IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAUL A. FOX, MERCURY ASSETS, LLC, and MERCURY TRUST, on behalf of themselves and derivatively on behalf of FOX PAINE & COMPANY, LLC,

Plaintiffs,

v.

W. DEXTER PAINE, III, THE PAINE FAMILY TRUST, FOX PAINE MANAGEMENT III, LLC, and nominally, FOX PAINE & COMPANY LLC,

Defendants.

C.A. No. 3187-VCL

W. DEXTER PAINE, III, THE PAINE FAMILY TRUST, and nominally, FOX PAINE & COMPANY, LLC,

Counterclaim-Plaintiffs,

v.

SAUL A. FOX, MERCURY ASSETS, LLC, and MERCURY TRUST, on behalf of themselves and derivatively on behalf of FOX PAINE & COMPANY, LLC,

Counterclaim-Defendants.

MEMORANDUM OPINION

Submitted: October 30, 2008
Decided: January 22, 2009

Peter B. Ladig, Esquire, Stephen B. Brauerman, Esquire, BAYARD P.A., Wilmington, Delaware; David Boies, Esquire, Philip M. Bowman, Esquire, Eric Brenner, Esquire, Courtney Rockett, Esquire, Jarrod F. Reich, Esquire, BOIES, SCHILLER & FLEXNER LLP, Armonk, New York; Steven A. Cozen, Esquire, George M. Gowen, III, Esquire, COZEN O'CONNOR, Philadelphia, Pennsylvania, *Attorneys for the Plaintiffs.*

Peter J. Walsh, Jr., Esquire, Scott B. Czerwonka, Esquire, POTTER ANDERSON & CORROON, LLP, Wilmington, Delaware; Eric S. Goldstein, Esquire, Liza Velazquez, Esquire, Elizabeth M. Eaton, Esquire, Marie-Amelie George, Esquire, PAUL WEISS RIFKIND WHARTON & GARRISON LLP, New York, New York, *Attorneys for the Defendants.*

LAMB, Vice Chancellor.

Two investment professionals who co-founded a successful private equity management company ended up in litigation when they could not agree on the future course of their business. On the eve of trial, they agreed to a settlement that envisioned a complete divorce of their business interests. Among other things, they each agreed to assume half of any future obligations arising with respect to past incentive compensation awards made to senior employees of the business. Those obligations resided with the original management company and were in large part owed to persons who were then working for a new entity controlled by the co-founder who was surrendering all of his interest in the original management entity. To resolve issues relating to these future obligations, the settlement agreement provided that the two co-founders should each become personally liable for half of the obligations and that the original management company should have no liability for the departing co-founder's 50% share.

After the first sale of a portfolio company following the settlement, both co-founders paid the amount they owed pursuant to this provision of the settlement agreement. After the second sale, however, the departing co-founder paid his share but the other did not. This caused the departing co-founder to file a motion to enforce the settlement agreement.

The parties, of course, disagree on the proper interpretation of the settlement agreement. The respondent contends that he and the original management

company are entitled to litigate (via arbitration) whether any particular compensation grant was validly created and, thus, was a binding obligation of the management company at the time of the settlement. The movant argues that settlement agreement clearly vests *all* of the grants, equally divides the obligation to pay *all* of them, and does not contemplate any right to contest the validity of *any* of them.

In this opinion, the court finds that the settlement agreement clearly and unambiguously divided these obligations—all of which were known to the parties at the time of settlement—as part of the separation or "divorce" of the parties' business interests and required that the two former partners pay them equally. Thus, the court will issue an order enforcing the settlement agreement and requiring the respondent to pay the amounts owed by him.

I.

A. The Parties To The Underlying Litigation

The plaintiffs in the original action were Saul A. Fox, Mercury Assets LLC,[1] Mercury Trust,[2] and Fox Paine & Company, LLC ("FPC") derivatively. The defendants in that action were W. Dexter Paine, III, The Paine Family Trust, Fox

[1] Mercury Assets LLC is the nominal holder of Fox's membership interests in FPC.
[2] Mercury Trust is Fox's revocable grantor living trust and the sole member of Mercury Assets LLC.

Paine Management III, LLC (n/k/a Paine & Partners, LLC) ("FPM III"),[3] and FPC nominally. FPC and FPM III are Delaware limited liability companies.

