IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DARBY EMERGING MARKETS FUND, L.P.,	:	
Plaintiff,	:	
v.	:	Consol. C.A. No. 8381-VCP
GREGORY J. RYAN, BIH LIMITED and PAULO DE BRITO,	:	
Defendants.	:	
BIH LIMITED,	:	
Plaintiff,	:	
v.	:	
DARBY EMERGING MARKETS FUND, L.P.,	:	
Defendant.	:	

MEMORANDUM OPINION

Submitted: August 27, 2013
Decided: November 27, 2013

Paul J. Lockwood, Esq., Ronald N. Brown, III, Esq., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware; *Attorneys for Plaintiff Darby Emerging Markets Fund, L.P.*

Michael J. Maimone, Esq., Gregory E. Stuhlman, Esq., Eve H. Ormerod, Esq., E. Chaney Hall, Esq., GREENBERG TRAURIG, LLP, Wilmington, Delaware; Jeffrey S. Torosian, Esq., Paul A. Del Aguila, Esq., GREENBERG TRAURIG, LLP, Chicago, Illinois; *Attorneys for Defendants BIH Limited and Gregory J. Ryan.*

PARSONS, Vice Chancellor.

This action relates to a minority shareholder's assertion of rights under the terms of a shareholders' agreement and the Articles of Association of a Cayman Islands company. Under the terms of the shareholders' agreement and the Articles of Association, the minority shareholder has the right to "put" its shares in the company to the entity's controlling shareholders in the event there is a "fundamental dispute" between the minority and controlling shareholders. The plaintiff minority shareholder alleges that a fundamental dispute exists between it and the defendant controlling shareholders regarding the timing and structure of the company's sale, and that the dispute has not been resolved within the time and manner prescribed by the shareholders' agreement and the Articles of Association. Because there is a fundamental dispute and because the controlling shareholders allegedly have repudiated the minority shareholder's right to put its shares, the minority shareholder claims the controlling shareholders have breached the shareholders' agreement and the Articles of Association. The plaintiff seeks, among other relief, a declaration that it has properly invoked its right to put its shares and an order compelling the controlling shareholders to specifically perform their obligations pertaining to the put right.

The defendants have moved to dismiss the complaint in its entirety on the grounds that this Court lacks subject matter jurisdiction over the plaintiff's claims and that the plaintiff has failed to state a claim upon which relief can be granted.

Having considered the parties' briefs and arguments on the motion, I conclude that the defendants' motion to dismiss should be denied in its entirety.

I. BACKGROUND

A. The Parties

Non-party Atlantica Hotels International, Ltd. ("AHI" or the "Company") is a privately held company incorporated under the laws of the Cayman Islands. AHI, through its subsidiaries, operates the second largest hotel management company in Brazil.

Plaintiff, Darby Emerging Markets Fund, L.P. ("Darby"), is a limited partnership organized under the laws of the Cayman Islands. Darby owns 30,000 shares, or approximately 26%, of AHI's stock.

Defendants Gregory J. Ryan and Paulo de Brito[1] are stockholders of AHI and parties to the Shareholders' Agreement (defined below). Ryan and de Brito are "Controlling Shareholders" under the Shareholders' Agreement.

Defendant BIH Limited ("BIH" and together with Ryan and de Brito, "Defendants")[2] is a company incorporated under the laws of the Cayman Islands. BIH controls AHI, and is a party to the Shareholders' Agreement along with AHI, Darby, Ryan, and de Brito.

---

1 Counsel for de Brito did not enter an appearance in this action until September 16, 2013, after BIH Limited and Ryan's motion to dismiss was filed and argued.

2 As discussed in Section II.A.3, *infra*, BIH is also a plaintiff against Darby in a related declaratory judgment action. Although the complaint in that action was filed separately from Darby's complaint, the two have since been consolidated. Since the motion before me implicates only Darby's complaint, I refer to BIH as a Defendant for convenience.

B. Facts[3]

1. The Shareholders' Agreement and AHI's Articles of Association

On March 31, 1998, AHI, Darby, BIH, Ryan, and de Brito entered into an agreement (the "Shareholders' Agreement") prescribing, among other things, AHI's management structure and Darby's rights as a minority shareholder of AHI.[4] With respect to AHI's management structure, Section 8 of the Shareholders' Agreement states that, "[d]uring the term of this Agreement or until such time as [AHI] completes a Qualifying Public Offering, Ryan and De Brito, collectively, shall directly or indirectly Control BIH and BIH shall Control [AHI]."[5]

The Shareholders' Agreement also specifies certain rights that Darby has, including a "Put Right," in the event of a fundamental dispute concerning the management, business, or strategic direction of AHI. The scope of the Put Right is outlined in two related sections of the Shareholders' Agreement. The first, Section 5.7.1, states that:

---

[3] Unless otherwise indicated, the facts recited in this Memorandum Opinion are based on the allegations in Plaintiff's complaint, documents integral to or incorporated in the complaint, and facts of which the Court may take judicial notice.

[4] Barrington International Hospitality, Inc. was also a party to the Shareholders' Agreement. Their involvement, however, is not relevant to this action.

