IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re DECADE, S.A.C., LLC, *et al.*, *Debtors.*	Chapter 7 Bankruptcy Case No. 18-11668 (CSS) (Jointly Administered)
DAVID W. CARICKHOFF, as Chapter 7 trustee for the estates of DECADE, S.A.C., *et al.*, *Plaintiff,* v. AARON GOODWIN, REGINA GOODWIN AND ERIC GOODWIN, *Defendants.*	Adversary Proceeding No. 19-50095 (CSS) Related D.I. 184, 185, 186, 187, and 188

MEMORANDUM ORDER[1]

Before the Court are five motions to exclude evidence (the "Motions in Limine"). Each of the Motions in Limine come before the Court in the form of letters. Each letter is composed of two parts. The first part of the letter is a motion seeking to exclude evidence. The second part of the letter is a response from the party opposing the motion to exclude.

Three of the letters are motions by David W. Carickhoff in his capacity as Chapter 7 trustee (the "Trustee" or "Plaintiff") to exclude evidence that Aaron Goodwin, Regina

[1] The Court hereby makes the following findings of fact and conclusions of law pursuant to Fed. R. Bank. P. 7052, which is applicable to this matter by virtue of Fed. R. Bankr. P. 9014. To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions of law constitute findings of fact, they are adopted as such.

Goodwin, and Eric Goodwin (the "Goodwins" or "Defendants") might present.[2] The last two letters are motions by the Goodwins to exclude evidence that the Trustee might present.

The Trustee's three motions to exclude consist of (i) *Motion in Limine to Exclude Evidence Outside the Four Corners of the SPA with Goodwins' Opposition* (the "SPA Motion"); (ii) *Motion in Limine to Exclude Evidence of Fraud with Goodwins' Opposition* (the "Fraud Motion"); and (iii) *Motion in Limine to Exclude Evidence Regarding Delivery of the Promissory Note with Goodwins' Opposition* (the "Instruments Motion").[3]

The Goodwins' two motions to exclude consist of (i) *Goodwins' Motion in Limine to Exclude Deposition Testimony with Trustee's Opposition* (the "Deposition Motion") and (ii) *Goodwins' Motion in Limine to Exclude Financial Hardship Evidence with Trustee's Response* ("the Financial Hardship Motion").[4]

JURISDICTION AND VENUE

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2)(A). Venue is proper before the United State Bankruptcy Court for the District of

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[2] Del. Bankr. Adv. Pro. No. 19-50095, D.I. 1. David Carickhoff serves as the Chapter 7 Trustee of the Debtors (the "Trustee") and the Plaintiff in this adversary proceeding. All references to the Adversary Proceeding Docket will be cited hereinafter as "Adv. D.I." and will refer to this Adversary Proceeding unless otherwise stated.

[3] See Adv. D.I. 184 *Motion in Limine to Exclude Evidence Outside the Four Corners of the SPA with Goodwins' Opposition* (the "SPA Motion"); Adv. D.I. 185 *Motion in Limine to Exclude Evidence of Fraud with Goodwins' Opposition* (the "Fraud Motion"); and Adv. D.I. 186 *Motion in Limine to Exclude Evidence Regarding Delivery of the Promissory Note with Goodwins' Opposition* (the "Promissory Note Motion").

[4] See Adv. D.I. 187 *Goodwins' Motion in Limine to Exclude Deposition Testimony with Trustee's Opposition* (the "Deposition Testimony Motion") and Adv. D.I. 188 *Goodwins' Motion in Limine to Exclude Financial Hardship Evidence with Trustee's Response* (the "Financial Hardship Motion").

Delaware under 28 U.S.C. §§ 1408 and 1409. This memorandum opinion constitutes the Court's findings of facts and conclusions of law.

BACKGROUND

A. Factual Background

i. SPA and Fraud Motions

Currently, the parties to the motions are the Goodwins and Trustee. The motions arise from the litigation of a transaction between the Goodwins and Decade S.A.C., LLC ("Decade" or "Debtor"), which closed on February 22, 2016. One of the key transaction documents is the Share Purchase Agreement (the "SPA"). Aside from the SPA, there were other documents (the "Other Documents") related to the transaction including employment agreements (the "Employment Agreements") entered into between the Goodwins and Decade.

Eventually, Decade failed to pay employees of the purchased companies under the terms of the SPA. The Goodwins disputed the validity of the SPA due to alleged misrepresentations. Trustee sought declaratory judgement that the SPA was valid. The Goodwins responded with four counterclaims based in fraud. This Court granted summary judgment on Trustee's motion to dismiss three of the Goodwins' four counterclaims but denied, in part, Trustee's motion to dismiss the Goodwins' counterclaim for a declaration of unenforceability due to unresolved questions of fact. Only two remaining issues are reserved for trial—substantial performance and ratification.

Provided below are the provisions of the Summary Judgment Opinion relevant to the SPA Motion.[5]

> The Goodwins argue that they read the SPA because *they read the employment agreements*. However, even if these employment agreements were part of the larger transaction, *they, nevertheless, were different contracts from the SPA*.
>
> The Goodwins have failed to present evidence that they have a valid excuse to justify their failure to read *the SPA* prior to signing it.
>
> Finally, the Court will deny the Trustee's motion for summary judgment on count one of the Complaint. *While any evidence of alleged fraud will be precluded*, there are genuine issues of fact that preclude entry of summary judgment.
>
> The Court rejects the idea that the SPA is unenforceable due to a lack of meeting of the minds.
>
> As sophisticated parties, the Goodwins provided no evidence that they fulfilled their obligation to review the SPA.

Relevant sections of the SPA are provided below:

> 12.13 **Entire Agreement**. This Agreement along with the other Transaction Agreements, set forth the entire understanding of Purchaser, Decade and each Seller and supersedes all other agreements and understandings between those parties relating to the subject matter hereof and thereof.[6]
>
> 12.15 **Amendments**. This Agreement may not be amended, modified, altered or supplemented except by means of a written instrument executed on behalf of Purchaser, Decade, Game, GSM, XXII Capital and each Seller.[7]

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[5] Adv. D.I. 132 p. 23, 29–32 (emphasis added).

[6] Adv. D.I. 102-11 p. 17–18.

[7] Adv. D.I. 102-11 p. 17.

> "Transaction Agreements" mean this Agreement [the SPA], the Employment Agreements, the Note and the Guaranty.[8]

The terms of the SPA define (i) Seller as Goodwin Associates Management Enterprises, Inc., Goodwin Sports Management, Inc., Aaron Goodwin, and Eric Goodwin and (ii) Purchaser as Decade, S.A.C. Contracts, LLC.[9]

ii. Instruments Facts

For purposes of this Memorandum Order, the Court shall use the term "Instruments" to refer to the promissory note or guaranty of payment or both.[10] The Goodwins made the following statement in the current case in the Southern District of New York (the "SDNY Litigation"): "We received a Promissory Note for the remaining $25.5 million."[11] Relevant to the Instruments, the Summary Judgment Opinion states:

> The Court also rejects the argument that the contract is unenforceable *because the Parties failed to physically deliver promissory notes and shares*. Here, even if they were components of the contract, the Goodwins present *no evidence that the contract was contingent on these items*. In the absence of

[8] Adv. D.I. 102-10 p. 47.

[9] Adv. D.I. 102-10 p. 42 (defining Purchaser, and non-individual Sellers); Adv. D.I. 102-13 (defining individual sellers).