B. Background

Fox and Paine co-founded Fox Paine & Company, L.P. in 1997. Each owned 50% of the business. In January 1998, Fox and Paine merged Fox Paine & Company, L.P. into FPC. FPC is a private equity management company that manages two funds (Fund I and Fund II). Fox and Paine raised $500 million for Fund I by April 1998 and raised $1 billion for Fund II by January 2001.

1. The New Fund

In late 2005, Paine expressed his desire for FPC to open a third fund, but Fox did not agree. Paine then decided to open a fund outside of the FPC umbrella. On February 2, 2006, Fox and Paine entered into an agreement that granted Paine's new fund a limited, conditional license to use certain FPC assets, including the "Fox Paine" name (the "Newco Agreement"). The Newco Agreement also required the advance joint written approval of Fox and Paine for any "material commitment, action or undertaking by FPC."[4] Previously, FPC's limited liability agreement authorized either Fox or Paine to bind the company unilaterally. After

[3] After Fox and Paine entered the settlement agreement discussed below, Fox Paine Management III, LLC's name was changed to Paine & Partners LLC. In an attempt to minimize confusion, the court will refer to the entity, in all cases, as "FPM III."
[4] Newco Agreement § 3.03.

execution of the Newco Agreement, Paine created the new management company, FPM III, and FPM III created the new fund, Fox Paine Capital Fund III. Fox became an investor in FPM III.

2. The Litigation

On August 27, 2007, Fox, Mercury Assets LLC, Mercury Trust, and FPC derivatively, filed suit against Paine, The Paine Family Trust, FPM III, and FPC nominally. The complaint alleged, among other things, that Paine raided FPC for the benefit of FPM III by improperly using FPC assets, improperly soliciting and hiring away FPC employees (including its CFO), misallocating expenses between FPC and FPM III, causing certain FPC companies to be put up for sale without requisite authorization, and using marketing materials that glorified FPM III to the detriment of FPC. The complaint set forth claims of breach of fiduciary duties, breach of the Newco Agreement, unjust enrichment, misappropriation of trade secrets, unfair and unlawful business acts and practices, and request for an accounting. Paine asserted various counterclaims against Fox, including improperly hiring a new CFO for FPC, improperly placing an airplane on FPC's books, failing to take an active role in FPC, and attempting to force Paine to relinquish his management authority over FPC.

3. The Settlement Agreement

On the eve of trial, after over three months of expedited proceedings, extensive discovery, and complete pre-trial briefing, Fox and Paine signed a settlement agreement. Pursuant to the settlement agreement, dated as of December 3, 2007, they agreed, among other things, to terminate the Newco Agreement and to provide mutual releases from claims that were made or could have been made in the litigation.[5] Also, Paine agreed to transfer all his interest in FPC to Fox and Fox agree to transfer all his interest in FPM III to Paine.

In addition, Fox and Paine each agreed to be responsible for paying 50% of the outstanding incentive compensation awards (in the form of phantom capital and carried interests) related to Fund I and Fund II. Phantom capital and carried interest were granted to FPC employees as a method of establishing an incentive retention program and until the execution of the settlement agreement were an obligation of FPC. The sections regarding phantom capital and carried interest, in pertinent part, read as follows:

> Fund I: All carried interest of employees in Fund I will vest immediately and any escrow accounts will be paid out to them at closing. Any obligations with respect to the phantom capital and

[5] The settlement agreement was in the form of a term sheet and contemplated the execution of a "more definitive documentation." The term sheet required the parties to negotiate in good faith until December 31, 2007 towards a more definitive agreement. The parties did not reach any such agreement. The settlement agreement expressly states that the term sheet will remain binding even if no more definitive agreement is reached. Thus, it is the interpretation of the somewhat skeletal term sheet that is before the court.

> carried interests relating to any Fund I deferred grants will be shared 50% by SF[6] and 50% by DP;[7] provided that DP shall cause such grants to be modified, or take such other action, so that each of SF and DP shall only be responsible for paying its respective 50% share directly to the grantees and neither FPC nor SF shall be responsible to the grantees for DP's 50% share.[8]
>
> Fund II: All carried interest (and deferred grants) of employees in Fund II will vest immediately and any escrow accounts will be paid out to them at closing. Any obligations with respect to the phantom capital and carried interests relating to any Fund II deferred grants will be shared 50% by SF and 50% by DP; provided that DP shall cause such grants to be modified, or take such other action, so that each of SF and DP shall only be responsible for paying its respective 50% share directly to the grantees and neither FPC nor SF shall be responsible to the grantees for DP's 50% share.[9]

As discussed below, this decision hinges on the meaning of these sections of the settlement agreement.