[5] Compl. Ex. A § 8. The Shareholders' Agreement and AHI's Articles of Association (the "Articles") are attached to and integral to the complaint. Therefore, they can be considered on a motion to dismiss. *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013).

> In the event of a fundamental dispute concerning the management, business, or strategic direction of the Company (including, without limitation, a dispute concerning any of the matters outlined in paragraph 5.5 or 5.6 of this Agreement) Darby may, at its option, convene the Board of Directors of the Company with the objective of achieving a resolution of the dispute that is satisfactory to the Shareholders. If the Shareholders acting in good faith are unable to reach a resolution within (10) Business Days, and Darby reasonably believes that its differences with BIH are irreconcilable, then Darby may, at its option and by written notice to BIH and the Controlling Shareholders, declare the existence of a deadlock.[6]

Section 5.5 includes "any merger or consolidation of [AHI] with or into any other entity"[7] and "any sale, lease or conveyance of all or substantially all of the assets of [AHI]."[8]

The second relevant section of the Shareholders' Agreement, Section 5.7.2, entitled "Put of Shares by Darby," states in relevant part that:

> [i]n the event that Darby declares a deadlock pursuant to Section 5.7.1, Darby shall have the right, but not the duty, to sell all, but not less than all, of its Shares to BIH and the Controlling Shareholders, and if Darby exercises such right BIH and the Controlling Shareholders shall have the joint and several obligation to purchase all, and not less than all, of Darby's Shares as provided herein. If Darby chooses to exercise such right it shall give thirty (30) Business Days' written notice to BIH and the Controlling Shareholders. The date of the notice shall be deemed the "Trigger Date" and the date following one hundred eighty (180) days thereafter shall be deemed the "Closing Date" . . . . The purchase price

---

6 *Id*. § 5.7.1.

7 *Id*. § 5.5(ii).

8 *Id*. § 5.5(iii).

> hereunder shall be paid by BIH and/or the Controlling Shareholders, as the case may be, to Darby on the Closing Date.[9]

The same day that the parties entered into the Shareholders' Agreement, AHI also adopted its Memorandum of Association and the Articles. Section 128(a) and 128(b) of the Articles are identical to Sections 5.7.1 and 5.7.2 of the Shareholders' Agreement, respectively.[10]

2. AHI fails to consummate an acquisition with a strategic buyer

In 2011, AHI began exploring strategic alternatives, including a sale of the Company or its assets. In early February 2012, AHI had identified a strategic buyer that was interested in acquiring the Company. After the strategic buyer had been identified, BIH and Ryan: (1) placed various non-customary restrictions on the prospective buyer's due diligence, making it difficult for the prospective buyer to value AHI; and (2) refused to consider the prospective buyer's preferred deal structure – a sale of AHI's Brazilian assets – instead of a sale of AHI's Cayman holding company. Due at least in part to BIH and Ryan's actions, the prospective buyer lost interest in acquiring AHI and pursued a different transaction.

On June 21, 2012, Capital Workshop LLC ("Capital"), a consulting company working on behalf of BIH and Ryan, prepared a presentation entitled "Addressing Shareholder Concerns." The presentation's stated objectives were listed as

---

[9] *Id*. § 5.7.2.

[10] Compl. Ex. B § 128(a)–(b).

"[r]econciliation of shareholder exit strategies" and "[a]lignment of shareholder interests."[11] While acknowledging that Darby preferred an immediate sale of AHI, the presentation stated that the "Controlling Group would like to pursue a Sale in 2014" and that, in their view, "a sale prior to 2014 would negatively impact potential valuation."[12] According to the presentation, the "Controlling Group" would support a sale of AHI before 2014 only if it received "a material incentive to compel it to pursue a sale." What the Controlling Group sought was described as a "moderate" premium to support a sale in 2013 and an "aggressive" premium to pursue a sale in 2012. Between June 2012 and January 2013, Darby attempted unsuccessfully on multiple occasions to engage Ryan in a conversation about the sale of AHI.

3. Darby asks BIH and Ryan to support a sale process

After BIH and Ryan failed to respond to Darby's request in January 2013 for an updated liquidity plan for shareholders, Darby sent a letter to them on February 8, 2013, requesting that they initiate a sale process for AHI that would lead to the Company being sold by the summer of 2013. Darby's letter emphasized its position that delay in selling AHI would "result in less value for shareholders." Three days later, Capital responded to Darby's letter by rejecting Darby's proposed course of action and stating that the Controlling Shareholders intended to wait one to two years before initiating a process to sell AHI.

---

11 Compl. ¶ 32.

12 *Id.*

The following day, on February 12, 2013, Darby submitted a notice of dispute pursuant to Section 5.7.1 of the Shareholders' Agreement and Section 128(a) of the Articles. In submitting the notice of dispute, Darby exercised its right to convene a meeting of AHI's Board of Directors (the "Board") "with the objective of achieving a resolution to the dispute."[13] Darby requested that the Board meet on February 15, 2013. Attorney Lawrence H. Brenman responded to Darby's request on February 13. Brenman stated he was acting on behalf of AHI[14] and asked Darby to postpone the Board meeting. On February 14, Darby rejected Brenman's request.