[10] Trustee does not define the Promissory Note of which he is talking. The Goodwins reference Adv. D.I. 7 ¶ 143 as context for their use of these terms. Adv. D.I. 186 p. 1 n.1. The Court adopts the Goodwins' use of the terms "promissory note" and "guaranty of payment." "These never-performed closing transactions include execution and delivery of a *promissory note* from Decade SAC, execution and delivery of a *guaranty of payment* of that promissory note from Decade Contracts, and, in consequence of these delivery obligations from Decade SAC and Decade Contracts, delivery of the shares of GAME and GSM." Adv. D.I. 7 ¶ 143 (emphasis added).

[11] SDNY Litigation, Case No. 1:17-cv-06910-GHW, D.I. 116 at ¶ 3, Decl. of Aaron Goodwin in Support of Memorandum of Law in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction.

> a contingent condition for delivery of the shares and promissory note, *substantial performance may be sufficient*.[12]

iii. Deposition Testimony Facts

The Deposition Testimony Motion relates to eight witnesses: Christopher Aden, Kevin Eisenberg, Dorsey James, Channing Johnson, Nicholas Gonella, Alonzo Llorens, C. Anthony Mulrain, and Chris Stuart (collectively, the "Witnesses").[13] The Goodwins especially object to the admission of deposition testimony of two of the Witnesses who were former principals of Decade—Christopher Aden and Dorset James (the "Former Principals").[14] Apart from the Former Principals, the Goodwins offer no evidence as to the location of the remaining Witnesses (the "Non-Principal Witnesses").[15] Below are the facts relating to the location of the Former Principals.

Each of the Former Principals filed for individual bankruptcy protection in the United States Bankruptcy Court for the District of New Jersey (the "New Jersey Bankruptcy Court") located at 50 Walnut Street, Newark, NJ 07102, 99.5 miles from this Court.[16]

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[12] Adv. D.I. 132 p. 31.

[13] Adv. D.I. 187 p. 1 of 6.

[14] Adv. D.I. 187 p. 5. *See* Adv. D.I. 187 p. 1–3.

[15] *See* Adv. D.I. 187.

[16] Deposition Testimony Motion, D.I. 187, at 5; 99.5 miles measured from 824 N. Market St, Wilmington, DE 19807 to 50 Walnut Street, Newark, NJ 07102, Google Maps, https://www.google.com/maps (in the search bar, enter 824 N. Market St, Wilmington, DE 19807; then click directions and enter 50 Walnut Street, Newark, NJ 07102; zoom in (as close as possible) to 824 N. Market St, Wilmington, DE 19807 and right click—select "Measure distance" from the bottom of the drop down list; zoom out until the 50 Walnut Street location is visible; zoom in (as close as possible) to 50 Walnut Street Newark, NJ 07102 and right click—select "Distance to here" from the drop down menu)

Mr. James' current service address in the SDNY Litigation is 830 Morris Turnpike, 4th Floor, Short Hills, NJ 07078 (the "James NJ Address"), 93.06 miles from this Court.[17]

Mr. Aden's service address in the SDNY Litigation is 784 Morris Turnpike, Suite 211 Short Hills, NJ 07078 (the "Aden NJ Address 1"), 93.13 miles from this Court.[18] This address might not be current.[19] In his bankruptcy proceeding in the New Jersey Bankruptcy Court, Mr. Aden listed his address as 1 Blossom Lane, Mahwah, NJ 07430 (the "Aden NJ Address 2"), 119.13 miles from this Court.[20] Mr. Aden is Decade's authorized representative.[21]

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[17] Deposition Testimony Motion, D.I. 187, at 5; 93.06 miles measured from 824 N. Market St, Wilmington, DE 19807 to 830 Morris Turnpike, Newark, NJ 07078, Google Maps, https://www.google.com/maps (in the search bar, enter 824 N. Market St, Wilmington, DE 19807; then click directions and enter 830 Morris Turnpike, Newark, NJ 07078; zoom in (as close as possible) to 824 N. Market St, Wilmington, DE 19807 and right click—select "Measure distance" from the bottom of the drop down list; zoom out until the 830 Morris Turnpike location is visible; zoom in (as close as possible) to 830 Morris Turnpike, Newark, NJ 07078 and right click—select "Distance to here" from the drop down list)

[18] Deposition Testimony Motion, D.I. 187, at 5; 93.13 miles measured from 824 N. Market St, Wilmington, DE 19807 to 784 Morris Turnpike, Newark, NJ 07078, Google Maps, https://www.google.com/maps (in the search bar, enter 824 N. Market St, Wilmington, DE 19807; then click directions and enter 784 Morris Turnpike, Newark, NJ 07078; zoom in (as close as possible) to 824 N. Market St, Wilmington, DE 19807 and right click—select "Measure distance" from the bottom of the drop down list; zoom out until the 784 Morris Turnpike location is visible; zoom in (as close as possible) to 784 Morris Turnpike, Newark, NJ 07078 and right click—select "Distance to here" from the drop down list)

[19] *Id.* Trustee represents that a S.D.N.Y. docket entry reads as follows, "[r]eceived returned mail re: 325 Memo Endorsement. Mail was addressed to Christopher Aden, 784 Morris Turnpike, Suite 211, Short Hills, NJ 07078 and was returned for the following reason(s): Return to Sender Attempted—Not Known Unable To Forward.").

[20] Deposition Testimony Motion, D.I. 187, at 5; 119.13 miles measured from 824 N. Market St, Wilmington, DE 19807 to 1 Blossom Lane, Mahwah, NJ 07430 Google Maps, https://www.google.com/maps (in the search bar, enter 824 N. Market St, Wilmington, DE 19807; then click directions and enter 1 Blossom Lane, Mahwah, NJ 07430; zoom in (as close as possible) to 824 N. Market St, Wilmington, DE 19807 and right click—select "Measure distance" from the bottom of the drop down list; zoom out until the 1 Blossom Lane location is visible; zoom in (as close as possible) to 1 Blossom Lane, Mahwah, NJ 07430 and right click—select "Distance to here" from the drop down list)

[21] Deposition Testimony Motion, at 3. *In re Decade, S.A.C., LLC, et al.*, 18-11668 (CSS), D.I. 1, at 4.

B. Procedural Background

On July 16, 2018, and October 16, 2018, Decade, S.A.C., LLC ("Debtor") and its affiliated entities filed voluntary petitions with the United States Bankruptcy Court for the District of Delaware.[22] These chapter 7 cases are in progress. On January 23, 2019, Trustee, on behalf of the Debtors, filed the *Complaint for Declaratory Judgment Determining Property of the Debtors' Estate* (the "Complaint") against the Goodwins in connection with a dispute involving the enforceability of the SPA.[23] On February 25, 2019, the Goodwins filed an *Answer to the Complaint*, which included four counterclaims against Debtor.[24] On March 18, 2019, Trustee filed the *Answer to Counterclaim*.[25] On June 27, 2019, this Court issued an *Order Assigning Adversary Proceeding to Mediation*.[26] Mediation occurred but was not successful.

On August 23, 2019, Trustee filed the *Trustee's Motion for Summary Judgment*, seeking summary judgment on count one of his Complaint and seeking dismissal of each of the Goodwins' four counterclaims.[27] On September 23, 2019, the Goodwins filed *The*

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[22] Del. Bankr. 18-11668, D.I. 1. The Debtors in these Chapter 7 cases are as follows: Decade, S.A.C., LLC, Gotham S&E Holdings, LLC, Decade, S.A.C. Contracts, LLC., Decade, S.A.C. II, LLC, and Decade, S.A.C. Executives, LLC (collectively the "Debtors" or "Decade").