The settlement agreement provides that Delaware law governs the agreement and that Court of Chancery maintains exclusive jurisdiction over any disputes involving the agreement.

5. The Disputed Grants

In March 2008, a Fund I company, Byram Health Centers, Inc., was sold. Pursuant to the language in the settlement agreement, Fox and Paine each paid 50%

---

[6] SF is defined as "Saul A. Fox and/or entities controlled by Saul A. Fox and/or his beneficiaries." Settlement Agmt. Ex. A, FP Settlement Term Sheet, Preamble.
[7] DP is defined as "W. Dexter Paine, III and/or entities controlled by W. Dexter Paine, III and/or his beneficiaries." *Id.*
[8] *Id.* at 1.
[9] *Id.* at 1-2.

of the grant obligations triggered by the sale of Byram.[10] In May 2008, another Fund I company, WJ Communications, was sold. This time, Fox refused to pay his obligations related to the sale, claiming that a number of the grants are not "obligations" within the meaning of the settlement agreement.

Until the execution of the Newco Agreement, either Paine or Fox could unilaterally bind FPC.[11] After execution of the Newco Agreement, "any material commitment" required the joint written approval of both Fox and Paine.[12] The grants at issue are: (1) the 2004 grant to Christopher Ruettgers, (2) the July 2005 grants to six executives,[13] and (3) the November 2005 grant to Robert Meyer (collectively, the "disputed grants"). According to Paine, the disputed grants were made verbally by Fox and/or Paine on the dates above.[14] These grants were not documented until after the Newco Agreement and the documents were only signed

---

[10] Fox paid his share of the grant obligations in connection with the Byram sale, over $432,000, in April 2008 after people in his staff received and presumably reviewed spreadsheets breaking down the source of the obligation by the type of grant and by the individual to whom the grant was made. Meyer Aff. ¶¶ 14-16 and Ex. P. The grants which created the obligations paid after the sale of Byram are included in the disputed grants in this action. Email from Robert Meyer to Christy Rempel, Seth Gersch, and Jill Haskins (Mar. 26, 2008, 16:59). Meyer Aff. Ex. O.

[11] Limited Liability Agreement of FPC ¶ 6(a).

[12] Newco Agreement § 3.03.

[13] The six executives are Brian Block, Herald Chen, Erik Glover, Ruettgers, Kevin Schwartz, and Tony Thacker.

[14] Paine contends that Fox verbally granted the July 2005 grants to employees in their mid-year reviews and has submitted affidavits from Schwartz and Thacker confirming that contention. Schwartz Aff. ¶ 2; Thacker Aff. ¶ 2. Fox, in his affidavit, challenges the validity of the July 2005 grants, but states that he has "no specific recollection of what was or was not said at Thacker's or Schwartz's or any other executive's mid-year reviews in or about July 2005." Fox Aff. ¶ 59.

by Paine.[15] The vast majority of the disputed grants were made to executives who left FPC to work for Paine at FPM III. Fox claims that the disputed grants were not properly made, are invalid, and are therefore not "obligations" addressed in the settlement agreement.

In response to Fox's refusal to pay his alleged obligations, Paine filed his second motion for enforcement of the settlement agreement.[16] This is the court's decision on that motion.

II.

Fox advances a number of arguments challenging this court's jurisdiction. None of these arguments hold water.

A. Forum

Fox argues that this court is not the proper forum because both the grant documents for the disputed grants and employment contracts of the executives receiving the disputed grants require arbitration. The settlement agreement, however, states that the parties agree "that the Delaware Chancery Court will maintain exclusive jurisdiction over the matters described in [the settlement

---

[15] The 2004 grant and the November 2005 grant were documented on May 6, 2006. The July 2005 grants were documented in November 2006.

[16] The first motion to enforce the settlement agreement dealt primarily with the calculation of Paine's capital account and was resolved by the parties prior to any judicial determination of the matter.

agreement] and will decide any open matters or disputes between the Parties[17] with respect to all matters concerning [the settlement agreement] and the implementation of the matters contemplated [therein]."[18] Pursuant to the settlement agreement, Fox and Paine agreed to split evenly any obligations with respect to phantom capital and carried interest in Funds I and II. The dispute at issue is the payment of obligations related to phantom capital and carried interest grants and thus falls within the scope of the settlement agreement's jurisdictional clause.

