IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: MOBILACTIVE MEDIA, LLC, a Delaware limited liability company.	)))))	Consol. C.A. No. 5725-VCP

MEMORANDUM OPINION

Submitted: September 7, 2012
Decided: January 25, 2013

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PARSONS, Vice Chancellor.

This action arises out of a dispute between two members of a joint venture. The plaintiff and the defendant founded the joint venture as a vehicle for taking advantage of mobile marketing opportunities in North America. One member, a former general counsel for a large telecommunications company, would provide industry contacts, whereas the other member, a United Kingdom company that owned proprietary mobile marketing technologies, would provide technical resources. The joint venture agreement contained a broad clause that stated that interactive video and advertising activities in North America by either joint venturer or their affiliates would take place exclusively through the joint venture. The scope of that clause is now contested by the two parties.

At the outset, the joint venture had bright prospects, including promising meetings with senior executives in the telecommunications and advertising industries. The joint venture, however, was able to complete only two engagements. Both met with limited success. During that time, the defendant made multiple overtures to buy out the plaintiff's interest in the venture. The defendant also embarked on a strategy whereby it acquired numerous companies within the mobile marketing industry.

Eventually, the defendant went through a restructuring and transferred all of its assets to a newly formed Canadian company. The plaintiff disputes the value of the consideration the company paid in this transaction. The new Canadian company was sold in 2011 for approximately $100 million.

The former general counsel filed this action against his co-joint venturer and its affiliates to recover for breach of contract and usurpation of corporate opportunity. He

also seeks relief from the newly-formed company under Delaware's Uniform Fraudulent Transfer Act ("DUFTA").[1]

The defendants seek dissolution of the joint venture. Additionally, they assert multiple defenses including the plaintiff's claims being barred by laches, prior material breaches of the agreement, waiver, acquiescence, and the doctrine of unclean hands. Finally, the newly formed company denies that this Court has any basis for exerting personal jurisdiction over it.

This Memorandum Opinion represents the Court's post-trial findings of fact and conclusions of law in this matter. Having carefully reviewed the full record and the parties' extensive post-trial briefs and oral argument, I find that the joint venture agreement was broad in scope and that the original defendant violated its obligations under the agreement. I also find that the original defendant violated its fiduciary duties by usurping corporate opportunities within the joint venture's line of business. I reject the defendants' various defenses. In terms of relief, I grant monetary relief in the form of damages based on the profits the defendants unjustifiably received from their participation in opportunities that should have been, but were not, presented to the joint venture.

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[1] 6 *Del. C.* §§ 1301–1311.

I. BACKGROUND

A. The Parties

Plaintiff, Terry Bienstock, began his career as a trial lawyer who specialized in the real estate industry and the cable television industry.[2] From 2001 to 2004, Bienstock was general counsel of Comcast Cable Communications, Inc. ("Comcast Cable"), the largest provider of cable, internet, and telephone services in the United States.[3] After leaving his position as general counsel for Comcast Cable, Bienstock consulted with and remained an employee of Comcast Cable.[4]

Defendant and Counterclaim Plaintiff Silverback Media, PLC ("Silverback") is a United Kingdom public limited liability company. Silverback is a 50% member of Nominal Defendant, Mobilactive Media, LLC ("Mobilactive"), a Delaware limited liability company. Defendant Adenyo, Inc. ("Adenyo Inc.") is the Canadian parent of Silverback, and of Defendants Adenyo USA, Inc. ("Adenyo USA") and Adenyo Acquisition Sub, Inc. ("Adenyo Acquisition")[5].

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2 Trial Transcript ("Tr.") 288 (Bienstock). Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically after the cited page of the transcript.

3 *Id.* at 289.

4 *Id.* at 290, 474.

5 I refer to Adenyo Inc., Adenyo USA, and Adenyo Acquisition, collectively, as "Adenyo" or the "Adenyo Entities."

B. Facts

1. The mobile marketing industry

Because the mobile marketing industry is still a nascent industry, it is useful to introduce and define some of the terms and products referred to in this Memorandum Opinion. Short Message Service ("SMS") is the most popular form of mobile communication and has over four billion users worldwide.[6] Also known as "text messaging," SMS allows users to send 160 character messages to and from mobile handsets. "Short codes" are short telephone numbers that service providers use to send and receive messages from consumers. Short codes often are used by advertisers; the user can "opt-in" to receive messages from a sponsor that provides advertisements, deals, and sweepstakes. Multimedia Messaging Service ("MMS") is a messaging architecture that allows users to send multimedia content, such as images, video, and audio, to and from mobile phones.

2. Origin of the Mobilactive joint venture

In 2004, after Bienstock had left Comcast Cable to start his own consulting business, Cellcast UK engaged Bienstock to assist in introducing their participation television products and services to North America.[7] In 2006, a former employee of Cellcast UK introduced Bienstock to Paul Amsellem, CEO of Cellcast UK affiliate

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6 John Naughton, *Now 4 billion people know the joy of txt*, The Guardian (May 5, 2012), http://www.guardian.co.uk/technology/2012/may/06/sms-text-messages-20th-birthday.

7 Tr. 292 (Bienstock). These products relied on paid audience participation for revenues.

Cellcast Interactif SAS ("Interactif").[8] Interactif provided the technical backbone for Cellcast UK's participation television programs.[9] Interactif also provided "end-to-end" mobile marketing services to clients.[10]

In the fall of 2006, Amsellem told Bienstock that he was leaving Interactif, which was going to be acquired by Silverback, and asked Bienstock if he would be interested in recreating Interactif in the United States.[11] Amsellem proposed to run the company and build it, while Bienstock would provide capital and access to his numerous contacts in the relevant industries.[12]

In January of 2007, Amsellem changed course and informed Bienstock that he had negotiated a deal to stay with Silverback, Interactif's new owner.[13] Under that deal, Amsellem would remain CEO of Interactif, be appointed to Silverback's Board of Directors, and be given the title of Global Managing Director.[14] Amsellem then suggested to Bienstock that they restructure the agreement they had discussed so as to

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8 *Id.* at 293.

9 *Id.* at 83 (Longobardo).

10 *Id.* at 234 (Hanley).

11 *Id.* at 292, 294 (Bienstock).

12 *Id.* at 294.

13 Tr. 304 (Bienstock).

14 *Id.* at 767–69 (Heney).

replace Amsellem with Silverback, which now owned Interactif's mobile marketing platform.[15]

Silverback and Bienstock later negotiated the terms of the joint venture. Martin Doane, Silverback's President, Chief Financial Officer, and Chairman of the Board, objected that "the scope of the JV is far too broad" and proposed that the "JV be limited initially to work done for Comcast."[16] Bienstock rejected this idea, stating that it was not reasonable to ask him to fund half the business and get Silverback deals with the top cable operator in the United States, only to allow Silverback to "use the technology, formats, for free and without [Bienstock]."[17] Bienstock also observed that:

> The idea is to build value in this Company. What you propose makes the Company superfluous once the 1st deal is done. [The joint venture] builds no value beyond the term of 1 deal. You could then take what we developed, and try to do it without me. Why would I ever agree to that?[18]

Bienstock further stated in an email to Doane and Amsellem that "the concept about the business is based on advertising in **all media**."[19]

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15 *Id.* at 304 (Bienstock).

16 JX 31 at 03939.

17 *Id.* at 03938

18 *Id.*

19 JX 30 at 03894.

3. The Agreement

On February 5, 2007, Bienstock and Silverback executed a limited liability company agreement for Mobilactive (the "Agreement").[20] The Agreement described the Purpose of Business as follows:

> Purpose. The purpose of the Company is to license, develop and own and market technology, content and applications for the purpose of enabling and enhancing interactive video programming and advertising content (the "Purpose"). This will involve multiple media platforms, including broadcast, cable and satellite television, mobile devices, and web sites via SMS, [W]AP and MMS and other mobile transmission and billing platforms. The Company will engage in the business of exploiting such technology, applications and content in North America, and upon separate agreement, elsewhere. *(Such activities conducted in any manner in North America, is deemed the "Business").*[21]

The same section of the Agreement also contained a carve-out (the "Carve-Out") that excluded certain things from the joint venture's Business. The Carve-Out provided:

> It is expressly acknowledged that the Business shall not include Silverback's and its subsidiaries' North American non-video based mobile and on-line marketing businesses and the Members and their subsidiaries shall be free to engage in any business activities except those whose primary purpose involve the enabling and enhancing of interactive video programming and advertising content across multiple digital platforms.[22]

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20 JX 42.

21 *Id.* § 1.4 (emphasis added). The acronym "WAP" refers to Wireless Access Protocol.

22 *Id.*

The parties intended the joint venture to be the exclusive vehicle for the Business. Specifically, Section 13.5 of the Agreement states:

> Exclusive Vehicle for the Business. The Members agree that the Company and its subsidiaries shall be the only means through which any Member or any of its Affiliates engage in the Business and that any future opportunities for new or expanded Business that any Member or its Affiliates learn of shall be presented to the Company as an opportunity for the Company to undertake on the terms set forth in this Agreement and no Member or any of such Member's Affiliates shall engage in any Business without the prior written consent and decision not to pursue such opportunity by the Members.[23]

Section 13.5 also contained the same Carve-Out as the Purpose section.[24]

Both parties agreed to contribute initial capital of $75,000 and additional capital as necessary for the operation of Mobilactive pro rata.[25] Silverback undertook to provide non-cash contributions to Mobilactive, including aspects of Interactif's intellectual property, platform, and services.[26] Particularly important is that Silverback agreed to "develop . . . interactive advertising and marketing applications . . . for all markets where the Business is conducted."[27]

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23 *Id.* § 13.5.

24 *See* note 22 and accompanying text.

25 JX 42 §§ 2.1–2.2 & Ex. B.

26 *Id.* § 2.5.

27 *Id.*

4. Early meetings

Within one week of creating the joint venture, Bienstock introduced Amsellem and Doane to, among others, Steve Burke who was the Chief Executive Officer ("CEO") of Comcast[28] and Dave Washington who was the head of marketing for Comcast Cable.[29] Bienstock also arranged meetings with the CEO of Saatchi & Saatchi and executives at industry players such as BBDO and ESPN.[30]

5. Mobilactive develops marketing materials

Mobilactive developed marketing materials which stated that its mission was "to develop, market, and license technology, content and applications making interactive video programming and advertising possible across multiple media platforms in North America."[31] Silverback's management, including Doane and Amsellem, received copies of those marketing materials.[32]

Mobilactive's website conveyed a similar message. It stated that "Mobilactive Media develops, markets, and licenses technology, content and applications, making interactive advertising and video programming possible across multiple media platforms

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28 Steve Burke is now the CEO of NBCUniversal Media, LLC.

29 Tr. 322 (Bienstock).

30 *Id.* at 323.

31 JX 67; JX 75; Tr. 92–93 (Longobardo); Tr. 307–17 (Bienstock).

32 Tr. 97–98 (Longobardo); Tr. 711 (Heney).

and opening up a whole new interactive audience to your advertising campaigns and programs."[33]

6. Silverback's buyout attempts

Doane was impressed with Bienstock's connections. In an email to Silverback's board in March 2007, Doane remarked that Bienstock and Amsellem "had fantastic meetings in [New York City] the last couple of days with agencies (Saatchi etc…) and television distributors and networks (Comcast, ESPN etc…)" and that Bienstock "can open a lot of doors with key decision makers."[34] Paul Heney, Silverback's Chief Operating Officer ("COO"), General Counsel, and a Board Director, proposed that "perhaps we [should] start positioning things to merge his interest in the JV into Silverback once we have written some business and its worth something . . . things would be easier down the road if we owned [Mobilactive] 100%."[35] In fact, just thirty to sixty days after signing the Agreement, Doane offered to buy out Bienstock's interest in Mobilactive.[36] Nothing came of that proposal, however, because although Bienstock was excited about Mobilactive's business and thought it "would be very successful," he "did not have confidence in Silverback's existing businesses."[37]

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33 JX 507 at 016434.

34 JX 81 at 02326.

35 *Id.*

36 Tr. 336 (Bienstock).

37 *Id.* at 337–38.

In May 2007, Silverback made a second overture to buy out Bienstock.[38] In an email to Heney, Doane wrote that he thought Silverback was "better off buying the 50% piece now for stock than 2 years from [n]ow when it will be worth 20 times that."[39] In that same email chain, Doane also acknowledged that "[i]t is very messy right now with all the *overlap* . . . . The market needs us to tighten up our story and combine operations. I am thinking we should rename the whole company [M]obilactive."[40]

Over the next two weeks the parties discussed arrangements between Mobilactive, Bienstock, and Silverback, including integrating Silverback and Mobilactive into one organization and Bienstock joining Silverback as an equity holder.[41] Both Heney and Doane expressed reservations about offering Bienstock an equity interest and potentially making Bienstock Chairman of Silverback. Specifically, Doane observed that Silverback had "not landed a deal."[42] Doane also noted that Bienstock "should be worried that we are going to concentrate our resources on [Silverback] because we own 100% of it."[43] Heney echoed those sentiments, responding that he did not trust Bienstock and that

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38 *Id.* at 348.

39 JX 123 at 01875; *see also* JX125 at 01860 ("Mobilactive will be worth $10 million in a year or two. We are better off buying his 50% now for stock.").

40 *Id.* at 01875–76 (emphasis added).

41 JX 136 at 008115.

42 JX 138 at 01766.

43 *Id.*

"Bienstock needed Interactif and Silverback resources."[44] Heney instead proposed that Silverback could use Atlas Telecom Mobile, Inc. ("Atlas"), a company Silverback was negotiating to acquire, as a "good base to transition into US capital and a US listing."[45] He noted that "Atlas can add a good chunk of value to [Silverback] and [that] we shouldn't need Bienstock or his money to make it happen."[46]

In discussing the form of a potential deal between Silverback and Bienstock, Doane expressed concern "that the rights [M]obilactive has to the video centric business could hamper a trade sale of [S]ilverback."[47]

Bienstock ultimately turned down Silverback's proposals, and on May 30, 2007, advised Silverback's Board of Directors that "I think we should simply focus on honoring and implementing our existing agreement for the [North American] market. This proposal presents nothing that would cause me to desire to renegotiate a new deal."[48] On June 5, 2007, Doane warned Amsellem that, "We need to be careful because there are things in the agreement with [Bienstock] that could be prejudicial to [Silverback]. Please monitor him closely."[49]

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44 *Id.*

45 *Id.*

46 *Id.*

47 JX 141 at 01699.

48 JX 143 at 005215.

49 JX 154 at 01266.

In the fall of 2007, Amsellem informed Bienstock that he would not be coming to the United States to serve as the COO of Mobilactive despite their previous understanding and a provision in the agreement that Amsellem would serve as Mobilactive's COO.[50] Amsellem told Bienstock that Silverback had instructed him to "focus on the business in France and [not to] be involved in the business in the [United States]."[51]

7. Silverback's acquisitions

The same day that Bienstock rebuked Silverback's offer, Doane instructed Amsellem and Heney to "spend as little time as possible on Mobilactive . . . . It is a 50% business for us, not a 100% business. You should focus on [Silverback]. Provide the platform for Mobilactive and fulfill on the deals [Bienstock] can close."[52]

In April of 2008, Terry Ham, Silverback's COO, asked Doane: "When do you think we should terminate [Bienstock] and get out of that deal[?]"[53] Doane responded that they should wait until they had completed the investment in Atlas:

> It's a tough call. I don't think we should fund anymore, but [Bienstock] said they were expecting cheque in from Comcast which would cover the burn for another 6 weeks or so . . . .

