IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EDGEN GROUP INC.,	:	
	:	
Plaintiff,	:	
	:	
v	:	Civil Action
	:	No. 9055-VCL
JASON GENOUD,	:	
	:	
Defendant.	:	

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Chancery Court Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, November 5, 2013
10:30 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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TELEPHONIC HEARING ON PLAINTIFF'S MOTIONS FOR EXPEDITED PROCEEDINGS AND FOR TEMPORARY RESTRAINING ORDER and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

APPEARANCES: (via teleconference)

P. CLARKSON COLLINS, JR., ESQ.
JOSEPH R. SLIGHTS, III, ESQ.
JASON C. JOWERS, ESQ.
BRETT M. McCARTNEY, ESQ.
Morris James LLP
-and-
STEVEN B. FEIRSON, ESQ.
JONI S. JACOBSEN, ESQ.
of the Illinois Bar
Dechert LLP
for Plaintiff

ALSO PRESENT:

RANDALL J. BARON, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP

ALEXANDER R. BILUS, ESQ.
of the Pennsylvania Bar
Dechert LLP

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THE COURT: Good morning. This is Travis Laster speaking.

MR. SLIGHTS: Good morning, Your Honor. It's Joe Slights from Morris James. If I could begin with some introductions.

THE COURT: That would be wonderful.

MR. SLIGHTS: With me here at Morris James we have the entire team assembled, actually. Clark Collins is here, Jason Jowers, and Brett McCartney. Also with us in our conference room is Steven Feirson from the Dechert firm, and we have on the line with us as well Joni Jacobsen, also from the Dechert firm, who is calling in from Chicago. And that completes the roster of attorneys on behalf of the plaintiff.

I believe that we have two additional attorneys on the line, Randall Baron and Sandy Bilus, who are -- I'm sorry? Oh, Sandy is with -- I'm sorry. Sandy is on our side of the ledger, but I believe Randy Baron is counsel to the plaintiff in the Louisiana action, and as we understand it is just going to be listening in today but not participating.

MR. BARON: Good morning, Your Honor.

THE COURT: Mr. Baron, is that

correct?

MR. BARON: Yes, Your Honor. Just so that I can make it clear on the record, I have a good relationship with the Court. I was asked to be on the call. I'm happy to do so, and I'm happy to provide information that the Court wants.

I do not have authority to speak on behalf of Mr. Genoud. I have not been retained by him. It's his view that the Court does not have personal jurisdiction over him, and he hasn't been served in the case. So I'm a little bit stymied as to what I think I can ethically do, but to the extent I can be a friend of the Court and provide any information, as always, I am happy to do so.

THE COURT: Thank you.

Well, the only person missing from the Dechert team is my ex-clerk, Ms. Newell, who I am very happy to say has joined Dechert. But I'm sure that she's off profitably billing on other matters, or at least I hope she is.

So, Mr. Slights, do you want to take it away?

MR. SLIGHTS: Yes, Your Honor. I may, with the Court's permission, lateral to Mr. Feirson to

the extent the Court has specific questions regarding the Louisiana action. I am not entered in that action, and Mr. Feirson is certainly much more familiar with what's occurred there and, importantly, not occurred there.

If I could start with just some procedural issues first, and to address specifically the service issue. I sent a letter to the Court yesterday outlining our efforts thus far to achieve service or process upon Mr. Genoud, and those efforts have been extensive. And I won't reiterate what we've already stated in the letter except to state that those efforts are ongoing, and we are confident we can achieve service. We did ask plaintiff's counsel to assist us in that regard, either to agree to accept service or to provide a residence address for Mr. Genoud, and they have thus far refused to do that.

We do have what we believe to be an employment address, which is all that we've been able to secure. And if necessary, we will attempt to achieve service on Mr. Genoud at that address, mindful of our obligations under Delaware law and under the Hague Convention.

We've also, I just want to let the

Court know, made extensive efforts to provide notice of today's hearing to the plaintiff's counsel in the Louisiana action. We supplied our papers to Louisiana plaintiff's counsel Thursday night immediately after they were filed, and then were in pretty regular e-mail communication with them yesterday regarding the status of scheduling this morning's hearing.

So we do believe, for all of those reasons, that we have complied with our notice obligations under Rule 65(b). And with that said, our intent, as I mentioned, is to effect service upon Mr. Genoud. And once we do that, we believe that this Court will be able lawfully to exercise personal jurisdiction over him.

And in this regard, the Delaware forum selection clause in the Edgen charter is key, really, to all aspects of our motion, but it's also key to our argument with respect to personal jurisdiction. And in our motion papers we cite to the Carlyle decision from our Supreme Court, among others, for the proposition that parties to a forum selection clause consent freely and knowingly to the Court's exercise of jurisdiction.

And we cite that case further for the

proposition that the clause itself is sufficient to confer personal jurisdiction on a court, and go on to cite case law for the proposition that in a case where there is a valid, clear forum selection clause, that the Court need not engage in a minimum contacts analysis. And we think that's what we have here.

So this is not a situation where we are relying upon Mr. Genoud's stock ownership of the Delaware corporation alone as a means for the Court to exercise personal jurisdiction. We believe the forum selection clause in the charter really is the key to the Court's exercise of personal jurisdiction and that the case law in Delaware supports that.

Turning, then, to the substantive elements of our motion, we've got two motions that we filed: One, a motion to expedite the proceedings, and the second, a motion for temporary restraining order. The standards for both motions are actually quite similar. We've got to show a colorable claim and we have to show immediate irreparable harm. And we believe that we have done that with regard to both motions.

