SCH | SCHINDLER COHEN & HOCHMAN

January 29, 2021

BY E-MAIL AND ECF

The Honorable Victor Marrero
District Judge
United States District Court for the Southern District of New York
500 Peal Street, Suite 1610
New York, NY 10007

Re: *Stephen A. Vogel v. David Boris and Marshall Kiev*, Index No. 1:20-cv-09301-VM

Dear Judge Marrero:

We write as counsel to defendants in the above captioned action pursuant to this Court's Individual Practice Rule II(B)(2). On January 19, 2021, we provided a letter to opposing counsel and this Court pursuant to Individual Practice Rule II(B)(1) outlining defendants' arguments for moving to dismiss plaintiff's complaint in this action. On January 26, 2021, plaintiff's counsel responded by letter to us and the Court outlining their position that the complaint should not be dismissed. Defendants do not believe there are any amendments to the complaint that would ameliorate the bases for dismissal we identified in our January 19 letter. Plaintiff apparently does not seek to amend the complaint and argues the complaint should survive dismissal as drafted. Accordingly, we write to notify the Court that the parties have been unable to resolve the dispute over the appropriateness of the filing of a motion to dismiss and to request a court conference.

We attach copies of the parties' pre-motion letters.

Very truly yours,

Jonathan L. Hochman
(212) 277 6330
jhochman@schlaw.com

(Enclosures)

cc: Joseph Lombardo, Esq. (*by ECF*)
David T.B. Audley, Esq. (*by ECF*)
Eric Silvestri, Esq. (*by ECF*)

SCH | SCHINDLER COHEN & HOCHMAN

January 19, 2021

BY E-MAIL AND ECF

Mr. Joseph Lombardo
Chapman and Cutler LLP
111 West Monroe Street
Chicago, IL 60603

Re: *Vogel v. Boris et al*, 1:20-cv-09301-VM

Dear Mr. Lombardo:

I write on behalf of David Boris and Marshall Kiev ("Defendants") pursuant to Judge Marrero's Individual Rule II(B) to set forth the basis for their anticipated motion to dismiss your client Stephen Vogel's ("Vogel") complaint in the above-referenced action (the "Complaint" or "Cmplt").

The parties entered into an operating agreement governing a time-limited, special purpose vehicle, expressly formed for a single deal.[1] That deal was done, and the company consequently dissolved. (Cmplt. ¶¶ 13, 40, 41, 49, 71.) Vogel's attempt to transform the operating agreement for that now-defunct company into a permanent partnership – and thus free-ride on his former partners' success in subsequent transactions – fails as a matter of law.[2]

The Plain Meaning and Context of the Agreement Require Dismissal

The Agreement governed only Forum Capital Management, LLC ("Forum Capital"), which existed exclusively to own, manage and monetize the special purpose acquisition company ("SPAC") Forum Merger Corporation (the "Forum I SPAC"). (Cmplt. ¶ 21.) It provided that Forum Capital would be dissolved upon the distribution of its assets, *i.e.*, following the consummation of the Forum I SPAC deal. (Agreement § 11.01(b); Cmplt. ¶ 41.) The Forum I SPAC deal concluded successfully. (Cmplt. ¶ 41.) Vogel nonetheless alleges that Section 7.02(b) of the Agreement means that the parties "were going to be creating an ongoing business agreement between themselves" and that "they were binding their business activities together" to do future SPAC deals. (Cmplt. ¶¶ 34-35). He, therefore, seeks to recover the profits from his former partners' subsequent deal. (Cmplt. ¶¶ 95-96.) But Section 7.02(b) creates no such lifelong partnership and contains no promise of future business. It provides:

> (b) Without limiting Section 6.03, except as otherwise approved by all Managers, other than FMC and its Subsidiaries, no Manager or Member may, directly or indirectly, (i) perform any services on behalf of any other special purpose acquisition

[1] The Amended and Restated Limited Liability Company Operating Agreement of Forum Capital Management, LLC (the "Agreement") executed by the parties and related entities.