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50 *See* JX 42 § 6.2; Tr. 94 (Longobardo).

51 Tr. 354 (Longobardo).

52 JX 144.

53 JX 264.

> My sense is we should wait until we close the $10M before pulling the plug.[54]

In June 2007, Silverback had entered into a letter of intent to acquire a 51% interest in Atlas.[55] That acquisition was completed in September 2007.[56] At that time, Atlas had two main products: (1) an off-the-shelf SMS gateway and reporting package; and (2) a micropayments business that allowed users to send and receive a text message to authorize the purchase of virtual goods.[57] In August 2009, Mobilactive acquired the remaining 49% of Atlas.[58] Silverback never presented Mobilactive or Bienstock with an opportunity to participate in either the 2007 or 2009 transactions to acquire Atlas.[59]

In February 2008, Silverback acquired BrainTrain, Inc. ("BrainTrain"), a Toronto based advertising and marketing boutique that provided traditional types of marketing services.[60]

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54 *Id.*

55 JX 158.

56 JX 193 at 10131.

57 Tr. 824 (Nelson).

58 JX 427 at 09002.

59 *See* Tr. 746–47 (Heney).

60 Tr. 250 (Hanley); Tr. 826–27 (Nelson).

In September 2008, Silverback acquired Generation 5 Mathematical Technologies, Inc. ("Gen5"), a Canadian analytics business that provided database solutions and predictive analytics.[61]

In June 2010, Silverback, which had changed its brand name to Adenyo,[62] acquired KinetX Analytic Search Technologies ("KAST") from KinetX.[63] KAST allowed non-technical users "to query very, very large databases and create customized reports in a very rapid fashion."[64] Neither Mobilactive nor Bienstock was offered an opportunity to invest in KAST.[65]

The next acquisition occurred in July 2010, and involved MoVoxx, Inc. ("MoVoxx"), a Delaware corporation that had a sizeable SMS network of 17 million consumers and the technology to deliver advertising to the network.[66] Shortly before then, Bienstock had sent Adenyo and Silverback a demand letter reiterating Silverback's obligation to present opportunities within Mobilactive's Business to Mobilactive.[67]

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61 Tr. 826–28 (Nelson).

62 JX 653 at 00430.

63 *Id.* at 00431; Tr. 251–52 (Bienstock).

64 Tr. 831 (Nelson).

65 *See id.* at 889.

66 *Id.* at 833–36.

67 JX 496.

Nelson, who was Adenyo's CEO, knew of Bienstock's letter, but did not offer Mobilactive an opportunity to invest in MoVoxx.[68]

In this Memorandum Opinion, I refer to Atlas, BrainTrain, Gen5, KAST, and Movoxx, collectively, as the "Acquired Companies."

8. Mobilactive's only two campaigns

In January 2008, Mobilactive obtained its first contract for approximately $20,000.[69] The deal was a twelve-week campaign that involved Comcast FEARnet, Unilever, Mobilactive, and Brightline.[70] Degree deodorant, a product of Unilever, ran commercials allowing people to enter a trivia quiz contest by texting a word to a short code number.[71] According to the marketing materials, Mobilactive was responsible for providing the short code, setting up the trivia contest application and keywords, providing access to content management and campaign management software, and providing access to their on-line reporting platform for real-time statistics.[72] The project ultimately failed for a number of reasons, including Atlas's inability to provide Brightline with accurate and properly-formatted data.[73] Mobilactive had been told that the XSTAT platform,

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68 Tr. 889 (Nelson).

69 JX 668 at 0025.

70 JX 200.

71 Tr. 146 (Longobardo).

72 JX 200 at 000324.

73 Tr. 152–54 (Longobardo).

which was used to provide real-time statistical information, would be available to Mobilactive, but in fact it was not.[74] According to Mobilactive's employee, Longobardo, Atlas also offended Brightline by accidentally copying it on an email critical of Brightline's employees.[75] Comcast eventually advised Mobilactive that it could not see doing business with Mobilactive again in the future.[76]

In September 2008, Mobilactive landed their second and only other contract for $16,625.[77] The campaign involved Creative Asylum, a marketing agency, and was intended to help promote Warner Home Video's DVD release of the first season of the TV series Gossip Girl.[78] The series revolved around students at an "Upper East Side" New York private high school and a "blogger" named "Gossip Girl" who blogged and texted about scandalous events.[79] As part of the campaign, consumers could opt-in to receive text messages from Gossip Girl. Bienstock alleges that the campaign failed because Atlas could not make the text messages appear to come from Gossip Girl, as Silverback had represented they could.[80] Silverback, on the other hand, attributes this

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74 *Id.* at 152–55

75 *Id.* at 154.

76 *Id.* at 155.

77 JX 668 at 0025.

78 JX 262; Tr. 162 (Longobardo).

79 Tr. 160 (Longobardo).

80 *Id.* at 161–63.

failed project to Bienstock's having allowed Longobardo—Mobilactive's only paid employee and project manager—to leave for a consulting position in Asia where he did not have reliable access to email right around the time the campaign was supposed to "go live."[81]

9. Mobilactive's decline

Despite these two unsuccessful campaigns, Bienstock continued to pursue deals on behalf of Mobilactive. Through the fall of 2008, Bienstock attended conferences and meetings with potential clients, and pursued a deal with Hearst Argyle, a large chain broadcasting group.[82] In 2009, Bienstock presented Silverback with lists of attendees at conferences and Silverback identified people it wanted Bienstock to contact.[83] Bienstock and Doug Sutherland, the Executive Vice President of payments and mobile technology at Silverback,[84] also coordinated to sell Gen5's predictive analytics platform through Mobilactive.[85] In fact, Sutherland prepared an introductory email describing the predictive analytics aspect of Mobilactive and assisted in preparing Mobilactive marketing materials that described predictive analytics services it could provide in

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81 *Id.* at 185–88; JX 275.

82 Tr. 388 (Bienstock); JX 296.

83 Tr. 398 (Bienstock); JX 366.

84 Tr. 1006 (Bienstock); JX 711.

85 Tr. 401–10 (Bienstock).

partnership with Silverback Media.[86] On July 3, 2009, after a number of advertising agencies expressed interest in Bienstock's presentation, Sutherland discussed securing financing for Mobilactive to implement the idea.[87]

In the fall of 2009, Bienstock heard that Tyler Nelson had replaced Doane as Silverback's CEO.[88] On November 2, 2009, Bienstock emailed Nelson regarding the Mobilactive joint venture.[89] Nelson emailed Doane asking him "how do we unwind [the joint venture]?"[90] After speaking with Bienstock, Nelson wrote to Doane: "36 page agreement with exclusive [N]orth American rights for video enabled advertising? – [W]hat were we/you thinking?"[91] The next day, Nelson instructed Amsellem that Silverback needed to untangle itself from the joint venture.[92]

On January 13, 2010, Nelson sent an email to Bienstock suggesting that they dissolve the joint venture and "move forward with a more constructive form of agreement that reflects the needs and capabilities of both parties."[93] Ultimately, on March 28, 2010,

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86 JX 373; JX 369.

87 JX 371; JX 377; Tr. 412–13 (Bienstock).

88 Tr. 412–13 (Bienstock).

89 JX 394.

90 JX 399.

91 JX 404.

92 JX 407.

93 JX 443.

Bienstock rejected the final consulting agreement proposed by Silverback noting that it was "materially less than what [Nelson] and I discussed, and gives me very little incentive to go this route. So we can just keep the existing JV in place, and deal with our relationship through that vehicle for all of North America."[94]

Nelson responded that the

> [joint venture] vehicle has nothing to do with our business . . . Adenyo isn't in any way participating in the market in a way which would be considered within the scope of the JV as it was defined . . . . I would like us to come to an agreement on a comp[ensation] structure to secure your help on the business development front but if we can't then I completely understand, your time is valuable . . . but the [joint venture] will still need to be wound down.[95]

On April 19, 2010, Bienstock's counsel sent a demand letter to Nelson and Silverback, alleging that Silverback had breached the Agreement.

10. The reorganization of Silverback into Adenyo Inc.

From as early as late 2007, Silverback had considered the possibility of withdrawing from its listings on European exchanges and going private.[96] On January 15, 2010, Silverback retained PricewaterhouseCoopers to begin implementing a restructuring and re-domiciliation plan.[97] According to Silverback's board minutes, the

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94 JX 487.

95 JX 489.

96 JX 181.

97 JX 448 at 46511–12.

restructuring was in anticipation of raising additional capital in the public markets in Canada and the United States.[98]

On June 8, 2010, less than two months after Bienstock sent his demand letter, the Board discussed deferring the acquisition of MoVoxx and KAST until the completion of the re-domiciliation.[99] On June 29, Adenyo USA and Adenyo Acquisition were incorporated as Delaware corporations.[100] On July 13, 2010, MoVoxx was merged into Adenyo USA, rather than into Silverback.[101] The merger agreement described Silverback as a predecessor in interest to Adenyo Inc., the parent of Adenyo USA and Adenyo Acquisition.[102]

In the same time period, PricewaterhouseCoopers valued Silverback at $79,920,000.[103] On November 9, 2010, Silverback, Adenyo, and the liquidators Freddy Khalastschi and Barry David Lewis (the "Liquidators") entered into an asset transfer agreement under which Adenyo provided a deed of indemnity to the Liquidators of Silverback in exchange for substantially all of its assets.[104] Specifically, the deed of

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98 *Id.*

99 JX 528 at 01524–25; Tr. 888 (Nelson).

100 JX 543; JX 544; JX 555.

101 JX 561; JX 562.

102 JX 557 at 32583; JX 567.

103 JX 653.

104 JX 617; JX 624; Parvez Dep. 217–22.

indemnity provides that "[Adenyo] undertakes to pay in full . . . the claims (whether present or contingent) of all creditors properly admitted in the liquidation of the Company."[105] Bienstock notified the Liquidators of his claims.[106] Silverback is still in liquidation proceedings.[107]

11. Sale to Motricity

In October 2010, Motricity, Inc. ("Motricity") first expressed serious interest in acquiring the equity of Adenyo.[108] On December 24, 2010, Motricity sent a letter of interest to acquire Adenyo for $100 million in cash and stock.[109] The parties ultimately agreed to an asset acquisition, and on April 14, 2011, Motricity acquired substantially all of the assets of Adenyo.[110] The acquisition also included the possibility of a $50 million earn-out.[111]

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105 JX 620.

106 JX 632.

107 Tr. 841–42 (Nelson).

108 Parvez Dep. 94–95.

109 JX 631.

110 JX 677 at 10.

111 *Id.* Motricity's Form 10-Q disclosure stated that as of September 30, 2011, it was "not probable" that Adenyo would receive the contingent earn-out. *Id.*

12. Legal action

Bienstock filed this action on August 16, 2010, using funds from Mobilactive. Silverback contends that was improper and not authorized,[112] because, for example, Mobilactive's Certificate of Formation previously had been cancelled by the Delaware Secretary of State for failure to pay annual Delaware taxes for three consecutive years.[113] On September 8, 2010, Bienstock purported to correct that problem by filing a Certificate of Revival with the Delaware Secretary of State without Silverback's consent.[114] Bienstock paid for the revival action with his own credit card, but instructed his accountant to "[b]ook it as a loan to Mobilactive."[115]

C. Procedural History

Silverback fired the first salvo in this dispute by filing a complaint seeking dissolution of Mobilactive.[116] That same day, Bienstock filed an action against Adenyo seeking, among other things, declaratory and injunctive relief concerning the Agreement and damages for breach of the Agreement and of Silverback's fiduciary duties.[117]

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112 JX 577; JX 669.

113 JX 556.

114 JX 587.

115 JX 582; Tr. 499 (Bienstock).

116 *Silverback Media, PLC v. Bienstock*, C.A. No. 5725-VCP (filed Aug. 16, 2010).

117 *Bienstock v. Adenyo Inc.*, C.A. No. 5731-VCP.

On May 13, 2011, I consolidated those two actions as *In re Mobilactive Media, LLC*.[118] Bienstock then filed a consolidated complaint (the "Complaint") seeking the same relief as his original complaint. Adenyo and Silverback filed an answer and counterclaims seeking dissolution of Mobilactive and the appointment of a liquidating trustee.

From April 30 through May 4, 2012, I presided over a five-day trial in this action. After extensive post-trial briefing, counsel presented their final arguments on September 7, 2012. This Memorandum Opinion constitutes the Court's post-trial findings of fact and conclusions of law.

D. Parties' Contentions

In Count I of the Complaint, Bienstock seeks a declaration that Silverback and Adenyo have breached the Agreement by engaging in the Business of Mobilactive in North America. Similarly, Count II seeks damages resulting from the breach of Sections 1.4, 2.1, 2.5, 13.5, 14.11, and 14.14 of the Agreement. Count III alleges that Silverback breached fiduciary duties it owed to Bienstock and Mobilactive by engaging in the aforementioned conduct. Finally, Bienstock asserts in Count IV that Silverback fraudulently transferred its assets to Adenyo in violation of DUFTA.[119]

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[118] C.A. No. 5725-VCP. *See* Order Granting Defs.' Mot. to Consolidate and Modifying Treatment of Discovery Material, C.A. No. 5725 (Del. Ch. May 13, 2011) (No. 37585981).

[119] 6 *Del. C.* §§ 1301–1311.

Silverback and Adenyo have counterclaimed for dissolution of Mobilactive and the appointment of a liquidating trustee. Silverback and Adenyo also dispute Bienstock's allegations and urge the Court to deny his claims. Specifically, Adenyo argues that Bienstock's claims are barred by his own prior material breach of the Agreement. Adenyo also proffers a different interpretation of the Agreement regarding the meaning of the following terms: the Business, the Purpose, and the Carve-Out. Silverback and Adenyo deny that they owed fiduciary duties to Bienstock and aver that, in any event, Plaintiff's claim for breach of fiduciary duty should be dismissed as duplicative of his breach of contract claims. Moreover, even if the fiduciary duty claim stands, Adenyo and Silverback contend that Bienstock failed to prove any usurpation of corporate opportunity. Furthermore, Silverback claims that Bienstock has failed to prove his DUFTA claims or damages. Adenyo and Silverback also raise a number of affirmative defenses including that Bienstock's claims are barred by laches, waiver, acquiescence, and the doctrine of unclean hands. Finally, Adenyo argues that, as a Canadian holding company, it is not subject to personal jurisdiction in this Court.

