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Chancery Court Chambers
Leonard J. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, August 5, 2016
9:18 a.m.

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BEFORE: HON. TAMIKA MONTGOMERY-REEVES, Vice Chancellor

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TELEPHONIC RULINGS OF THE COURT ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

CHANCERY COURT REPORTERS
Leonard J. Williams Justice Center
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Wilmington, Delaware 19801
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1 APPEARANCES: (Via teleconference)

2 PETER B. LADIG, ESQ.

3 MEGHAN A. ADAMS, ESQ.

4 ELIZABETH A. POWERS, ESQ.

5 Morris James LLP

6 for Plaintiff

7 STEPHEN D. DARGITZ, ESQ.

8 Manion Gaynor & Manning LLP

9 -and-

10 CRAIG J. FRANCO, ESQ.

11 MATTHEW KAPUSCINSKI, ESQ.

12 of the Virginia Bar

13 Odin, Feldman & Pittleman, P.C.

14 for Defendant

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1 THE COURT: Good morning, everyone.
2 Before I start, Debi, are you on the
3 line?

4 THE COURT REPORTER: Yes, Your Honor.

5 THE COURT: Okay. Great.

6 Thank you all for jumping on the phone
7 so early and on such short notice. I wanted to get
8 you together to give you the benefit of my ruling.

9 This matter of contract interpretation
10 is before me on the parties' cross motions for summary
11 judgment. As authorized by the Delaware LLC Act,
12 Quivus Systems' LLC agreement requires Quivus, to the
13 full extent allowed by the laws of the State of
14 Delaware, to indemnify and advance expenses to its
15 present CEO. Harrison seeks advancement for expenses
16 arising from a lawsuit that Quivus filed against him
17 for actions he allegedly took while acting as CEO of
18 Quivus. This ruling determines whether the LLC
19 agreement requires Quivus to advance Harrison's
20 expenses incurred defending actions he took as Quivus'
21 CEO.

22 For the following reasons, Quivus'
23 summary judgment motion is denied and Harrison's
24 summary judgment motion is granted.

1 Defendant Quivus is a Delaware LLC
2 with two members: Quivus Holdings and Soroof
3 International. Soroof owns 55 percent of Quivus.
4 Quivus Holdings owns the remaining 45 percent.
5 Non-party Soroof is a corporation organized under the
6 laws of the Kingdom of Saudi Arabia and is owned and
7 operated by His Highness Prince Bander Bin Adbulla Bin
8 Mohammed Al-Saud, whom I will refer to as "Prince
9 Bander." Prince Bander also serves as president and
10 CEO of Soroof.

11 Plaintiff, John E. Harrison, is the
12 sole member and manager of Quivus Holdings, which is a
13 Delaware LLC. At all times relevant to the
14 allegations of the complaint, Harrison served as the
15 CEO of defendant Quivus.

16 Harrison and Prince Bander became
17 acquainted in 2006, when Harrison's friend and former
18 colleague sent Prince Bander a memorandum regarding a
19 strategic business opportunity. This included a
20 potential joint venture between Soroof and Quivus
21 Holdings regarding systems integration opportunities
22 with the Kingdom of Saudi Arabia.

23 In-person meetings between Quivus
24 Holdings, represented by Harrison, and Soroof,

1 represented by Prince Bander and Soroof's chief
2 operating officer, first occurred in Saudi Arabia in
3 February 2007. After meetings and dinners regarding
4 the joint venture, Harrison provided a document
5 outlining the proposals for the joint venture based on
6 those conversations. By the end of the month,
7 Harrison provided a draft MOU that outlined the terms
8 of the joint venture. Negotiations regarding the
9 terms of the MOU continued for several months by
10 telephone and e-mail. Soroof later agreed to terms
11 for the joint venture and requested Harrison draft the
12 remainder of the documents to form the LLC that would
13 become Quivus Systems.

14 Bobby Leatherman, Quivus Holdings'
15 attorney and Harrison's brother-in-law, drafted the
16 initial version of the LLC agreement and provided it
17 to Soroof on June 3rd, 2007. The first draft of the
18 LLC agreement included the precise language at issue
19 here, even though the LLC agreement went through
20 several rounds of comprehensive revisions between
21 June 3rd and August 14th, 2007, when Harrison, on
22 behalf of Quivus Holdings, and Prince Bander, on
23 behalf of Soroof, signed the final version.