[23] Adv. Pro. No. 19-50095, D.I. 88 at A-516. The Share Purchase Agreement involves Decade S.A.C. Contracts, LLC ("Decade Contracts"), Goodwin Associates Management Enterprises, Inc. ("GAME"), Goodwin Sports Management, Inc. ("GSM"), and their associated entities and parties (Decade, GAME, GSM, and together with their associated entities and parties, the "Parties").

[24] Adv. Pro. No. 19-50095, D.I. 7.

[25] Adv. Pro. No. 19-50095, D.I. 21.

[26] Adv. Pro. No. 19-50095, D.I. 62.

[27] Adv. Pro. No. 19-50095, D.I. 86. The four counterclaims for declaratory judgment include: fraud in the execution, fraudulent inducement, fraudulent misrepresentation, and unenforceability. The Motion for Summary Judgment was filed together with *The Trustee's Memorandum of Law in Support of His Motion for*

Goodwins' Memorandum of Law in Opposition to the Trustee's Motion for Summary Judgment.[28] In response to Goodwin's memorandum, on September 30, 2019, Trustee filed *The Trustee's Memorandum of Law in Support of His Motion for Summary Judgment*.[29] On October 1, 2019, the Trustee filed *The Trustee's Request for Oral Argument* on the *Trustee's Motion for Summary Judgment*.[30] The Court heard oral argument on January 6, 2020. On January 29, 2020, the Court issued its opinion (the "Summary Judgment Opinion") on the *Trustee's Motion for Summary Judgment*.[31] In the Summary Judgment Opinion, the Court denied the *Trustee's Motion for Summary Judgment* on Count One—seeking a declaration that the SPA is valid and enforceable according to its terms—of the Complaint.

DISCUSSION

A. Motion in Limine Standard

At trial, if evidence is relevant, it is admissible.[32] Evidence is relevant "if it tends to make the existence or nonexistence of a disputed material fact more probable than it would be without that evidence."[33] But, relevant evidence may be excluded under Federal Rule of Evidence 403 "if its probative value is substantially outweighed by a

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Summary Judgment (D.I. 87) and the *Appendix to Memorandum of Law in Support of Motion for Summary Judgment* (D.I. 88), collectively (the "Summary Judgment Motion").

[28] Adv. Pro. No. 19-50095, D.I. 101. This memorandum was filed together with the Appendix to *The Goodwins' Memorandum of Law in Opposition to the Trustee's Motion for Summary Judgment* (D.I. 102).

[29] Adv. Pro. No. 19-50095, D.I. 109 (the "Trustee's Reply"). This memorandum was filed together with *The Trustee's Reply Appendix in Support of His Motion for Summary Judgment* (D.I. 110).

[30] Adv. Pro. No. 19-50095, D.I. 111.

[31] Adv. D.I. 132.

[32] Fed. R. Evid. 402.

[33] *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315, 318 (E.D. Pa. 2007) (citing *Forrest v. Beloit Corp.,* 424 F.3d 344, 355 (3d Cir.2005)); *see* Fed. R. Evid. 401 and 402.

danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[34]

To exclude evidence under Rule 403, parties submit motions in limine. These limine motions are "designed to narrow the evidentiary issues for trial . . . eliminate unnecessary trial interruptions"[35] and "aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial."[36]

As to motions to exclude, the Third Circuit carries a "strong presumption that relevant evidence should be admitted" thus, to exclude evidence under Rule 403, "the probative value of evidence must be 'substantially outweighed' by the problems in admitting it."[37] Consequently, "evidence that is highly probative is exceptionally difficult to exclude."[38] Indeed, "[e]vidence should not be excluded pursuant to a motion in limine, unless it is clearly inadmissible on all potential grounds."[39]

B. Trustee's Motions in Limine

i. SPA Motion

Trustee requests the Court exclude evidence, testimony, or argument that the parties' agreement contains terms not included in (i) the SPA and (ii) the Other

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[34] Fed. R. Evid. 403.

[35] *Bradley v. Pittsburgh Bd. Of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990).

[36] *Johns Hopkins Univ. v. Alcon Labs. Inc.*, No. CV 15-525, 2018 WL 4178159, at *1 (D. Del. Aug. 30, 2018).

[37] *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343–44 (3d Cir. 2002).

[38] *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343–44 (3d Cir. 2002).

[39] *Leonard v. Stemtech Health Scis., Inc.*, 981 F. Supp. 2d 273, 276 (D. Del. 2013).

Documents.[40] Trustee argues that such evidence, including any evidence that the terms of the parties' agreement were modified by the parties following the closing of the February 2016 transaction, should be excluded from the trial of this matter, under Rule 403, as irrelevant, inadmissible, and prejudicial.[41] Trustee makes two arguments in support: (1) the law of the case doctrine and (2) the theory that the terms of the SPA prohibit the introduction of extrinsic evidence.[42]

First, Trustee argues that the law of the case doctrine which "limits relitigation of an issue once it has been decided in an earlier stage of the same litigation"[43] applies because this Court's Summary Judgment Opinion "rejects the idea that the SPA is unenforceable due to a lack of meeting of the minds."[44] Trustee argues that because the Court already ruled that there was a meeting of the minds when the SPA was closed, any evidence seeking to show that the terms of the SPA and Other Documents at the time of closing were different than what the SPA and Other Documents state should be precluded.[45]

The Goodwins agree with Trustee that the law of the case doctrine in connection with "the [Summary Judgment] Opinion precludes evidence that the SPA was void *ab*

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[40] Adv. D.I. 184 p.1.

[41] Adv. D.I. 184 p. 3.

[42] *See* Adv. D.I. 184 p. 1–3.

[43] *Hamilton v. Leavy*, 322 F.3d 776, 786 (3d Cir. 2003).

[44] Adv. D.I. 132 p. 30.

[45] Adv. D.I. 184 p. 1.

initio as the product of fraud or lack of a meeting of minds."[46] Nevertheless, the Goodwins reject Trustee's application of the law of the case doctrine to the extent he extends it to preclude evidence relating to the Employment Agreements or Other Documents.[47]

While the law of the case doctrine "limits relitigation of an issue once it has been decided in an earlier stage of the same litigation,"[48] it cannot be extended to an issue that was not "actually decided" by the Court in an earlier stage of the litigation.[49] Trustee argues that this Court's statement that "any evidence of alleged fraud will be precluded" applies not only to the SPA but to the Other Documents as well. Trustee is incorrect. The Court, in its Summary Judgment Opinion, decided issues relating to the SPA but did not decide issues as to the Other Documents, including the Employment Agreements.[50] Consequently, the Court rejects Trustee's application of the law of the case doctrine to the extent he uses it to request this Court preclude evidence of fraud relating exclusively to the Other Documents, including the Employment Agreements, as inadmissible.

To support his second theory, Trustee argues that Sections 12.13 and 12.15 of the SPA provide that any amendment, modification, or alteration of the terms of the SPA or

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[46] Adv. D.I. 184 p. 4 n.1.

[47] Adv. D.I. 184 p. 5.

[48] *Hamilton v. Leavy*, 322 F.3d 776, 786 (3d Cir. 2003).