Just briefly to review some of the key facts, Edgen's initial public stock offering occurred

on April 27th, 2012. On that same day it adopted its charter, which contains the provision that really, as I mentioned, is the key to our motion here, and that is at Article X of the charter, which is Exhibit B to the McCartney affidavit.

Importantly, the provision selects Delaware as the exclusive forum for, among other claims, breach of fiduciary duty claims against directors and claims relating to the internal affairs of the company. That charter provision was in place at the time that Mr. Genoud acquired his shares.

The merger that is at issue in the Louisiana action with the Sumitomo Corporation of America was approved by the Edgen board on September 30th, 2013. It was announced October 1. There is, we now understand, a target closing date this month. And in particular, we're advised that once the Hart-Scott-Rodino clearances are secured -- and that is anticipated on or about November 18 -- that the closing could occur immediately thereafter.

The Louisiana action was filed on October 11, 2013. My understanding is an amended petition was filed on October 22nd, 2013. That is at Exhibit D of the McCartney affidavit. And that action

in Louisiana brings claims challenging the merger that fall within the Edgen charter forum selection provision.

Expressly asserted in Louisiana are claims for breach of fiduciary duty and other claims relating to the Internal Affairs of Edgen, and we frankly don't see that there could be any credible argument made that the Louisiana claims do not fall within the claims enumerated in the forum selection clause of the Edgen charter.

Interestingly, there was a Delaware action filed on October 17th, and then voluntarily dismissed about six days later, as best we can tell, on October 23rd. And my sense is that that is how Your Honor is the lucky recipient of this motion, because that prior action was assigned to you and we felt obliged to alert the Court of that related action when we filed this action.

THE COURT: That was very candid of you, Mr. Slights, although perhaps to your detriment.

MR. SLIGHTS: Yes, I know. Candor at times can be detrimental.

So turning now to the substance of our motion, and with the Court's permission I'd like to

start with irreparable harm. In addition to the case law that we've cited from Delaware that holds, in essence, that forcing us to litigate the forum selection clause outside of Delaware is itself irreparable harm, because Edgen would be denied the benefit of its forum selection charter provision by having to litigate that issue elsewhere -- and we've cited the case law for that point -- we have, really, two more practical concerns with having to litigate the forum issue in Louisiana.

The first, we have filed a motion to dismiss or stay in Louisiana, and yet, we have concerns that a decision on that motion that will -- in our view at least -- necessarily involve a determination regarding the effect and enforceability of Edgen's charter forum selection provision could have issue preclusion implications if we return to this Court to argue that issue anew.

And I know that there have been instances -- the Household case, for example, that Chancellor Allen decided in several different iterations -- where the Court of Chancery has visited another court's decision not to stay or dismiss an action. Yet in that case there was not a forum

selection clause that was at issue, and there were no determinations made by the Texas Court with respect to any forum selection clause enforceability or scope, and so that case really doesn't provide us much comfort here.

Our concern, as I say, is that the Louisiana Court is going to have to weigh in on how far-reaching our forum selection provision within our charter is, and those findings may well be impediments to our seeking relief in this Court down the road.

So that is one concern that we have and, frankly, is an example of the kind of irreparable harm that I think our courts have recognized in making the pronouncement that litigating these issues outside of Delaware in itself constitutes irreparable harm.

Our second concern is that plaintiffs are seeking injunctive relief in Louisiana. And while thus far nothing really of substance has happened in Louisiana -- in fact, the Court really hasn't been involved at all as of yet -- there is a conference scheduled for tomorrow which we understand to be a scheduling conference, but the agenda for that conference has not been set. And, frankly, we're not entirely certain what issues will be addressed there

tomorrow.

There is a motion for expedited discovery that has been filed. As I understand it, though, no motion for preliminary injunction has yet to be filed although, as I say, the complaint does note a request for injunctive relief in the prayer.

So our sense is that there will be some -- or at least common sense suggests that there would be some sequence in Louisiana that would have our forum motion decided prior to the injunction motion, but there is no guarantee as to sequence. And if this transaction is enjoined in Louisiana -- we don't think it should be, but if it is, it's too late for us to really seek to invoke our exclusive forum provision at that point. The Court's anti-suit injunction really would not be of any real value or benefit at that stage.

So those are our two concerns in addition, as I say, to the per se irreparable harm that our case law recognizes in terms of practical irreparable harm that we're facing on a very near-term basis. Those are our principal concerns.

As to the colorable claim component of our burden here, we believe that we have provided an

analytical chain based on settled jurisprudence of this Court and our Supreme Court that would allow us to seek expedited specific performance or enforcement of the Edgen Delaware forum charter provision.

The charter of a Delaware corporation is a contract among the shareholders of the corporation and between the corporation and its shareholders. That is well settled in our law. And this Court has recognized this dynamic and has advised, "If boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." And that was Your Honor's decision in the Revlon case, citing to section 102(b)(1) of our general corporation law. And this is precisely what Edgen did in April of 2012 when it adopted its Delaware forum selection charter provision.

We also cited to what I think is now well settled authority in Delaware from Bremen, our United States Supreme Court decision, followed by our Delaware Supreme Court in Ingres and Carlyle, and then

followed by the Court of Chancery in the ASDC decision, among others, that stands for the proposition that a forum selection provision is presumptively valid, presumptively enforceable, and that the provision should be enforced unless to do so would be unreasonable, "unreasonable" having been interpreted to mean that enforcement would deny a plaintiff his day in court.