II. ANALYSIS

Bienstock bears the burden of proving his claims by a preponderance of the evidence.[120] "Proof by a preponderance of the evidence means proof that something is

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[120] *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007) ("The burden of persuasion with respect to the existence of the contractual right is a 'preponderance of the evidence' standard." (citations omitted)); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 2003 WL 22016864, at *1 (Del. Super. Aug. 26, 2003) ("In order to establish a claim for usurpation, Mobil

more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[121] Under this standard, Bienstock is not required to prove his claims by clear and convincing evidence or to exacting certainty.[122]

A. Are Bienstock's Claims Barred by the Doctrine of Laches?

Silverback alleges that Bienstock's claims are time-barred by Delaware's applicable three-year period of limitations. "[I]n a court of equity, the applicable defense for untimely commencement of an action for an equitable claim is laches, rather than the statute of limitations."[123] Laches "operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment."[124] This doctrine "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights."[125] There are

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or Exxon must show, by a preponderance of the evidence . . . ."), *aff'd*, 866 A.2d 1 (Del. 2005).

121 *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002) (quoting Del. Super. P.J.I. § 4.1 (2000)).

122 *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *6 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE).

123 *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *13 (Del. Ch. Dec. 23, 2008) (citations omitted); *see also Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009).

124 *Scureman v. Judge*, 626 A.2d 5, 13 (Del. Ch. 1992), *aff'd sub nom. Wilm. Trust Co. v. Judge*, 628 A.2d 85 (Del. 1993).

125 *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

three generally accepted elements to the equitable defense of laches: "(1) plaintiff's knowledge that she has a basis for legal action; (2) plaintiff's unreasonable delay in bringing a lawsuit; and (3) identifiable prejudice suffered by the defendant as a result of the plaintiff's unreasonable delay."[126]

The Court of Chancery generally begins its laches analysis by applying the analogous legal statute of limitations.[127] The time fixed by the statute of limitations is deemed to create a presumptive time period outside of which the Court will apply laches absent circumstances that would make the imposition of the statutory time bar unjust.[128] In this case, the analogous statute of limitations for claims of breach of contract and breach of fiduciary duty is three years "from the accruing of the cause of such action."[129] DUFTA provides a four-year limitations period for asserting a claim against a transferee of an allegedly fraudulent transfer.[130]

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126 *Whittington v. Dragon Gp. LLC*, 2008 WL 4419075, at *3 (Del. Ch. June 6, 2008) (quoting *Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *7 (Del. Ch. Mar. 22, 2004)).

127 *See, e.g.*, *Adams*, 452 A.2d at 157; *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989).

128 *See U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993).

129 10 *Del. C.* § 8106.

130 6 *Del. C.* § 1309.

"[A] cause of action 'accrues' under Section 8106 at the time of the wrongful act, even if the plaintiff is ignorant of that cause of action."[131] "The 'wrongful act' is a general concept that varies depending on the nature of the claim at issue. For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of breach."[132] Similarly, "[a] claim for breach of fiduciary duty accrues at the time of the wrongful act."[133] "When the wrongful act involves a contractual obligation, the claim accrues at the time when 'enforceable legal rights [are] created.'"[134]

As to Bienstock's claims for breach of contract and breach of fiduciary duty, Silverback argues that the wrongful acts that allegedly gave rise to those claims occurred in June 2007 when Silverback first "announced" the Atlas transaction and in 2007 when Bienstock learned that Silverback was competing with Mobilactive.[135] Bienstock, however, waited until August 16, 2010 to file his original complaint.

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131 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

132 *Whittington v. Dragon Gp. LLC.*, 2008 WL 4419075, at *5 (Del. Ch. June 6, 2008) (citing *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032 (Del. Ch. Jan. 24, 2005)).

133 *Sutherland v. Sutherland*, 2010 WL 1838968, at *8 (Del. Ch. May 3, 2010).

134 *Id.*

135 There is no dispute that Bienstock brought his DUFTA claims well within the relevant four year statute of limitations. Therefore, I do not examine those claims further in terms of laches.

1. The Atlas acquisition

The sole acquisition that allegedly occurred before August 16, 2007, the critical date for Bienstock's claims for which the analogous limitations period is three years, was the acquisition of 51% of Atlas. Silverback avers that it made a June 2007 "announcement" that it was acquiring a majority interest in Atlas. The evidentiary support for that allegation, however, consists of the internal minutes of Silverback's Board[136] and Silverback's financial statements for the fiscal year ending December 31, 2007.[137] Furthermore, although Silverback's Board approved a nonbinding letter of intent regarding the acquisition of 51% of Atlas in June 2007, the acquisition itself was not completed until September 2007.[138]

Therefore, I must determine whether the cause of action based on the Atlas acquisition accrued at the time of the "announcement," which would be outside of the three-year analogous statute of limitations, or at the time of the actual acquisition, which would be within that limitations period.

For Bienstock's breach of contract claim, the cause of action accrued at the time of the breach.[139] Here, the Mobilactive Agreement provides that: "[T]he Members agree . . . that any future opportunities for new or expanded Business that any Member or its

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136 JX 158.

137 JX 193.

138 *Id.* at 12131 ("[I]n September 2007, Silverback Media acquired a majority interest in Atlas Telecom Mobile.").

139 *See supra* note 132 and accompanying text.

Affiliates learn of *shall be presented* to [Mobilactive] as an opportunity for the Company to undertake on the terms set forth in this Agreement."[140]

Silverback appears to argue that the alleged breach of the Agreement occurred when Silverback knew of the Atlas opportunity and did not present it to Bienstock, *i.e.*, in June 2007. Bienstock, however, seeks to recover damages he incurred as a result of Silverback's *acquisition* of Atlas. Moreover, as previously noted, damages are a necessary element of a breach of contract claim. In June 2007, the parties merely had signed a *nonbinding* letter of intent. Because such a document is unenforceable until the parties have agreed on all the essential terms,[141] Bienstock's claim for damages would not have been ripe in June 2007.[142] Indeed, Bienstock's claim did not accrue until the parties entered into a binding commitment.

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140 JX 42 § 13.5.

141 *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2010 WL 4813553, at *7 (Del. Ch. Nov. 23, 2010) ("In order for a contract to be binding under Delaware law, the contracting parties must have agreed on all essential terms. Moreover, where 'commercial parties draft a term sheet that is intended to serve as a template for a formal contract, the law of this state, in general, prevents the enforcement of the term sheet as a contract if it is subject to future negotiations because it is, by definition, a mere agreement to agree.'" (internal citations omitted)); *Int'l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 WL 208955, at *9 n.3 (Del. Ch. Apr. 22, 1997) (noting that Delaware law "require[s] the parties to have reached agreement on all material terms before an 'agreement to agree' will be enforced").

142 *K&K Screw Prods., LLC v. Emerick Capital Invs., Inc.*, 2011 WL 3505354 (Del. Ch. Aug. 9, 2011) ("In general, an action is not ripe when it is contingent, meaning that it is dependent on the occurrence of some future event(s) before its factual predicate is complete. Indeed, the Supreme Court has cautioned trial courts not to declare the rights of parties before they are convinced that, among other things, the

According to Silverback's July 27, 2007 Board minutes, Silverback and Atlas still had not entered into a binding agreement as of that date.[143] Moreover, Silverback, which has the burden of proof on its laches defense, failed to prove that the parties entered into a binding agreement before August 16, 2007. Rather, based on the limited evidence in the record, I find that Silverback and Atlas did not have a binding agreement as of August 16, 2007. Therefore, Bienstock's breach of contract action based on the Atlas acquisition accrued within the analogous three-year limitations period.

A claim for damages based on usurpation of a corporate opportunity also is not ripe until the parties have entered into a binding commitment. In *International Equity Capital Growth Fund, L.P. v. Clegg*,[144] the Court of Chancery examined a usurpation claim in the context of an "agreement to agree."[145] The Court held that "mere agreements to agree are unenforceable at common law" and dismissed without prejudice all claims for breach of fiduciary duty in relation to the plaintiff's "announced intention to acquire"

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material facts of the relevant dispute are static and the rights of the parties are 'presently defined rather than future or contingent.'" (internal citations omitted)).

143 JX 160 at 07198 ("[T]he purpose of the meeting was to consider, [] if deemed appropriate, to authorize the execution of a definitive, *binding* agreement of purchase and sale relating to the acquisition of Atlas.") (emphasis added). Although Silverback's Board provided authorization to enter an agreement, there is no evidence that a binding agreement was entered into by August 16, 2007.

144 1997 WL 208955 (Del. Ch. Apr. 22, 1997).

145 *Id.* at *8.

the company in question.[146] Because Defendants here have not shown by a preponderance of the evidence that the alleged cause of action accrued before August 16, 2007, I reject Silverback's laches defense in regard to the Atlas acquisition.[147]

2. North American activities

Silverback also alleges that Bienstock's claims should be barred by laches because Bienstock had extensive knowledge before August 16, 2007 of Silverback's mobile advertising activities in North America. Silverback relies on three due diligence documents to show that Bienstock "knew Silverback was conducting mobile advertising sales through [Silverback Wireless] in Los Angeles."[148] In other words, Silverback alleges that Bienstock knew of activities that would have violated the Agreement between February 5, 2007, the date the Mobilactive Agreement was signed, and August 16, 2007, the critical date for this laches analysis.

Bienstock has not alleged in this action, however, that any of the pre-August 16, 2007 North American activities referenced in the documents Silverback cites violated the Agreement. In fact, those activities arguably are included in the Carve-Out, which states

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146 *Id.* at *9 ("Diamond has taken no action this court can review in connection with its announced intention to acquire Handy.").

147 *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009) ("Because we have held that Reid's action was timely under the analogous statute of limitations . . . , we examine the issue of laches from the opposite point of view. That is, Reid's action will be barred by laches only if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of his claim within the time allowed by law.").

148 Silverback and Adenyo's Answering Post-Trial Br. ("Defs.' Answering Br.") 18 (citing JX 85–87).

that "the Business shall not include Silverback's and its subsidiaries North American non-video based mobile and on-line marketing businesses."[149] Moreover, Silverback Wireless became inactive by the end of 2007 and was, according to Bienstock, worthless.[150] In addition, Bienstock does not complain about or claim damages based on Silverback Wireless's activities. Similarly, the calculation of damages by Bienstock's expert and by this Court *infra* does not rely on the pre-August 16, 2007 activities of which Silverback contends Bienstock had notice.[151]

For all of these reasons, I conclude that Silverback's laches argument fails to provide a defense to Bienstock's claims.[152]

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149 JX 42 §§ 1.4, 13.5; *see infra* Part II.D.3. Indeed, Bienstock admits that the Carve-Out "allows Silverback to grow organically within North America." Pl. Bienstock's Opening Post-Trial Br. ("Pl.'s Opening Br.") 6.

150 JX 681 at 12; Heney Dep. 198–99; Tr. 353.

151 *See* JX 680.

152 In one sentence (and an accompanying footnote), Silverback argues that Bienstock's claims also are barred by the doctrines of waiver and acquiescence. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived . . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work . . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." *Roca v. E.I. duPont de Nemours & Co., Inc.*, 842 A.2d 1238, 1243 n.12 (Del. 2004).

In addition, the Agreement contains a "no waiver" provision. JX 42 § 14.17. Silverback has not explained why that provision would not preclude its acquiescence and waiver arguments here. Moreover, "[t]he standard for finding waiver in Delaware is quite exacting." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289 (Del. 1994). "Waiver is the voluntary and intentional relinquishment of a known right . . . . It implies knowledge of all material facts

B. Doctrine of Unclean Hands

Silverback also argues that Bienstock's claims are barred by the doctrine of unclean hands.

"[H]e who comes into equity must come with clean hands." In other words, "[t]he equitable doctrine of unclean hands bars litigants who have acted inequitably from seeking what might otherwise be available relief."[153] "The unclean hands doctrine is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case."[154] "The standard, as applied by the Court of Chancery, is that the inequitable conduct must have an 'immediate and necessary' relation to the claims under which relief is sought."[155]

Here, Silverback seeks to bar Bienstock from recovering because he: (1) "unilaterally, and without notice either to Silverback or its litigation counsel, purported to

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and intent to waive." *Realty Growth Investors v. Council of Unit Owner*s, 453 A.2d 450, 456 (Del. 1982) (internal citations and quotation marks omitted). "To make out a case of implied waiver, there must be a clear, unequivocal, and decisive act of the party showing such a purpose." *Biasotto v. Spreen*, 1997 WL 527956, at *10 (Del. Super. July 30, 1997). Silverback has not identified any such act.

Because the Agreement has a "no waiver" provision and Silverback failed to develop its acquiescence argument or identify any act by Bienstock showing a purpose to waive his rights, I find Silverback's waiver and acquiescence defenses unpersuasive.

153 *Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *6 (Del. Ch. Mar. 22, 2004), *aff'd*, 888 A.2d 204 (Del. 2005).

154 *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).

155 *Id.*

revive the Mobilactive charter";[156] and (2) paid a retainer to his Delaware counsel and fees to White & Case LLP "with the last remaining funds from Mobilactive's bank account."[157]

Silverback cites no cases and this Court knows of no cases that have held that reviving a cancelled Certificate of Formation constituted inequitable conduct.[158] Nor is there any basis in the record for finding the revival here amounted to conduct that is so questionable that it warrants dismissing Bienstock's claims. As to Bienstock's payments to counsel, the Agreement provides that: "The Members [of the LLC] shall defend and prosecute legal or equitable actions as it deems necessary to enforce or protect the interests of [Mobilactive] and such expenses shall be an expense of [Mobilactive]."[159] In the circumstances of this case, Bienstock appears reasonably to have believed that the litigation expenses he caused to be incurred were to enforce or protect the interests of Mobilactive. It is not surprising that Silverback, as Bienstock's co-joint venturer and the party being sued, disagrees. The existence of such a disagreement and the possibility that

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156 In fact, Bienstock revived Mobilactive's Certificate of Formation, which had been cancelled pursuant to 6 *Del. C.* § 18-1108 for failure to pay taxes.

157 Defs.' Answering Br. 43, 52.

158 Indeed, the revival of a corporate charter is sanctioned by 8 *Del. C.* § 312. Similarly, "[a] domestic limited liability company whose certificate of formation has been canceled pursuant to" 6 *Del. C.* § 1108(a) "may be revived" as set forth in 6 *Del. C.* § 1109.

159 JX 42 § 14.20.

Bienstock's actions ultimately might be found to have been improper does not make his conduct so inequitable as to trigger the unclean hands doctrine.