[49] *See e.g.*, *United Artists Theatre Cir., Inc. v. Twp. of Warrington, Pa.*, 316 F.3d 392, 397–98 (3d Cir. 2003).

[50] The Trustee limited his request to "[d]eclaring that the SPA is a valid and enforceable contract according to its terms" and that is the request this Court considered and ruled on. Complaint p. 10 ¶ 40. Furthermore, this Court stated that "[E]ven if these employment agreements were part of the larger transaction, they, nevertheless, were different contracts from the SPA. Summary Judgment Opinion at p. 29.

Other Documents is only effective if it is contained in a writing signed by the parties.[51] Trustee argues that under New York law, any evidence or argument seeking to vary or contradict the terms of the integrated agreement is precluded by the integration clause unless such amendment, modification, or alteration is in writing and signed.[52]

The Goodwins argue that under New York law, parties may modify a written contract via subsequent oral agreement.[53] The Goodwins further argue that the parties' post-closing conduct amounted to an "indisputable mutual departure" from the payment mechanics under the SPA or Other Documents.[54] Additionally, the Goodwins argue that such contractual modification is relevant to ratification—one of the two remaining issues for trial.[55]

"Because the parties appear to be in agreement on this issue, we will assume, without deciding" that New York state law is applicable in reviewing the modification of a written contract.[56] The Court rejects Trustee's argument that under New York law, the existence of Sections 12.13 and 12.15 of the SPA, alone, is sufficient reason for the Court to preclude evidence of post-closing modification to the terms of the SPA or Other

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[51] Adv. D.I. 184 p. 2–3.

[52] Adv. D.I. 184 p. 2.

[53] Adv. D.I. 184 p. 6.

[54] Adv. D.I. 184 p. 6.

[55] Adv. D.I. 184 p. 6.

[56] *See USA Mach. Corp. v. CSC, Ltd.*, 184 F.3d 257, 263 (3d Cir. 1999); *see also USG Ins. Services, Inc. v. Bacon*, 2016 WL 6901332, *6 (W.D. Pa. Nov. 22, 2016) ("Where the parties agree on the substantive state law that applies, however, a court may assume—without deciding—that that state's substantive law applies."); *Booth v. BMO Harris Bank, N.A.*, 2014 WL 3952945, *4 n.4 (E.D. Pa. Aug. 11, 2014).

Documents. The Court looks to *F. Garofalo Elec. Co. v. New York Univ.*, a New York case discussing exceptions to the general rule that oral agreements cannot overcome contractual language requiring a signed writing for modification.[57]

> When a written contract, as here, provides that it can be modified only by a signed writing, an oral modification of that agreement is not enforceable unless the oral modification is fully executed or there has been a partial performance "unequivocally referable" to the oral modification.[58]

Garofalo, shows that under New York law, partial performance "unequivocally referable" to the oral modification may render a "no oral modification" clause unenforceable. Given this exception and with an eye toward the remaining issues of substantial performance and ratification, the Court rejects Trustee's argument that New York contract law categorically prohibits evidence relating to the post-closing modification of a written contract that contains a "no oral modification."[59] Indeed, Trustee has failed to show that evidence of the oral modification of the SPA or Other Documents "is clearly inadmissible on all potential grounds."[60] Additional relevant evidence is required to make such a determination.

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[57] *See generally, F. Garofalo Elec. Co. v. New York Univ.*, 705 N.Y.S.2d 327 (N.Y. App. Div. 1st Dep't 2000).

[58] *F. Garofalo Elec. Co. v. New York Univ.*, 705 N.Y.S.2d 327, 331 (N.Y. App. Div. 1st Dep't 2000) (citing GOL § 15–301[1]; *Rose v. Spa Realty Assocs.*, 366 N.E.2d 1279 (N.Y. 1977); *Tierney v. Capricorn Investors, L.P.*, 592 N.Y.S.2d 700 (N.Y. App. Div. 1st Dep't 1993), *lv. denied* 616 N.E.2d 159 (N.Y. 1993)).

[59] As previously settled in the Summary Judgment Opinion the Court stated that even if these "employment agreements were part of the larger transaction, they, nevertheless were different contracts from the SPA." Adv. D.I. 132 p. 29. Thus, there the Court has already considered, at least some of, the Other Documents to be distinct from the SPA.

[60] *Leonard v. Stemtech Health Scis., Inc.*, 981 F. Supp. 2d 273, 276 (D. Del. 2013).

As such, the Court grants, in part, the SPA Motion to the extent it seeks to preclude any evidence or argument that the SPA contained terms outside its four corners as of the closing date, February 22, 2016, and denies it to the extent it seeks to preclude evidence, testimony, or argument that (i) the SPA or Other Documents were modified post-closing or (ii) that the Other Documents contained terms not included therein as of the closing date.

ii. Fraud Motion

Trustee requests an order precluding the Goodwins from introducing evidence, argument, or testimony concerning any alleged fraud by the Debtors or their principals relating to the SPA or Other Documents executed by the parties in February 2016.[61] Trustee presents two theories supporting his request to preclude evidence of fraud.

First, such evidence of fraud is inadmissible because under the law of the case doctrine, a decision on this issue has already been made—the Summary Judgment Opinion clearly states that, "any evidence of alleged fraud will be precluded" at trial.[62] Second, the admission of such evidence should be precluded under Rule 403 as it would needlessly delay the trial and waste time as the Court has already ruled that the Goodwins could not justifiably rely on any misrepresentations of others, as the Goodwins were unable to show that they attempted to read the SPA before signing it.[63] Because justifiable reliance is an essential element of the Goodwins' fraud-based counterclaims as

[61] Adv. D.I. 185 p. 1.

[62] Adv. D.I. 185 p. 3; Adv. D.I. 132 p. 32.

[63] Adv. D.I. 132 p. 24.

well as their fraud-based defenses, Trustee requests that the exclusion of evidence, argument, or testimony alleging fraud or misrepresentation by the Debtors.[64]

The Goodwins' motion to reject the Fraud Motion is virtually identical to their motion to reject the SPA Motion. In short, the Goodwins argue that the Court should reject Trustee's law of the case argument because Trustee fails to distinguish, unlike the Court in its Summary Judgment Opinion, between the SPA and the Other documents.

The Court rejects Trustee's law of the case argument and reiterates that the Summary Judgment Opinion only ruled on fraud or misrepresentation as to the SPA—not fraud or misrepresentation relating to the Other Documents, including the Employment Agreements.

Rule 403 of the Federal Rules of Evidence states that, "[t]he court *may* exclude relevant evidence if its probative value is substantially outweighed by danger of . . . undue delay [or] wasting time."[65] The Court's reasoning in the Summary Judgment Opinion for precluding evidence relating to the SPA could apply to the Employment Agreements. Because the reasoning for the SPA could extend to the Employment Agreements, there is a danger of undue delay or waste of time. The Summary Judgment Opinion is clear that the reason the Goodwins failed to establish the justifiable reliance prong of the fraudulent inducement test is because they "provided no evidence that they

[64] Adv. D.I. 132 p. 16, 25, 26, and 29.