And that certainly cannot be the case here if the Court enforces the Delaware forum selection provision in the Edgen charter. The Court of Chancery is available, and certainly learned in our corporation law, more so than any other court in the world. So this plaintiff has an available forum and can certainly have his day in court here in Delaware, where the charter of the company he owns stock in tells him he needs to be.

As we've argued, the law in Delaware is now settled that violation of those forum selection laws is per se irreparable harm, a harm that cannot be remedied with monetary damages or anything, really, short of injunctive relief. And without this remedy in this case, under the circumstances presented here, the forum selection provision in the Edgen charter

would be rendered completely meaningless and utterly superfluous. And, therefore, we're asking the Court specifically to enforce that provision, and at least at this point, for now, to temporarily restrain Mr. Genoud from prosecuting his claims in Louisiana in clear violation of that provision.

And unless the Court has any questions, I think that summarizes our two applications.

THE COURT: Great. Thank you, Mr. Slights. I don't have any questions.

I do hope that the folks from Dechert understood that I was joking about my clerk. My current clerks, who are with me in my office, gave me a dirty look when I said that, as if I was getting their friend in trouble, so I wanted to make sure I put that caution on the record.

MR. FEIRSON: As you might expect, she's off to a fast start.

THE COURT: Well, good to hear.

Mr. Baron, I know that you are limited in what you can say, but I want to give you the opportunity to add whatever you feel you can add, should you wish to do so.

MR. BARON: And I appreciate the Court's indulgence, and I'm going to try to walk a fine line here. I think that, as a friend of the Court, the issue of personal jurisdiction is one that should concern the Court. I think that the position that they are taking that a charter provision swallows the constitutionality -- the constitutional rule of minimum contact -- because I think under that argument, then by passing that statute then they get personal jurisdiction, and it's not over justice issues, it is over any issue in which a company chooses to shoot to its shareholders. I think that up to this point there are some decisions in Delaware that are directly contrary to that concept.

As a friend of the Court, I'd be happy to brief that issue, without it representing my client, but so that the Court is aware of, I think, the other authority, to the extent the Court is not already aware of it.

I also think that, you know, the issue of enforceability is one that is not the issue here. I think the one we're talking about, we note the Delaware courts have talked about the enforceability of forum selection clauses, both in -- you know,

passed in bylaws, and presumably it wouldn't rule any differently if they were passed in a charter. But that's only half of the equation.

The next part of the equation is the full faith and credit, and the question as to full faith and credit that is given to one ruling in one court in a second jurisdiction is one that we face all the time. We face that in res judicata, we face that in releases.

And I think that the appropriate attack on whether that Court needs to give full faith and credit to a charter provision or a ruling in another court is truly up to that court, and that -- you know, and indeed, that is teed up to be heard in Louisiana. The Louisiana Appellate Court, if that court goes along, has that opportunity, and then there are of course constitutionality arguments that allow the federal courts to get involved.

So my view is this is a very premature effort on their part in trying to short-circuit, I think, a system that has its checks and balances throughout. Again, I am happy to provide briefing as a friend of the Court. I don't have authority to make specific arguments on behalf of our client, however.

THE COURT: That's fine. Thank you, Mr. Baron.

Mr. Slights, is there anything you would like to add in light of Mr. Baron's comments?

MR. SLIGHTS: Only, Your Honor, that this is a classic instance where we have a plaintiff in Louisiana bought stock in a company, and no doubt would seek to take advantage of the Delaware corporate governance law and its rights to the extent that it advances his agenda, but in this instance seeks to avoid a limitation on those rights as properly promulgated by the corporation and its charter.

And our case law says that you just can't do that. You can't have it both ways. And that there are, with regard to the jurisdiction issues, consent to jurisdiction in these kinds of contractual relationships.

With regard to the full faith and credit, you know, we're stuck. If the Louisiana Court issues a preliminary injunction, either glossing over or improperly interpreting the forum selection provision in our charter, no full faith and credit argument is going to help us. We're going to be likely stuck with those rulings, improper as they may

be. And going up the chain in Louisiana does not really provide us with the kind of certainty that the forum selection provision that Edgen adopted was meant to provide, and properly so.

So we urge the Court to grant our motions.

THE COURT: All right. Well, thank you, everyone, for getting on the phone. This case likely warrants a written opinion, but time unfortunately doesn't allow it. We're having this hearing today because the plaintiff, Edgen Group, has sued and sought expedition and a temporary restraining order in advance of a conference with the Court in Louisiana tomorrow. Therefore, I'm going to give you my ruling now.

This case really exemplifies the interforum dynamics that have allowed plaintiff's counsel to extract settlements in M&A litigation and that have generated truly absurdly high rates of litigation challenging transactions.

It also demonstrates why corporations have seen fit to respond with forum selection provisions in an effort to reduce the ability of plaintiff's counsel to extract rents from what is

really a market externality.

There is no competition or beef or argument between the Delaware courts and Louisiana courts, or the Delaware courts and any other courts. This is simply a question of what is an efficient way, in a federal system, for matters to be resolved.

Currently the ability of plaintiffs' counsel to sue in multiple forums is a factor that imposes materially increased costs on deals and effectively disadvantages stockholders as a whole. The people that the stockholder plaintiff firms purport to represent end up picking up the tab for these types of litigations.