The doctrine of unclean hands is "designed to protect the integrity of a court of equity, not a weapon to be wielded by parties seeking to excuse their own inequitable behavior by pointing out a trifling instance of impropriety by their counterpart."[160] Bienstock's conduct that Silverback characterizes as inequitable has not threatened the integrity of either this Court or this proceeding. Therefore, I hold that Silverback's unclean hands defense is without merit.

C. Prior Material Breach

"A party is excused from performance under a contract if the other party is in material breach thereof."[161] "The converse of this princip[le] is that a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract."[162] "The question whether the breach is of sufficient importance to justify non-performance by the non-breaching party is one of degree and is determined by 'weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.'"[163]

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160 *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 81 (Del. Ch. 2008).

161 *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

162 *E. Elec. & Heating, Inc. v. Pike Creek Prof'l Ctr.*, 1987 WL 9610, at *4 (Del. Super. Apr. 7, 1987), *aff'd*, 540 A.2d 1088 (Del. 1988).

163 *Id.* (citation omitted).

The Restatement (Second) of Contracts identifies a number of relevant factors for "determining whether a failure to render or to *offer performance* is material."[164] Those factors include:

> (a) [T]he extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to *offer to perform* will suffer forfeiture; (d) the likelihood that the party failing to perform or to *offer to perform* will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to *offer to perform* comports with standards of good faith and fair dealing.[165]

Here, Silverback contends that Bienstock's claims should be barred because he failed to make his initial capital contribution in full, and thereby materially breached the Agreement. Section 2.1 of the Agreement, which defines the initial capital contribution, provides:

> Initial Capital Contributions. Upon execution of this Agreement, each Member agrees to contribute cash in the amount set opposite their respective names on Exhibit B to the Company.[166]

Exhibit B identified only two Members: Bienstock and Silverback Media, PLC. Both members were to contribute "Initial Capital" of $75,000. Bienstock asserts that he

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164 *Restatement (Second) of Contracts* [hereinafter *Restatement*] § 241 (2012) (emphasis added).

165 *Id.* (emphasis added); *see also BioLife Solutions, Inc.*, 838 A.2d at 278.

166 JX 42 § 2.1.

was willing to fund his share of the Initial Capital and even paid Longobardo's salary, despite Silverback's refusal to pay.[167] The *Restatement* suggests that a party claiming a prior material breach first must show "a failure to render or *to offer performance*."[168] Because I find that Bienstock offered to make capital contributions to Mobilactive, his actions cannot be considered a material breach.[169]

More importantly, Silverback asked Bienstock to, and Bienstock did, render other performance under the Agreement.[170] In *DeMarie v. Neff*,[171] this Court asked: "even if a buyer forfeits his rights by not performing under the contract, is the contract void or merely voidable by the seller?"[172] One answer to that question is found in *Williston on Contracts*, which states:

> Where there has been a material failure of performance by one party to a contract, so that a condition precedent to the duty of the other party's performance has not occurred, the latter party has the choice to continue to perform under the contract or to cease to perform, and *conduct indicating an intention to continue the contract in effect will constitute a conclusive election, in effect waiving the right to assert that the breach discharged any obligation to perform*. In other

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167 JX 189 at 4240; JX 278; Tr. 522–23.

168 *Restatement* § 241 (emphasis added).

169 *See, e.g.*, JX 189 at 04240 (Bienstock) ("I have always been ready to fund my share to make inroads we need . . . . Had it been offered to me, I would have funded half the Atlas acquisition, in all likelihood, as an example.").

170 *See, e.g.*, JX 365, 366, 369, 370, 371, 373, 377.

171 2005 WL 89403 (Del. Ch. Jan. 12, 2005).

172 *Id.* at *5

> words, the general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party, with knowledge of the facts, either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render future performance.[173]

Put another way, "the nonbreaching party may not, on the one hand, preserve or accept the benefits of a contract, while on the other hand, assert that contract is void and unenforceable."[174]

Silverback accepted the benefits of Bienstock's performance of the Mobilactive Agreement, but now asserts that his failure to perform a part of the Agreement, which Silverback itself failed to perform, should preclude Bienstock from recovering. By continuing to accept the benefits of the contract, however, Silverback essentially admitted to its validity, and is estopped from arguing voidability.[175]

Moreover, "[e]quity . . . . will disregard a forfeiture occasioned by failure to comply with the very letter of an agreement when it has been substantially performed."[176]

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[173] 14 *Williston on Contracts* § 43:15 (4th ed. 2004) (internal citations omitted) (emphasis added).

[174] *DeMarie*, 2005 WL 89403, at *5.

[175] *See SLMSoft.Com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *11 (Del. Super. Apr. 2, 2003) ("[T]his Court holds that an obligor who (1) asserts a material breach that arises from an anti-assignment provision that allegedly renders the underlying contract voidable, and (2) fails to void that contract while continuing to perform for assignees, and (3) then admits to the ongoing validity of such contract as against subsequent assignees, is estopped from arguing voidability.").

[176] *Jefferson Chem. Co. v. Mobay Chem. Co.*, 267 A.2d 635, 637 (Del. Ch. 1970).

There is no dispute that both Bienstock and Silverback contributed $46,500.00 of their Initial Capital obligation in 2007 and 2008.[177] The relatively insignificant failure by Bienstock to contribute the full amount of his Initial Capital, therefore, should not preclude Bienstock's ability to recover under the Agreement. Such a result would contravene the reasonable expectations of both parties that they would continue to perform the contract despite their mutual failure to comply with the strict requirements of Section 2.1.

Thus, Bienstock's failure to perform under Section 2.1 does not prevent him from recovering under the terms of the Agreement.

D. Breach of Contract

To prove a breach of contract claim, a plaintiff must show: "the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff."[178] In a post-trial opinion, such as this, "a claimant asserting a breach of contract must prove the elements of its claim by a preponderance of the evidence."[179]

Bienstock asserts that Silverback breached the Agreement by: (1) refusing to honor Mobilactive as the exclusive vehicle for engaging in the Business in North America; (2) diverting acquisition opportunities away from Mobilactive; and (3)

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177 JX 668 at 00028.

178 *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

179 *Estate of Osborn ex rel. Osborn v. Kemp*, 2009 WL 2586783, at *4 (Del. Ch. Aug. 20, 2009) (citing *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007)).

establishing a competing business to capitalize on those opportunities. In denying the existence of any breach, Silverback proffers a different definition of the term "Business." In addition, Silverback contends that the Carve-Out limited the scope of the Business. Consequently, this Court must interpret the meaning of the Business and the Carve-Out, before it can assess whether Silverback breached any obligations imposed by the Agreement.

1. Contract interpretation standard

When interpreting a contract, the court's ultimate goal is to determine the shared intent of the parties.[180] Delaware adheres to the objective theory of contracts.[181] Accordingly, "the court looks to the most objective indicia of that intent: the words found in the written instrument."[182] "As part of this initial review, the court ascribes to the words their common or ordinary meaning and interprets them as would an objectively reasonable third-party observer."[183] A disagreement between the parties as to a contract's

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180 *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).

181 *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007) (citing *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007)).

182 *Sassano*, 948 A.2d at 462. In determining the intent of the parties, the court looks first at the relevant document, read as a whole. *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2008 WL 151855, at *11 (Del. Ch. Jan. 16, 2008) (quoting *Matulich v. Aegis Commc'ns Gp., Inc.*, 2007 WL 1662667, at *12 (Del. Ch. May 31, 2007)).

183 *Sassano*, 948 A.2d at 462.

construction does not suffice to render it ambiguous. Instead, a contract will be deemed ambiguous only if its language is susceptible to two or more reasonable interpretations.[184]

If the contract is ambiguous, a court will apply the parol evidence rule and consider all admissible evidence relating to the objective circumstances surrounding the creation of the contract.[185] "Such extrinsic evidence may include 'overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry.'"[186] After examining the relevant extrinsic evidence, "a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of [the] negotiation."[187]

2. Meaning of "Purpose" and "Business"

The parties agree that the Agreement requires Silverback and Bienstock to engage in the Business, as defined in Section 1.4, exclusively through Mobilactive.[188] The parties disagree, however, as to the meaning of Business and the scope of Section 1.4.

Section 1.4 provides:

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184 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

185 *U.S. West v. Time Warner Inc.*, 1996 WL307445, at *10 (Del. Ch. May 6, 1996).

186 *United Rentals*, 937 A.2d at 834–35 (quoting *Supermex Trading Co. v. Strategic Solutions Gp., Inc.*, 1998 WL 229530, at *3 (Del. Ch. May 1, 1998)) (alteration in original).

187 *U.S. West*, 1996 WL 307445, at *10.

188 JX 42 § 13.5.

> Purpose. The purpose of the Company is to license, develop and own and market technology, content and applications for the purpose of enabling and enhancing *interactive video programming and advertising content* (the "Purpose"). This will involve multiple media platforms, including broadcast, cable and satellite television, mobile devices, and web sites via SMS, [W]AP and MMS and other mobile transmission and billing platforms. The Company will engage in the business of exploiting such technology, applications and content in North America, and upon separate agreement, elsewhere. (Such activities conducted in any manner in North America, is deemed the "Business").[189]

Silverback interprets the "Purpose" of Mobilactive to be to license, develop, own and market technology, content, and applications for the purpose of enabling and enhancing interactive video programming and *interactive video* advertising content. In other words, Silverback argues that the phrase "interactive video" modifies both "programming" and "advertising content." Bienstock, on the other hand, contends that the scope of the Business includes "interactive video programming" and "interactive advertising." That is, Bienstock construes "video" as modifying only "programming," and not "advertising content."

Based on the plain language of the Agreement, I hold that Bienstock's interpretation of the phrase "interactive video programming and advertising content" is correct. The next sentence states that "[t]his will involve multiple media platforms, including broadcast, cable and satellite television, mobile devices, and web sites via

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[189] *Id.* § 1.4 (emphasis added).

SMS, [W]AP and MMS and other mobile transmission and billing platforms."[190] The inclusion of non-video platforms in that sentence undermines Silverback's contention that the parties intended to limit the definition of the advertising portion of the Business to only video advertising content.

Moreover, the Carve-Out explicitly excludes "non-video based mobile and on-line marketing businesses" of Silverback and its affiliates in North America.[191] Such a carve-out would be superfluous if Mobilactive's Business were limited to interactive video programming and interactive video advertising. "When interpreting contracts, this Court gives meaning to every word in the agreement and avoids interpretations that would result in superfluous verbiage."[192]

For these reasons, I hold that the Agreement's definition of Business of Mobilactive is unambiguous. That Business consists of exploiting technology, content, and applications for the purpose of enabling and enhancing interactive video programming and interactive advertising content.

Furthermore, even if, contrary to my conclusion, the words at issue here were found to be ambiguous and I considered extrinsic evidence, I still would construe the contested phrase regarding advertising in Bienstock's favor. "When faced with

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190 *Id.*

191 *Id.*

192 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007) (internal quotation marks omitted) (citing *NAMA Hldgs., LLC v. World Market Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. July 20, 2007)).

contractual ambiguity, the court's 'primary search' remains to find the parties shared intent or common meaning."[193] To determine that common meaning, the court may consider objective evidence, "including the overt statements and acts of the parties, the business context, the parties' prior dealings, and industry custom."[194] The *Restatement* notes that, in this search, courts should consider the parties' course of performance as "the most persuasive evidence of the [meaning of the] parties' agreement."[195]

Mobilactive's early Gossip Girl campaign involved "interactive advertising" whereby consumers could opt-in to receive text messages from Gossip Girl. The Gossip Girl campaign related to a television show, but it did not involve interactive video advertising, which, as the wording of that phrase suggests, includes interaction between viewers and video or television. Indeed, the proposal for the Gossip Girl campaign

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193 *Julian v. Julian*, 2010 WL 1068192, at *5 (Del. Ch. Mar. 22, 2010) (citing *Wilm. Firefighters Ass'n, Local 1590 v. City of Wilm.*, 2002 WL 418032, at *10–11 (Del. Ch. Mar. 12, 2002)).

194 *Wilm. Firefighters Ass'n*, 2002 WL 418032, at *10–11 (citing *Bell Atl. Meridian Sys. v. Octel Commc'ns Corp.*, 1995 WL 707916, at *5 (Del. Ch. Nov. 28, 1995)).

195 *See Personnel Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 n.21 (Del. Ch. May 5, 2008) (citing *Restatement* § 202 cmt. g (2008)); *see also Restatement* § 202 cmt. g ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning . . . . Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or waiver by one party."); *id.* § 202(4) ("[A]ny course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."); *City of Wilm. v. Wilm. FOP Lodge # 1*, 2004 WL 1488682, at *7 (Del. Ch. June 22, 2004) ("[C]ourse of performance . . . may be used to aid a court in interpretation of an ambiguous contract, [or] it may also be used to supply an omitted term when a contract is silent on an issue.").

describes mobile web, SMS, and other services, but does not refer to any interaction between video or television and consumers.[196] Thus, the Gossip Girl campaign, which was one of only two contracts actually executed by Mobilactive, consisted of an interactive mobile advertising campaign, but did not involve interactive video advertising. Therefore, the course of the parties' performance of the Agreement shows that they did not intend to limit Mobilactive to interactive video advertising.

The advertising and marketing materials drafted by Silverback provide further insight into the scope of the joint venture. The marketing materials and website were prepared with the assistance and oversight of Silverback.[197] One presentation entitled "Marketing Agencies & Mobile Marketing" described Mobilactive's mission as developing, marketing, and licensing content and applications that makes "interactive video programming and advertising possible."[198] That presentation contained a number of case studies and a description of Mobilactive's capabilities, using Buick as an example.[199] Many of those case studies illustrated Mobilactive's capability in the mobile arena, but had no video aspects. For example, an Adidas case study showed how Mobilactive could be used to deliver mobile voice messages to retail partner databases.[200]

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196 JX 262.

197 Tr. 698, 711 (Heney).

198 JX 75 at 013826.

199 JX 75.

200 *Id.* at 013846.

Similarly, the Buick example involved a video prompt to text "Buick" to a short code for access to mobile content, including giveaways, product demos, scheduling of test drives, and mobile downloads.[201] These examples demonstrate that, from the early days of the joint venture, the parties understood that Mobilactive's scope included non-video interactive advertising.

The Mobilactive website also reinforces this conclusion. The Mobilactive website stated that "Mobilactive Media develops, markets, and licenses technology, content, and applications, making interactive advertising and video programming possible across multiple media platforms and opening up a whole new interactive audience to your advertising campaigns and programs."[202] The reversed order of "interactive advertising" and "video programming" further demonstrates that the parties did not believe that video modified or limited "interactive advertising."

Thus, if it were necessary to consider extrinsic evidence to resolve the contractual interpretation issues before me, I would find that the evidence shows that Bienstock and Silverback understood and intended that the "advertising" aspect of Mobilactive's business would not be limited to "video" advertising. For that reason and, more importantly, based on the unambiguous language of the contract, I hold that the Purpose of Mobilactive was to enable and enhance interactive video programming and both video and non-video interactive advertising content.