[65] Fed. R. Evid. 403.

fulfilled their obligation to review the SPA" prior to signing it.[66] According to the Summary Judgement Opinion, this is not the case for the Employment Agreements. Relevant language from the Summary Judgment Opinion provides: "[t]he Goodwins argue that they read the SPA because they read the employment agreements.[67] The Court then differentiates between the SPA and the Employment Agreements.[68] Trustee has failed to show that the evidence of fraud or misrepresentation relating to the Other Documents or Employment Agreements "is clearly inadmissible on all potential grounds." [69] Furthermore, because the Goodwins allege to have read the Employment Agreements and the Employment Agreements are different contracts from the SPA, the dangers of wasting time or undue delay do not outweigh the probative value of evidence relating to fraud in these distinct contracts.

Consequently, the Court grants, in part, the Fraud Motion to the extent it seeks to preclude evidence of fraud or misrepresentation relating *solely* to the SPA—but denies it to the extent it seeks to preclude evidence of fraud or misrepresentation relating to the Other Documents, including the Employment Agreements.

iii. Instruments Motion

Trustee requests an order precluding the Goodwins from offering testimony, evidence, or making any argument, that they did not receive delivery of the Promissory

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[66] Adv. D.I. 132 p. 30.

[67] Adv. D.I. 132 p. 23.

[68] Adv. D.I. 132 p. 23 ("However, even if these employment agreements were part of the larger transaction, they, nevertheless, were different contracts from the SPA.").

[69] *Leonard v. Stemtech Health Scis., Inc.*, 981 F. Supp. 2d 273, 276 (D. Del. 2013).

Note (the "Note") or Guaranty Agreement (the "Guaranty" together with the "Note" the "Instruments").[70] Trustee argues that the Goodwins should be precluded from arguing that they did not receive delivery of the Instruments because (i) the Goodwins have admitted to receiving the Instruments, (ii) the law of the case doctrine applies, and (iii) the Goodwins implicitly admitted the SPA's validity by bringing a breach of contract claim against Debtor because the Goodwins could not bring a breach of contract claim against Debtors unless the SPA was valid and the SPA cannot be valid without delivery of the Instruments.[71] Finally, Trustee argues that the law of the case doctrine applies in this instance because the Court rejected "the argument that the contract is unenforceable because the Parties failed to deliver promissory notes and shares."[72]

The Goodwins counter, arguing that Debtors' failure to deliver the Instruments is relevant to the open issue of substantial performance.[73] The Goodwins argue that the Summary Judgment Opinion rejected only the discrete "argument that the contract is *unenforceable* because the Parties failed to physically deliver promissory notes and shares" but did not reject the specific argument that the Instruments are relevant to the issue of substantial performance.[74] Thus, the Goodwins argue, the law of the case doctrine does not apply.

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[70] Adv. D.I. 186 p. 1.

[71] Adv. D.I. 186 p. 1–3.

[72] Adv. D.I. 186 p. 2–3.

[73] Adv. D.I. 186 p. 4.

[74] Adv. D.I. 186 p. 4.

The Court agrees with the Goodwins that the Summary Judgment Opinion rejected only the specific "argument that the contract is *unenforceable* because the Parties failed to physically deliver promissory notes and shares" but did not reject the argument that the circumstances surrounding the delivery of the Instruments are relevant to the issue of substantial performance.[75]

Trustee next argues that the Goodwins previously admitted to receiving the Instruments based on statements made during litigation occurring in the Southern District of New York.[76] The Goodwins seek to clarify Trustee's assertion that the Goodwins have already admitted to receiving the Instruments— by representing that the statement to which the Trustee is referring, "merely confirms that the $25.5 million Note constituted consideration for the Goodwins' sale to Decade of shares in their businesses, and that the Goodwins received a 'copy' of the Note that was 'dated February 22, 2016' at some point in the nearly two years since closing."[77]

Given the Third Circuit's "strong presumption that relevant evidence should be admitted," and that the evidence may be relevant to the one or both of the remaining issues at trial, the Court rejects Trustee's argument that the Goodwins SDNY Litigation admission is sufficient to preclude the Goodwins from introducing evidence, argument, or testimony, concerning the method by which Instruments were delivered.[78] To clarify,

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[75] Adv. D.I. 186 p. 4 (citations omitted).

[76] Adv. D.I. 186 p. 1 n.2. ("We received a Promissory Note for the remaining $25.5 million.").

[77] Adv. D.I. 186 p. 5 n.1

[78] *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343–44 (3d Cir. 2002).

the Court grants the Instruments Motion to the extent it seeks to preclude any evidence, testimony, or argument that that the SPA is unenforceable due to the Goodwins' failure to receive the Instruments and denies it to the extent it seeks to preclude any evidence, testimony, or argument concerning how the method by which the Instruments were delivered may relate to substantial performance or ratification.

C. The Goodwins' Motions in Limine

i. Deposition Testimony

The Goodwins request an order precluding Trustee from offering the deposition testimony of the Witnesses in lieu of live testimony at trial.[79] The Goodwins argue that Trustee has failed to evidence the unavailability of the Witnesses under Federal Rule of Civil Procedure 32(a)(4)— exceptions from the general rule that testimony at trial be live.[80] Conversely, Trustee claims that Rules 32(a)(4)(B) and (D) apply.[81]

The Goodwins argue that (i) Trustee failed to exercise reasonable diligence to secure the preferred live testimony of the Witnesses and (ii) the Former Principals are less than 100 miles from the place of trial because they (a) both list service addresses that are within 100 miles of this Court, (b) both sought personal bankruptcy protection in a court located within 100 miles of this Court, and (c) Mr. Aden sought the protection of this Court by signing Decade's bankruptcy petition as the "authorized representative of the

[79] Adv. D.I. 187 p.1.

[80] Adv. D.I. 187 p.1–3.

[81] Adv. D.I. 187 p.2.

debtor."[82] Next, the Goodwins allege that because the Trustee did not (i) issue subpoenas to any of the Witnesses or (ii) take adequate steps to secure Witnesses' testimony, the Rule 32(a)(4)(D) exception is unavailable.[83] Finally, in the event the Court admits the Witnesses' deposition, in lieu of live testimony, the Goodwins request the Court draw a negative inference against the Trustee.[84]

Trustee counters arguing that all the Witnesses are located more than 100 miles from this Court and observes that, except for Former Principals, the Goodwins do not argue that any of the Witnesses fall within 100 miles of this Court. Trustee further argues that the Former Principals: (i) are located more than 100 miles from the courthouse—based on all known addresses; (ii) have told the Goodwins they object on that basis to subpoenas the Goodwins served on them; and (iii) have told Trustee's counsel that they will not voluntarily appear at trial and will object to and resist any subpoena served on them.[85]

The Court will now establish why Federal Rule of Civil Procedure 32 applies to the issues at hand. Firstly, "[s]tatements made during deposition testimony that are offered at trial to prove the truth of the matter asserted are hearsay."[86] Under the Federal

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[82] Adv. D.I. 187 p. 4-6.

[83] Adv. D.I. 187 p.2.

[84] Adv. D.I. 187 p.3.

[85] Adv. D.I. 187 p.4–5.

[86] *Aubrey Rogers Agency, Inc. v. AIG Life Ins. Co.*, No. CIV.A.97-529 MMS, 2000 WL 135129, at *1 (D. Del. Jan. 13, 2000). Fed. R. Evid. 801(c). A statement is defined to be "an oral or written assertion," and a declarant "is a person who makes a statement. Fed. R. Evid. 801(a) & (b).

