transactions with a Member, including the lending of company funds; and (3) the appointment of "Executive Officers."[14]

To address any dispute about whether any Member — and one senses, especially BCR as Administrative Member — took unilateral action that usurped

[11] *Id.* ¶ 12; LLC Agreement § 9.02.
[12] Compl. ¶¶ 11.
[13] LLC Agreement § 4.02.
[14] *Id.* §§ 9.02(e), (g), (r); Compl. ¶ 11.

the authority of the Management Committee, the LLC Agreement contains a mandatory Arbitration Clause. Specifically, Section 9.05 of the LLC Agreement provides that:

> In the event any Member materially breaches this Agreement (the "Breaching Member") *by engaging in actions that require the Approval of the Management Committee without the Approval of the Management Committee* and such action continues uncured for fifteen (15) business days following delivery to the Breaching Member of written notice describing in reasonable detail such breach, the non-breaching Member (the "Aggrieved Member") and the Breaching Member shall attempt in good faith and using all reasonable efforts to resolve the disagreement between them concerning the Breaching member's actions within fifteen (15) business days by negotiations between executives who have authority to settle the controversy. If the dispute cannot be settled through direct discussions within the 15 business-day period, *the Aggrieved Member and the Breaching Member agree that the dispute shall be settled by arbitration administered by the American Arbitration Association* in accordance with its Commercial Arbitration rules, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.[15]

Because the LLC Agreement requires the Management Committee to approve any related party transactions (including ones with LLC employees or affiliates such as Roch or BCR) or any expenditures in excess of agreed upon budgets,[16] the Arbitration Provision covers much of the fun stuff out of which breach of fiduciary duty actions have historically been made.

[15] LLC Agreement § 9.05 (emphasis added).
[16] *Id*. § 9.02 (setting forth actions that required the approval of the Management Committee).

Because the Members of Safeguard apparently viewed it as beneficial to have as many forums as possible in the mix, the LLC Agreement also contains a non-mandatory forum selection provision, stating as follows:

> Each member hereby (i) submits to personal jurisdiction in the state of Delaware for the enforcement of this Agreement and (ii) waives any and all personal rights under the law of any state or country to object to jurisdiction within the State of Delaware for the purposes of litigation to enforce this Agreement.[17]

By its plain terms, this provision does not require that any dispute be litigated in this state.

C. Roch And Chaney's Employment Agreements

But the forum fun does not stop there. The employment contracts of Roch and Chaney are also critical to resolving the current motion. Roch began his employment as Safeguard's President and CEO of Safeguard on May 31, 2005 under a written employment agreement with Safeguard (the "Roch Employment Agreement").[18] Chaney, like Roch, entered into an employment agreement on May 31, 2005 (the "Chaney Employment Agreement").[19]

Both the Roch and Chaney Employment Agreements contain a Louisiana choice of law provision. And, the Employment Agreements include Forum Selection Clauses providing that Louisiana state and federal courts are the

[17] *Id*. at § 23.11(a).
[18] Roch Aff. Ex. 2 (Executive Employment Agreement of Bruce Roch) ("Roch Employment Agreement").
[19] Roch Aff. Ex. 3 (Executive Employment Agreement of Jack Chaney) ("Chaney Employment Agreement").

exclusive forums in which any disputes arising under the Agreements are to be litigated:

> This Agreement shall be governed by, and interpreted in accordance with the internal substantive laws of the State of Louisiana, without giving effect to the principles of conflicts of law. Each party hereto irrevocably submits itself to the *exclusive* personal jurisdiction of the Federal and State courts sitting in the State of Louisiana, and hereby waives any claims it may have as to inconvenient forum.[20]

Also, as part of his Employment Agreement, Roch also entered into a confidentiality agreement with Safeguard (the "Confidentiality Agreement"), which contains a forum selection provision identical to the one in the Roch Employment Agreement.[21]

D. PPF's Allegations

With all of these forums firmly in mind, I turn to the claims that PPF has advanced in this litigation.