This case arises out of the sale of the Edgen Group to Sumitomo Corporation of America in a transaction where all stockholders will receive $12 per share. Edgen stock had been trading for less than $8 per share the previous day, meaning that the $12 per share merger consideration constitutes a 55 percent premium from the prior day's trading price.

The $12 per-share consideration also constitutes significant premiums to the volume-weighted average closing prices for the 30-day window before the deal (55 percent), the 180-day

before the deal (69 percent), and the one-year window before the deal (38 percent).

Notably, Edgen has controlling stockholders. They have majority stockholders. But critically, of critical importance, those stockholders are receiving the same per-share consideration in the deal. There is no misalignment of interest alleged in the Louisiana action that would colorably skew the process.

The claim currently alleged is simply that the controllers had large illiquid blocks that they could only monetize via a sale. That is not an argument that calls into question on a reasonably conceivable basis the decision to sell now versus later. The alleged illiquidity is something that would incent a sale whenever a controller sells. Therefore, there's no reason to credit a market timing argument; namely, that the controller wants to sell now, at a time when it's disadvantageous to other stockholders, versus later, at a time when the controller supposedly wouldn't be able to capture the same advantages. To the contrary, the only reasonable inference, when interests are aligned and there's no pled reason for divergence, is that the controller is

selecting the optimal time to sell to maximize the controller's wealth.

Consequently, under Delaware law, this is an exceedingly weak challenge to a deal. Indeed, the challenge is one that would likely not survive a motion to dismiss, and it's hardly likely to be expedited.

On the merits of the claim, one can consult the Chancellor's decision in the Synthes Stockholder Litigation, 50 A.3d 1022, a 2012 decision. In terms of the denial of a motion to expedite, one can consult a number of decisions, but the gist of it is that because there's a controlling stockholder, if, indeed, the plaintiff were successful in alleging a divergent interest, then entire fairness would apply, at which point money damages would be an adequate remedy. Given that dynamic, it comes as no surprise to me that the lone plaintiff who chose to file in Delaware, once they had a time to more closely evaluate their claims, chose to dismiss them.

It is also indisputable that this suit is governed by Delaware law under the internal affairs doctrine. Consequently, the logical and most efficient place for this lawsuit to be brought is

Delaware, and that's for reasons described by the Chancellor in the Topps case. He was then a Vice Chancellor.

In saying this, I mean no disrespect to the Louisiana courts, just as I don't mean any disrespect to any other courts. This is simply a question of what we do a lot, versus what other courts do a lot. I do Delaware mergers and acquisitions cases a lot. I therefore have a comparative advantage in handling Delaware law M&A cases, because I am very familiar with that body of law.

There are myriad types of cases where other courts would have a dramatically large comparative advantage over me. I would not hesitate to admit that I know virtually nothing about Louisiana law. I love New Orleans. I've been there many times. I had at least two matters in practice where there was parallel litigation in Louisiana. But otherwise, essentially, other than knowing that it's a civil law state, I really don't know much about Louisiana law.

There is no question that a Louisiana judge would have a nigh infinite comparative advantage over me in dealing with matters of Louisiana law. I don't think my comparative advantage over the

Louisiana courts is nearly anywhere so great. It is at most a marginal comparative advantage, given my familiarity with Delaware law.

But the plaintiff here didn't decide to sue in Delaware. The plaintiff is Mr. Genoud, who is a resident of our neighbor to the north, hailing from Edmonton in the Province of Alberta, Canada, and he owns an undisclosed number of shares.

He did not choose to sue in Alberta, Canada. He did not choose to sue in Delaware. He, instead, filed his case as a putative class action. In other words, he seeks to sue on behalf of all stockholders everywhere. He filed that case in the 19th Judicial District Court of East Baton Rouge Parish in Louisiana. That seems to be where the company is headquartered.

Now, for many types of suits, suing where the company is headquartered makes perfect sense and could likely be quite preferrable to suing in Delaware, but for suits against a board of directors where the suit is governed by Delaware law under the internal affairs doctrine, the concept of comparative advantage comes directly into play. Moreover, as the plaintiff here has pointed out, only one director --

so only one of the actual human defendants in this suit -- is a Louisiana resident, and that's the CEO.

The plaintiff is represented in his case by Robbins Geller, a firm of which Mr. Baron is a member, and he is on the line. Robbins Geller is a law firm based in San Diego, California, that predominantly represents plaintiffs. One of their specialties is M&A litigation. They frequently sue in the Delaware Court of Chancery. In fact, Mr. Baron and his partner Mr. Wissenbroeker, who called my chambers yesterday, are lawyers that I see quite often. I would hazard a guess that I see them more frequently than some members of the Delaware bar.

There is no clear jurisdictional interest that a resident of Edmonton in Alberta, Canada, and a law firm hailing from San Diego, California, have in suing in a Louisiana forum. The assertion of a Louisiana forum is particularly problematic here because Edgen has a forum selection provision in its certificate of incorporation. That provision has been there since before its initial public offering, and that provision provides that the Delaware courts shall be the exclusive forum for this type of litigation. The charter is a public document,

both in Delaware and in the public filings that have been disclosed pursuant to the federal securities laws.

For reasons that I will return to, the suit in Louisiana is quite obviously violative of the forum selection provision. The issue that Edgen faced was what to do about it. Edgen has done two things about it. The first is that Edgen has moved to dismiss the Louisiana proceeding as violative of the forum selection clause. Edgen has also taken the more aggressive step -- and I don't use that in a critical way, it's just a more aggressive step -- of filing suit in this Court against Mr. Genoud seeking an anti-suit injunction against his continuing litigation in Louisiana.