[2] Because the Agreement simply does not give Vogel the rights he claims, no amendment of the Complaint could save Vogel's claims, so we do not suggest any.

company, other than Pacific Special Acquisition Corp. or related entities or (ii) invest in any other special purpose acquisition company or public shell company other than as a passive investor. (Agreement § 7.02(b).)

Contracts must be interpreted according to their plain meaning and in light of their context. *Fortis Advisors LLC v. Stora Enso AB*, C.A. No. 12291-VCS, 2018 WL 3814929, at *5 (Del. Ch. Aug. 10, 2018) (finding that "when interpreting a contract, 'it is helpful to look at the transaction from a distance [in order to give] sensible life to a real-world contract.'") (citing *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 557 (Del. 2017) (internal quotation marks and citation omitted); *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017)). Here, the plain meaning and the context both indicate that the parties did not intend to form a permanent partnership by way of a single paragraph in the operating agreement of a one-deal company. Section 7.02(b) neither addresses any ongoing partnership nor indicates that it survives dissolution of Forum Capital. By contrast, where a term in the Agreement was intended to survive dissolution, liquidation or the consummation of the business transaction at issue, it explicitly says so. (*See* Agreement §§ 4.01, 7.03, 7.04.)[3]

The Agreement sought to protect the success of Forum Capital, which in turn existed to protect the success of the Forum I SPAC by "making sure that [the parties'] expertise and energy were focused on" it, "rather than diverted to independent projects." (Cmplt. ¶ 37.) The Agreement included Section 7.02(b) to prohibit a party from participating in another SPAC without the other parties' permission because doing so *while the current deal was ongoing* could have harmed the Forum I SPAC. Once the Forum I SPAC was successfully completed and Forum Capital wound up, Section 7.02(b) became moot.

Vogel's Interpretation of the Agreement Is Unenforceable

Vogel's interpretation of Section 7.02(b), restricting the parties' future SPAC activity, is absurd and unenforceable as a matter of public policy. *See Tristate Courier & Carriage, Inc. v. Berryman*, C.A. No. 20574-NC, 2004 WL 835886, at *10 (Del. Ch. April 15, 2004) (requiring, *inter alia,* "a legitimate economic interest" to enforce a restrictive covenant). Vogel's interpretation of Section 7.02(b) serves no legitimate business interest because it does not relate to the purpose of Forum Capital – to successfully bring to fruition the Forum I SPAC. The parties cannot be bound together indefinitely with no purpose other than to insulate Vogel from ordinary competition. *Navajo Air, LLC v. Crye Precision, LLC*, 318 F. Supp. 3d 640, 650 (S.D.N.Y. 2018) ("The covenant may not merely insulate a party from competition."). Section 7.02(b) is also unenforceable because it lacks reasonable scope and duration.[4]

[3] "When a contract is silent as to time of performance, the Court will imply a reasonable period of time under the circumstances." *AFH Holding Advisory, LLC v. Emmaus Life Scis., Inc.*, C.A. No. N12C-09-045, 2013 WL 2149993, at *10 (Del. Super. Ct. May 15, 2013). Here, given the context, the only reasonable timeframe is the duration of the Forum I SPAC transaction.

[4] *Crossroads ABL, LLC v. Canaras Capital Mgmt., LLC*, 941 N.Y.S.2d 537 (Sup. Ct. 2011) (finding non-competition provisions unenforceable under Delaware law where the provisions contained no limit in terms of geographic scope or temporal duration). Where a covenant seeks to protect a "non-existent business interest," as exists here under Vogel's interpretation, a court will not intervene to blue pencil the restrictive provision to render it enforceable. *See, e.g.*, *Navajo Air*, 318 F. Supp. 3d at 651.