24 The LLC agreement named Harrison as

1 the CEO and Prince Bander as chairman of the board.
2 The LLC agreement further required the board of
3 directors to consist of three members appointed by
4 Soroof and two members appointed by Quivus Holdings,
5 but Quivus Holdings never appointed any members to the
6 board.

7 The business relationship continued
8 for six years until it soured in late 2013.
9 Apparently Soroof was displeased with Harrison's
10 performance and Harrison was frustrated with Soroof
11 because it was not promoting Quivus in Saudi Arabia.
12 Soroof sent two letters to Harrison in February and
13 April 2014 requesting certain information regarding
14 Quivus.

15 Soroof removed Harrison from his
16 position as CEO of Quivus on July 1st, 2014. Harrison
17 alleges that termination failed to comply with the
18 express terms of the LLC agreement, which "...
19 require[s] the consent of at least 50% of both the
20 Soroof appointed Board members and the Quivus Holding
21 appointed Board members."

22 One year later, on July 2nd, 2015,
23 Soroof individually and derivatively on behalf of
24 Quivus filed an action against Harrison and Quivus

1 Holdings in the Superior Court for the District of
2 Columbia, which I will refer to as the "D.C. action."
3 The D.C. action challenged acts Harrison allegedly
4 took in his capacity as the CEO and manager of Quivus
5 in an eight-count complaint.

6 The claims against Harrison arise from
7 his alleged mismanagement, incompetence, and corporate
8 malfeasance, which, according to Soroof, caused Quivus
9 to lose money every year. In particular, Soroof
10 alleged that Harrison and Quivus Holdings "mismanaged
11 and looted the assets of [Quivus] and intentionally
12 disenfranchised [Soroof] by failing to appoint a Board
13 of Directors, as required by the then-effective [LLC
14 Agreement] ... and failing to submit annual budgets
15 and financial statements (audited or unaudited) to
16 [Soroof]." Soroof further alleged that Harrison
17 "looted the assets of the corporation to enrich
18 himself by using corporate funds for his personal
19 expenses and taking an unconscionably bloated annual
20 salary which, despite increasing financial losses by
21 [Quivus], was increased each year by [Harrison]
22 without [Soroof's] knowledge or approval."

23 The allegations in the D.C. action,
24 with the exception of one count, relate to actions

1 purportedly taken by Harrison in his capacity as CEO
2 of Quivus. Specifically, Soroof seeks compensatory
3 damages in the amount of \$3 million and punitive
4 damages in an amount to be determined at trial, among
5 other things.

6 In the D.C. action, Harrison filed an
7 answer and counterclaim against Soroof and Quivus. He
8 asserted four counterclaims which specifically allege
9 Quivus' financial condition was not the result of
10 misconduct on Harrison's part, but was the result of
11 Soroof and Prince Bander's failure to develop business
12 for Quivus. And in this respect, Harrison alleged
13 that Prince Bander refused to take action when
14 opportunities arose or would cause Soroof to add such
15 a large charge to the proposed price so as to price
16 Soroof and Quivus out of the market. Harrison also
17 alleged that his termination as CEO and manager of
18 Quivus violated the LLC agreement.

19 By letter dated February 23rd, 2016,
20 Harrison's counsel demanded that Quivus advance
21 certain of Harrison's expenses incurred in the D.C.
22 action pursuant to Article XI of the LLC agreement.
23 Specifically, Harrison demanded advancement for all
24 expenses, including legal fees, he incurred and would

1 continue to incur in defending against all but one
2 count in the D.C. action, as well as in prosecuting
3 his four counterclaims in the D.C. action.

4 Quivus rejected Harrison's demand on
5 March 4th, 2016, for various reasons.

6 On March 7, 2016, Harrison filed his
7 verified complaint and motion to expedite in this
8 action against Quivus. Count I alleges breach of the
9 LLC agreement for refusing his advancement demand.
10 Count II seeks fees on fees for prosecuting this
11 action.

12 On March 28th, 2016, Quivus opposed
13 the motion to expedite.

14 On March 29, 2016, Quivus filed an
15 answer, including ten affirmative defenses. After
16 Harrison's first set of interrogatories, however,
17 Quivus withdrew four of these defenses.