Rules of Evidence, "[h]earsay is not admissible except as provided by these rules or by other rules."[87] One such "other rule" is Rule 32 of Federal Rules of Civil Procedure.[88]

As a preliminary matter, Rule 32(a) requires those offering deposition testimony in lieu of live testimony to meet two requirements before the Rule 32(a)(2)–(8) exceptions can be discussed.[89] The gateway requirements are that the deposition may only be used against a party at a hearing or trial if: (i) such party was (a) present or represented at the taking of the deposition or (b) had reasonable notice of it and (ii) the testimony would be admissible if the witness testified in person.[90]

Rule 32(a)(4) is the only section at issue here and applies to unavailable witnesses. A party, under Rule 32(a)(4), "may use for any purpose the deposition of a witness, whether or not a party, if the court finds:"

> **(A)** that the witness is dead;
>
> **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
>
> **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

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[87] Fed. R. Evid. 802.

[88] *Fletcher v. Tomlinson*, 895 F.3d 1010, 1021 (8th Cir. 2018); *see Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002) ("Rule 32(a), as a freestanding exception to the hearsay rule, is one of the "other rules" to which Fed. R. Evid. 802 refers. Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court.") (citations omitted); *Novozymes A/S v. Genencor Int'l, Inc.*, No. CIV.A. 05-160-KAJ, 2006 WL 318936, at *1 (D. Del. Feb. 10, 2006) ("Thus, 'Rule 32(a) creates of its own force an exception to the hearsay rule.') (citations omitted).

[89] Fed. R. Civ. Pro. 32(a)(1).

[90] Fed. R. Civ. Pro. 32(a)(1)(A)–(C).

> **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or
>
> **(E)** on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used.[91]

Rule 32(a)(4) is a disjunctive test, meaning that if any of the above exceptions apply, the deposition may be offered in lieu of live testimony—even if the witness is otherwise available.[92] Importantly, even if all the requirements of a 32(a)(4) exception to hearsay are met, courts retain the discretion to reject the otherwise permissible deposition testimony.[93] There are only two exceptions at issue before the Court—32(a)(4)(B) and 32(a)(4)(D). The Court will first discuss Rule 32(a)'s general requirements before turning to Rule 32(a)(4)(B) and then Rule 32(a)(4)(D).

The preliminary requirements, as applied to this case, would disallow Trustee the use of any of the Rule 32(a) hearsay exceptions if the Goodwins were not present at the deposition or if the deposition testimony Witnesses offered said testimony live it would be inadmissible. Trustee represents that the Goodwins were present at the depositions

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[91] Fed. R. Civ. Pro. 32(a)(4).

[92] *See e.g., Daigle v. Maine Med. Ctr., Inc.*, 14 F.3d 684, 691–92 (1st Cir. 1994) ("[T]he admissibility of deposition testimony under the aegis of Rule 32(a)(3)(B) is not contingent upon a showing that the witness is otherwise unavailable."); *see also Delgado v. Pawtucket Police Dep't*, 668 F.3d 42, 49 (1st Cir. 2012) ("Critically, however, Rule 32(a)(4)(B) does not contain the requirement that the court find 'that the witness cannot attend or testify because of' distance.")

[93] Fed. R. Civ. Proc. 32(a)(4) ("Unavailable Witness. A party **may** use for any purpose the deposition of a witness, whether or not a party . . . .") (emphasis added); see also, *VIIV Healthcare Co. v. Mylan Inc.*, No. 12-CV-1065-RGA, 2014 WL 2195082, at *1 (D. Del. May 23, 2014) ("Further, courts retain significant discretion in determining whether to admit deposition testimony.") (citations omitted).

and the Goodwins do not dispute the point. Thus, the first of the preliminary requirements is met. The parties fail to address whether any portion of the proffered depositions would be inadmissible if offered by a live witness—nor do they, at this point, need to. To clarify, if the Court finds that a deposition can be proffered in lieu of live testimony under Rule 32(a)(4), any portion of such deposition will be inadmissible to the extent parties show it to be inadmissible if offered by a live witness.[94] With that caveat, the Court looks to Rule 32(a)(4)(B).

The two requirements of 32(a)(4)(B) are: (i) a witness must be more than 100 miles from this Court, and (ii) it must not appear that the party offering the deposition procured witnesses' absence.[95] There are no "exceptions" to Rule 32(a)(4)(B) for unique witnesses—even witnesses whose presence at trial may be compelled pursuant to a subpoena can qualify as unavailable under this exception.[96] Trustee has the burden to show that Witnesses are more than 100 miles from this Court while the Goodwins have the burden to support allegations that Trustee procured Witnesses' absence.[97]

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[94] *See* Fed. R. Civ. Pro. 32(b).

[95] Fed. R. Civ. Proc. 32(a)(4).

[96] *Mazloum v. D.C. Metro. Police Dep't*, 248 F.R.D. 725, 726–27 (D.D.C. 2008) (finding no support for the proposition that a witness that can be subpoenaed cannot qualify as unavailable under Rule 32).

[97] *Compare Allgeier v. United States*, 909 F.2d 869, 876 (6th Cir. 1990) (The party seeking to admit a deposition at trial must prove that the requirements of Rule 32(a) have been met.") *with Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204 (1st Cir. 1988) ("Consequently, the plaintiffs' only argument is that the absence of the witnesses was procured by the defendant. However, the plaintiffs have offered absolutely no evidence to support the allegation that the Bahama Cruise Lines 'actively took steps to keep the deponents from setting foot in the courtroom.'") *and Fletcher v. Tomlinson*, 895 F.3d 1010, 1020 (8th Cir. 2018) ("The officers have produced no record evidence to show that Fletcher procured Dr. Berns's absence.").

Courts calculate the 100 mile distance by straight line measurement—from the witnesses' residence, place of work, or sometimes, current location.[98] Being close to 100 miles from the place of trial is not close enough.[99] Courts generally calculate the 100 mile measurement "as of the time at which the deposition is offered."[100]

Trustee represents, and the Goodwins do not dispute, that the Non-Principal Witnesses are located more than 100 miles from this Court.[101] With no evidence or

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[98] Pre-1963, the 100 miles distance was interpreted to mean "travel miles" as opposed to "straight line measurement." However, in 1977, the United States District Court for the District of Connecticut in *SCM Corp. v. Xerox Corp.*, convincingly stated that "[t]he convenience of those few witnesses who live within 100 air miles but beyond 100 travel miles of the courthouse is too insubstantial to justify continuation of the pre-1963 interpretation of Rules 32(a)(3)(B) and 45(e)(1) at variance with Rule 4(f)." *SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214, 214-15 (D. Conn. 1977). The *SCM* court's reasoning is generally followed. *See e.g.*, U.S. v. Ol (779 F.2d 791, 791 (2d Cir. 1985) (*per curiam*); *Maine Cmty. Health Options v. Walgreen Co.,* No. 18-MC-0009, 2018 WL 6696042, at *3 (W.D. Wis. Dec. 20, 2018) *McDaniel v. BSN Med., Inc.*, No. 4:07CV-36-M, 2010 WL 2464970, at *2 (W.D. Ky. June 15, 2010); *cf. Hill v. Equitable Bank, Nat. Ass'n*, 115 F.R.D. 184, 186 (D. Del. 1987) (applying the *SCM* decision to Rule 45(e)(1)). To determine if a witness is more than 100 miles from the place of trial, courts have examined the witnesses' residence, place of work, and present location. *See e.g., Goldenson v. Steffens*, No. 2:10-CV-00440, 2014 WL 3105367, at *3 (D. Me. July 7, 2014).