In 2008, relations between PPF and BCR became strained. On May 31, 2008, Chaney's employment agreement formally expired, and although Roch claims that Chaney continued to serve as a Chief Investment Officer of Safeguard, he admits that Chaney gave up the role of Chief Operating Officer.[22] Also on May 31, 2008, the initial term of Roch's own employment agreement terminated.[23] Because PPF and BCR could not agree on a formal extension of Roch's status as

[20] *Id.* § 18; Chaney Employment Agreement § 17 (emphasis added).
[21] Davey Aff. Ex. 1 ("Confidentiality and Non-Competition Agreement") ("Confidentiality Agreement") at § 8.
[22] Roch Aff. ¶¶ 15, 16; Chaney Employment Agreement § 3.
[23] Roch Employment Agreement § 3.

CEO, a provision of the Roch Employment Agreement extending that agreement until May 31, 2009 kicked in.[24] For the remainder of 2008, no successors to Roch or Chaney were agreed upon between PPF and BCR. PPF claimed that the formal expiration of Chaney's Employment Agreement had left him ineligible to serve on the Management Committee and that the expiration of Roch's Employment Agreement on May 31, 2009 would put him in a similar position. BCR took the position that Chaney and Roch continued to serve as at-will employees and therefore as Executive Officers absent any proper action by the Management Committee to remove them, and were thus eligible to continue as members of the Management Committee.

Under the Buy/Sell Provision in the LLC Agreement, PPF was given the right to either (1) purchase the interests of the other Members, or (2) sell its interests to the other Members following certain triggering events.[25] On May 14, 2009, PPF invoked the Buy/Sell Provision, indicating its intention to buy the other Members' interests in Safeguard. Although Roch and BCR contested PPF's invocation of the Buy/Sell Provision, PPF's complaint alleges that Roch and BCR took wrongful action to extract unfair value for Safeguard knowing that their time at Safeguard was coming to an end.[26]

To wit, according to PPF, BCR as Safeguard's Administrative Member and Roch as the sole member of BCR and CEO of Safeguard have engaged in a pattern

[24] *Id.*
[25] LLC Agreement § 11.03.
[26] *E.g.*, Compl. ¶¶ 13, 21, 30, 38.

of self-interested behavior in "the few month preceding and following PPF's invocation of the Buy/Sell [Provision]" that harmed Safeguard.[27] PPF's allegations largely involve the claim that BCR and Roch, through BCR, improperly used Safeguard to reimburse Roch's personal expenses, and authorized excessive payments to organizations of which Roch was a member such as the Young Presidents Organization.[28]

Roch and BCR also allegedly caused Safeguard to make expenditures that were in excess of the agreed-upon budget.[29] PPF further alleges that Roch failed to attend to his duties as CEO by being inattentive to his duties and working unreasonably short hours.[30] While spending Safeguard's money improperly on payments to Roch, BCR and Roch allegedly failed to ensure that Safeguard made payments critical to its own financial health, such as for insurance premiums and to pay key vendors, and declined for self-interested reasons (*i.e.*, an ability to put up its share) to make capital calls despite Safeguard's need for capital.[31] BCR and Roch also supposedly suspended important development projects without properly notifying PPF's representatives on the Management Committee.[32] To conceal

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[27] *Id*. ¶ 13.
[28] *See PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, C.A. No. 4712-VCS at 33 (May 3, 2010) (TRANSCRIPT); Compl. ¶ 17. The Young Presidents Organization is a global network of executives with the purpose of providing a "peer network . . . ongoing education, and . . . a 'safe haven'" for young executives. *See* YPO: Our Mission, http://www.ypo.org/mission.htm. The comfort and security of such sanctuary to the young executive during litigation like this is, well, ineffable.
[29] Compl. ¶ 22.
[30] *Id*. ¶ 19.
[31] *Id*. ¶¶ 21, 23, 25.
[32] *Id*. ¶ 24.

their mismanagement, BCR and Roch allegedly reallocated Safeguard employees' responsibilities and terminated certain employees.[33]