Vogel Cannot Recover for a Breach After Electing Not to Perform Himself

Vogel concedes he elected to pursue another SPAC without Defendants, in violation of his own interpretation of Section 7.02(b). (Cmplt. ¶¶ 83-85.) Under established Delaware law, Vogel cannot seek damages for breach of the Agreement repudiated by his own non-performance. "It [] is well-settled . . . that a party may not refuse to perform its contractual obligations after a material breach while simultaneously retaining the benefits of a contract."[5] "Under the doctrine of election of remedies, a party who has two or more inconsistent remedies available, and elects to pursue one of them to the exclusion of the others, may not later pursue other inconsistent remedies." *Carlyle Inv. Mgmt., L.L.C. v. Moonmouth Co. S.A.*, C.A. No. 7841-VCMR, 2018 WL 5045716, at *1 (Del. Ch. June 28, 2018) (internal quotation marks and citation omitted). Vogel, thus, "may not have it both ways." *Lincoln Nat. Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 565 (D. Del. 2010). He could have treated the contract as ongoing and performed himself, or treated it as terminated and done his own new deals, but not both. (*Id.*)

Vogel Is Not Entitled to the Damages He Seeks

The Complaint also warrants dismissal because Vogel suffered no damages. It is axiomatic that "[a] plaintiff cannot recover for a breach of contract that caused it no harm." *See, e.g.*, *Coney Island Land Co., LLC v. Domino's Pizza LLC*, No. 15-CV-4746, 2017 WL 213016, at *6 (E.D.N.Y. Jan. 18, 2017). The remedy for breach of contract is "the amount of money that would put the promisee in the same position as if the promisor had performed the contract." *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015), as corrected (Dec. 28, 2015) (internal quotation and citation omitted). Vogel does not and cannot plead such damages here. But for Defendants' alleged breach, Vogel would be in exactly *the same position he is today*, with no profits from the fruits of Defendants' subsequent deal. Vogel alleges Defendants' breach of Section 7.02(b) occurred because they engaged in a SPAC deal without his consent, after the successful conclusion of the Forum I SPAC deal. (Cmplt. ¶¶ 89-93.) If Defendants had not breached, they simply would not have done another SPAC deal.[6] Thus, even under Vogel's theory, the Complaint asks *not* to put him in the same position as contemplated by the Agreement, but rather, to put him in a better position. This would give Vogel an impermissible windfall. *See Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009) ("[Contract] damages should not act as a windfall.") (internal quotation marks and citation omitted).

[5] *Post Holdings, Inc. v. NPE Seller Rep LLC*, C.A. No. 2017-0772-AGB, 2018 WL 5429833, at *5 (Del. Ch. Oct. 29, 2018); *see also Henkel Corp. v. Innovative Brands Holdings, LLC*, C.A. No. 3663-VCN, 2013 WL 396245, at *7 (Del. Ch. Jan. 31, 2013) (a plaintiff may not "preserve or accept the benefits of a contract, while on the other hand, assert that contract is void and unenforceable") (internal quotation marks and citation omitted).

[6] Had Defendants breached prior to the realization of the Forum I SPAC deal, which they did not, Vogel might have lost the benefits of the deal and suffered actual damages because certain investors of Forum I might have diverted resources elsewhere. This comports with the obvious purpose of Section 7.02(b).

Very truly yours,

Jonathan L. Hochman
(212) 277 6330
jhochman@schlaw.com

cc: The Honorable Victor Marrero (*via ECF)*
District Judge
United States District Court for the Southern District of New York
500 Peal Street, Suite 1610
New York, NY 10007

Chapman and Cutler LLP
Attorneys at Law · Focused on Finance®

David T.B. Audley
111 West Monroe Street
Chicago, Illinois 60603-4080
T 312.845.2971
audley@chapman.com

January 26, 2021

VIA EMAIL AND ECF

Jonathan L. Hochman, Esq.
SCHINDLER COHEN & HOCHMAN LLP
jhochman@schlaw.com

Re: *Vogel v. Boris et al, 1:20-cv-09301-VM*

Dear Mr. Hochman:

Pursuant to Judge Marrero's Individual Rule II(B), we write in response to your letter of January 19, 2021 (the *"Letter"*) regarding the Complaint[1] filed by our client, Stephen Vogel (*"Plaintiff"*), initiating the above-referenced lawsuit against the Defendants. We note that the Letter identifies no path to avoiding dismissal practice. While we respond to your arguments here, it nevertheless seems likely the parties will proceed to conference before Judge Marrero. Given that Defendants' arguments variously ignore the language of the Agreement, misapprehend the Complaint, and fail to account for federal pleading standards, motion practice would only waste each party's time and resources. We urge Defendants to instead answer the Complaint so that this matter can proceed efficiently.

Defendants Are Bound by the Plain Meaning of the Agreement

We agree on what the Agreement says and in particular § 7.02(b): "[N]o Manager or Member may, directly or indirectly, (i) perform any services on behalf of any other special purpose acquisition company, other than Pacific Special Acquisition Corp. or related entities or (ii) invest in any other special purpose acquisition company or public shell company other than as a passive investor." *See* Agreement § 7.02(b); Letter pp. 1–2. However, Plaintiff disagrees with Defendants' repeated implication that anything beyond this plain language should be read into § 7.02(b) or other parts of the Agreement. Section 7.02(b) means what it says, which is that the Defendants are barred from doing precisely what they did, *i.e.*, engaging in other SPAC ventures.

Defendants' Letter erroneously assumes that the Agreement was terminated and therefore the enforcement of § 7.02(b) requires a survival provision, but that assumption ignores what is actually alleged in the Complaint: that the Agreement is, in fact, still in operation as a valid and binding contract. *See* Complaint ¶ 71. Specifically, the Complaint alleges that Defendants improperly purported to terminate the Agreement, but that effective termination required Plaintiff's consent, which, the Complaint alleges, **was never provided**. *See* Complaint ¶¶ 66–71.

1 Unless otherwise stated capitalized terms herein are the same as those in the Letter.

The Complaint explains in detail facts that reveal Defendants knew the Agreement could not be unwound without Plaintiff's consent—namely that Defendants attempted to obtain Plaintiff's signature on a written plan of dissolution. Complaint ¶¶ 66–73. Further, the Complaint specifically alleges that Defendants included in that document a purported waiver of § 7.02(b), which they knew to prohibit the investment activity they had planned, and which is precisely why Plaintiff never signed it. Complaint ¶ 67. As you know, these well-pleaded and specific factual allegations are assumed to be true in dismissal practice. *See Wright v. Ernst & Young LLP,* 152 F.3d 169, 173 (2d Cir. 1998). That the Court must assume the Agreement is still in operation by itself defeats Defendants' entire theory as outlined in the Letter. For this reason alone, a dismissal motion is a pointless exercise.

Even Assuming Termination of the Agreement Would Not Mandate Dismissal

The Complaint goes on to allege that § 7.02(b) would survive even assuming that Defendants' attempt to terminate the Agreement without full consent was effective. Complaint ¶¶ 72, 90 ("Section 7.02(b) . . . survives **to the extent such dissolution ever took place**.") (emphasis added). While pleaded as an alternative theory, this is nonetheless true as a matter of contract interpretation. Despite termination, courts will enforce contractual terms that must survive to give effect to an agreement, even in the absence of explicit survival clauses or language. *See Wells Fargo Bank, N.A. v. Texas Liquids Partners, LLC*, No. 11 CV 00528 BSJ KNF, 2012 WL 1022346, at *5 (S.D.N.Y. Mar. 26, 2012) ("Defendants' alternative reading which limits the surviving provisions to those which contain express survival terms is untenable."). Contrary to what is asserted in your Letter, no provision of the Agreement "explicitly states" it survives termination. In fact, the only provisions that explicitly discuss survival are those that **do not survive** termination. For example, § 7.02(a) states that it does not survive termination. In contrast, the very next subsection, (and the critical provision here) § 7.02(b), contains no such limitation. The same is true of the provisions Defendants cite as examples of those that survive. *See* Agreement § 4.01 (no explicit mention of survival); § 7.03 (same); § 7.04 (same).