4. The February 15, 2013 Board meeting

A telephonic meeting of the Board was convened on February 15, 2013. During the meeting, Ryan explicitly acknowledged that Darby, Ryan, and BIH were in "dispute resolution" mode under the Shareholders' Agreement and the Articles. Paul Sistare, AHI's CEO and a person with authority to act for BIH, stated that BIH and Ryan would support selling the Company by the end of the year rather than wait 12–24 months to begin the sale process. Darby rejected this proposal, but agreed to meet in person with Ryan and Sistare on February 26, 2013, in an attempt to reach an agreement on the Company's future.

In advance of the in-person meeting, on February 22, 2013, Darby sent AHI and Ryan a draft process agreement and timeline setting forth a proposed plan to market and

---

13 *Id.* ¶ 39.

14 Brenman later identified himself as counsel for BIH and Ryan, not AHI.

sell AHI (the "Process Agreement"). In a letter on February 26, BIH and Ryan responded, in part, that they were "in full agreement with [Darby] that the Company should immediately initiate a sale process of 100% of the shares of the Company and pursue that process pursuant to the timetable set forth in Exhibit A to your draft Process Agreement in accordance with all of our respective fiduciary duties."[15]

Notwithstanding their February 26 letter, on February 28, 2013, through their counsel, BIH and Ryan sent Darby another letter essentially rejecting the Process Agreement and proposing an alternative framework. Darby responded the next day, on March 1, 2013, with a list of several areas of disagreement with BIH and Ryan's proposal. The areas of disagreement included, but were not limited to: (1) BIH and Ryan's request that Darby waive some of its rights, including its ability to declare a deadlock; (2) whether bidders only should have access to confidential AHI information after signing an acquisition agreement; and (3) whether AHI should be flexible with regard to transaction structures it was willing to accept to consummate a transaction.

Over the weekend of March 2–3, 2013, the parties, through their counsel, continued to have discussions in an attempt to resolve their differences. During these discussions, BIH and Ryan agreed to drop their request for a "fiduciary out" from any dispute with Darby over the eventual transaction price, if Darby agreed not to support a transaction that valued AHI below a predetermined minimum net proceeds amount. Darby refused to agree to such a minimum amount before AHI "tested the market" and

---

[15] Compl. ¶ 45.

got a sense of how the market was valuing the Company. In addition, BIH and Ryan continued to insist that Darby agree to waive its Put Right and agree to a standstill if a transaction was not achieved by a specified date.

Further discussions between the parties were held on March 4, 2013, the tenth "Business Day" after Darby convened the Board to attempt to resolve its disagreement with BIH and Ryan. At 5:00 p.m. that day, counsel for BIH and Ryan emailed Darby's counsel that BIH and Ryan supported a "sale of 100% of the shares of the Company."[16] The email did not include a revised process agreement that incorporated any of Darby's key negotiating points.

C. Procedural History

Darby filed its verified complaint for declaratory and injunctive relief (the "Complaint") in this Court at 7:20 p.m. on March 4, 2013. BIH filed a complaint for declaratory judgment against Darby in the Delaware Superior Court twenty-four minutes later. On March 18, Darby moved to transfer BIH's complaint from the Superior Court to this Court. After receiving briefing from both sides, the Honorable Jan R. Jurden heard argument on Darby's motion to transfer on April 3, 2013. On April 29, Judge Jurden granted Darby's motion, pursuant to 10 *Del. C.* § 1902.

BIH's complaint then was transferred to the Court of Chancery, and Darby moved, without opposition from BIH, to consolidate BIH's action with its own on May 9, 2013. This Court granted Darby's motion to consolidate on May 29. In the interim, on April

---

[16] *Id.* ¶ 51.

12, 2013, BIH and Ryan moved to dismiss Darby's Complaint in its entirety. After full briefing on that motion, I heard argument on August 19, 2013. This Memorandum Opinion constitutes my ruling on BIH and Ryan's motion to dismiss.

D. Parties' Contentions

Darby alleges two breach of contract claims against Defendants, Ryan, BIH, and de Brito. In Count I, Darby asserts that Ryan, BIH, and de Brito breached the Shareholders' Agreement by repudiating Darby's Put Right and stating that they will not accept and pay for Darby's shares of AHI on the terms and conditions set forth in the Shareholders' Agreement. In Count II, Darby avers that the conduct of Ryan, BIH, and de Brito also constitutes a breach of Section 128 of the Articles.

In response, BIH and Ryan seek dismissal of the Complaint in its entirety under Court of Chancery Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. With respect to subject matter jurisdiction, BIH and Ryan make two arguments. First, they assert that 8 *Del. C.* § 111 does not provide a statutory basis of jurisdiction over any of Darby's claims because it does not apply to the governance documents of non-Delaware entities. Second, they contend that the Complaint fails to request an equitable remedy because Darby's allegations state a claim for, at most, anticipatory breach of contract, and the equitable remedy of specific performance is not available where the time for performance

has not yet expired.[17] Regarding Rule 12(b)(6), BIH and Ryan maintain that the Complaint fails to state a claim because Darby has not alleged that any Defendants have made a "positive and unequivocal statement" that they do not intend to perform their obligations under the Shareholders' Agreement or the Articles.