Permeating all of its claims is PPF's argument that BCR and Roch interfered with the proper functioning of the Management Committee because BCR permitted Roch and Chaney to serve as its Management Committee appointees after their Employment Agreements with Safeguard expired, in violation of the LLC Agreement.[34] In its original complaint in this case, PPF sought a declaration that neither Roch nor Chaney could function as members of the Management Committee after the formal end of their written Employment Agreements.[35] For reasons that appear to be tactically designed to address the defendants' original dismissal motion, PPF dropped that request in its Verified Amended Complaint but continues to make the contention that Roch and Chaney could not function after the termination of their written Employment Agreements as BCR's appointees to the Management Committee even though no action of the Management Committee was taken to remove them as Executive Officers.[36]

Relying on these factual allegations, the plaintiffs have brought claims against BCR for: (1) breach of the LLC Agreement; (2) breach of BCR's fiduciary duties as Administrative Member of Safeguard; and (3) breach of the implied covenant of good faith and fair dealing. As to Roch, the complaint brings

[33] *Id*. ¶¶ 28-32.
[34] *Id*. ¶¶ 33-37.
[35] Verified Complaint at 31-32.
[36] Compl. ¶¶ 35-37.

claims for: (4) tortious interference with BCR's obligations under the LLC Agreement; and (5) aiding and abetting BCR's breaches of fiduciary duty. The latter claims are intricate, indeed. Rather than allege that Roch breached his Employment Agreement by receiving improper expense reimbursement, PPF alleges that Roch, as controlling member of BCR, tortiously prevented BCR from complying with its contractual duties and aided and abetted its fiduciary misconduct by causing BCR to provide himself, as CEO, with payments he was not entitled to under his Employment Agreement. In fact, PPF largely seeks recovery for payments to Roch *before* the May 31, 2009 formal expiration of Roch's Employment Agreement.[37]

The parties do not dispute that Chaney's Employment Agreement terminated, because Chaney submitted a formal letter of resignation to the Management Committee resigning as Chief Operating Officer of Safeguard.[38] But, according to Roch, Chaney has continued to serve as Safeguard's Chief Investment Officer and thus as an Executive Officer,[39] and was therefore still eligible to be one of BCR's appointees to the Management Committee.[40] On May 14, 2009, PPF invoked the Buy/Sell Provision and, on June 1, 2009, told Roch that

[37] Compl. ¶¶ 15-19.
[38] *See* Letter to the Honorable Leo E. Strine Jr. from Allen M. Terrell, Jr., Esquire (May 5, 2010) at 2, Ex. 2.
[39] Roch Aff. ¶ 15.
[40] Compl. ¶ 36.

he was out as CEO.[41] For a time, Roch continued to insist that BCR remained the Administrative Member of Safeguard and that he remained both the CEO of Safeguard and a member of the Management Committee.[42] On July 31, 2009, BCR and Roch relented and acceded to PPF formally taking control of Safeguard,[43] although the parties continue to fight over whether the price PPF offered in the buy/sell transaction was proper.

III. Analysis

The defendants have moved to dismiss under both Court of Chancery Rule 12(b)(1) and Court of Chancery Rule 12(b)(3), because PPF's claims implicate both the mandatory Forum Selection Clause in the Roch Employment Agreement and the mandatory Arbitration Clause in the LLC Agreement. This court will dismiss a case under Rule 12(b)(1) when the claims raised are subject to a mandatory arbitration clause. That is, this court "will not 'accept jurisdiction over' claims that are properly committed to arbitration since in such circumstances arbitration is an adequate legal remedy."[44] As important, Delaware respects the contractual freedom of parties to enter arbitration agreements and will not allow a party to escape its promise to resolve claims by arbitration by filing in our courts.

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[41] *See* Letter to the Honorable Leo E. Strine Jr. from Allen M. Terrell, Jr., Esquire (May 5, 2010) at 2, Ex. 3.
[42] Roch Aff. ¶ 18.
[43] *Id*. ¶ 19.
[44] *Dresser Indus. v. Global Indus. Techs., Inc*., 1999 WL 413401, at *4 (Del. Ch. Jun. 9, 1999); *see also Carder v. Carl M. Freeman Comm., LLC*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009) ("If a claim is arbitrable, *i.e.*, properly committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.").

