

April 23, 2021

*Vogel v. Boris et al, 1:20-cv-09301-VM***VIA EMAIL AND ECF**

Dear Mr. Hochman:

Pursuant to Judge Marrero's memo endorsement of April 19, 2021 we write to respond to Defendants' arguments concerning Plaintiff's election of remedies. Defendants' argument is variously inapplicable or misapprehends Delaware law. The argument is a conflation of three separate legal theories/cases: election of remedies (*Carlyle Investment Management, LLC*); prior material breach as an excuse for non-performance (*Post Holdings, Inc.*); and an insurance company retaining premiums rather than rescinding the policy (*Lincoln Nat'l Life Ins. Co.*).

Election of remedies doctrine under Delaware law states that: "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 Investment Management, LLC*, 2018 WL 5045716, at *2 (Del. Ch. Ct. June 28, 2018). A classic example is where a party is induced to enter a contract through fraud, and then must choose either rescission or money damages as a remedy. *Elysian Fed. Sav. Bank v. Sullivan*, 1990 WL 207737, at * 3 (Ch. Ct. Del. Mar. 2, 1990) Here, Plaintiff has sought but one remedy: money damages under breach of contract theory. Defendants' second theory, regarding prior material breach, is both unrelated to the doctrine of election of remedies and does not bar Vogel's claim. Following a material breach, the non-breaching party has two options: (1) continue to perform under the contract or (2) cease to perform. *Post Holdings, Inc.*, 2018 WL 5429833, at *5 (Del. Ch. Oct. 29, 2018). If the party ceases to perform, that does not obligate him to treat (nor does the law view) the agreement as terminated. Rather, Delaware law simply states that non-breaching parties who continue to perform may later be barred from asserting that the prior breach waived its own obligation to perform. *DeMarie v. Neff*, 2005 WL 89403, at *5 (Ch. Ct. Del. Jan. 12, 2005). Here, Plaintiff alleges he did *not* continue to perform after Defendants' breach, such that the principal enunciated in *Neff* is clearly inapplicable. Were there a counterclaim against Vogel, similar to the facts of *Post Holdings, Inc.*, there might be a need to investigate if Defendants' breach excused Vogel's conduct. But no one has asserted a claim against Vogel, likely because Defendants insist the Operating Agreement terminated and their claim would be barred by these same principles. Finally, it is unclear what an insurer's choice between retaining premiums or seeking rescission has to do with the present matter. Presumably, the *Lincoln Nat's Life Ins. Co. v. Snyder* case was cited by Defendants just because it has a quote to their liking, even if that quote is inapplicable.

Very truly yours,

CHAPMAN AND CUTLER LLP

By: _____



David T.B. Audley

cc: The Honorable Victor Marrero (via ECF)