Section 7.02(b)'s Survival Does Not Violate Public Policy

Defendants argue that Plaintiff's alternative theory on the survival of § 7.02(b) is "unenforceable as a matter of public policy," but they do not identify the public policy upon which their argument rests. "Delaware courts are rightly reluctant to accept such arguments" because "[w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." *Libeau v. Fox*, 880 A.2d 1049, 1056-58 (Del. Ct. Ch. 2005). Further, Delaware law is especially hostile to such arguments in situations like this one, where the dishonor of a valid commercial contract under "public policy" grounds will financially benefit the party making the assertion. *Libeau*, 880 A.2d at 1058 ("this [public policy] exception does not exist as a sword for

parties to avoid their contracts when avoidance suits their personal interests"). Accordingly, Defendants' public policy argument is insufficient to warrant dismissal, which, again, would only apply if the Court were to assume the opposite of what is alleged in the Complaint, *i.e.*, that the Agreement was terminated.

While it is not clear from the Letter, Defendants also appear to argue that § 7.02(b) is an unenforceable restrictive covenant. That argument misapprehends the law. Defendants analyze § 7.02(b) under employment restrictive covenant cases, but Delaware law treats sophisticated commercial matters very differently. Specifically, a court will conduct "[a] 'less searching' inquiry into the enforceability of restrictive covenants" when found in a contract between sophisticated parties. *Revolution Retail Systems LLC v. Sentinel Technologies Inc.*, 2015 WL 6611601, at *10 (Del. Ch. Ct. Oct. 30, 2015). Further, where a party negotiates for a contractual restriction, 'it is stuck with that,' and 'cannot, as an 'oh by the way' claim that a broader or lesser restriction must apply.'" *Id.* Accordingly, in a commercial context, a party may well be able to enforce a wide and broad covenant "of the same mutually applicable competitive restrictions." *Id.* at *10 n.79. In the present matter, § 7.02(b) applies equally to Plaintiff and Defendants, and so falls under that same commercial analytical framework, especially at the pleading stage.

Plaintiff Has Properly Pled Damages

Finally, Defendants aver that "[i]f Defendants had not breached, they simply would not have done another SPAC deal" and therefore Plaintiff is without damages. Letter p. 3 The Complaint alleges the exact opposite. *See* Complaint ¶ 95 ("Vogel would have participated in FMC II, had the Defendants not impermissibly formed the SPAC without him in violation of § 7.02(b)"). In dismissal examinations, only one of those parties is entitled to the assumption that his allegations are true and a favorable construction of the pleadings and contracts—the Plaintiff. *See Wright*, 152 F.3d at 173. The Complaint alleges numerous specific facts about the purpose of the Agreement and the anticipated partnership between these three individuals, which was meant to bind them in cooperative SPAC investments at the expense of other opportunities. Complaint ¶¶ 31–39. That partnership and those purposes were explicitly served by § 7.02(b), which the Complaint alleges "reflected an agreement between Vogel, Boris, and Kiev that they were going to be creating an on-going business agreement between themselves with limited exceptions as to passive investments and a specific existing investment." Complaint ¶ 34. As Delaware Courts instruct, expectation damages require the breaching promisor to fulfill promisee's reasonable expectation of the value of the breached contract. *Duncan v. Theratx, Inc.*, 775 A.2d 1019 (Del. 2001). Here, as alleged in the Complaint, Plaintiff's expectation was to engage in SPAC investments together with the Defendants. The Defendants breached the Agreement thus violating that expectation, which entitles Plaintiff to a restoration of those expectations. Accordingly, for this additional reason, a dismissal motion is unlikely to prevail.

Very truly yours,

CHAPMAN AND CUTLER LLP

By: _____
David T.B. Audley

cc: The Honorable Victor Marrero (via ECF)