Indeed, because our law favors the enforcement of arbitration clauses,[45] Delaware courts "ordinarily resolve any doubts in favor of arbitration."[46]

In a similar spirit, Delaware honors contractual choice of forum provisions. Thus, under Rule 12(b)(3), a court will grant a motion to dismiss for improper venue based upon a forum selection clause where the parties "use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action."[47] Delaware courts defer to forum selection clauses and routinely "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[48]

These principles clearly dictate that PPF's claims be dismissed. Although PPF engaged in strenuous mental contortions to escape the Arbitration Clause and Forum Selection Clause, those distracting gymnastics do not obscure the reality that PPF's claims plainly implicate both the of these Clauses. For example, much of the complaint is taken up with the idea that Roch, sensing his time with

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[45] *See Graham v. State Farm Mut. Auto Ins. Co.*, 565 A.2d 908, 911 (Del. 1989) ("In short, the public policy of this state favors the resolution of disputes through arbitration."); *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009) (noting that "Delaware's public policy strongly favors arbitration"); *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001) ("Delaware public policy . . . favors resolving disputes through arbitration.").

[46] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155-56 (Del. 2002); *see also SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998) ("Any doubt as to arbitrability is to be resolved in favor of arbitration.").

[47] *Eisenbud v. Omnitech Corp. Solutions, Inc.*, 1996 WL 162245, at *1 (Del. Ch. Mar. 21, 1996).

[48] *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007); *see also Prestancia Mgmt. Group., Inc. v. Virginia Heritage Foundation, II LLC*, 2005 WL 1364616, at *7 (May 27, 2005) (quoting WOLFE & PITTENGER § 5-4[a], at 5-53 to 5-54).

Safeguard was short, received improper expense reimbursement from Safeguard for personal expenses, and that Roch was wrongfully paid for travel on a private jet owned by a company that Roch controlled.[49] But the Roch Employment Agreement establishes the policy by which Roch could be reimbursed, and provides that:

> The Executive is authorized to incur reasonable, ordinary and necessary business expenses in the performance of the duties outlined above during the Employment Term in accordance with the policies established by the Company. The Executive shall account to the Company for all such expenses and the Company shall reimburse the Executive or pay the expenses, in each case, in accordance with the policies established by the Company.[50]

The complaint also alleges that Roch was often absent from the office, and, when he was present, stayed for only five hours a day.[51] This allegation also implicates his Employment Agreement which states that Roch expected to "devote substantially all of his business time and attention to the affairs of [Safeguard]."[52] Finally, the allegation that Roch removed a large amount of Safeguard's confidential information from the premises[53] implicates his Confidentiality Agreement, which set forth Roch's responsibilities with regard to Safeguard's confidential information both while employed by Safeguard and following the end

[49] Compl. ¶¶ 15-16.
[50] Roch Employment Agreement § 7.
[51] Compl. ¶ 19.
[52] Roch Employment Agreement § 2(c).
[53] Compl. ¶ 42.

of his employment,[54] and which also contains a Louisiana Forum Selection Clause.

Indeed, even PPF's allegation, which is not buttressed by any briefing on this motion, that Roch and Chaney ceased to be employees of Safeguard and were therefore automatically ineligible to serve on the Management Committee by virtue of the expiration of their written employment contracts raises a question that directly relates to the Roch and Chaney Employment Agreements. Those Agreements between Safeguard and Roch and Chaney expressly invoked Louisiana law and contained Louisiana Forum Selection Clauses.[55] BCR and Roch have cited Louisiana authority for the proposition that if a written employment agreement ceases and is not replaced with a succeeding agreement, the employee remains employed under the same terms and conditions, but subject to proper removal at will.[56] The implications of the formal end of Roch's and Chaney's Employment Agreements during a period when the Members are deadlocked requires a consideration of the language of the Employment Agreements and the implications of their formal expiry under Louisiana law.[57] It