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201 JX 75.

202 JX 507 at 16434.

3. Meaning of the Carve-Out

The parties next disagree as to the meaning of the Carve-Out. The Carve-Out appears in Sections 1.4 and 13.5 of the Mobilactive Agreement and provides:

> It is expressly acknowledged that the Business shall not include Silverback's and its subsidiaries' North American non-video based mobile and on-line marketing businesses and the Members and their subsidiaries shall be free to engage in any business activities except those whose primary purpose involves the enabling and enhancing of interactive video programming and advertising content across multiple digital platforms. To the extent there is any business conducted by Members and their subsidiaries that involves an ancillary video component, and to the extent that the Company has developed and owns technology that can fulfill a Member's requirements for such activities, then the parties may agree upon a revenue sharing or licensing relationship to provide the Member with access to such technology, but are not obligated to do so.[203]

Bienstock interprets the Carve-Out as including only the Silverback subsidiaries that existed when the joint venture was formed. Silverback, on the other hand, avers that the Carve-Out encompasses both existing and future subsidiaries of Silverback. The parties also disagree as to whether the Carve-Out allowed the excluded subsidiaries and Silverback to engage in the same Business as Mobilactive. In that regard, Silverback alleges that the Carve-Out excluded from the Business of Mobilactive only business activities whose *primary purpose* did not involve enabling and enhancing interactive video programming and advertising content across multiple digital platforms. Hence, Silverback contends that it could pursue business activities involving the enabling and

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[203] JX 42 §§ 1.4, 13.5.

enhancing of interactive video programming and advertising as long as that was not the *primary* purpose of those activities. Bienstock interprets the relevant language differently. He argues that the Carve-Out allows Silverback to grow organically within North America, but not by acquisition, and that Silverback only could engage in conduct that did not impinge upon the Purpose of Mobilactive.

Although the parties disagree as to the meaning of the Carve-Out, the Carve-Out is not necessarily ambiguous.[204] In interpreting the Agreement, I "must construe the agreement as a whole, giving effect to all provisions therein."[205] "Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless."[206] With these principles in mind, I have considered the Carve-Out language in Sections 1.4 and 13.5 and concluded that it is not ambiguous.

The first part of the Carve-Out states, "It is expressly acknowledged that the Business shall not include Silverback's and its subsidiaries' North American non-video

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204 *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

205 *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 2012 WL 4950759, at *2 (Del. Oct. 17, 2012); *see also Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996) ("Contracts must be construed as a whole, to give effect to the intentions of the parties."); *accord* 11 *Williston on Contracts* § 32:5 (4th ed.) ("[A] contract will be read as a whole and every part will be read with reference to the whole.").

206 *Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992); *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006).

based mobile and on-line marketing businesses."[207] That language refers to the subsidiaries of Silverback that existed at the time Mobilactive was formed, *i.e.*, Silverback and its existing subsidiaries. At the time of the formation, Silverback's subsidiaries included Umph Media, an online social media development company, Adsoda, an online marketing business, and Silverback Wireless, a mobile virtual network operator.[208] Furthermore, the evidence shows that Silverback's existing subsidiaries engaged in non-video based mobile and online marketing businesses. Therefore, it is reasonable to conclude that the parties intended the Carve-Out to include those existing subsidiaries. Moreover, the possessive form of "subsidiaries" coupled with the reference to "businesses" implies that this portion of the Carve-Out was intended to include only Silverback and its subsidiaries' business at the time of the Agreement, as opposed to future new business or acquired subsidiaries. This view is buttressed by juxtaposing the first part of the Carve-Out against the second part.

The second part of the Carve-Out states that "the Members and their subsidiaries shall be free to engage in any business activities except those whose primary purpose involves the enabling and enhancing of interactive video programming and advertising content across multiple digital platforms."[209] This language appears to describe what the Members, including Bienstock, could do after the Agreement was executed. There is no

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207 JX 42 §§ 1.4, 13.5.

208 Tr. 247–49 (Hanley).

209 JX 42 §§ 1.4, 13.5.

indication that Bienstock had any subsidiaries when Mobilactive was formed, but the Agreement addresses the possibility that he might at some later time.

The subsequent clause of Sections 1.4 and 13.5 also appears to use the term "Members and their subsidiaries" to refer to future acquired subsidiaries. The Carve-Out states:

> To the extent there is any business conducted by Members and their subsidiaries that involves an ancillary video component, and to the extent that the Company [*i.e.*, Mobilactive] has developed and owns technology that can fulfill a Member's requirements for such activities, then the parties may agree upon a revenue sharing or licensing relationship to provide the Member with access to such technology, but are not obligated to do so.[210]

This provision contemplates that, sometime in the future, the Members and their subsidiaries might conduct business that involves an ancillary video component. Interpreting the phrase "Members and their subsidiaries" so as to give it the same meaning throughout the Agreement,[211] I construe "Members and their subsidiaries" to refer to existing and future subsidiaries, whereas "Silverback's and its subsidiaries'" refers only to existing subsidiaries.

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210 *Id.* §§ 1.4, 13.5.

211 *See Del. ex rel. Satterthwaite v. Highfield*, 152 A. 45, 52 (Del. 1930) ("[I]t is a general rule of construction that where the same word or phrase is used on more than one occasion in the same instrument, and in one instance its meaning is definite and clear and in another instance it is susceptible of two meanings, there is a presumption that the same meaning was intended throughout such instrument."); 28 Richard A. Lord, *Williston on Contracts* § 32:6 ("Generally, a word used by the parties in one sense will be given the same meaning throughout the contract in the absence of countervailing reasons.").

Under this second part of the Carve-Out, therefore, the Members of Mobilactive and their subsidiaries were allowed to engage in business activities whose primary purpose was not the enabling and enhancing of interactive video programming and advertising content across multiple digital platforms, even if it might impinge marginally on the Business of Mobilactive. The Carve-Out, however, must be considered in the context of Section 13.5 as well.

Section 13.5 provides that Mobilactive was to be the exclusive vehicle for engaging in the Business in North America. It states:

> The Members agree that the Company and its subsidiaries shall be the only means through which any Member or any of its Affiliates engage in the Business and that any future opportunities for new or expanded Business that any Member or its Affiliates learn of shall be presented to the Company as an opportunity for the Company to undertake on the terms set forth in this Agreement and no Member or any of such Member's Affiliates shall engage in any Business without the prior written consent and decision not to pursue such opportunity by the Members.[212]

In that regard, Silverback and its existing subsidiaries would be free, notwithstanding Section 13.5, to continue conducting their non-video based mobile and online marketing businesses without regard to the primary purposes of those activities. After the Agreement was executed, Silverback and its future subsidiaries also could engage in *business activities* whose primary purpose was *not* the enabling and enhancing of

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[212] JX 42 § 13.5. The term "Affiliates" is broadly defined in the Agreement and appears to encompass the ordinary meaning of the undefined term "subsidiaries." *Id.* at 03027.

interactive video programming and advertising content across multiple digital platforms. On the other hand, "[a]ny future opportunities for new or expanded Business" that included a "business activit[y]" having a primary purpose to do such things still would have to be presented to Mobilactive as a corporate opportunity. Thus, the "primary purpose" limitation refers to specific business activities, such as a new product or service, and is not confined to a business in general. That is, if Silverback learned of a future opportunity for new or expanded Business that included any business activities whose primary purpose involved the enabling and enhancing of interactive video programming and advertising content across multiple digital platforms, Silverback first would have had to present that opportunity to Mobilactive under Section 13.5.

4. Breach of the Agreement

Having determined the proper meaning of "the Business" and the Carve-Out, I now must determine whether Silverback breached its obligations under the Agreement. As previously stated, the contract imposed certain obligations on the Members of Mobilactive. Specifically, Section 13.5 provides that Mobilactive

> shall be the only means through which any Member or any of its Affiliates engage in the Business and that any future opportunities for new or expanded Business . . . shall be presented to [Mobilactive] as an opportunity for [Mobilactive] . . . and no Member or any of such Member's Affiliates shall engage in any Business without the prior written consent and decision not to pursue such opportunity by the Members.[213]

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[213] JX 42 § 13.5.

I discuss in Part II.E, *infra*, the question of whether Silverback breached Section 13.5 by diverting acquisition opportunities away from Mobilactive and acquiring businesses within Mobilactive's line of business, and will examine those questions along with Bienstock's breach of fiduciary duty and usurpation of corporate opportunity claims.[214] At this point, however, I first must determine whether Silverback itself breached Section 13.5 by engaging in the Business in North America, but failing to do so exclusively through Mobilactive.

Bienstock notes that in September 2010, Silverback, which was marketing itself as Adenyo, advertised to provide the same mobile advertising services, including interactive video advertising that Mobilactive previously had presented to Comcast. A September 27, 2010 presentation to Comcast corroborates that allegation.[215] For example, the overview section of that presentation states that Adenyo's portfolio includes "Predictive Analytics, Mobile Websites & Applications, Mobile Messaging Campaigns and Mobile Advertising" and "provid[es] customers a range of innovative and compelling ways to engage customers."[216] That same presentation described Adenyo's "interactive television

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214 To the extent Bienstock is able to recover under a theory of usurpation of corporate opportunity, he would be entitled to disgorgement of the profits Defendants obtained through their inequitable conduct. *See infra* Part II.F. Because that is Bienstock's preferred theory of recovery, I analyze Silverback's conduct regarding the challenged acquisitions according to that theory.

215 JX 694.

216 *Id.* at 22017.

product."[217] Similarly, in May 2010, Adenyo pursued a number of opportunities involving apps, *i.e.*, applications for mobile devices (*e.g.*, Blackberry phones and iPhones), for television shows including "Big Brother Season 12" and "Inside the NFL."[218]

These presentations and proposals show that Silverback infringed on the Business by providing interactive advertising content through mobile platforms independently of Mobilactive. Section 13.5 prohibited Silverback from engaging in the Business without Bienstock's prior written consent. Thus, Silverback violated Section 13.5 of the Agreement.

E. Usurpation of Corporate Opportunity

I next examine whether Silverback breached the Agreement and breached the fiduciary duties it owed to Mobilactive and Bienstock by acquiring companies within the same line of business as Mobilactive.[219] The Agreement clearly states that "the Members as Members are fiduciaries to each other and the Company" and "shall at all times act in the best interest of the Company and shall exercise the utmost in good faith and fair

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217 *Id.* at 22042.

218 JX 519.

219 Defendants seek the dismissal of Bienstock's breach of fiduciary duty claims as being merely duplicative of his breach of contract claims. Defendants ignore, however, the Agreement's express imposition of fiduciary duties on the members of Mobilactive. *See* JX 42 § 14.14. Moreover, the remedies for breach of contract and breach of fiduciary duty in this case are different. *See supra* note 214. Therefore, I reject Defendants' characterization of Bienstock's fiduciary duty claim as duplicative. *See Schuss v. Penfield P'rs, L.P.*, 2008 WL 2433842, at *10 (Del. Ch. Jun. 13, 2008).

dealing."[220] Additionally, under Delaware law, "[t]he relationship of joint adventurers is fiduciary in character and imposes upon all of the participants the utmost good faith, fairness and honesty in dealing with each other with respect to the enterprise."[221]

A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty.[222] "At the core of the fiduciary duty is the notion of loyalty—the equitable requirement that, with respect to the property subject to the duty, a fiduciary always must act in a good faith effort to advance the interests of his beneficiary."[223] "It forbids one joint adventurer from acquiring solely for himself any profit or secret advantage in connection with the common enterprise."[224] "The doctrine of corporate opportunity represents but one species of the broad fiduciary duties."[225] The elements of misappropriation of corporate opportunity are: (1) the opportunity is within the corporation's line of business; (2) the corporation has an interest or expectancy in the opportunity; (3) the corporation is

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220 *Id.* § 14.14.

221 *J. Leo Johnson, Inc. v. Carmer*, 38 Del. Ch. 579, 584 (1959).

222 *Heller v. Kiernan*, 2002 WL 385545, at *3 (Del. Ch. Feb. 27, 2002), *aff'd*, 806 A.2d 164 (Del. 2002) (TABLE).

223 *Dweck v. Nasser*, 2012 WL 161590, at *12 (Del. Ch. Jan. 18, 2012).

224 *J. Leo Johnson, Inc.*, 38 Del. Ch. at 584.

225 *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154 (Del. 1996).

financially able to exploit the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary is placed in a position inimical to his duties to the corporation.[226]

The first element for misappropriation of a corporate opportunity is whether the opportunities, *i.e.*, Atlas, BrainTrain, Gen5, KAST, and MoVoxx, were within Mobilactive's line of business. In *Guth v. Loft*,[227] the Delaware Supreme Court described a "line of business" as follows:

> Where a corporation is engaged in a certain business, and an opportunity is presented to it embracing an activity as to which it has fundamental knowledge, practical experience and ability to pursue, which, logically and naturally, is adaptable to its business having regard for its financial position, and is one that is consonant with its reasonable needs and aspirations for expansion, it may be properly said that the opportunity is in the line of the corporation's business.[228]

Similarly, "[w]hen determining whether a corporation has an interest in a line of business, the nature of the corporation's business should be broadly interpreted."[229]

Silverback's first acquisition was Atlas. At the time of the transaction, Atlas had two main products: (1) an off-the-shelf SMS gateway and reporting package; and (2) a micropayments business that allowed users to send and receive a text message to

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226 *Id.* at 154–55.

227 5 A.2d 503 (Del. 1939).

228 *Id.* at 514.

229 *Dweck v. Nasser*, 2012 WL 161590, at *13 (Del. Ch. Jan. 18, 2012).

authorize the purchase of virtual goods.[230] Later presentations by Atlas indicate that it ultimately provided "interactive TV," "interactive radio," mobile content management and delivery, and a web-based mobile marketing platform.[231] The suite of services offered by Atlas while it was a subsidiary of Silverback, notably "interactive TV" and mobile content management, closely mirrors the services offered by Mobilactive.[232] Thus, Atlas's activities were within Mobilactive's line of business.

Silverback next acquired BrainTrain, a boutique advertising creative agency. BrainTrain provided its advertising services through paper advertising and direct mail campaigns.[233] Even construing Mobilactive's line of business broadly, I am not convinced that paper advertising and direct mail fit within that line of business or the Business as defined by the Agreement. Paper and direct mail advertising is not interactive and does not involve the media platforms defined in the Purpose section of the Agreement. Thus, BrainTrain's activities were outside of Mobilactive's line of business and fall outside the requirements of Section 13.5 of the Agreement.

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230 Tr. 824 (Nelson).