18 The Court heard argument on the motion
19 to expedite on April 7, 2016, where it held that, one,
20 this action is a summary proceeding and should be
21 expedited; and, two, the parties could take limited
22 discovery on contract formation.

23 Both Quivus and Harrison filed briefs
24 in support of cross motions for summary judgment on

1 May 16th and answering briefs thereto on June 1st,
2 2016.

3 Summary judgment is proper only if the
4 pleadings, depositions, and discovery on file show
5 there is no genuine issue of material fact and that
6 the moving party is entitled to judgment as a matter
7 of law. In ruling on a motion for summary judgment,
8 the Court must view the facts in a light most
9 favorable to the nonmoving party. When opposing
10 litigants make cross motions for summary judgment,
11 however, neither litigant's motion will be granted
12 unless no genuine issue of material fact exists and
13 one of the litigants is entitled to judgment as a
14 matter of law. Claims for advancement of attorneys'
15 fees are particularly well-suited for resolution by
16 way of a motion for summary judgment because the
17 relevant question turns on the application of the
18 terms of the corporate instruments setting forth the
19 purported right to advancement and the pleadings in
20 the proceedings for which advancement is sought.

21 Similar to the facts faced by this
22 Court in DeLucca v. KKAT Management LLC, "this
23 advancement dispute differs from those that typically
24 arise under the Delaware General Corporation Law"

1 Section 145 of the DGCL authorizes corporations to
2 "... indemnify any person who was or is a party or is
3 threatened to be made a party ... by reason of the
4 fact that the person is or was a director, officer,
5 employee or agent of the corporation" Thus,
6 corporate charters and bylaws providing these rights
7 have tended to track the DGCL and often hinge the
8 right to advancement on whether a corporate officer is
9 being sued by reason of the fact that she took action
10 in her official corporate capacity.

11 But this case concerns the Delaware
12 LLC Act, which provides no such qualifications.
13 Specifically, Section 18-108 provides: "Subject to
14 such standards and restrictions, if any, as are set
15 forth in its limited liability company agreement, a
16 limited liability company may, and shall have the
17 power to, indemnify and hold harmless any member or
18 manager or other person from and against any and all
19 claims and demands whatsoever."

20 Thus, Delaware courts have made clear
21 that Section 108 defers completely to the contracting
22 parties to create and to limit rights and obligations
23 with respect to indemnification and advancement.
24 Furthermore, the right to advancement is not dependent

1 upon a determination that the party in question
2 ultimately will prevail or be entitled to
3 indemnification.

4 The advancement provision here
5 provides: "Subject to any limitations set forth in
6 the [Delaware LLC] Act, the Company shall indemnify
7 and advance expenses to each present and future Member
8 or Manager of the Company (and, in either case, his
9 heirs, estate, personal representatives or
10 administrators) to the full extent allowed by the laws
11 of the State of Delaware, both as now in effect and as
12 hereafter adopted. The Company may indemnify and
13 advance expenses to any employee or agent of the
14 Company who is not a Member or Manager (and his heirs,
15 estate, personal representatives or administrators) to
16 the same extent as to a Member or Manager, if the
17 disinterested Members determine that it is in the best
18 interests of the Company to do so. The Company shall
19 also have the power to contract with any individual
20 Member, Manager, employee, or agent for whatever
21 additional indemnification the Members shall deem
22 appropriate."

23 In *Fillip v. Centerstone Linen*
24 *Services, LLC*, the Court said, "... the LLC Act gives

1 contracting parties complete discretion in
2 establishing the scope of indemnification and
3 advancement rights" Therefore, Harrison's right
4 to advancement is subject to such standards and
5 restrictions, if any, as set forth in Quivus' LLC
6 agreement. And the restrictions are few, if any.

7 Defendant does not dispute that the
8 advancement provision prescribes no limitation on the
9 types of expenses which are subject to indemnification
10 and advancement, the nature of the legal proceedings,
11 the status of the legal proceedings, or the capacity
12 in which the member or manager is subject to the
13 proceedings. Defendant does argue, however, that the
14 advancement provision qualifies the right to
15 indemnification and advancement only by stating that
16 only present and future members or managers are
17 eligible for indemnification and advancement.