Now, Mr. Genoud has not responded to the complaint. Extraordinary efforts have been made by Mr. Slights and his colleagues to track down Mr. Genoud, including the hiring of two process servers and the hiring of a private investigator. His residential address cannot be found.

The Louisiana counsel who represent Mr. Genoud for purposes of that action have declined to accept service. And the Robbins Geller firm, a

firm that I generally have great respect for, has engaged in unsatisfying and, dare I say, pathetic representational contortions in which they have maintained that although they represent Mr. Genoud for purposes of challenging the merger and bringing the lawsuit in Louisiana, they do not represent Mr. Genoud for the clearly-related subject matter of this proceeding.

Now, anyone remotely familiar with this type of stockholder litigation understands that Robbins Geller is not taking its direction from a nominal client on these issues but rather is calling the shots itself. And the idea that Robbins Geller and Louisiana counsel have not been able to reach their client, even though they sued in Louisiana and sought expedited proceedings and have a status conference tomorrow, is either, one, not credible, or two, confirmatory that Robbins Geller is not taking direction from its client about how to handle this litigation.

Frankly, it's quite disappointing behavior from a firm that otherwise has done a great deal to build up reputational capital and credibility with the Delaware courts. It would not have been, I

think, any impairment at all to enter an appearance and reserve the ability to fight the jurisdictional issue. It is much more credibility-straining to claim that you can't contact your client, and that although you have been engaged to handle a broad and expedited attack on a merger and to sue in a jurisdiction internationally removed from your client's residence, you have nevertheless not been retained to handle a related proceeding in another court that, although I haven't done the math, is probably equidistant, if not closer, to the plaintiff's residence.

There are two issues today: the motion to expedite and the motion for TRO. I'm going to focus on the latter. The issuance of a temporary retraining order is appropriate when the movants have demonstrated that there's a colorable claim against the defendants and that irreparable injury would result if the Court denies the short-term injunctive relief. There's also a balancing of the equities, but that factor is tilted in favor of the movant because of the short-term nature of the remedy sought.

Here, the complaint is clearly colorable. The forum selection provision in the charter is valid as a matter of Delaware corporate

law. Under long-settled and repeated holdings of the Delaware Supreme Court, the charter is a three-way contract among the corporation, all of its stockholders, and the State of Delaware, which creates it and provides its key attributes. The Supreme Court recited that in the Lawson v. Household Financial case, a decision from 1930. And I'm going to quote. "[I]t has been generally recognized in this country that the charter of a corporation is a contract both between the corporation and the state and the corporation and its stockholders. It is not necessary to cite authorities to support this proposition."

It was so settled in 1930. It was equally settled in 1991. In the STAAR Surgical case, the Delaware Supreme Court wrote, "[A] corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders."

Because of this fact, general rules of contract interpretation apply to provisions found in the charter. I'm now going to quote from Centaur Partners, a decision of the Delaware Supreme Court from 1990. "Corporate charters and by-laws are contracts among the shareholders of a corporation and

the general rules of contract interpretation are held to apply."

Under those general rules of contract interpretation, forum selection clauses are "presumptively valid" and entitled to "substantial weight." Those are quotations from the Delaware Supreme Court in the Carlyle case, that Court's most recent decision on forum selection clauses. Moreover, forum selection clauses that appear in the charter or bylaws are similarly presumptively valid and handled the same way as clauses in other contracts. That's from Chancellor Strine's decision in Boilermakers Local 154 Retirement Fund vs. Chevron Corp, 73 A.3d 934 from this year, 2013.

Nor should it come as any surprise that Delaware handles forum selection clauses in that manner. The premise that forum selection clauses are presumptively valid and entitled to substantial weight is something that the United States Supreme Court announced in its 1971 decision in Bremen vs. Zapata. More recently, in 1991, the Supreme Court applied the same principles to a forum selection provision that was preprinted on the back of a ticket in the Carnival Cruise Lines case.

It is also clear that the plaintiff here has facially breached the exclusive forum clause. Article Ten -- that's Roman numeral X -- so Article X of Edgen's certificate, titled "Exclusive Jurisdiction for Certain Actions," provides -- and this is going to be a lengthy quote that I start now: "The Court of Chancery of the State of Delaware shall, to the fullest extent permitted by applicable law, be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer, or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation arising pursuant to any provision of the DGCL or the Corporation's Certificate of Incorporation or bylaws or (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine, in each such case subject to said Court of Chancery having personal jurisdiction over the indispensible parties named as defendants therein. Any person or entity purchasing or otherwise acquiring an interest in the shares of capital stock of the Corporation shall be

deemed to have notice of and consented to the provisions of this Article X." That's the end of that lengthy quote.

The Louisiana action asserts claims for breach of fiduciary duty. That is the subject matter of (ii) of the exclusive jurisdiction provision. The Louisiana action claims that the directors and controlling stockholders of Edgen breached their fiduciary duties by failing to obtain the best transaction reasonably available, and by breaching their fiduciary duty of disclosure. The Louisiana action, therefore, falls squarely within the clause. It is clear, therefore, for purposes of the motion for a TRO and, indeed, for the motion to expedite, that the plaintiff has stated a colorable claim.