231 JX 457.

232 *See* JX 681, Expert Report of Associate Professor Michael Hanley ("Hanley Report"), ¶ 21 ("It is my opinion that Atlas operated within the scope of Mobilactive's business and competed directly against Mobilactive in the areas of SMS and MMS delivery, mobile strategy development, mobile payments, interactive TV and mobile content platform (content management, mobile storefront, games, etc.).").

233 Tr. 826–27 (Heney).

The next two acquisitions, Gen5 and KAST, provided predictive analytics and data measurement services to marketers in North America.[234] Although there has been no specific showing that Gen5's and KAST's predictive analytics platforms had any application to mobile advertising before Adenyo was sold to Motricity,[235] predictive analytics was within Mobilactive's line of business. For example, a Mobilactive presentation in June 2009 indicated that Mobilactive would provide a "powerful online statistics engine and tools."[236] A later presentation stated that Mobilactive could generate "campaigns . . . using *predictions* to identify the most likely consumers."[237] Moreover, marketing materials prepared by Silverback and Mobilactive stated that Mobilactive had a long-standing partnership with Silverback and touted Silverback's predictive analytics services.[238] Thus, predictive analytics and the predictive analytics technology developed by Gen5 and KAST were a key part of Mobilactive's marketing strategy and were within Mobilactive's line of business.[239]

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234 Tr. 826–28, 831 (Nelson).

235 Tr. 832–33 (Nelson).

236 JX 75 at 013831.

237 JX 369 at 011386 (emphasis added).

238 *Id.* at 011376.

239 *See* Hanley Report ¶ 23 ("It is my opinion that Gen5 operated within the scope of Mobilactive's business and that Mobilactive offered many of the same analytical and measurement services as Gen5."); *Id.* ¶ 24 ("In my opinion KAST operated within Mobilactive's business and provided analytical and data mining capabilities similar to those of Mobilactive.").

Mobilactive's final acquisition was MoVoxx, which had a sizeable SMS network of 17 million consumers and the technology to deliver advertising to the network.[240] MoVoxx could send an SMS message to customers with a hyperlink that would take the consumer to third-party hosted content, such as video.[241] In other words, MoVoxx's business involved providing a mobile platform for the delivery of mobile advertising content. Thus, MoVoxx was also within Mobilactive's line of business.[242]

The second inquiry under the corporate usurpation doctrine is whether Mobilactive had an interest or expectancy in the opportunity. Here, the Agreement made clear that Mobilactive had an expectancy in corporate opportunities like those presented by Silverback's and Adenyo's acquisitions. The Agreement states:

> The Members agree that the Company and its subsidiaries shall be the only means through which any Member or any of its Affiliates engage in the Business and that *any future opportunities for new or expanded Business that any Member or its Affiliates learn of shall be presented to the Company as an opportunity for the Company to undertake* on the terms set forth in this Agreement and no Member or any of such Member's Affiliates shall engage in any Business without the prior written consent and decision not to pursue such opportunity by the Members.[243]

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240 Tr. 833–36 (Nelson).

241 *Id.*

242 *See* Hanley Report ¶ 25 ("It is my opinion that MoVoxx operated within Mobilactive's business and that Mobilactive had the technical capabilities and mobile platform capacity to develop and deliver the same type and quantity of mobile content as MoVoxx.").

243 JX 42 § 13.5 (emphasis added).

"For the corporation to have an actual or expectant interest in any specific property, there must be some tie between that property and the nature of the corporate business."[244] Where, as here, a party explicitly contracts for the right to have an opportunity presented to it, it is axiomatic that the interest or expectancy element is met.[245]

The third element of the corporate opportunity doctrine is that the corporation is financially able to exploit the opportunity.[246] Silverback avers that it is Bienstock's burden to establish conclusively that he was financially capable of exploiting the opportunity; a burden they contend he cannot meet through testimony alone. Silverback also argues that the evidence shows that Bienstock and Mobilactive were not able to fund the acquisition of any of the Acquired Companies. In that regard, Defendants note that the Members only invested $46,500 each in Mobilactive and the Company only generated $36,625 in revenues. In opposition, Bienstock asserts that Silverback's failure to present a corporate opportunity in the face of a clear contractual obligation to do so itself constitutes a breach of fiduciary duty, and that, therefore, the Court need not address whether Bienstock or Mobilactive was financially able to avail itself of the

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244 *Johnston v. Greene*, 121 A.2d 919, 924 (1956).

245 *See, e.g.*, *Yiannatsis v. Stephanis ex rel. Sterianou*, 653 A.2d 275, 278 (Del. 1995) (affirming that the corporate opportunity doctrine precludes directors from interfering with negotiated for first refusal rights).

246 *See, e.g.*, *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996); *Guth v. Loft*, 5 A.2d 503, 511 (Del. 1939).

opportunity.[247] In the alternative, Bienstock relies on the following testimony he gave at trial to demonstrate that he had the requisite financial capability: "I had substantial assets that I could have used to make acquisitions . . . . I certainly had enough liquid assets that I could have used to join in the acquisitions."[248]

In *Yiannatsis v. Stephanis ex rel. Sterianou*,[249] the Supreme Court considered a usurpation of corporate opportunity claim in the context of a parallel contractual obligation to present a corporate opportunity. The Court concluded that a breach of fiduciary duty based on usurpation had occurred without the need to consider the company's financial condition.[250] As in *Yiannatsis*, Silverback had a contractual obligation to present corporate opportunities to Mobilactive that roughly parallels Silverback's fiduciary duties. Consequently, I find that the same result should obtain here.

In addition, Bienstock's testimony suffices to make a *prima facie* showing of financial ability. Defendants attempt to blunt that testimony by pointing out that, during

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247 Pls.' Opening Br. 37 (citing *Yiannatsis*, 653 A.2d at 279).

248 Tr. 435; *see also* Tr. 437.

249 653 A.2d 275 (Del. 1995).

250 *Id.* at 279 ("[W]e do not determine whether or not the 'insolvency-in-fact' standard adopted by the Court of Chancery for determining financial inability is the appropriate standard to apply in corporate opportunity cases. We hold instead that this case turns on the Court of Chancery's finding that 'Sunview never invoked the 1975 Agreement upon the death of Costas.' Accordingly, we hold that Demos and Stella breached the fiduciary duties they owed to John and Sunview by failing to present properly the opportunity to Sunview to purchase Costas' shares." (citations omitted)).

discovery, Bienstock refused to produce his financial records, which might have undermined his current protestations of financial wherewithal. Bienstock's failure to produce the requested documents is puzzling and a cause for concern. But, Defendants never pursued a motion to compel the production of Bienstock's financial documents. Therefore, based on the absence of a motion to compel or any evidence to rebut Bienstock's testimony, I perceive no basis for doubting the veracity of Bienstock's testimony or for drawing an adverse inference that Bienstock was not financially capable of exploiting the corporate opportunities at issue.[251]

Indeed, there are sound policy reasons for not drawing an adverse inference against Bienstock. If Defendants are permitted to justify their conduct on a theory of corporate inability to exploit the opportunity, "there will be a temptation [by potential usurpers] to refrain from exerting their strongest efforts on behalf of the corporation since, if it does not meet the obligations, an opportunity of profit will be open to them personally."[252] For all of these reasons, the third element of the corporate opportunity doctrine is satisfied.

Finally, the corporate opportunity doctrine requires that, as a result of the alleged usurpation, the corporate fiduciary stands in a position inimicable to his duties to the

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[251] To the contrary, an email by Heney suggests that Bienstock had the financial resources to acquire Atlas. *See* JX 138 at 01766 ("Atlas can add a good chunk of value to [Silverback] and we shouldn't need Bienstock or his money to make it happen!").

[252] *See Irving Trust Co. v. Deutsch*, 73 F.2d 121, 124 (2d Cir. 1934).

corporation. Here, Silverback usurped several corporate opportunities and exploited those opportunities on its own behalf rather than sharing the benefits with Bienstock and Mobilactive. Silverback's successor Adenyo then sold its entire business to Motricity for $100 million, keeping the resulting profits for themselves. By doing so, Defendants wrongfully placed themselves in a position inimicable to Silverback's duties to Mobilactive to serve their own self-interest.[253]

For the foregoing reasons, I conclude that Silverback usurped Mobilactive's opportunities to acquire each of Atlas, Gen5, KAST, and MoVoxx.

F. Damages

In cases where the defendant breaches the duty of loyalty, the infringing party must disgorge all profits and equity from the usurpation.[254] "[I]f, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired."[255] "The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by

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253 *Dweck v. Nasser*, 2012 WL 161590, at *12 (Del. Ch. Jan. 18, 2012).

254 *Id.* at *13.

255 *Guth v. Loft*, 5 A.2d 503, 511 (Del. 1939).

the fiduciary relation."[256] This Court's goal, therefore, is to determine the benefit Silverback realized by usurping Mobilactive's corporate opportunities.

Bienstock must prove his damages by a preponderance of the evidence.[257] Delaware does not "require certainty in the award of damages where a wrong has been proven and injury established."[258] Indeed, "[t]he quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage."[259] Responsible estimates of damages that lack mathematical certainty are permissible so long as the court has a basis to make such a responsible estimate.[260] Public policy has led Delaware courts to show a general willingness to make a wrongdoer "bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven."[261] Nevertheless, when acting as the fact finder, this Court may not set damages

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256 *Id.* at 510.

257 *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *22 (Del. Ch. Jan. 29, 2010).

258 *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *15 (Del. Ch. Oct. 23, 2002) (quoting *Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prods., Inc.*, 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992)).

259 *Total Care Physicians, P.A. v. O'Hara*, 2003 WL 21733023, at *3 (Del. Super. July 10, 2003).

260 *Del. Express Shuttle*, 2002 WL 31458243, at *15 (quoting *Red Sail Easter*, 1992 WL 251380, at *7).

261 *Great Am. Opportunities*, 2010 WL 338219, at *23 (citing *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1023 (Del. 2001); *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958); *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 855 A.2d 1059, 1067 (Del. Ch. 2003); *Dionisi v. DeCampli*, 1995 WL 398536, at *18 (Del. Ch. June 28, 1995)).

based on mere "speculation or conjecture" where a plaintiff fails adequately to prove damages.[262]

In that regard, both parties presented damages experts to assist the Court in its calculation of damages. Those experts treated this case much like an appraisal action, arguing over each and every component of their final calculation. "Unlike the more exact process followed in an appraisal action, [however,] the 'law does not require certainty in the award of damages.'"[263] In the interest of not adding further to the length of this opinion, I have not attempted to discuss the rationale for each of my decisions on the many points of disagreement between the damages experts. I have considered the reports and testimony of both Plaintiff's expert, Gregory Cowhey, and Defendants' expert, Brett Margolin. In some instances, I have relied on one or both of the experts' techniques and opinions, while in other instances, I have exercised my own independent judgment in determining the calculation of damages. I begin by noting, however, that consistent with the approach of Cowhey, I use the sale by Adenyo to Motricity as a starting point for valuing the benefit Silverback received by usurping Mobilactive's corporate opportunities.[264]

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262 *Medek v. Medek*, 2009 WL 2005365, at *12 n.78 (Del. Ch. July 1, 2009) (quoting *Henne*, 146 A.2d at 396).

263 *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999) (quoting *Red Sail Easter*, 1992 WL 251380, at *7), *aff'd*, 766 A.2d 437 (Del. 2000).

264 Because I conclude that Silverback's transfer of assets to Adenyo is avoidable as a fraudulent transfer, *see infra* Part II.H, I consider the value realized by Adenyo

To quantify the benefit Defendants realized by usurping Mobilactive's corporate opportunities, I have assessed five separate elements: (1) the benefit of the asset sale to Motricity; (2) an allocation factor for the percentage of operations within Mobilactive's line of business; (3) an allocation factor for the percentage of operations attributable to North America; (4) the capital costs attributable to those acquisitions within Mobilactive's business; and (5) the operating costs attributable to the North American operations within Mobilactive's line of business. After calculating the total revenues Defendants received from the sale to Motricity, I multiplied that result by the allocation factors that reflect Defendants' activities in North America and Mobilactive's line of business. Next, I subtracted the capital costs and operating costs attributable to the North American operations within Mobilactive's business. Finally, I multiplied that result by .50 to take into account Bienstock's one-half interest in the joint venture. The details of each of the elements of my damages calculation are discussed briefly below.

1. The benefit of the asset sale

Motricity structured its purchase of Adenyo's assets as a blended stock and cash transaction with the opportunity for an earn-out. Motricity paid $48,585,000 in cash. The asset sale also included a contingent earn-out of $50,000,000. As of September 30, 2011, however, Motricity's Form 10-Q disclosed that it was "not probable" that Adenyo

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from its sale to Motricity of business interests that constitute corporate opportunities of Mobilactive to be a suitable proxy for calculating damages.

would receive the contingent earn-out.[265] In addition, Motricity provided 3,277,002 shares of Motricity, of which 959,561 were subject to a contractual lockup.[266] Of the latter shares, one half (*i.e.*, 479,780.5 shares) were subject to a 45-day lockup and the other half to a 90-day lockup.[267] The trading price of Motricity was $13.16 on April 14, 2011 (the date of the asset purchase), $9.31 on May 31, 2011 (the first trading day after the 45-day lockup expired), and $7.44 on July 13, 2011 (90 days after closing).[268] Thus, the benefit of the asset sale can be calculated as follows:

Type of Consideration	**Shares**	**Price ($)**	**Amount ($)**
Cash payment			48,585,000.00
Earn-out			-
Shares tradeable at closing	2,317,441	13.16	30,497,523.56
Shares subject to 45 day lockup	479,781	9.31	4,466,756.46
Shares subject to 90 day lockup	479,781	7.44	3,569,566.92
Total Proceeds from Sale			**87,118,846.94**

Therefore, Adenyo received $87,118,847 in consideration from Motricity.[269]

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265 JX 677 at 10.

266 Motricity, Inc.'s Form 8-K (filed April 14, 2011).

267 Tr. 565 (Cowhey).

268 *See* Yahoo Finance, Motricity, Inc. Historical Stock Prices, http://finance.yahoo.com/q/hp?s=MOTR+Historical+Prices (last visited Dec. 27, 2012); JX 688.

269 Defendants also argue that, to complete the acquisitions that preceded the sale to Motricity, Mobilactive would have had to become a "subchapter C" corporation, and that, therefore, taxes should be deducted from the proceeds. Because the remedy in this case is based on a disgorgement of Defendants' profits, rather than a calculation of Mobilactive's lost profits, I find it unnecessary to engage in a counterfactual exercise that assumes the scenario posited by Defendants.