18 In determining whether Harrison
19 qualifies for advancement as a present manager, the
20 Court's task is to give legal effect to the
21 advancement provision's plain language. When
22 interpreting a contract, the role of the court is to
23 effectuate the parties' intent. In doing so, a court
24 is constrained by a combination of the parties' words

1 and the plain meaning of those words where no special
2 meaning is intended. The language of the agreement
3 must therefore be the starting point. Contract terms
4 themselves will be controlling when they establish the
5 parties' common meaning so that a reasonable person in
6 the position of either party would have no exceptions
7 inconsistent with the contract language. A term in a
8 contract that is reasonably or fairly susceptible to
9 more than one interpretation is ambiguous, but the
10 parties' steadfast disagreement over interpretation
11 will not, alone, render the contract ambiguous.
12 Neither will extrinsic, parol evidence be used to
13 manufacture an ambiguity in a contract that facially
14 has only one reasonable meaning. Because the
15 advancement provision is unambiguous, extrinsic
16 evidence is not considered.

17 For the following reasons, the
18 advancement provision requires Quivus to advance
19 Harrison's expenses.

20 Defendant argues that Harrison is not
21 entitled to advancement because he is neither a
22 present nor a future manager, as the advancement
23 provision requires, but a former manager. This is a
24 curious argument for defendants to make, however, as

1 defendant both relies heavily on the principle that
2 unambiguous contract terms must be given their plain
3 meaning and asks the Court to rewrite the parties'
4 agreement to include the word "former" and construct a
5 distinction between "present" and "former" favoring
6 Quivus. Although the LLC agreement does not define
7 present or future managers, much less former managers,
8 it does define managers as, "... collectively, the
9 Chief Executive Officer, the Secretary, and each other
10 manager elected by the Members." If nothing else,
11 Harrison was a present manager when he was the CEO of
12 the company and the events underlying the D.C. action
13 occurred. But defendant argues Harrison is not
14 entitled to advancement now because he is not a
15 present manager or future manager of Quivus under the
16 agreement's plain language.

17 At oral argument, defendant conceded
18 that because the LLC agreement is silent as to when
19 indemnification and advancement rights vest, they will
20 have to be read into the agreement somehow. In this
21 regard, defendant took the position that advancement
22 rights granted under the LLC agreement vest the moment
23 a claim is made against a present manager.

24 Defendant's interpretation is

1 unreasonable, however, because it reads "future" out
2 of the LLC agreement. If one becomes a present
3 manager upon one's election by the members, then no
4 future manager has rights under the LLC agreement
5 because, by definition, they have not yet been
6 elected. Alternatively, if a future manager is akin
7 to a manager-elect, could that future manager petition
8 this Court to protect his or her advancement rights?
9 Under defendant's construction, a claim must be made
10 against a future manager for acts taken or events
11 occurring in his or her capacity as a future manager
12 before his or her rights to indemnification and
13 advancement vest under the LLC agreement. But
14 defendant explains neither who falls into this covered
15 class nor how a future manager could be subject to
16 liability for actions taken or events occurring in
17 that capacity.

18 Defendant's interpretation of "present
19 and future" brings to mind a certain Mel Brooks film
20 in which the antagonist, Dark Helmet, exploits
21 breakthrough technology in home video marketing
22 allowing him to watch the entire film while it is
23 still being made. Dark Helmet fast forwards to learn
24 the location of the protagonists, Lone Starr and

1 Princess Vespa, but becomes confused when he sees
2 himself watching himself in that exact present moment.
3 His second-in-command, Colonel Sandurz, says, "You're
4 looking at now, sir. Everything that happens now is
5 happening now," and explains that they passed then
6 just now, they're at "now" now, and they can't go back
7 to then because they missed it, but then will be now
8 soon.

9 Similarly, under defendant's
10 interpretation, the Court can explore breakthrough
11 technology to fast-forward time. According to
12 defendant, Harrison was a present manager in the past,
13 not the present. Instead, in the present, where
14 everything that happens now is happening now, Harrison
15 is a former manager, or at least became one just now,
16 but we can't go back to then -- when Harrison was a
17 present manager -- because we missed it. As
18 explained, however, this interpretation is not
19 reasonable because it reads "present" and "future" out
20 of the LLC agreement.