[99] *Swearingen v. Gillar Home Health Care, L.P.*, 759 F. App'x 322, 324 (5th Cir. 2019) ("Accepting the Rule to mean what it says, we reject that merely being close to 100 miles from the place of trial is ever close enough."). *But see Goldenson v. Steffens*, No. 2:10-CV-00440, 2014 WL 3105367, at *2 n.3 (D. Me. July 7, 2014) ("At the same time, accepting the Defendants' mileage measurements from Google Earth of something in excess of ninety-nine miles, but less than 100 miles, the Defendants' position seems remarkably punctilious. It is true that if ninety-nine miles and a fraction were rounded up to 100 miles, the "more than" 100 mile requirement of Rule 32(a)(4)(B) would still fail by a whisker. Here, as the resolution seems clearer under Rule 32(a)(4)(E), the Court turns to the exceptional circumstances provision.").

[100] *Hartman v. United States*, 538 F.2d 1336, 1345 (8th Cir. 1976). *See generally*, *Starr v. J. Hacker Co.*, 688 F.2d 78, 81 (8th Cir. 1982) ("At no time has it been suggested that these witnesses were within 100 miles of the courthouse at the time of trial."); *A.H. ex rel. Hadjih v. Evenflo Co.*, 579 F. App'x 649, 656, (10th Cir. 2014) (similar); *Phoenix Techs. Ltd. v. VMware, Inc.*, No. 15-CV-01414-HSG, 2017 WL 8069609, at *1–2 (N.D. Cal. June 7, 2017) ("[T]he plain language of Rule 32 and controlling precedent establish that [the Witness] is technically unavailable at the time the deposition is being offered, authorizing defendant's use of her deposition."); *but see U.S. v. IBM Corp.,* 90 F.R.D. 377, 383 (S.D.N.Y.1981) ("[T]he deponent's location should be examined ... beyond the time of offering to include any point during presentation of proponent's case when a trial subpoena could have been served.").

[101] Adv. D.I. 187 p. 1–3, 5.

representations to the contrary, Trustee has met his burden. The Court finds the Non-Principal Witnesses to be located more than 100 miles from this Court for purposes of Rule 32(a)(4)(B).

The Goodwins dispute whether Former Principals, are further than 100 miles from the location of this Court.[102] The dispute is two-fold. On the one hand, the parties have offered conflicting representations as to whether the Former Principals are 100 miles from this Court using the same addresses. On the other hand, the parties disagree as to which addresses should be used for purposes of calculating the 100 mile distance. Neither party shows the methodology used in calculating the distance.

Thus, the Court, using the measure distance feature of Google Maps, takes judicial notice of the distance from this Court to each of the addresses the parties have discussed. Applying the straight line measurement methodology, the Court finds the following addresses to be within 100 miles from this Court: New Jersey Bankruptcy Court (99.5 miles), James NJ Address (93.06 miles), and Aden NJ Address 1 (93.13 miles).[103] Only the Aden NJ Address 2 (119.13 miles) is found to be located more than 100 miles from this Court.[104]

Trustee failed to show that Mr. James is located more than 100 miles from this Court. Every address connected to Mr. James is located within 100 miles of this Court.

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[102] Adv. D.I. 187 p. 3.

[103] For the methodology the Court used, see *supra* p. 6–7 nn.16–18.

[104] *See supra* p. 7 n.20.

The Court finds that Mr. James is located within 100 miles of the Court under Rule 32(a)(4)(B).

Trustee represents that the Aden NJ Address 1 (93.13 miles) does not appear to be current.[105] The Court agrees and turns to observe the two remaining locations for Mr. Aden—the Aden NJ Address 2 (119.13 miles) and the New Jersey Bankruptcy Court (99.5 miles). The Goodwins' argument that Mr. Aden regularly transacts business at the New Jersey Bankruptcy Court because he filed a personal bankruptcy petition there is unpersuasive. The Goodwins' seek to apply the incorrect test. The "regular transaction of business" test is specific to Rule 45 and does not apply to Rule 32—but even if it did, filing for bankruptcy is not a "regular" transaction of "business."[106] Filing for individual relief under Chapter 13 of the Bankruptcy Code more appropriately constitutes the individual's transaction of *personal* finances—not said individual's transaction of business. Furthermore, filing an individual bankruptcy petition is, in most cases, a singular transaction in two senses of the word. First, most Chapter 13 filers are not repeat or serial filers.[107] Second, during the Chapter 13 bankruptcy process, individuals do not need to regularly attend court—the Bankruptcy Code only requires an individual to

[105] *See supra* p. 7 n.19.

[106] *Compare* Fed. R. Civ. Pro. 45(c)(A) *with* Rule 32(a)(4)(B).

[107] Jean M. Lown, *New Study: Serial Bankruptcy Filers No Problem*, 26 AM. BANKR. INST. J., 36, 83 (June 2007) (compiling cases from different bankruptcy districts and finding that of 4,932 chapter 13 cases filed, 93.7 percent were one-time filers).

attend one meeting.[108] In sum, for purposes of Rule 32(a)(4)(B), the Court will not consider the New Jersey Bankruptcy Court as one of the locations from which to determine distance. This leaves the Court with only one address from which to measure the location of Mr. Aden under Rule 32—the Aden NJ Address 2 (119.13 miles). The Court finds that Mr. Aden is located more than 100 miles from it.

The Court now turns to the second prong of the 32(a)(B)(4) test—whether Trustee procured the distance of Witnesses. The plain language of the rule is clear that "there is a difference between procuring a witness's absence and electing not to procure his attendance."[109] Indeed, Rule 32 does not require "the litigant to procure the deponent's presence."[110] The Goodwins must show that Trustee acted to procure the distance or absence of the Wintesses.

The Goodwins do not allege that Trustee acted to procure the distance or absence of the Witnesses.[111] Instead, they allege that Trustee made a half-hearted to "secure the Witnesses' testimony."[112] Rule 32(a)(4)(B), unlike Rules 32(a)(4)(D) or (E), does not require a lack of effort—rather, it demands the Goodwins show that Trustee made active efforts to procure the absence of Witnesses. The Goodwins have failed to offer evidence

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[108] *See* 11 U.S.C. § 341. Debtor's attorney can appear in place of debtor at a chapter 13 confirmation hearing. D.N.J. LBR 3015-4.

[109] *A.H. ex rel. Hadjih v. Evenflo Co.*, 579 F. App'x 649, 656 (10th Cir. 2014).

[110] *Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002).

[111] See Adv. D.I. 187 p. 1–3.

[112] *See* Adv. D.I. 187 p. 2.

sufficient to show that Trustee procured the absence of Witnesses. As such, the Court finds that Trustee did not procure the absence of Witnesses under Rule 32(a)(4)(B).

In sum, the Court finds that the deposition of all Witnesses, except Mr. James, may be offered in lieu of live testimony under the Rule 32(a)(4)(B) exception to hearsay. Conversely, the testimony of Mr. James must be offered live unless Rule 32(a)(4)(D) provides an exception.