II. ANALYSIS

A. The 12(b)(1) Claim

1. Legal standard

The Court of Chancery will grant a motion to dismiss under 12(b)(1) "if it appears from the record that the Court does not have jurisdiction over the claim."[18] The plaintiff "bears the burden of establishing this Court's jurisdiction, and where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to

---

[17] At oral argument, Ryan and BIH for the first time also presented their position that even if Darby had alleged an actual breach, rather than an anticipatory breach, it would not be entitled to specific performance. In support of their argument, Ryan and BIH relied on *Manchester v. Narragansett Capital, Inc.*, 1989 WL 125190 (Del. Ch. Oct. 19, 1989). This argument, however, is unpersuasive. Unlike in *Manchester*, the parties in this action did not agree in either the Shareholders' Agreement or the Articles to a valuation methodology for AHI's shares, which are not publicly traded. Indeed, the court in *Manchester* explicitly recognized that specific performance can be an appropriate remedy in cases such as this where it would be difficult to ascertain AHI's stock's value. *Id*. at *5. Furthermore, Sections 9 and 13 of the Shareholders' Agreement state, respectively, that a breach of the agreement can constitute irreparable harm and that the non-breaching party may be entitled to specific performance. Therefore, at this early stage of the proceedings, I disagree with Ryan and BIH's argument that, as a matter of law, Darby cannot be entitled to specific performance of its Put Right if Ryan and BIH are found to have breached the Shareholders' Agreement or the Articles.

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

the pleadings, he must support those allegations with competent proof."[19] As Delaware's constitutional court of equity, this Court can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right;[20] (2) the request for an equitable remedy when there is no adequate remedy at law;[21] or (3) a statutory delegation of subject matter jurisdiction.[22] "[T]he Court of Chancery will not exercise subject matter jurisdiction 'where a complete remedy otherwise exists but where plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic 'open sesame' to the Court of Chancery.'"[23]

---

19 *Yancey v. Nat'l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993) (internal citation omitted).

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

21 10 *Del. C.* § 342 ("The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State."); *Christiana Town Ctr.*, 2003 WL 21314499, at *3 ("Equitable remedies . . . may be applied even where the right sued on 'is essentially legal in nature, but with respect to which the available remedy at law is not fully sufficient to protect or redress the resulting injury under the circumstances.'") (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2-3[b] (2001 ed.)).

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

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

In addition, "[t]he Court of Chancery . . . routinely decides controversies that encompass both equitable and legal claims."[24] "[I]f a controversy is vested with equitable features which would support Chancery jurisdiction of at least part of the controversy, then the Chancellor *has discretion* to resolve the remaining portions of the controversy as well."[25] "Once the Court determines that equitable relief is warranted, even if subsequent events moot all equitable causes of action or if the court ultimately determines that equitable relief is not warranted, the court retains the power to decide the legal features of the claim pursuant to the cleanup doctrine."[26]

2. This Court does not have subject matter jurisdiction under 8 *Del. C.* § 111

Darby argues that this Court has subject matter jurisdiction over its claim to enforce its rights under the Articles pursuant to 8 *Del. C.* § 111. Section 111 provides that:

> Any civil action to interpret, apply, enforce, or determine the validity of the provisions of: (1) The certificate of incorporation or the bylaws of a corporation; (2) Any instrument, document or agreement by which a corporation creates, sells, or offers to create or sell, any of its stock, or

---

[24] *Nicastro v. Rudegeair*, 2007 WL 4054757, at *2 (Del. Ch. Nov. 13, 2007) (citing Wolfe & Pittenger § 2–4 (supp. 2006) ("It is not at all unusual for cases properly within the subject matter jurisdiction of the Court of Chancery to involve both legal and equitable claims.")).

[25] *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978) (emphasis added).

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

> any rights or options respecting its stock . . . . may be brought in the Court of Chancery."[27]

According to Darby, Section 111 is not limited to Delaware corporations and unambiguously applies to all "corporations," including Cayman Island companies such as AHI. Darby contends, therefore, that this Court may not consider any extrinsic evidence such as Section 111's synopsis,[28] in determining that section's applicability to this case. I disagree.

I question the reasonableness of Darby's proffered interpretation of Section 111, and I also note that it is not supported by any Delaware authority. If Darby is correct, this Court would have subject matter jurisdiction over any dispute that relates to the interpretation of a corporate charter of any corporate entity or virtually any other agreement or document that relates to the corporation's stock, regardless of where that entity is incorporated. It is well established, however, that the Court of Chancery is a court of limited jurisdiction.[29] Accepting Darby's position regarding Section 111

---

[27] 8 *Del. C.* § 111(a)(1–2).

[28] The synopsis of a statute is analogous to the statute's legislative history and is an important source for determining legislative intent. *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1289–90 (Del. 2007) (finding that the "preamble" and "synopsis accompanying the amendment" to a bill were "instructive" in determining legislative intent); *Carper v. New Castle Cty. Bd. of Educ.*, 432 A.2d 1202, 1205 (Del. 1981) (describing the synopsis of a Bill as a proper source from which to glean legislative intent); *Dawson v. State Farm Mut. Auto. Ins. Co.*, 980 A.2d 1035, 1039 n.3 (Del. Super. 2009) ("Legislative intent may be deduced from a statute's synopsis.").