21 Notwithstanding defendant's argument
22 to the contrary, its interpretation is unreasonable
23 also because it renders the phrase "his heirs, estate,
24 personal representatives or administrators"

1 meaningless. Because, under defendant's reading, a
2 present manager's right to advancement vests the
3 moment a claim against him or her is made, a present
4 manager could die or become incapacitated before or
5 after vesting. But in either case, the "heirs,
6 estate, personal representatives or administrators"
7 phrase changes nothing. Specifically, vested rights
8 already succeed to a present manager's heirs, estate,
9 personal representatives, or administrators by
10 operation of law, and a former manager still has no
11 rights to advancement under defendant's
12 interpretation.

13 I read the LLC agreement differently
14 than defendant. Delaware law is clear that contracts
15 must be read as a whole to give effect to each term,
16 and the Court will not adopt an interpretation that
17 produces an unreasonable result. So "present" and
18 "future" must be read consistently with each other and
19 in a way where both words have meaning.

20 In this case, the simplest
21 interpretation is not only reasonable and unambiguous,
22 but also uncontroversial. When the parties adopted
23 the LLC agreement, Quivus became bound to provide each
24 then-present member or manager of the company with

1 mandatory indemnification and advancement. Quivus
2 also became bound to provide mandatory indemnification
3 and advancement to anyone who became a member or
4 manager of the company sometime thereafter -- that is,
5 in the future. Thus, the class covered by the
6 advancement provision includes anyone who was a member
7 or manager when the parties adopted the LLC
8 agreement -- a present manager or member -- or anyone
9 who later became a manager or member -- a future
10 member or manager. Further, those covered were
11 entitled to indemnification and advancement to the
12 full extent allowed by the laws of Delaware, not only
13 as the laws were in effect then, but also to the full
14 extent allowed by any laws adopted by Delaware after
15 the LLC agreement became effective.

16 Quivus argues, however, that
17 interpreting the LLC agreement to grant the fullest
18 advancement rights permitted by law to present,
19 future, and former members renders the phrase
20 "whatever additional indemnification" meaningless.
21 Quivus is mistaken. The phrase "whatever additional
22 indemnification" appears in a sentence giving Quivus
23 the power to create contractual indemnification rights
24 beyond those already provided in the LLC agreement.

1 The difference between an independent indemnification
2 agreement and the LLC agreement is that the LLC
3 agreement can be amended unilaterally, at least with
4 respect to prospective indemnification. For example,
5 if the members hire a new CEO who insists on receiving
6 the same broad indemnification and advancement rights
7 in an independent indemnification agreement, that
8 agreement remains valid even if the members later
9 amend the LLC agreement to scale back Quivus'
10 indemnification and advancement obligations. Thus, if
11 nothing else, "whatever additional indemnification"
12 includes contractual protection against Quivus
13 reducing rights prospectively by amending the LLC
14 agreement.

15 Vice Chancellor Laster's discussion of
16 vested rights and Delaware's public policy favoring
17 advancement in Marino v. Patriot Rail Corporation
18 supports this outcome. In Marino, the company agreed
19 in its certificate of incorporation to "indemnify and
20 to advance expenses on behalf of its officers and
21 directors to the fullest extent permitted by law in
22 existence either now or hereafter." No one disputed
23 whether the company would have been obligated to
24 provide advancement if Marino had been sued while

1 still an officer or director, but, similar to this
2 case, because Marino resigned from his position when a
3 stock sale closed, the parties disputed whether the
4 company's certificate continued to cover Marino's
5 claims for advancement after he ceased to be an
6 officer or director.

7 As an initial matter, I recognize that
8 Marino interprets and applies portions of the DGCL
9 that neither the LLC Act nor the LLC agreement
10 include. Marino can be distinguished on this basis.
11 On the other hand, the portions of Marino supporting
12 the outcome of this case concern principles of
13 contract interpretation and public policy that I
14 consider applicable.

15 As for public policy, Delaware's
16 public policy foundation for advancement and
17 indemnification rights is to encourage capable men and
18 women to serve as corporate directors, secure in the
19 knowledge that expenses incurred by them in upholding
20 their honesty and integrity as directors will be borne
21 by the corporation they serve.