2. Allocation factor for the percentage of operations within Mobilactive's line of business and in North America

As previously discussed, BrainTrain was not within Mobilactive's line of business. Consequently, its value should be excluded from the calculation of damages. A 2011 valuation report prepared for Silverback states that "[w]e have not seen the balance sheet[] of . . . BrainTrain Inc. as at Valuation Date. Based on discussions with Management, we understand and have assumed that [this] subsidiar[y] has a nil FMV."[270] The report also stated that "Adenyo Corp., a business managed by only 2 employees previously with BrainTrain, is a consulting business and does not own any technology, as such we do not believe that Adenyo Corp's value could be significantly higher."[271] Having decided to exclude the value of BrainTrain, I also consider it appropriate to exclude Adenyo Corp., *i.e.*, the consulting business managed by BrainTrain's two former employees. The valuation report assigned a value of $1,611,000 to Adenyo Corp.[272] The report valued Adenyo Inc. as a consolidated entity at $85,515,000,[273] which means Adenyo Corp. represented 1.88% of Adenyo Inc.'s consolidated value.[274] Therefore, to exclude BrainTrain from the calculation of the benefit Defendants received, I have reduced the consideration received by Adenyo in the Motricity transaction by 1.88%.

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270 JX 653 at 00470. The report was prepared PricewaterhouseCoopers.

271 *Id.* at 00473.

272 *Id.* at 00522.

273 *Id.* at 00477.

274 *See also id.* at 00503 (determining a 1.9% value).

In computing the benefit Defendants obtained from the usurpation, I also must determine the percentage of the Motricity proceeds attributable to North American operations. The valuation report assigned a value of $44,308,000 to Adenyo SAS (formerly known as Interactif and SBW Paris SAS), which operated entirely in Europe and contained Adenyo's European operations.[275] The report valued Adenyo Inc. as a consolidated entity at $85,515,000.[276] According to these valuations, European operations represented 51.81% of Adenyo Inc.'s consolidated value.[277] Thus, I also reduced the consideration received from Motricity by 51.81%.

In sum, to remove BrainTrain/Adenyo Corp. and the European operations from the consideration received from Motricity, I reduced the total amount, $87,118,847, by 53.69%. That results in $40,344,738 of consideration attributable to North American operations within Mobilactive's line of business.

3. Capital Cost Deductions

Next, to determine the amount of Silverback's profits resulting from the usurpation, I must subtract the cost of the North American acquisitions within Mobilactive's line of business.[278] The costs of the relevant acquisitions are as follows:[279]

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275 JX 653 at 00439, 00503.

276 *Id.* at 00477.

277 *But see id.* at 00503 (determining a 53.4% value).

278 *See* JX 680. Bienstock's expert, Cowhey, suggested that the cost of the North American acquisitions should be subtracted as if the transactions were completed by Mobilactive. *Id.* at 12. Here, I have subtracted the acquisition costs so as to calculate accurately Silverback's profits rather than its revenues.

Entity	Acquisition Date	Purchase Price ($)
51% Atlas	Sept. '07	1,696,000
Gen5	Sept. '08	1,630,000
49% Atlas	Aug. '09	3,184,000
KAST	June '10	982,000
MoVoxx	June '10	4,500,000
		11,992,000

Such a calculation, however, also should incorporate Silverback's cost of equity.[280] According to a valuation by PricewaterhouseCoopers, Adenyo's cost of equity was between 30% and 40%.[281] Using the midpoint as the cost of equity, 35%, I determined the following adjusted costs for the acquisition:[282]

Entity	Acquisition Date	Adjusted Purchase Price ($)
51% Atlas	Sept. '07	5,024,895
Gen5	Sept. '08	3,574,357
49% Atlas	Aug. '09	5,305,411
KAST	June '10	1,274,399
MoVoxx	June '10	5,697,629
		20,876,690

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279 *See* JX 680, 686.

280 Silverback's expert, Margolin, first proposed calculating the acquisition costs on an economic basis rather than a historical cost basis. *See* JX 686 at 6–8, Ex. D. Because I am attempting to effect a disgorgement of Silverback's profits, I have taken into account Silverback's opportunity cost or the cost of carrying the acquired assets.

281 JX 653 at 00465, 00526.

282 I used a future value ("FV") equation that assumed annually compounding interest, *i.e.*, $FV = PV \times (1 + i)^t$. For example, in the 51% Atlas acquisition, the Present Value ("PV") was $1,696,000, the interest rate was 35%, and the time period was 3.6191 years (September 1, 2007 to April 14, 2011). Thus, the value of that acquisition is equal to $\$1{,}696{,}000 \times (1 + .35)^{3.6191}$. That results in an adjusted purchase price of $5,024,895. *See* JX 686 at 6–8, Ex. D.

Thus, the cost of acquiring those companies within Mobilactive's line of business in North America was $20,876,690 as of April 14, 2011, the date of the Motricity transaction.

4. Operating income

To calculate the operating losses attributable to North American operations within Mobilactive's line of business, I looked at historical operating losses and removed the losses or gains attributable to Adenyo SAS (Adenyo's European operations) and Adenyo Corp. (*i.e.*, BrainTrain).[283] The following chart summarizes those calculations for 2009–2011:[284]

	2009	**2010**(1)	**2011**(2)
Consolidated EBITDA	(3,437)	(8,462)	199
Adenyo SAS	(1,061)	(4,035)	502
Adenyo Corp.	72	221	120
Adjusted EBITDA	**(2,448)**	**(4,648)**	**(423)**

(1) Annual estimates based on actual results for the first 11 months.[285]

(2) Estimated as 3.5 months of 2011 projections, *i.e.*, until the April 14, 2011 sale to Motricity.

Thus, for 2009 through April 14, 2011, the total operating losses attributable to the North American operations within Mobilactive's line of business were $7,519,000.

For 2007 and 2008, I used the operating losses attributable to North America[286] and subtracted out BrainTrain's losses in 2008 that occurred after the acquisition of

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283 Both Cowhey and Margolin subtracted operating losses in their calculation of damages. *See* JX 680 at 11–12; JX 686 at 3, 8–9.

284 *See* JX 653.

285 JX 653 at 00421, 00453 n.1, 00461, 00506.

BrainTrain.[287] The following table reflects the calculation of the adjusted operating losses for 2007 and 2008:[288]

	2007[(1)]	**2008**
Consolidated North American EBITDA	(837)	131
BrainTrain EBITDA	-	219
Adjusted EBITDA	**(837)**	**(88)**

(1) The Mobilactive Agreement was not signed until February 2007. Consequently, I reduced the 2007 result by one-twelfth.

Thus, for the last eleven months of 2007 and the entirety of 2008, operating losses attributable to North American operations within Mobilactive's line of business were $925,000. The total operating loss for all years was $8,444,000.

I also adjusted the operating losses to reflect Adenyo's cost of equity. The following table summarizes that adjustment:[289]

	2007	**2008**	**2009**	**2010**	**2011**
EBITDA	(837)	(88)	(2,448)	(4,648)	(423)
Time Value Adjusted EBITDA	(2,580)	(203)	(4,184)	(5,885)	(447)

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286 JX 382 at 23371.

287 JX 338 at 41.

288 JX 382 at 23371.

289 Using the same future value equation referenced in note 282, *supra*, I also applied a mid-period convention (*i.e.*, July 1 for full years and the mid-period for other periods). For example, for 2008, the PV was –$837,000, the interest rate was 35%, and the time period was 2.786 years (July 1, 2008 to April 14, 2011). Thus, the losses for 2008 are equal to $-\$837{,}000 \times (1 + .35)^{2.786}$. That results in an adjusted EBITDA of -$1,931,000.

Thus, the present value as of April 14, 2011 of the operating losses attributable to the North American entities within Mobilactive's line of business was $13,299,000.

5. Conclusion

The following table represents the total damages to be assessed against Silverback:

	Amount ($)
Consideration	40,344,738
Cost of Acquisitions	(20,876,690)
Operating Costs	(13,299,000)
Total Profits	**6,169,048**
Ownership Stake	*50%*
Disgorged Profits	**3,084,524**

Thus, my analysis produces a final damages award of $3,084,524, which would have been due on April 14, 2011.

6. Prejudgment Interest

Bienstock requested prejudgment interest in the Joint Pretrial Order. Delaware law is settled that "[a] successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues."[290] Generally, the legal rate of interest has been used as "the benchmark for pre-judgment interest."[291] Nevertheless, this Court "has broad discretion, subject to principles of fairness, in fixing the [interest] rate to be applied."[292] Interest is awarded with two goals in mind, one of which is "to require the

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290 *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 755 (Del. Ch. 2007) (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988)).

291 *Summa Corp.*, 540 A.2d at 409.

292 *Id.*

respondent to disgorge any benefit it received."[293] In the exercise of my discretion, I award Bienstock prejudgment interest at the legal rate from April 14, 2011 to the date of judgment, compounded monthly.

G. Personal Jurisdiction Over Adenyo

Before assessing whether Bienstock has proven his fraudulent transfer claim against Adenyo, I first must determine whether this Court has personal jurisdiction over Adenyo.[294] The plaintiff bears the burden to show the basis for the court's exercise of personal jurisdiction over a defendant.[295]

Bienstock has advanced five theories in support of personal jurisdiction over Adenyo. First, Bienstock argues that Adenyo is subject to jurisdiction under the "transacts business" prong of the Delaware long-arm statute.[296] Second, Bienstock contends that Adenyo is an alter ego of Silverback, and that this Court, as a court of equity, should disregard Adenyo's corporate form. Third, Bienstock maintains that because Adenyo Inc. is the parent of Adenyo USA, which allegedly conducts business in Delaware, this Court should impute Adenyo USA's contacts to Adenyo Inc. Fourth, Bienstock asserts that jurisdiction exists over Adenyo under Delaware's implied consent

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293 *Ramunno v. Capano*, 2006 WL 1830080, at *1 (Del. Ch. June 23, 2006), *aff'd*, 922 A.2d 415 (Del. 2007) (TABLE). The other goal of prejudgment interest is to compensate the plaintiff for the loss of the use of its money. *Id.*

294 From the outset of this litigation, Adenyo has denied the existence of personal jurisdiction over it.

295 *See Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003).

296 10 *Del. C.* § 3104(c)(1).

statute, which confers jurisdiction over a managing entity that "participates materially in the management of the limited liability company."[297] Finally, Bienstock argues that Adenyo is subject to this Court's jurisdiction under the conspiracy theory of jurisdiction because it conspired with Silverback to engage in the alleged breaches of fiduciary duty.

To establish personal jurisdiction over Adenyo, however, Bienstock need only succeed on one of these theories. The most compelling of the five theories are those relying on Adenyo's transaction of business in Delaware through the incorporation of a Delaware subsidiary and Adenyo's management of a Delaware LLC.[298] To show a basis for jurisdiction over Adenyo under either of these theories, Bienstock must demonstrate: "(1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy constitutional due process."[299]

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297 6 *Del. C.* § 18-109(a).

298 I express no opinion as to whether, under the facts of this case, Adenyo would be subject to the personal jurisdiction of this Court under any of Bienstock's other three theories.

299 *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *6 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE); *see also Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008) ("Delaware courts apply a two-step analysis to determine whether the exercise of personal jurisdiction over a nonresident is appropriate. First, the court must determine whether Delaware statutory law offers a means of exercising personal jurisdiction over the nonresident defendant. Second, after establishing a statutory basis for jurisdiction, the court must determine whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment." (internal quotation marks and citations omitted)).

1. Delaware long-arm statute

a. Statutory basis for personal jurisdiction

As a preliminary matter, I note that the "burden [is] upon the plaintiff to make a specific showing that the Delaware court has jurisdiction under the long-arm statute."[300] In this case, Bienstock relies on the following section of the Delaware long-arm statute:

> As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent: (1) [t]ransacts any business . . . in the State . . . .[301]

Because Section 3104(c)(1) constitutes a specific jurisdiction provision, it only allows jurisdiction over causes of action that are closely intertwined with the jurisdictional contact.[302]

"[A] single transaction is sufficient to confer jurisdiction where the claim is based on that transaction."[303] "Forming a Delaware entity for the purpose of engaging in a [challenged] transaction constitutes the 'transaction of business' within the State of Delaware sufficient to confer specific personal jurisdiction over the party forming the entity under Section 3104(c)(1)." Similarly, "[a] single act of incorporation, *if done as part of a wrongful scheme*, will suffice to confer personal jurisdiction under

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300 *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984) (citing three cases including *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178 (1936)).

301 10 *Del. C.* § 3104(c)(1).

302 *Sample v. Morgan*, 935 A.2d 1046, 1057 n.43 (Del. Ch. 2007).

303 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000).

§ 3104(c)(1)."[304] "But merely participating in the formation of a Delaware entity, without more, does not create a basis for jurisdiction in Delaware."[305] Instead, the formation must be "an integral component of the total transaction to which plaintiff's cause of action relates."[306]

Here, I infer from the evidence of record that Adenyo "purposefully availed" itself of the benefits and protections of Delaware by incorporating Delaware subsidiaries, including Adenyo USA and Adenyo Acquisition. Specifically, it appears that Adenyo incorporated Adenyo USA and Adenyo Acquisition for the purpose of acquiring MoVoxx, one of the wrongful acts challenged in the Complaint.

The acquisition of MoVoxx and the formation of Adenyo Acquisition are intertwined closely with the causes of action asserted by Bienstock. As previously discussed, the acquisition of MoVoxx constituted the usurpation of a corporate opportunity of Mobilactive. Therefore, Bienstock has asserted a statutory basis under 10 *Del. C.* § 3104(c)(1) for this Court's exercise of personal jurisdiction over Adenyo.

b. Due process considerations

I next address whether the imposition of personal jurisdiction in this case under Delaware's long-arm statute violates the Due Process Clause of the Fourteenth

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304 *Conn. Gen. Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *2 (Del. Ch. Oct. 28, 2011) (citing *Cairns v. Gelmon*, 1998 WL 276226, at *3 (Del. Ch. May 21, 1998)).

305 *Id.*

306 *Shamrock Hldgs. of Cal., Inc. v. Arenson*, 421 F. Supp. 2d 800, 804 (D. Del. 2006).

Amendment. "The focus of this inquiry is whether Adenyo engaged in sufficient 'minimum contacts' with Delaware to require it to defend itself in the courts of this State consistent with the traditional notions of fair play and justice."[307] "In order to establish jurisdiction over a nonresident defendant, the nonresident defendant's contacts with the forum must rise to such a level that it should 'reasonably anticipate' being required to defend itself in Delaware's courts."[308]

The Delaware Supreme Court's reasoning in *Papendick*[309] suggests that the decision by a foreign parent corporation to incorporate a subsidiary in Delaware in circumstances such as those existing in this case is sufficient to be a "minimum contact." The Supreme Court stated:

> We do not believe that the *International Shoe* "minimum contact" due process standards were intended to deprive Delaware courts of jurisdiction by permitting an alien corporation to come into this State to create a Delaware corporate subsidiary for the purpose of implementing a contract under the protection of and pursuant to powers granted by the laws of Delaware, and then be heard to say, in a suit arising from the very contract which the subsidiary was created to implement, that the only contact between it and Delaware is the "mere" ownership of stock of the subsidiary.
>
> The latter point is most significant in applying *International Shoe* standards. There is a controlling distinction, for present purposes, between the ownership of shares of stock acquired

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307 *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 440 (Del. 2005) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

308 *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

309 *Papendick v. Bosch*, 410 A.2d 148 (Del. 1979).