The Court now considers whether Trustee can offer the deposition testimony of Mr. James in lieu of live testimony under Rule 32(a)(4)(D). Federal Rule of Civil Procedure 32(a)(4)(D) allows the admission of deposition testimony in lieu of live testimony "if the court finds . . . that the party offering the deposition could not procure the witness's attendance by subpoena."[113] Under Rule 45, a subpoena can command a person to attend a live trial only if that trial is within 100 miles of where the person resides, is employed, or regularly transacts business in person; or the trial is within the state where the person resides.[114] As discussed in the Rule 32(a)(4)(B) analysis, aside from Mr. James, none of the Witnesses reside, are employed, or regularly transact business in person within 100 miles of this Court. The Goodwins do not allege that any of the Witnesses reside in the Delaware—the state in which the live trial will be held.[115] Under

[113] Fed. R. Civ. Pro. 32(a)(4)(D).

[114] Fed R. Civ. Pro. 45(c)(1).

[115] *See* Adv. D.I. 187 p. 1-3.

Rule 45(c), Trustee, the party offering the deposition, can only issue an enforceable subpoena upon Mr. James.

The language of Rule 32(a)(4)(D) is clear, Trustee must be the party attempting to secure the attendance of Mr. James by subpoena. Trustee admits that he has made no such attempt to secure Mr. James's attendance by subpoena, in part, because Trustee believed the subpoena to be unenforceable. Trustee's failure to attempt to subpoena Mr. James, alone, is sufficient for the Court to find that the Rule 32(a)(4)(D) exception does not apply to Mr. James.

The Court grants the Deposition Testimony Motion to the extent it seeks to preclude Trustee from introducing at trial deposition testimony of Mr. James and denies it to the extent it seeks to preclude Trustee from introducing at trial deposition testimony of the Non-Principal Witnesses and Mr. Aden.

Finally, the Court will address whether it should, as the Goodwins request, draw an adverse inference against any factual question of which Mr. Aden is likely to have knowledge. When and whether to apply the adverse inference "lies within the sound discretion of the trier of fact."[116] The Court will not decide this at this time.

ii. Financial Hardship

The Goodwins, in their Financial Hardship Motion, seek to preclude Trustee's introduction of evidence concerning (i) Eric Goodwin's alleged financial hardship prior

[116] *Underwriters Labs. Inc. v. N.L.R.B.*, 147 F.3d 1048, 1054 (9th Cir. 1998).

to entering into the SPA with Debtors and (ii) the Goodwins' use of a portion of Decade's initial consideration payment to satisfy tax liens.[117]

The Goodwins admit to *receiving* the initial $9,500,000 consideration payment but deny that their *use* or *motivations* for accepting the initial payment is legally relevant to proving the remaining two issues at trial—substantial performance and ratification.[118] *Goodwins* arguments are best summarized into two categories: (i) legal elements of ratification and substantial performance focus on the post-closing conduct of the parties to the contract—meaning that any evidence as to *why* (financial hardship) the parties entered into the contract is legally irrelevant; and (ii) evidence as to the use of the initial payment is legally irrelevant and is merely a roundabout attempt to show that the Goodwins engaged in some wrong (delinquent taxes) not at issue here.[119] Finally, the Goodwins point out that Trustee does not contest that any pre-closing financial hardship persisted post-closing.[120] The Goodwins have the burden of showing that the evidence of Eric Goodwin's financial hardship pre-closing or the Goodwins' use of initial payments under the SPA to pay tax liens "is clearly inadmissible on all potential grounds."[121]

Trustee argues that evidence of the Goodwins financial hardship is relevant to the issue of ratification because the Goodwins' post-closing acceptance of the initial

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[117] Adv. D.I. 188 p. 2.

[118] Adv. D.I. 188 p. 2.

[119] *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 188 (3d Cir. 1990) ("Evidence that a party committed wrongs other than those at issue in a case often creates a danger of 'unfair prejudice.'").

[120] Adv. D.I. 188 p. 2.

[121] *Leonard v. Stemtech Health Scis., Inc.*, 981 F. Supp. 2d 273, 276 (D. Del. 2013).

payments under the SPA evidence their acceptance of benefits under the SPA—a legal element of ratification.[122] Trustee next argues that the Goodwins financial hardship allows insight into their "silent acceptance" that many installments of the initial payments were paid directly to tax authorities to satisfy tax liens—which insight supports Trustee's contention that the Goodwins' post-closing conduct constitutes ratification.[123] Finally, Trustee argues that evidence of the Goodwins' financial hardship informs their rush to sign the SPA and Other Documents—which may be relevant to the extent the validity of the SPA or Other Documents is litigated.[124]

Certainly relevant to the issue of ratification, is the fact that the Goodwins received benefits under the SPA. Peripherally relevant is *why* the Goodwins wanted those benefits (Eric Goodwin's financial hardship). Irrelevant is how the Goodwins *used* the benefits (paying tax liens).

The Goodwins have shown that their use of initial payments under the SPA to pay off tax liens is irrelevant or creates a danger of unfair prejudice. Such evidence is legally irrelevant because the Goodwins stipulated that they *received* the initial payments under the SPA.[125] Evidence as to how the Goodwins' *used* the initial payments adds no further

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[122] Adv. D.I. 188 p. 3.

[123] Adv. D.I. 188 p. 3.

[124] Adv. D.I. 188 p. 3–4.

[125] Adv. D.I. 188 p. 2 ("Where, as here, the Goodwins do not dispute that they received an initial consideration payment pursuant to the SPA.").

legal significance to the issue of ratification and is prejudicial because it draws attention to an unrelated alleged wrong doing.

The Goodwins have failed to show that Eric Goodwins' financial hardship is inadmissible on all potential grounds. Trustee is correct that the Goodwins might argue the validity of the Other Documents. In such a case, evidence of Eric Goodwins' pre-closing financial hardship may be relevant to understand the parties' negotiations.

The Court grants the Goodwins' Financial Hardship Motion to the extent it seeks to preclude evidence showing that the initial payments were used to pay the Goodwins' tax liabilities and denies it to the extent it seeks to preclude evidence of Eric Goodwin's pre-closing financial hardship.

CONCLUSION

For the reasons set forth above, the Court grants and denies the Motions in Limine as follows:

A. Trustee's Motions in Limine

The Court grants, in part, the SPA Motion to the extent it seeks to preclude any evidence or argument that the SPA contained terms outside its four corners as of the closing date and denies it to the extent it seeks to preclude evidence, testimony, or argument that (i) the SPA or Other Documents were modified post-closing or (ii) that the Other Documents contained terms not included therein as of the closing date.

The Court grants, in part, the Fraud Motion to the extent it seeks to preclude evidence of fraud or misrepresentation relating *solely* to the SPA—but denies it to the

extent it seeks to preclude evidence of fraud or misrepresentation relating to the Other Documents, including the Employment Agreements.

The Court grants the Instruments Motion to the extent it seeks to preclude any evidence, testimony, or argument that that the SPA is unenforceable due to the Goodwins' failure to receive the Instruments and denies it to the extent it seeks to preclude any evidence, testimony, or argument concerning how the method by which the Instruments were delivered may relate to substantial performance or ratification.

B. The Goodwins' Motions in Limine

The Court grants the Deposition Testimony Motion to the extent it seeks to preclude Trustee from introducing at trial deposition testimony of Mr. James and denies it to the extent it seeks to preclude Trustee from introducing at trial deposition testimony of the Non-Principal Witnesses and Mr. Aden.

The Court grants the Goodwins' Financial Hardship Motion to the extent it seeks to preclude evidence showing that the initial payments were used to pay the Goodwins' tax liabilities and denies it to the extent it seeks to preclude evidence of Eric Goodwin's pre-closing financial hardship.

Christopher S. Sontchi
Chief United States Bankruptcy Judge

Dated: February 1, 2021