[54] Confidentiality Agreement § 2(a).
[55] Roch Employment Agreement § 18; Chaney Employment Agreement § 17.
[56] *See* Letter to the Hon. Leo E. Strine, Jr. from T. Brad Davey, Esquire at 2 n.1 (May 5, 2010).
[57] PPF cites to a Louisiana employment law case which held that an employee became an at-will employee when his written contract expired. *A&B Bolt Supply, Inc. v. Dawes*, 948 So.2d 1143, 1146 (La. App. 3 Cir. 2007). Likewise, under Delaware employment law, when an employee's employment agreement expires but the employee continues to work for the employer, the employee is treated as an at-will employee. *See Luscavage v. Dominion Dental USA, Inc.*, 2007 WL 901641, at *1 (Del. Super. Mar. 20, 2007) (explaining that an employee became an at-will employee after his employment

is also bound up in questions regarding what happens when the Members cannot agree on a key issue like the appointment of successor officers. Thus, that issue implicates not only the Forum Selection Clauses of the Employment Agreements but also the Arbitration Clause in the LLC Agreement itself.

That is an important transitional and thematic point.

One of the ways in which PPF has most strained logic is by trying to evade the Forum Selection Clause in the Roch Employment Agreement by styling its claims that Roch failed to fulfill his contractual duties as CEO and received contractually improper expense reimbursement as ones against BCR for letting Roch violate his Employment Agreement, and against Roch himself for, in essence, causing BCR to allow himself to violate the Employment Agreement. To justify this convoluted approach, PPF points out that Roch himself was not a party to the LLC Agreement, and that only BCR was.

Thus, PPF claims to be solely pressing its rights under the LLC Agreement.[58] I believe that to be an improper means for PPF to avoid its own

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agreement expired); *see also Lazard Debt Recovery GP, LLV v. Weinstock,* 864 A.2d 955, 970 (Del. Ch. 2004) ("[T]he common law of many states, including this one, emphasizes that, absent an employment contract, employees serve at-will . . . ."). And, under Delaware corporate law, an officer of a Delaware corporation holds office until her successor is elected, or until the officer resigns or is removed. *See* 8 *Del. C.* § 142(b). But it is not clear how employment law and entity law intersect in this case, particularly for Safeguard — a Delaware limited liability company with its principal place of business in Georgia and operations in Louisiana. Because PPF's claims must be brought in either arbitration or in Louisiana, the question of whether Roch and Chaney remained Executive Officers of Safeguard after their Employment Agreements expired is not for this court to answer.

[58] *See PPF Safeguard LLC*, C.A. No. 4712-VCS at 20 (Del. Ch. May 3, 2010) (TRANSCRIPT).

contractual promise that any dispute regarding whether Roch was violating his duties as CEO would be litigated in Louisiana.[59] PPF seeks to bypass that promise by claiming in Delaware that Roch received contractually improper payments and that he aided and abetted BCR's breaches of fiduciary duty, but through the indirect means of claiming that BCR breached its contractual and fiduciary duties by allowing Roch to breach his Employment Agreement. All very elaborate indeed, but not so mesmerizing that I lose sight of the reality that if Roch was entitled to reimbursement under his Employment Agreement and put in the effort required by that Agreement, then PPF's claims fail. PPF agreed to litigate these questions in the first instance in Louisiana.[60]

As importantly, PPF's attempt to evade the Forum Selection Clause in the Employment Agreement only runs it smack into the Arbitration Clause of the LLC Agreement itself. The Arbitration Clause plainly requires the arbitration of any dispute where PPF, as a Member, alleges that another member, such as BCR, took

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[59] *See Ashall Homes, Ltd. v. ROK Entertainment Group Inc.*, 992 A.2d 1239, 1245 (Del. Ch. 2010) ("The courts of Delaware defer to forum selection clauses and routinely 'give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation.'" (quoting *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007))); *Prestancia*, 2005 WL 1364616, at *7 n.62 (dismissing a complaint where the contract at issue contained a mandatory forum selection clause, because the clause "preclude[d] consideration by any Delaware court").