Next, in terms of irreparable harm, the Delaware Supreme Court has held squarely on at least two occasions that when considering forum selection clauses that appear in negotiated agreements, the violation of a forum selection clause constitutes irreparable harm. The Delaware Supreme Court so held in the Ingres case. More recently, the Delaware Supreme Court so held in the Carlyle case.

To elaborate on the Carlyle holding, which is even more on point than the on-point Ingres holding, there, Carlyle sought an anti-suit injunction to bar the defendant, referred to in the opinion as NIG, from prosecuting litigation in Kuwait. NIG failed to defend the Delaware action and the Court of Chancery entered a default judgment that included the requested anti-suit injunction.

On appeal, NIG argued in part that the Court of Chancery lacked subject matter jurisdiction because Carlyle could not prove irreparable harm or the absence of an adequate remedy at law. According to NIG, Carlyle had an adequate remedy at law because it could simply invoke the exclusive forum provision in the other forum.

This is what the Supreme Court said. It is going to be a less lengthy quote than the last one, but still somewhat prolonged. I'm going to begin now. "Carlyle would suffer irreparable harm if it were required to litigate in Kuwait in contravention of the bargain it struck with NIG that is set forth in the forum selection clause of the Subscription Agreement. Carlyle has no adequate remedy other than an anti-suit-suit injunction. Therefore, Carlyle was

entitled to equitable relief by having the forum selection clause specifically enforced in the Court of Chancery by the issuance of an anti-suit-suit injunction." That is at pages 385 through 386 of the Delaware Supreme Court's decision.

The Supreme Court reasoned, and I'm quoting again, "requiring Carlyle to enforce the forum selection clause in Kuwait, when Carlyle bargained for a Subscription Agreement provision that precluded such litigation, would deprive Carlyle of the benefit of its bargain. Therefore, that is not an adequate remedy at law." That's at page 385. Consequently in this situation there is irreparable harm sufficient to support the issuance of an injunction.

This leads me to the third element, which is the balancing of the equities. And I will tell you now that despite the fact that there is a colorable claim and irreparable harm, the balancing of the equities leads me to deny the request for the temporary restraining order in this instance.

I do so for two reasons: First, I do so because there are potential questions about personal jurisdiction. Historically, as a general rule, simply owning stock in a Delaware corporation is

not sufficient to confer personal jurisdiction on a Delaware court.

Edgen has made a quite strong argument that Genoud consented to jurisdiction in Delaware for the limited purpose of those claims falling within the exclusive forum provision. That provision states -- and I'm going to again quote it so you-all don't have to flip back in the transcript -- "Any person or entity purchasing or otherwise acquiring any interest in the shares of capital stock of the Corporation shall be deemed to have notice of and consented" to it.

But note that the forum provision does not specifically call out consent on the part of the stockholders to personal jurisdiction. By contrast, in the preceding sentence of the provision the provision does specifically call out the need for the Court of Chancery to have personal jurisdiction over indispensable parties named as defendants. Contrast the absence of an explicit consent to personal jurisdiction in this case with the contract at issue in Carlyle, in Vice Chancellor Parson's decision in ASDC, and in the Capital Group vs. Armour case, another Court of Chancery decision, where in each

case, the provisions in question actually addressed explicitly the matter of personal jurisdiction.

Now, I am not making a ruling today that I do not have personal jurisdiction under the consent to jurisdiction theory. I am merely holding that there is a litigable issue there that affects the balancing of equities in terms of the need for a TRO issued today.

The second factor that enters the balancing is the question of ends versus means. The end that Edgen seeks is indeed laudable and efficient; namely, the localization of litigation to a contractually selected forum, wherever that may be. Here it happens to be Delaware, but there's absolutely no reason why one of these provisions would have to select Delaware. This corporation could have selected Louisiana and concentrated its litigation there, but for whatever reason, they selected Delaware.

The question, though, is one of means. In Carlyle -- and this is from the Chancellor's trial-level decision in Carlyle, not from the Delaware Supreme Court case -- but in Carlyle, Chancellor Strine recognized at least three ways to enforce a forum selection clause and achieve the laudable end.

The first is to move to dismiss in the foreign forum. Edgen has done that.

The second is to obtain a default judgment in the contractually specified forum when the breaching party declines to appear in the contractually specified forum. The party obtaining that default judgment can then seek res judicata in the other forum on the grounds of the judgment that was obtained. Now, given jurisdiction dodging so far by Genoud and his counsel, Edgen is well on its way to getting that.

The third option is the anti-suit injunction. I would be remiss if I didn't say again that I do think the anti-suit injunction is the most aggressive of these three, and I don't say that in a bad way. I simply mean relative to the other two, it is more aggressive. It creates potential issues of interforum comity if the other court feels slighted by the issuance of an anti-suit injunction. That certainly would not be my intent, but we have all lived long enough to understand that human actions are quite frequently misconceived, and that people may take offense even where none is intended.

The contrary argument, of course, is

that failing to enforce a forum selection clause could be equally insulting and have negative implications for comity. The obvious reasons include that if I don't enforce the forum selection clause, I have forced my judicial colleague in Louisiana to be stuck with work that he or she otherwise would not have to do. A further consequence is that parties, if forum selection clauses are not enforced, would thereby be encouraged to file multiple different suits in multiple jurisdictions, contrary to their forum agreements. That itself is insulting to judges, who generally like people to follow their contracts. Integrity of contracts is the overarching value, as Chancellor Strine explained, and he also explained these other principles at page 8 of his decision in Carlyle. Nevertheless, I have to recognize that comity is a concern here.