[29] *See El Paso Natural Gas Co. v. TransAm. Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995) ("The Delaware Court of Chancery is a court of equity. It has only

drastically would increase the scope of this Court's subject matter jurisdiction. I decline to adopt Darby's proposition that its interpretation of Section 111 is the only reasonable one, especially because Darby has failed to identify any case law or other recognized authority in support of its position. This circumstance, together with the fact that 8 *Del. C.* § 111 is part of the Delaware General Corporation Law, leads me to conclude that one reasonable interpretation of Section 111 is that it applies only to Delaware corporations. Because this issue is before me on a motion to dismiss, however, I need not decide definitively whether Darby's argument that Section 111 applies to non-Delaware entities is untenable as a matter of law. Even assuming for purposes of argument only that Darby's interpretation is reasonable, which seems unlikely, the statute would be ambiguous with respect to its application to non-Delaware entities, because there is at least one other reasonable interpretation.[30] To resolve that ambiguity, the Court may consider the statute's legislative history, such as its synopsis.[31]

The synopsis for Section 111 states that, "[t]his amendment expands the jurisdiction of the Court of Chancery with respect to a variety of matters pertaining to Delaware corporations." To the extent Section 111 is ambiguous with respect to its

---

that limited jurisdiction that the Court of Chancery in England possessed at the time of the American Revolution, or such jurisdiction as has been conferred upon it by the Delaware General Assembly.").

30 *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

31 *See LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 & n.13 (Del. 2007) (stating that "[t]he goal of statutory construction is to determine and give effect to legislative intent" and that such intent can be derived from a statute's synopsis.).

application to foreign entities, the synopsis appears to resolve that ambiguity by limiting Section 111's application to Delaware corporations. Therefore, I am not persuaded that Section 111 gives this Court a basis for exercising subject matter jurisdiction over Darby's claims related to interpreting AHI's Articles.

3. Subject matter jurisdiction under the equitable cleanup doctrine[32]

a. This Court has subject matter jurisdiction over the complaint BIH originally filed in the Superior Court

When BIH filed its complaint in the Superior Court, it sought a declaratory judgment either that there was never a "fundamental dispute" or that any "fundamental

---

[32] A large portion of the briefing and argument in this case focused on whether Darby could be entitled to specific performance for an anticipatory breach. Because I find that this Court has subject matter jurisdiction under the cleanup doctrine, I need not resolve that issue. I note, however, that in the context of this specific case, BIH and Ryan's argument is hypertechnical and unpersuasive. I heard argument on BIH and Ryan's motion to dismiss on August 19, 2013. Although disputed, Darby claimed the Closing Date under the Shareholders' Agreement and the Articles was August 31, 2013, meaning that if BIH and Ryan did not honor Darby's Put Right at that time, it would be an actual, not anticipatory, breach of the Shareholders' Agreement and the Articles. Therefore, there was never a real possibility in this case that BIH and Ryan could be ordered to specifically perform a contractual obligation before the agreement itself required them to act. I am skeptical that in a situation such as this, where a request for specific performance was, as a practical matter, neither illusory nor premature, that dismissal for lack of subject matter jurisdiction would be appropriate. *See Carteret Bancorp, Inc. v. Home Gp., Inc.*, 13 Del. J. Corp. L. 1115, 1124 (1988) ("an anticipatory repudiation theory will not support specific performance relief prior to the time the parties themselves agreed that the performance was due."). Even if I found Ryan and BIH's argument persuasive, any dismissal I granted under Rule 12(b)(1) would be without prejudice. The fact that Darby could cure the alleged jurisdictional defect immediately by refiling the exact same complaint supports the conclusion that it would not be proper, in this instance, to dismiss Darby's claims on the grounds that a party is not entitled to specific performance in an anticipatory breach action.

dispute" had been resolved within ten business days of the February 15, 2013 Board meeting. In addition, BIH also requested that, if the Superior Court did not grant any of the declaratory relief requested, it would enter "an order re-setting the 10 business day dispute resolution period referenced in Section 5.7.1 of the Agreement from the date of this Court's disposition of this case."[33] In other words, if BIH lost, it was asking the court to grant it a "do over" rather than hold that it was obligated to honor Darby's Put Right under the Shareholders' Agreement or the Articles. On March 18, 2013, Darby moved to transfer BIH's complaint to this Court on the grounds that the Superior Court lacked subject matter jurisdiction over BIH's request for equitable relief.

On April 29, 2013, Judge Jurden granted Darby's motion, and transferred BIH's complaint to this Court pursuant to 10 *Del. C.* § 1902. Section 1902, entitled "Removal of actions from courts lacking jurisdiction," states that "[n]o civil action, suit, or other proceeding brought in any court of [Delaware] shall be dismissed solely on the ground that such court is without jurisdiction of subject matter . . . . Such proceeding may be transferred to an appropriate court for hearing and determination."[34] Judge Jurden did not detail her reasons for transferring BIH's complaint, but the order transferring the case under Section 1902 indicates that Judge Jurden concluded that she did not have subject matter jurisdiction over the case. The only readily apparent reason the Superior Court would not have had subject matter jurisdiction over BIH's declaratory judgment action

---

[33] BIH's Compl. Prayer for Relief ¶ C.