[60] *See Simon v. Navellier Series Fund*, 2000 WL 1597890, at *5 n.18 (Del. Ch. Oct. 19, 2000) (citing cases for the proposition that "artful pleading" designed to circumvent enforcement of the parties' contractual choice of forum is not permitted (citing *Anselmo v. Univision Station Group, Inc.*, 1993 WL 17173, at *2 (S.D.N.Y. Jan. 15, 1993) ("A forum selection clause should not be defeated by artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship, or if 'the gist' of those claims is a breach of that relationship.")).

unilateral action on a subject entrusted to the Management Committee's approval.[61] Under the Arbitration Clause, PPF was required to give notice of any such violation to BCR and if the violation was not cured, was required to submit the dispute for resolution to arbitration.[62]

Among the actions required to be approved by the Management Committee was the appointment of any Executive Officers of the Company.[63] Thus, the pickle that Safeguard's Members found themselves in when the Employment Agreements of Roch and Chaney expired and the Management Committee could not agree on replacements is one that is grist for arbitration to the extent that PPF seems to allege that BCR somehow unilaterally and improperly "appointed" Roch and Chaney to continue as Executive Officers and Management Committee

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[61] LLC Agreement § 9.05.

[62] In determining whether a claim is arbitrable under an arbitration clause, the court must "[f]irst . . . determine whether the arbitration clause is broad or narrow in scope [and] [s]econd, . . . apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions requiring arbitration." *Parfi*, 817 A.2d at 155. The Arbitration Clause in the LLC Agreement is a narrow clause, because it is limited to specific types of disputes. LLC Agreement § 9.05; *see HDS Inv. Holding Inc. v. Home Depot, Inc.*, 2008 WL 4606262, at *5 (Del. Ch. Oct. 17, 2008) (explaining that "an arbitration clause is narrow if arbitration is limited to specific types of disputes" (citing *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988))).

But, even for "narrow" arbitration provisions, like the Arbitration Clause in the LLC Agreement, there is still a strong presumption in favor of arbitration, "and courts are to defer to the arbitration process in close cases." *RBC Capital Markets Corp. v. Thomas Weisel Partners, LLC*, 2010 WL 681669, at *8 (Del. Ch. Feb. 25, 2010); *see also Cantor Fitzgerald LP v. Prebon Sec. (USA) Inc.*, 731 A.2d 823, 831 (Del. Ch. 1999) ("When parties to a federal arbitration agreement dispute whether a particular claim or controversy should be litigated in the courts or subject to mandatory arbitration and there is, in fact, doubt as to whether the parties to the agreement ever expected or wanted the claim or controversy to be arbitrated, there is no question federal law requires that the doubt be resolved in favor of arbitration . . . .").

[63] LLC Agreement § 9.02(r).

members after their Employment Agreements terminated. Likewise, to the extent that PPF alleges that BRC unilaterally put certain agreed-upon projects in Safeguard's budget and approved plans on ice, PPF is alleging that BCR took unilateral action entrusted to the Management Committee.[64] Even more obviously, PPF seeks to evade the Arbitration Clause by suing BCR for taking unilateral actions that were subject to Management Committee approval in order to enrich Roch.[65]

Despite PPF's arguments to the contrary, the complaint repeatedly alleges that Roch and BCR made "Major Decisions" which, under the LLC Agreement, required the Management Committee's approval. For example, PPF alleges that BCR and Roch repeatedly caused Safeguard to exceed its budget.[66] The LLC Agreement defines "expenditures by the Company in any calendar year in excess of the amounts set forth on the applicable Approved Operating Budget" to be a Major Decision that required the approval of the Management Committee.[67] Also, PPF's claim that BCR allowed Roch to use Safeguard funds for travel on a