22 In *Homestore v. Tafeen*, the Supreme
23 Court said, "Advancement is an especially important
24 corollary to indemnification as an inducement for

1 attracting capable individuals into corporate
2 service." And as this Court noted in Marino, "The
3 public policy foundation for advancement and
4 indemnification rights has particular salience when
5 lawsuits target former directors and officers for
6 actions taken during their periods of service." That
7 this case concerns the LLC Act and not the DGCL does
8 not change the business incentive and public policy
9 justifications for indemnification and advancement.
10 The relevant difference here is that the LLC Act is
11 less paternalistic than the DGCL by requiring the
12 parties to contract affirmatively for the public
13 policy benefits of mandatory advancement and
14 indemnification. And the parties here unquestionably
15 grant mandatory advancement and indemnification rights
16 despite having no obligation to do so.

17 Time and time again, this court has
18 pointed out that sage businesspersons who wish to
19 avoid situations like this must exercise the
20 contractual freedom afforded to them under Delaware
21 law to delimit the circumstances in which they are
22 obligated to advance funds to, or ultimately
23 indemnify, employees and other officials. There is no
24 requirement that advancement provisions be written

1 broadly or in a mandatory fashion. But when an
2 advancement provision is, by its plain terms,
3 expansively written and mandatory, it will be enforced
4 as written. The advancement provision here is such a
5 provision.

6 The Court's discussion of vested
7 rights in Marino also is relevant here because the
8 advancement provision is silent as to when a present
9 or future member or manager's rights to advancement
10 vests. True, Marino recognizes that Section 145's
11 "... structure implements the public policy foundation
12 for advancement and indemnification rights ...," but
13 it also recognizes that, "[a]s a matter of black
14 letter contract law, [a] covered person's service
15 provides the consideration necessary to form a binding
16 contract. ... Because the individual's rights vest at
17 that point, they cannot be amended retroactively
18 unless the original grant of protection specifically
19 contemplated the possibility of after-the-fact
20 amendment." Further, in Marino, the Court observed
21 that "[b]ecause indemnification and advancement rights
22 are triggered by actions, suits, and proceedings,
23 there necessarily will be an event that gives rise
24 later to litigation. Whether a particular act or

1 omission will give rise to litigation often cannot ...
2 be known at the time of the act. It seems more
3 straightforward to me, therefore, to speak of vesting
4 through service."

5 In this regard, I agree with Marino's
6 reasoning, which applies to indemnification and
7 advancement rights regardless of the governing
8 statute. Thus, similar to Marino, when Harrison
9 agreed to serve Quivus as a present manager, he became
10 entitled to receive mandatory indemnification and
11 advancements to the fullest extent of Delaware law.
12 That coverage was part of the consideration that the
13 company offered in exchange for his service. Through
14 service, Harrison's coverage vested.

15 In light of Harrison's success in
16 pursuing his advancement claim, he is also entitled to
17 fees on fees. In Delaware, the right to advancement
18 "to the fullest extent of the law" includes, absent an
19 express exclusion in the governing documents,
20 reasonable fees and expenses incurred in prosecuting
21 an advancement action. The relevant documents here do
22 not expressly preclude an award of fees on fees and,
23 in fact, provide advancement to the fullest extent
24 provided by Delaware law. Accordingly, Harrison is

1 entitled to his fees reasonably incurred in pursuing
2 this action.

3 Next I address Quivus' affirmative
4 defenses. In its March 29th, 2016, answer, Quivus
5 pled the following ten reasons why Harrison is not
6 entitled to advancement: one, failure to state a
7 claim; two, lack of standing; three, laches and
8 estoppel; four, unclean hands; five, failure of
9 consideration, conditions precedent and conditions
10 subsequent; six, prior material breach of the LLC
11 agreement, including breach of the implied covenant of
12 good faith and fair dealing; seven, offset and/or
13 setoff for money Harrison purportedly owed to Quivus
14 exceeding the amount sought; eight, fraud, deceit or
15 misrepresentation; nine, failure to join indispensable
16 parties; and, ten, unjust enrichment. After
17 Harrison's first set of interrogatories, however,
18 Quivus voluntarily withdrew the fifth, sixth, seventh,
19 and ninth of these affirmative defenses. Then, for
20 the first time, in its opening brief, Quivus raised an
21 eleventh defense, impossibility.