[34] 10 *Del. C.* § 1902.

was because BIH also was seeking an equitable reset as an alternative form of relief, and such an equitable remedy was beyond the jurisdiction of the Superior Court.

None of the parties named in the BIH complaint sought to reargue or appeal Judge Jurden's transfer order. Nor have any of the parties to the consolidated action challenged this Court's ability to exercise subject matter jurisdiction over BIH's complaint since it was transferred here from the Superior Court. This is unsurprising because BIH does appear to be seeking equitable relief. Neither the Shareholders' Agreement nor the Articles contain any provision for a "reset" of the dispute resolution procedures once they are invoked. Furthermore, BIH and Ryan have failed to explain adequately how such a "reset" constitutes relief that is available at law and is not equitable in nature given that the ten-day dispute resolution period actually was invoked in this dispute and expired over eight months ago. I conclude, therefore, that BIH's complaint requests an equitable form of relief and that this Court has subject matter jurisdiction over BIH's equitable claim.

b. BIH's complaint and Darby's Complaint now comprise a single action

After BIH's lawsuit was transferred to this Court, Darby moved (without opposition) to consolidate its action with BIH's. In ordering the actions to be consolidated, I stated that, "[a]ll documents previously served and filed in either of the

actions consolidated herein are deemed a part of the record in the consolidated action."[35] BIH's complaint and Darby's Complaint are now equal parts of the same action.[36]

c. This Court has subject matter jurisdiction over Darby's claims under the equitable cleanup doctrine

Having determined that BIH's complaint states a claim for equitable relief, that BIH's complaint is properly before this Court, and that BIH's complaint and the Complaint are now part of a single action, I turn to Darby's argument that this Court has subject matter jurisdiction over its claims under the equitable cleanup doctrine.

"The existence of jurisdiction in this Court over even a single count . . . is sufficient for the exercise of jurisdiction over the remaining counts under the cleanup doctrine."[37] Furthermore, obtaining jurisdiction over additional parts of a controversy through the cleanup doctrine, regardless of whether those other counts are equitable in

---

35 Order of Consolidation ¶ 4.

36 BIH and Ryan aver that BIH's complaint should be viewed as a counterclaim to the Complaint, and that under longstanding federal question jurisprudence, a counterclaim cannot serve as the basis for subject matter jurisdiction. BIH and Ryan's Reply Br. 9 (and the cases cited therein). Even if I were to determine that federal question jurisprudence is analogous and applicable in this case, BIH and Ryan's argument would not be persuasive. BIH's complaint in the Superior Court and the Complaint in this Court were filed within minutes of one another. There is no principled basis for me to decide, as a matter of law, that one of these simultaneously filed, mirror-image actions should be given precedence over the other for purposes of determining subject matter jurisdiction. I decline, therefore, to attach legal significance to whether BIH's complaint ultimately might be dubbed the "complaint" or the "counterclaim" in this consolidated action.

37 *Duff v. Innovative Discovery LLC*, 2012 WL 6096586, at *7 (Del. Ch. Dec. 7, 2012).

nature, can be appropriate for "any of several reasons, including to resolve a factual issue which must be determined in the proceedings; to avoid multiplicity of suits; to promote judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law."[38]

BIH and Darby filed mirror-image complaints. Their claims are closely intertwined and arise from the identical set of facts.[39] Moreover, it appears that virtually all of the relevant factors discussed in *Medek* weigh in favor of applying the cleanup doctrine in this instance. Because this Court has jurisdiction over at least BIH's claims, I am convinced that failing to apply the cleanup doctrine to Darby's claims, which are inextricably linked with BIH's, would undermine judicial efficiency and be contrary to the interests of justice.[40] Therefore, I conclude that it is appropriate to apply the cleanup

---

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

39 This supports the application of the cleanup doctrine. *See Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 150 (Del. Ch. 1978) ("Of great importance is whether the facts involved in the equitable counts and in the legal counts are so intertwined as to make it undesirable or impossible to sever them.").

40 10 *Del. C.* § 1902 states that it "shall be liberally construed to permit and facilitate transfers of proceedings between the courts of this State in the interests of justice." Judge Jurden determined that BIH's claims could not be heard properly in the Superior Court. It is in the interest of justice to have this matter litigated as expeditiously as possible in a single forum where all parties are capable of pursuing simultaneously all of the relief that they seek. Ryan and BIH neither challenged this Court's power to exercise subject matter jurisdiction over their complaint, nor did they oppose the consolidation of their action with Darby's. Under these circumstances, sending either BIH's or Darby's cause of action to the Superior Court would be contrary to the interests of justice.

doctrine to exercise jurisdiction over Darby's claims, and I deny BIH and Ryan's motion to dismiss the Complaint pursuant to Rule 12(b)(1).

B. The 12(b)(6) Claim

1. Legal standard

Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Delaware Supreme Court,[41] "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[42] That is, when considering such a motion, a court must:

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[43]

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[44] If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the

---

41 *See Winshall v. Viacom Int'l, Inc.*, 2013 WL 5526290, at *4 n.12 (Del. Oct. 7, 2013).

42 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs., LLC*, 27 A.3d 531, 536 (Del. 2011) (footnote omitted).