When I review the Chevron decision -- that's Chancellor Strine's decision that upheld the validity of a forum selection clause found in the bylaws of a Delaware corporation -- it is seemingly apparent on the face of the that decision that Chancellor Strine contemplated, at least for purposes of his ruling in that case, that the forum selection

provision would be considered in the first instance by the other court, by the court where the breaching party filed its litigation, not through an anti-suit injunction in the contractually specified court.

One can't say that Chancellor Strine was not aware of the anti-suit injunction route. Indeed as I noted, he wrote the trial court decision in Carlyle that identified the three means by which a forum selection clause could be enforced.

Despite this, his Chevron decision repeatedly contemplates enforcement by the foreign forum. And by foreign I mean the non-contractually selected forum. It's at page 938 of the decision. In explaining why he chose to address the legal issue presented in that case, he stated that doing so "aids the administration of justice, because a foreign court that respects the internal affairs doctrine, as it must, when faced with a motion to enforce the bylaws, will consider, as a first order issue, whether the bylaws are valid under the chartering jurisdiction's domestic law." He is thus contemplating this issue would be considered by the foreign, i.e., non-contractually selected court.

Likewise, on page 941 of his decision

he discusses that, "as-applied challenges to the reasonableness of a forum selection clause should be made by a real plaintiff whose real case is affected by the operation of the forum selection clause. If a plaintiff faces a motion to dismiss because it filed outside the forum identified in the forum selection clause, the plaintiff can argue under Bremen that enforcing the clause in the circumstances of the case would be unreasonable." Edgen has clearly heeded the part about a real plaintiff whose real case is affected, and I'm not criticizing them for that. But this language seems to indicate that the decision, at least as contemplated by Chevron, would be made in the first instance by the non-contractually selected forum.

On page 954 of the Chevron decision he states the following: "Because the corporation must raise the forum selection clause as a jurisdictional defense if it wishes to obtain dismissal of the case filed in a different forum outside of the state selected in the bylaws, the enforceability of the forum selection bylaws will be analyzed under the Bremen test in any case where an affected stockholder resists compliance...." Same idea.

And then lastly, on page 958 he states, "[I]f a plaintiff believes that a forum selection clause cannot be equitably enforced in a particular situation, the plaintiff may sue in her preferred forum and respond to the defendant's motion to dismiss for improper venue by arguing that, under Bremen the forum selection clause should not be respected because its application would be unreasonable."

I would simply add to his references to Bremen that Carnival Cruise is the case, and he acknowledges in his decision, but Carnival Cruise is the case that really deals with these types of clauses that appear in contracts to which the party against whom the clause is being enforced is not a direct signatory to the contract. So it's clear from his decision that the reference to Bremen includes Carnival Cruise.

Nevertheless, there's no discussion of the anti-suit injunction approach in Chevron. I don't think that rules out the anti-suit injunction approach at all. It may be that in the right case an anti-suit injunction is appropriate, but I do think that Chevron suggests that primacy should be given in the first

instance to the non-contractually selected forum to address the Bremen/Carnival Cruise issue.

Lastly, I would be remiss if I didn't recognize that forum selection provisions in charter and bylaws represent an evolving issue. In traditional bilateral contracts the initial course for courts was to defer and allow the nonselected forum to address the motion to dismiss. As Mr. Slights, I think, correctly recognized, that was Delaware law for a long time, and it remains Delaware law in the McWane context that we try to let the other court decide it first. Chancellor Allen, in Household V. Eljer, elucidated those principles at length.

I view myself now bound by Ingres and Carlyle, that in the case of a negotiated agreement with signatories it's clear that the Delaware Supreme Court wants an injunction issued to avoid the myriad problems that are created when one isn't issued. But it took us a long time to get there. It took us approximately two and a half, if not three, decades to get sufficiently comfortable with forum selection clauses in negotiated agreements that the preference went from allowing the other court to determine it first to simply issuing the anti-suit injunction.

Now, it's not at all clear to me that forum selection provisions are as yet sufficiently understood and accepted such that the Delaware Supreme Court would want the same approach taken for a forum selection clause that appears in the charter and bylaws. Maybe they would. Far be it from me to say that they wouldn't. I don't know what they'd do, but I do know that they haven't been given the opportunity to deal with this yet because the plaintiff in the Chevron case, perhaps recognizing that discretion is the better part of valor, dismissed the appeal and denied the Delaware Supreme Court an opportunity to address this issue. Thus, we might have had learning on this but for the strategic behavior of firms who predominantly represent plaintiffs.

Needless to say, though, at present, in light of Chevron and when I compare it to the evolution of how these clauses have been treated in bilateral agreements, it is not clear to me that it is appropriate at this time to be making anti-suit injunctions the initial tool of judicial first resort.

I will say that as this action proceeds, if it proceeds beyond the default judgment stage -- if, for example, if we have a preliminary

injunction or something like that -- what will be quite informative to me is how courts have handled other mass contracts involving non-direct signatories.

So, for example, we have Carnival Cruise and the issuance of pre-printed tickets and similar things with forum selection provisions. To what degree are anti-suit injunctions granted in that context? If they are, that counsels in favor of anti-suit injunctions in the charter and bylaw context, where the degree of consent and acceptance and the ability to modify the provision is far greater than in the pre-printed contract setting.

One could also think about bubblewrap and click-through agreements for software. Are anti-suit injunctions granted in those type of cases? If they are, again, that counsels in favor of using anti-suit injunctions as more of a tool of first resort in the charter and bylaw context.