22 Quivus waived its impossibility
23 defense by failing to assert it in a timely manner.
24 Whether a defendant has waived an affirmative defense

1 by failing to assert it in a timely manner is left to
2 the discretion of the Court. Here, given the
3 compressed schedule of this case, by raising its
4 impossibility defense after the close of discovery,
5 Quivus prejudiced Harrison's ability to challenge and
6 rebut it. In my discretion, I consider this defense
7 waived.

8 In addition, Quivus intentionally and
9 voluntarily withdrew four of its affirmative defenses
10 in response to Harrison's first set of
11 interrogatories, where it said, "Defendant hereby
12 withdraws Affirmative Defenses numbered 5-7 and 9 in
13 Defendant's Answer filed March 29, 2016." Those
14 defenses include failure of consideration, conditions
15 precedent and conditions subsequent; prior material
16 breach of the LLC agreement, including breach of the
17 implied covenant of good faith and fair dealing;
18 offset and/or setoff for money Harrison purportedly
19 owed to Quivus exceeding the amount sought; and
20 failure to join indispensable parties. A waiver
21 occurs when a person intentionally relinquishes an
22 available contention or objection. Accordingly,
23 Quivus waived its right to assert them on this motion.

24 This is the case even with respect to

1 the affirmative defenses Quivus attempted to revive in
2 its opening brief to this motion on May 16th, 2016.
3 Moreover, to the extent Quivus argues that it did not
4 learn of the basis for its prior material breach and
5 breach of the implied covenant of good faith and fair
6 dealing defenses until Harrison argued at his
7 deposition that he is still the CEO, the Court awarded
8 Harrison advancement above without regard to this
9 argument. Thus, this issue is moot.

10 Last, it is settled Delaware law that
11 issues not briefed are deemed waived. In its opening
12 brief, Quivus fails to argue the remaining affirmative
13 defenses. Accordingly, those affirmative defenses are
14 waived.

15 For these reasons, defendant's summary
16 judgment motion is denied and plaintiff's summary
17 judgment motion is granted.

18 Those are my rulings. Does anyone
19 have any questions?

20 MS. ADAMS: Yes, Your Honor. This is
21 Meghan Adams from Morris James.

22 We had also talked at the hearing
23 about how we would proceed forward with the right for
24 the submission of bills. I was just wondering if Your

1 Honor had any thoughts on that?

2 THE COURT: My gut would be to do
3 something like in the Konstantino v. AngioScore case.
4 That's a Chancellor Bouchard case. There is a really
5 good order that you can use that I have been
6 implementing in other cases. I think that's a great
7 place to start. If you-all are able to agree to
8 something different, then I'm okay with that, I'm
9 amenable to that. But if you aren't and you come
10 before me, that's probably what I'm going to
11 implement.

12 MS. ADAMS: Okay. Your Honor, we will
13 work through that and we will take a draft and provide
14 it to the other side. And if we are not able to reach
15 agreement, then we will contact you.

16 THE COURT: Okay. Thank you.
17 Is there anything else?

18 MR. FRANCO: Not from the defendants,
19 Your Honor.

20 THE COURT: All right. Thank you all
21 for your time today. Have a great weekend.

22 MS. ADAMS: Your Honor, just --

23 THE COURT: Hello?

24 MS. ADAMS: Do you want us to do an

1 order implementing your decision today?

2 THE COURT: Do you need an order? You
3 don't have to. I'm fine with this being so ordered.

4 What I would like to see is the order
5 dealing with how you're going to address this going
6 forward. I do want to see that and enter that. But I
7 don't necessarily need an order for this --

8 MS. ADAMS: Okay.

9 THE COURT: -- ruling today.

10 MS. ADAMS: Thank you, Your Honor.

11 THE COURT: Okay. Thank you. Thank
12 you all.

13 Is there anything else?

14 MS. ADAMS: No. Thank you.

15 THE COURT: Okay. Great. Have a good
16 weekend.

17 MS. ADAMS: You, too. Thank you.

18 THE COURT: Bye.

19 (Teleconference concluded at
20 9:49 a.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 29 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 8th day of August, 2016.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public