43 *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

44 *Id.* at 537 & n.13.

motion to dismiss.[45] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[46] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[47]

2. It is reasonably conceivable that there is an unresolved "fundamental dispute"

Before deciding whether Darby has stated a claim for anticipatory breach of the Shareholders' Agreement and the Articles, I first must consider whether Darby has a colorable claim that it is entitled to exercise its Put Right. Some tension has existed between Darby and Defendants regarding the timing and structure of a sale of AHI for several years. That tension came to a head in February 2013 when Darby initiated the dispute resolution process prescribed by the Shareholders' Agreement and the Articles. On February 15, 2013, during a telephonic meeting of the Company's Board, "Ryan and his directors explicitly acknowledged that Darby, Ryan, and BIH were in 'dispute resolution' mode under the Shareholders' Agreement and the Articles and had a contractual obligation to resolve the dispute within ten business days."[48] In the days following the February 15 Board meeting, Darby and varying combinations of BIH,

---

45 *Id.* at 536.

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

47 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

48 Compl. ¶ 42.

Ryan, and Sistare attempted to negotiate mutually acceptable conditions to sell the Company.

As of March 4, 2013, ten business days after the February 15 Board meeting, Darby alleges that the parties had "irreconcilable differences on several key points." Specifically, Darby took issue with:

> (i) Ryan's and BIH's refusal to consider an asset sale without a pre-set net proceeds guarantee, (ii) their demand that Darby waive its Put Right and agree to a standstill if a transaction were not achieved by a specified date, (iii) [Ryan's and BIH's] insistence that no transaction could close if they believed it was inconsistent with their fiduciary duties or, in the alternative, if it did not meet specified net proceeds; and (iv) their insistence on restrictions on due diligence that would impede the efforts to sell the Company.[49]

Darby found these positions unacceptable because it believed that "(i) an asset sale is the structure most likely to be preferred by potential buyers, (ii) there is no 'sunset' to the Put Right, (iii) there is no 'fiduciary out' to the Put Right," and (iv) it should not agree in advance to a minimum net proceeds amount without first testing the market.[50] It is at least reasonably conceivable, therefore, that the parties disagree about the timing and structure of any sale of AHI. Because a dispute regarding "any merger or consolidation" of AHI is specifically referenced as an example of a "fundamental dispute concerning the management, business or strategic direction of the Company," it is

---

[49] Compl. ¶ 50.

[50] *Id*.

reasonably conceivable that Darby was entitled to declare the existence of a deadlock under the Shareholders' Agreement and the Articles on March 4, 2013.

The fact that counsel for BIH and Ryan sent Darby an email on March 4 stating that they support a "sale of 100% of the shares of the Company," does not establish definitively that the dispute between the parties had been resolved. Even if the e-mail indicated that BIH and Ryan agreed with Darby's proposed timetable to sell AHI, it does not address, for example, Darby's position that it was important that ownership of AHI could be transferred via an asset sale, as well as through a sale of shares in the Company. Yet, the structure of any change of control transaction for AHI had been a point of contention between the parties since at least February 2012. Nothing in BIH and Ryan's email even speaks to that issue, let alone moots it. Drawing all reasonable inferences in Darby's favor as I must at this stage of the proceedings, it is reasonably conceivable that on March 4, 2013, ten business days after the parties failed to settle their differences at a Company Board meeting, they had an outstanding and irreconcilable "fundamental dispute" between them. Therefore, it is reasonably conceivable that Darby was entitled to declare a deadlock and pursue its Put Right before it filed this lawsuit.

3. Darby has pled sufficiently the elements of anticipatory breach

Having determined that Darby has pled a colorable claim that it is entitled to exercise its Put Right, I turn to whether Darby has alleged adequately that Defendants breached their obligations under the Shareholders' Agreement and the Articles. BIH and Ryan argue that the Complaint fails to allege that they made a positive and unequivocal statement repudiating their obligations under either the Shareholders' Agreement or the

Articles. Darby avers that the Complaint states a claim for a present, not an anticipatory, breach of contract. Darby contends further that even if its breach claims are considered anticipatory, the Complaint, BIH's complaint, and Defendants' briefing on their motion to dismiss all belie BIH and Ryan's argument that Darby has failed to allege that BIH and Ryan positively and unconditionally stated that they would not honor Darby's Put Right. I find Darby's argument persuasive.

"A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions. Repudiation may be accomplished through words or conduct, but must be positive and unconditional."[51] The Complaint alleges that BIH and Ryan "refuse to recognize the validity of Darby's right to exercise the Put Right and have repudiated their obligations under the Shareholders' Agreement and the Articles."[52] Darby also alleges that BIH, Ryan, and de Brito have stated that "they will not accept and pay for Darby's shares of AHI on the terms and conditions set forth" in the Shareholders' Agreement and in the Articles.[53] These allegations support a reasonable inference that Defendants have positively and unconditionally repudiated their obligations to honor Darby's Put Right.

In addition, with respect to the requirement that there be a "fundamental dispute," Darby alleges that, "Ryan and BIH dispute the existence of this dispute." In support of

---

51 *Henkel Corp. v. Innovative Brands Hldgs., LLC*, 2013 WL 396245, at *8 (Del. Ch. Jan. 31, 2013) (internal quotations and citations omitted).