[64] *Id*. § 9.02(c), (e), (f). Indeed, to the extent that the refusal of BCR to make a capital call is a pled wrong, that itself also tends to be closely related to clearly arbitrable claims. Under the LLC Agreement, any capital calls had to be approved by the Management Committee. LLC Agreement § 9.02. Thus, PPF is somehow arguing that BCR wrongly failed to propose or objected to a proposed capital call by wrongly claiming that Roch and Chaney were still members of the Management Committee. This example illustrates that even if there are subsidiary aspects of PPF's claims that are not strictly within the reach of the Forum Selection Clause and Arbitration Clause, their maintenance here at this time would risk entangling this court in matters clearly entrusted to the arbitrators and the Louisiana courts.
[65] Compl. ¶¶ 14-18.
[66] *Id*. ¶ 22.
[67] LLC Agreement § 9.02(e).

personal jet is a claim about a "transaction with an affiliate," which is defined by the LLC Agreement as a Major Decision.[68] This allegation also falls within Section 9.09 of the LLC Agreement, which provides that any expenses paid by a Member are to be reimbursed "so long as such payment is reasonably necessary for [Safeguard] . . . and is expressly authorized in this Agreement *or in any Operating Budget Approved by the Management Committee*."[69]

Perhaps most tellingly, PPF cannot seem to keep its own arguments straight. Although the appointment of executive officers of Safeguard requires Management Committee approval, at oral argument, PPF's counsel suggested that BCR could unilaterally determine whether to remove such officers.[70] If that is the case, it is not even clear how to make sense of most of PPF's complaint, and again raises issues of the employment status of Roch that seem committed to arbitration. More pervasively, PPF seems to argue that BCR could not unilaterally retain Roch and Chaney as Executive Officers after the expiration of their Employment Agreements and that by doing so, BCR usurped the proper role of the Management Committee.[71] That is, they argue that BCR did on its own what it

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[68] *Id*. § 9.02(g).
[69] *Id*. § 9.09 (emphasis added).
[70] *See PPF Safeguard LLC*, C.A. No. 4712-VCS at 40 (Del. Ch. May 3, 2010) (TRANSCRIPT); Compl. ¶¶ 35-36.
[71] *See, e.g.*, Letter to the Hon. Leo E. Strine, Jr. from Allen M. Terrell, Jr., Esquire (May 5, 2010) at 3 ("[A]ny conversion of Roch's employment status into an 'at-will' executive officer would have been tantamount to a reappointment as an executive officer. The LLC Agreement, however, requires unanimous Management Committee approval for the appointment of any Executive Officer. . . . The two remaining representatives of PPF on the Management Committee certainly did not approve Roch's continuing employment as an at-will employee . . . . It follows that neither Roch nor Chaney were executive officers

could not do, a claim that directly implicates the Arbitration Clause.[72]

Recognizing that many of its allegations plainly allege that BCR usurped to itself authority of the Management Committee, PPF says that it is not complaining about the usurpation, it is complaining about the substance of what BCR did. As a result, it says, it can litigate here and need not arbitrate. That argument is unconvincing. By its plain terms, the Arbitration Clause requires PPF to identify any situation where it alleges that BCR acted beyond its unilateral discretion, give BCR a chance to cure, and arbitrate over any remaining disagreement.[73] The Arbitration Clause clearly gives the arbitrator a right to issue an award, and nowhere indicates that such an award may not involve monetary damages where that is appropriate.[74] Indeed, the logical relief in situations when unilateral action cannot or has not been cured would often involve monetary recompense to Safeguard for any injury it suffered. PPF simply seeks to escape the forum chosen

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of Safeguard in June of 2009, and were therefore ineligible to serve on the Management Committee.").

[72] Additionally, it is a colorable argument that the power of appointment vested in the Management Committee also implied that the Management Committee had the power of removal. *Cf*. 63C AM. JUR. 2D *Public Officers and Employees* § 170 (2010) ("When the term or tenure of a public officer is not fixed by law, and the removal is not governed by a constitutional or statutory provision, as a rule, the power of removal is incident to the power to appoint.").

[73] LLC Agreement § 9.05.