> by purchase or grant as in *Shaffer* [*v. Heitner*[310]], on the one hand, and ownership arising from the purposeful utilization of the benefits and protections of the Delaware Corporation Law in activities related to the underlying cause of action, on the other hand. [The defendant] purposefully availed itself of the benefits and protections of the laws of the State of Delaware for financial gain in activities related to the cause of action. Therein lies the "minimum contact" sufficient to sustain the jurisdiction of Delaware's courts over [the defendant].[311]

Here, the totality of the circumstances show that Adenyo has sufficient ties to this State to satisfy the minimum contacts requirement. "Having engaged in conduct that involved the formation of a Delaware entity, [Adenyo] should have 'reasonably anticipated . . . that his . . . actions might result in the forum state exercising personal jurisdiction over him in order to adjudicate disputes arising from those actions.'"[312] Thus, asserting jurisdiction over Adenyo under 10 *Del. C.* § 3104(c)(1) also comports with constitutional notions of due process.

2. Delaware's implied consent statute

In addition to being subject to jurisdiction under Delaware's long-arm statute, Adenyo also would be subject to jurisdiction under the implied consent statute. The Delaware Limited Liability Company Act (the "LLC Act") authorizes service of process on the managers of limited liability companies formed under the laws of this State. [313]

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310 433 U.S. 186 (1977).

311 *Papendick*, 410 A.2d at 152.

312 *Hamilton P'rs, L.P. v. Englard*, 11 A.3d 1180, 1199 (Del. Ch. 2010) (citing *In re USACafes, L.P. Litig.*, 600 A.2d 43, 50 (Del. Ch. 1991)).

313 The "implied consent" statute, 6 *Del. C* § 18-109(a), reads in part:

Bienstock claims that Adenyo is subject to this Court's personal jurisdiction as a result of its alleged material participation in the management of Mobilactive, a Delaware LLC. Bienstock argues that because Silverback had no employees in 2010, Adenyo Inc. must have directed the filing of the Delaware action seeking Mobilactive's dissolution. Bienstock also alleges that Bienstock was dealing with Adenyo Inc. when he contacted Nelson and other Adenyo officers to discuss the management of Mobilactive's affairs, such as the renewal of Mobilactive's website registration. Adenyo, on the other hand, argues that its conversations with Bienstock did not involve the management of Mobilactive, and were essentially settlement negotiations in furtherance of dissolution of Mobilactive.

Notably, Adenyo does not deny that it directed the filing of Mobilactive's dissolution. I, therefore, infer from Adenyo's statements that Silverback had no employees in 2010[314] and the fact that the filing of an action for dissolution occurred in

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> A manager . . . of a limited liability company may be served with process in the manner prescribed in this section in all civil actions . . . brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company . . . .

"Manager," as used in Section 18-109(a), refers to any person who is a manager as defined in the LLC Act's definitional section, Section 18-101(10), as well as a person who "participates materially in the management of the limited liability company."

314 *See* JX 627, Response to Interrogatory No. 3.

August 2010, that Adenyo must have directed Mobilactive's application for dissolution. Moreover, under 6 *Del. C.* § 18-802, an application for dissolution must be made "by or for a member or manager." Thus, Adenyo effectively made the application for dissolution as a manager of Mobilactive and thereby became subject to jurisdiction under Delaware's implied consent statute.

Finally, "service under § 18-109 will be consistent with due process when the action relates to a violation by the manager of a fiduciary duty owed to the limited liability company."[315] Here, the action relates to the violation by Adenyo, as the successor to Silverback and a material participant in the management of Mobilactive, of its duty to present corporate opportunities to Mobilactive. Thus, service under § 18-109 also comports with due process considerations.

H. Fraudulent Transfer

DUFTA provides remedies to creditors who are defrauded by debtors who transfer assets or incur obligations "[w]ith actual intent to hinder, delay or defraud any creditor of

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315 *PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *5 (Del. Ch. Feb. 26, 2010) (citing *Assist Stock Mgmt.*, 753 A.2d at 978 n.18 ("[I]f the complaint is read as validly alleging a breach of fiduciary duty against Rosheim in his capacity as a manager of AIT, there is little question that § 18-109 will subject him to the jurisdiction of this court for purpose of litigating that claim.")); *see also Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980).

the debtor" (*i.e.*, an actual fraudulent transfer), or, in certain circumstances, "[w]ithout receiving reasonably equivalent value" (*i.e.*, a constructively fraudulent transfer).[316]

Section 1304(a) of DUFTA provides, in full, as follows:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

For purposes of the Act, a creditor is defined as "any person who has a claim."[317] A claim is defined as a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,

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316 *See August v. August*, 2009 WL 458778, at *10 (Del. Ch. Feb. 20, 2009); *Wilm. Sav. Fund Soc., FSB v. Kaczmarczyk*, 2007 WL 704937, at *4 (Del. Ch. Mar. 1, 2007).

317 6 *Del. C.* § 1301(4).

undisputed, legal, equitable, secured or unsecured."[318] Thus, Bienstock's unliquidated, contingent, disputed, unsecured right to payment in this case is nevertheless a claim for purposes of DUFTA, and Bienstock is a creditor of Silverback.[319]

DUFTA provides a number of factors for the Court to consider when determining whether a debtor transferred assets with "actual intent to hinder, delay or defraud" under Section 1304(a)(1). They are:

> (1) The transfer or obligation was to an insider; (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[320]

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318 6 *Del. C.* § 1301(3).

319 *See Mitsubishi Power Sys. Ams., Inc. v. Babcock & Brown Infrastructure Gp. US, LLC*, 2009 WL 1199588, at *4 n.11 (Del. Ch. Apr. 24, 2009).

320 6 *Del. C.* § 1304(b).

"It is not necessary that all of the factors support a finding of actual intent."[321] Rather, "the confluence of several [factors] in one transaction generally provides conclusive evidence of an actual intent to defraud."[322]

Here, a number of relevant factors are present. Bienstock sued Silverback on August 16, 2010, and the transfer was made on November 9, 2010. The transfer also involved "substantially all" of Silverback's assets. Moreover, the value of the consideration received by Silverback was not reasonably equivalent to the value of the asset transferred: Silverback transferred assets worth $79,920,000 solely for a deed of indemnity.[323] Finally, shortly after the transfer, Silverback entered liquidation proceedings.

In addition, internal communications of Silverback and Adenyo support the inference that Defendants intended the transfer to hinder Bienstock's ability to enforce his rights under the Agreement. It is undisputed that as of April 19, 2010, the date Bienstock sent a demand letter to Nelson and Silverback, Silverback knew of Bienstock's claims. Notwithstanding Bienstock's demand, the Board on June 8 discussed deferring

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321 *Dryden v. Estate of Gallucio*, 2007 WL 185467, at *6 n.36 (Del. Ch. Jan. 11, 2007).

322 *VFB LLC v. Campbell Soup Co.*, 2005 WL 2234606, at *32 (D. Del. Sept. 13, 2005), *aff'd*, 482 F.3d 624 (3d Cir. 2007).

323 There is no evidence in the record from which this Court could infer that the deed of indemnity had reasonably equivalent value.

the acquisitions of MoVoxx and KAST until the completion of the re-domiciliation.[324] Moreover, although Bienstock filed this action on August 16, 2010, Silverback and Adenyo entered into the asset transfer on November 9, 2010 whereby Silverback transferred substantially all of its assets to Adenyo for a deed of indemnity. I infer from this chronology and Defendants' longstanding desire to rid themselves of their entanglement with Bienstock and Mobilactive, along with the other objective factors, that the transfer was a fraudulent transfer designed to enable Adenyo to carry on Silverback's business without being subject to the Mobilactive Agreement.

For the foregoing reasons, I find that Silverback acted with actual intent to hinder Bienstock, as a creditor with a claim, when it transferred substantially all of its assets to Adenyo. Therefore, the transfer was fraudulent under 6 *Del. C.* § 1304(a)(1).

Silverback's transfer also would qualify as a fraudulent transfer under Section 1305(a) of DUFTA. That Section provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.[325]

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[324] JX 528 at 01524–25; Tr. 888 (Nelson).

[325] 6 *Del. C.* § 1305(a).

In other words, under Section 1305(a), a creditor whose claim arose before a challenged transfer may have that transfer effectively set aside if the debtor: (1) is insolvent or is made insolvent by the transfer; and (2) does not receive reasonably equivalent value.[326] Under DUFTA, "[a] debtor who is generally not paying debts as they become due is presumed to be insolvent."[327]

Shortly after the transfer, Silverback had no remaining assets and entered liquidation.[328] Moreover, as discussed *supra*, Silverback did not receive reasonably equivalent value when it transferred its assets for a deed of indemnity. Thus, Silverback's transfer to Adenyo also represents a fraudulent transfer under Section 1305(a).

DUFTA provides broad remedies to creditors and leaves considerable leeway for the exercise of equitable discretion.[329] In addition to specific remedies such as avoidance and attachment, the statute provides that, "[s]ubject to applicable principles of equity . . .

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326 *Wilm. Sav. Fund Soc., FSB v. Kaczmarczyk*, 2007 WL 704937, at *5 (Del. Ch. Mar. 1, 2007).

327 6 *Del. C.* § 1302(b).

328 *See* Parvez Dep. 222–23.

329 *August v. August*, 2009 WL 458778, at *10 (Del. Ch. Feb. 20, 2009) (citing *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 199 (Del. Ch. 2006) ("Both state law and federal law provide a panoply of remedies in order to protect creditors injured by a wrongful conveyance, including avoidance, attachment, injunctions, appointment of a receiver, and virtually any other relief the circumstances may require.")).

[a defrauded creditor may obtain] [a]ny other relief the circumstances may require."[330] As the Supreme Court has recognized, "the trial court has broad latitude to exercise its equitable powers to craft a remedy" appropriate to the circumstances of a fraudulent transfer.[331]

"The overarching goal in applying these remedies is to put a creditor in the position she would have been in had the fraudulent transfer not occurred."[332] "This principle stems from the concept that the recipient of a fraudulent transfer holds the asset in constructive trust for creditors, and is reflected in Section 1308 of the DUFTA, which allows a creditor to recover 'an amount equal to the value of the asset at the time of the transfer, subject to the adjustment as the equities require' from a transferee."[333] "[A] defrauded creditor may seek recovery not only from the transferor but from a transferee as well."[334]

Under 6 *Del. C.* § 1307, Bienstock is entitled to "[a]voidance of the transfer or obligation to the extent necessary to satisfy [his] claim." In the exercise of my equitable powers, therefore, I hold that, until such time as the full award has been paid by Silverback, Adenyo, or their agents, Bienstock is entitled to the imposition of a

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330 *Id.* (citing 6 *Del. C.* § 1307(a)(3)).

331 *See Hogg v. Walker*, 622 A.2d 648, 652–54 (Del. 1993).

332 *August v. August*, 2009 WL 458778, at *10.

333 *Id.* (quoting 6 *Del. C.* § 1308(c)).

334 *Mitsubishi Power Sys. Ams., Inc. v. Babcock & Brown Infrastructure Gp. US, LLC*, 2009 WL 1199588, at *5 (Del. Ch. Apr. 24, 2009).

constructive trust over the proceeds from the Motricity sale for the entire damages of $3,084,524 plus prejudgment interest at the legal rate, compounded monthly.

I. Dissolution

Finally, Silverback argues that Mobilactive should be dissolved pursuant to 6 *Del. C.* § 18-802 of the LLC Act and Section 11.2(a)(ii) of the Agreement because it is no longer reasonably practicable to carry on the business in conformity with the Agreement.[335] Section 18-802 of the LLC Act provides: "On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."[336] "Section 18-802 has the 'obvious purpose of providing an avenue of relief when an LLC cannot continue to function in accordance with its chartering agreement.'"[337] Yet, even in cases where the standard for

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335 Defs.' Answering Br. 50 (citing 6 *Del. C.* § 18-802; JX 42 § 11.2(a)(ii)).

336 *See also* JX 42 § 11.2(a) ("The Company shall be dissolved, liquidated and terminated upon the earliest occurrence of . . . (ii) The entry of a decree of judicial dissolution under the Act on the application of a Member whenever it is not reasonably practicable to carry on the business in conformity with the Agreement.").

337 *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009) (quoting *Haley v. Talcott*, 864 A.2d 86, 94 (Del. Ch. 2004)), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE).

dissolution has been met, the Court of Chancery, in the exercise of its equitable powers, *may* decide whether it should issue a decree of dissolution.[338]

Although Silverback remains a member of Mobilactive and it may not be reasonably practicable to carry on Mobilactive's business in the wake of the fraudulent transfer of Silverback's assets to Adenyo, dissolution of Mobilactive is not warranted at this time. Dissolving Mobilactive before Defendants have remitted to Bienstock the damages and interest to which I have held he is entitled could provide a windfall to Defendants. Silverback breached its fiduciary duty to Bienstock by usurping corporate opportunities. The usurpation of corporate opportunities and related breach of Silverback's fiduciary duties contributed materially to Mobilactive's inability to fulfill its business purpose. Silverback should not be permitted to use its inequitable conduct to extricate itself from what it has long considered to be a bad deal with Bienstock and Mobilactive and simultaneously hinder Bienstock from recovering the damages he is due. Therefore, in the exercise of my equitable powers under the specific circumstances of this case, I deny Silverback's request for dissolution of Mobilactive.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I find in favor of Bienstock on all four counts of the Complaint. I also hold that the transfer of assets by Silverback to Adenyo was a fraudulent conveyance. Therefore, I direct that judgment be entered

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338 *Vila v. BVWebTies LLC*, 2010 WL 3866098, at *6 (Del. Ch. Oct. 1, 2010) ("[t]he Court of Chancery *may* decree dissolution") (emphasis added) (quoting *Haley*, 864 A.2d at 93).

against Silverback, Adenyo, Inc., Adenyo USA, Inc., and Adenyo Acquisition Sub, Inc., jointly and severally, for the full amount of $3,084,524 plus prejudgment interest at the legal rate, compounded monthly.[339] In addition, until such time as the judgment is satisfied in full, I also impose a constructive trust over the proceeds from the sale to Motricity that remain in the possession of any and all of Defendants. Finally, I deny Silverback's counterclaim for dissolution of Mobilactive.

Counsel for Bienstock shall submit, on notice, a proposed form of final judgment reflecting these rulings within ten (10) days of the date of this Memorandum Opinion.

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[339] In that regard, one means, but not the only means, by which Bienstock may be able to recover the entire amount to which he is due is through the deed of indemnity posted by Adenyo.