52 Compl. ¶ 13.

53 *Id*. ¶¶ 55, 59.

that allegation, Darby cites BIH and Ryan's March 4 email and statements their counsel made before Darby filed this action denying the existence of a fundamental dispute. Darby's Put Right exists only if there is a fundamental dispute. Having taken the position that there is no fundamental dispute, Defendants BIH and Ryan necessarily deny that Darby has a Put Right. It is reasonable to infer, therefore, that in asserting that there is no fundamental dispute and that Darby does not have a Put Right, Defendants have indicated that they do not intend to purchase Darby's shares in accordance with the terms of the Shareholders' Agreement and the Articles.

Defendants' actions in this litigation also reflect their intentions with respect to Darby's Put Right. Less than thirty minutes after Darby filed the Complaint, BIH filed its own complaint for declaratory judgment in the Delaware Superior Court.[54] In its complaint, BIH alleged that "Darby has fabricated this alleged 'fundamental dispute' so that it can declare the existence of a 'deadlock' for purposes of exercising a put option pursuant to the Shareholders' Agreement."[55] BIH also stated that, "[i]f allowed to exercise that option, Darby would be able to sell its shares in the Company for many tens

---

[54] This Court can take judicial notice of publicly available facts that are not subject to reasonable dispute, and consider those facts on a motion to dismiss. *In re Gen. Motors S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006). BIH's complaint is a publicly filed document. The complaint's contents are subject to reasonable dispute if they are relied on for their truth. To the extent the complaint's contents are used as examples of BIH's own statements, however, the contents are not subject to reasonable dispute. Therefore, for purposes of this motion to dismiss, I have considered BIH's complaint insofar as it reveals statements BIH made on the same date Darby filed its Complaint, but not for the truth of those statements.

[55] BIH's Compl. ¶ 2.

of millions of dollars more than it would otherwise receive from the sale of all of the Company's shares to a third party."[56] BIH's allegations support a reasonable inference that BIH, and its controllers, clearly have indicated that they will not purchase Darby's shares pursuant to the Put Right's terms.

BIH's request for relief in its complaint further supports such an inference. As discussed *supra*, BIH is requesting a judicial declaration that there never was a fundamental dispute or that the fundamental dispute has been resolved. In addition, as a form of alternative relief, BIH asks that if this Court declines to make either of those declarations that it nevertheless order a "reset" of the ten business day dispute resolution period referenced in Section 5.7.1 of the Shareholders' Agreement to be measured from the date of this Court's disposition of the case. As a practical matter, any such reset would postpone the Put Right Closing Date for a minimum of 190 days from the *date of the Court's disposition* of the case. Thus, even if BIH's litigation efforts in this matter are unsuccessful, BIH still seeks to avoid honoring Darby's Put Right per the terms of the Shareholders' Agreement and the Articles, and instead seeks to have a second opportunity to negotiate. These actions also support a reasonable inference that BIH has conveyed a positive and unconditional refusal to perform under the terms of the Shareholders' Agreement or the Articles.

---

56 *Id.*

BIH's position regarding the Put Right has remained unchanged since it and Darby filed their respective complaints.[57] In the briefing on this motion to dismiss, BIH criticized Darby's action in commencing this litigation as having been done: "[m]ere minutes after declaring a 'deadlock' on a *fabricated* 'fundamental dispute' regarding the management, business, or strategic direction of [AHI] so that it purportedly could exercise its *supposed right* to put all of its shares in AHI to BIH, Ryan, and Defendant Paulo De Brito."[58] According to Defendants, Darby's request that BIH, Ryan, and de Brito "accept and pay for all of Darby's shares of AHI stock at a catastrophically high valuation in accordance with Darby's purported put right," amounts to an attempt to procure an "unwarranted, unearned, and legally unsupportable windfall."[59] I am satisfied that Defendants' stated position with respect to Darby's Put Right, in addition to the allegations in the Complaint and BIH's own cause of action, reflect a positive and unconditional unwillingness to purchase Darby's stake in AHI under the terms of either

---

57 Defendants conceivably could have mooted Darby's claims by retracting their repudiation. *See Carteret Bancorp, Inc. v. Home Gp., Inc.*, 13 Del. J. Corp. L. 1115, 1125 (Del. Ch. 1988) ("A suit seeking specific performance is, however, in effect, an assertion not that the promisee elects to finalize the breach claimed and calculate his damages now, but rather that the promisee treats the mutual obligations as being still in force. Where the promisee does so, there is no purpose to be served by treating the filing of suit as cutting off the promisor's power to retract a repudiation."). To date, there is no evidence that Defendants have made any retraction.

58 BIH and Ryan's Opening Br. 1 (emphasis added).

59 *Id.* at 2.

the Shareholders' Agreement or the Articles. Therefore, Darby has pled adequately a claim for anticipatory breach of the Shareholders' Agreement and the Articles.[60]

III. CONCLUSION

For the foregoing reasons, BIH and Ryan's motion to dismiss is denied in its entirety.

IT IS SO ORDERED.

---

[60] Darby claims that the Closing Date was August 31, 2013. Defendants argue that the Closing Date was at least thirty days after that. Regardless of which party is correct, it appears that the Closing Date has passed. There is no indication that Darby's Put Right has been honored.