I am sure that everyone on the phone, myself included, has received credit card agreement modifications in the mail, where you're told that here's notice of modification, and gosh darn it, if you choose to use your credit card after you've received this notice, you have consented to a

rewriting of your contract. Those contracts have forum selection clause provisions in them. Sometimes it's an arbitration provision. Are there anti-suit injunctions granted in that context?

Perhaps there are other areas that counsel can think of, but if the case law shows wide judicial acceptance of the anti-suit injunction as a tool of, if not first, at least faster resort in those other types of mass contracts, I think that could presage and be certainly persuasive authority as to what the Delaware Supreme Court would want this Court to do when dealing with charter and bylaw provisions. Right now, though, I don't have that type of showing.

Finally -- and I know this is my second finally. I apologize for that. We are talking about a status conference tomorrow in Louisiana. Given that we're talking about a status conference, I think that the risk of truly irreparable harm to Edgen is relatively slight. I get the idea that on a theoretical level any engagement in Louisiana is harmful, because you bargained for this protection or you established this protection in your charter provision and the stockholders accepted it. So I understand the theory, but it's hard for me to credit

that participating in a scheduling conference is sufficiently scary that I should err on the side of granting the TRO, given these other considerations.

So for all these reasons, I am going to deny the application for a temporary restraining order. I believe that there is a colorable claim. I believe that there is irreparable harm. But nevertheless, in balancing the equities, I think the equities counsel against the grant.

Likewise, I'm going to deny for the time being the motion to expedite without prejudice to Edgen's ability to come back if there are concrete circumstances that would require me revisiting that issue.

I will also tell Edgen that to the extent that the time for a response to the complaint runs and there is no response, you can immediately seek entry of a default judgment, and thereby follow course two that was anticipated by Chancellor Strine in the Carlyle case.

I apologize for being long-winded. As I said at the outset, this situation really warrants a written opinion, but given the time frame involved and the request by the parties, time really didn't allow

it. And so I have belabored the issue with you orally.

Mr. Slights, what questions do you have?

MR. SLIGHTS: Your Honor, I guess my only question is to get some understanding -- and perhaps the Court may not be comfortable in providing us with this guidance, but at least opportunity to come back before you to seek expedited treatment of our complaint was mentioned, depending on circumstances.

And as I mentioned in my presentation, at the moment what we're being told is that there is a potential for closing of this transaction this month. We anticipate tomorrow in Louisiana the Court to address a schedule to go forward with the complaint that has been brought there. Presumably our motion to dismiss will also be scheduled, we hope in advance of any motion to preliminarily enjoin the transaction, but we are dealing with a compressed time frame here and genuine concerns that our merger partner may walk away in the event that we're not able to bring this deal to closing.

So I'm just wondering under what

circumstances might the Court entertain, at least, a motion for expedition down the road, depending on what occurs in Louisiana.

And again, I understand if you're not wanting to read the crystal ball and give us that guidance, but I just want to be clear that we don't file a motion anew that does not square with Your Honor's view of when that might be appropriate.

THE COURT: Well, I think it's a very good question. The short answer is I don't know. I, like all mortals, see through a glass darkly. I don't have prescience. I don't know what's going to happen.

ATTORNEY ONE: Right.

THE COURT: What may well happen is that the Louisiana Court may grant your motion. If that happens all of this is moot, and, you know, contracts have prevailed. If the Louisiana Court doesn't grant your motion or grants a different type of relief, that would all have to be taken into account.

Part of comity means being respectful of one's judicial colleagues in other fora. So I can't foresee what's going to happen coming out of tomorrow, and so I'm not in a position -- it's not

that I don't want to. I'd love to be able to tell you exactly what's going to happen. And then I would also make my living, you know, betting on things. But I can't do it. I just can't do it.

So you're just going to have to make a judgment as to whether or if you need to come back on some type of preliminary injunction record.

I think that what I would like to have from you is some type of report on what goes on in Louisiana, just so I'm kept informed. I think that experience has proven that in these multi-forum situations, keeping both Courts completely informed is the best policy.

Along those similar lines, I would ask that you or your counsel that's representing Edgen in Louisiana makes sure that the Louisiana Court is aware that this Court has deferred on the issue of the forum selection provision. I certainly have no objection to you providing a copy of this transcript to the Court so that the Court understands what my reasoning was and why I didn't want to interfere with his or her decision in the first instance.

But beyond that, we're going to have to see what happens and where this thing goes, and I'm

not in a position today, because of human frailty, to give you any further guidance.

MR. SLIGHTS: Understood, Your Honor. Thank you.

THE COURT: Anything else from your side?

MR. SLIGHTS: No, Your Honor.

THE COURT: All right. Well, thank you, everyone, for getting on the phone. And I will look forward to being kept up to date as to what happens further afield.

MR. BARON: Your Honor, this is Randy Baron. May I just add one thing to --

THE COURT: No. You're not here for any purpose other than I think as a friend of the Court. So if you want to file an application to appear as amicus, you can.

MR. BARON: I understand. I just wanted to clarify --

THE COURT: All right.

MR. BARON: Something that I thought maybe was misunderstood by the Court, but I'm happy to --

THE COURT: If you want to put that in

writing, you may.

MR. BARON: All right. Thank you very much, Your Honor.

THE COURT: Thank you, everyone.

(Hearing concluded at 11:40 a.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 51, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 5th day of November, 2013.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public