[74] *Id*. The Commercial Arbitration Rules of the American Arbitration Association, which are the rules selected by the Arbitration Clause to govern disputes, allow the arbitrator to award monetary relief. *See* Commercial Arbitration Rules and Mediation Procedures, American Arbitration Association, http://www.adr.org/sp.asp?id=22440#R42 (amended June 1, 2009) at Rules 42, 43.

for addressing any instances when Safeguard or a member is harmed by improper unilateral action by BCR.[75]

In sum, PPF's claims are based on interrelated allegations that implicate both the Forum Selection Clauses of the Employment Agreements and the Arbitration Clause of the LLC Agreement. By contract, the bulk of PPF's claims must be either arbitrated or litigated in Louisiana. None of those claims must be litigated in Delaware.

In this situation when it is impossible to isolate stray instances where PPF might have a claim that falls outside the reach of the mandatory Arbitration and Forum Selection Clauses, dismissal of the complaint under Rules 12(b)(1) and 12(b)(3) is required.[76] PPF is the master of its own complaint. Having every incentive to plead a discrete claim that is not subject to either the Arbitration Clause or the Forum Selection Clause, PPF has pled a complaint that pervasively implicates both. In a similar context, this court noted the danger to contractual rights that would arise if a trial court proceeded in this context rather than to deferring to the forum contractually chosen by the parties: "[a]s a theoretical matter, [a state court not selected by a forum selection clause] could hear aspects of [a plaintiff's] claims, but in doing so would undertake an exercise fraught with

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[75] *See Simon*, 2000 WL 1597890, at *5 n.8 (noting that "artful pleading" to circumvent enforcement of the parties' contractual promises is not permitted).

[76] *E.g.*, *Ashall*, 992 A.2d at 1543-54 (dismissing all of a plaintiff's claims due to a mandatory forum selection provision so that the court chosen by the provision could properly determine the provision's scope); *Carder*, 2009 WL 106510, at *8 (dismissing a complaint pursuant to Rule 12(b)(1) so that an arbitrator could determine whether or not certain claims fell outside the scope of an arbitration clause).

the danger that it was intruding on the domain accorded to [another] state's courts by [a] forum selection clause."[77] Those same dangers dictate dismissal here.

PPF may regret that it participated in an exercise in contractual freedom that involved the use of overlapping mandatory dispute resolution techniques, and that left the courts of this state as simply an optional forum for disputes not covered by those mandatory provisions. But PPF made its bargain and that bargain requires it to press its claims in arbitration and in litigation in Louisiana. I do not envy the Louisiana court or the arbitrator in the task of dividing up responsibility for taking the first crack at claims subject to overlapping dispute resolution provisions. But it would do a disservice to the parties — despite their, to date, obstinate refusal to recognize that their own self-interest might be served by a single forum — and to the interests of a justice system with limited resources — for this court to complicate that difficult task further by failing to honor the primacy of those tribunals. Furthermore, given the reality that PPF must litigate many of its claims in the courts of Louisiana and that all of its allegations arise out of the same course of events, PPF should, under accepted principles, bring all of its claims not subject to arbitration in Louisiana and not engage in inefficient and unduly burdensome claim splitting.[78]

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[77] *In re IBP, Inc.*, 2001 WL 406292, at *9 (Del. Ch. Apr. 18, 2001).

[78] *See Betts v. Townsends*, 765 A.2d 531, 534 (Del. 2000) (stating that the doctrine of res judicata forecloses a party from "bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties"); *see also* RESTATEMENT (SECOND) OF JUDGMENTS (1982) § 24 ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . the claim extinguished

IV. Conclusion

For all these reasons, the complaint is dismissed in its entirety under Rules 12(b)(1) and 12(b)(3) in deference to the forums provided in the Forum Selection Clause and Arbitration Clause. IT IS SO ORDERED.

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includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."); 47 AM. JUR. 2D *Judgments* § 476 (2010) ("If a litigant attempts to split a cause of action, res judicata bars a second suit when the matter could have been decided in the first suit.").