B. Standing

Next, Fox challenges Paine's standing to bring claims related to the disputed grants. Fox argues that the validity of disputed grants is an issue between FPC and the former FPC executives who claim the grants. Fox asserts that Paine will suffer no "injury in fact" resulting from the issue before the court because Paine was not one of the executives entitled to such grants nor can Paine, under the settlement agreement, be liable for Fox's nonpayment of the disputed grants.

As a party to the settlement agreement, Paine clearly has standing to enforce its terms.[19] Moreover, the settlement agreement expressly states that Paine has

---

[17] Fox argues that FPC is not a party to the settlement agreement and therefore the issue in this case does not qualify as a "matter or dispute between *the Parties*." Regardless of whether FPC is a party to the settlement agreement, the court concludes that the dispute in this case can be properly framed as a dispute between Fox and Paine (both of whom are clearly included in the definition of "parties") as to the enforcement of the settlement agreement.

[18] Settlement Agmt. ¶ 2.

[19] *See Triple C Railcar Serv., Inc. v. City of Wilmington*, 630 A.2d 629, 633 (Del. 1993) ("It is axiomatic that either party to an agreement may enforce its terms for breach thereof."); *Comrie*

"available to [him] whatever rights exist at law or equity to enforce the provisions of the Term Sheet, including but not limited to a right of specific performance."[20] While the provisions related to the disputed grants certainly benefit the former FPC executives, they also benefit Paine because most of those executives joined him at FPM III.[21] If the provisions are not enforced, Paine can reasonably expect some dissension in his company from executives who do not receive the compensation owed them, whatever the source.[22] This potential injury to Paine coupled with the fact that Paine is a party to the settlement agreement is certainly sufficient to establish his standing in this case.

---

v. Enterasys Networks, Inc., 2004 WL 293337, at *2 (Del. Ch. Feb. 17, 2004) ("Parties to an agreement may enforce the contractual terms of that agreement."); *Madison Realty Partners 7, LLC v. AG ISA*, *LLC,* 2001 WL 406268, at *4 (Del. Ch. Apr. 17, 2001) ("It is undisputed that Madison, as a signatory to the Partnership Agreement, has standing to sue for a breach of that Agreement."); *Leonard v. Univ. of Delaware*, 204 F. Supp. 2d 78, 787 (D. Del. 2002) ("[I]t is well-settled that the court 'has jurisdiction to enforce a settlement agreement entered into by the parties in a case currently pending before it.'") (quoting *Liberate Technologies LLC v. Worldgate Comm'ns, Inc.,* 133 F. Supp. 2d 357, 358 (D. Del. 2001)); *In re Digex, Inc. S'holders Litig.,* 2004 WL 3090615, at *1 (Del. Ch. Nov. 18, 2004) ("The Special Committee was a party to the Settlement, and it has the right to seek enforcement of the Settlement . . . .").

[20] Settlement Agmt. ¶ 1.

[21] *Digex,* 2004 WL 3090615, at *1 (holding that the special committee had standing to enforce the terms of a settlement agreement, even though the amount in dispute was owed to counsel, not the special committee); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 307 ("Where specific performance is otherwise an appropriate remedy, *either* the promisee or the beneficiary may maintain a suit for specific enforcement of a duty owed to an intended beneficiary.") (emphasis added).

[22] *See John Julian Const. Co. v. Monarch Builders, Inc.*, 306 A.2d 29, 34 (Del. 1973) (finding that "where, in a third party beneficiary contract, the promisor has breached its duty to perform an act for the benefit of a [third party] beneficiary, the promisee—the original obligor—has a right to recover the full value of the promised performance from the promisor."); 9 CORBIN ON CONTRACTS § 46.2 (rev. ed. 1993) ("[T]here is no longer any doubt that the promisee has the same right to performance in a contract for the benefit of a third party as any other contract promisee.").

III.

At issue here is the agreement that Fox and Paine will each pay half of "[a]ny obligations with respect to the phantom capital and carried interest" related to Funds I and II.[23] The settlement agreement does several other things in relation to these compensation awards: first, it provides that all such awards should vest immediately; second, it directs that all money held in escrow with respect to any of the awards should be paid out at closing to the employees of Fund I and Fund II; and, third, it directs Paine to modify the documents granting the phantom capital and carried interests so that Fox and Paine will each be responsible for paying 50% of the obligations "and neither FPC nor SF shall be responsible to the grantees for DP's 50% share."[24]

A settlement agreement is construed using contract interpretation principles.[25] The law surrounding contract interpretation in Delaware is well settled. The primary goal in contract interpretation is to fulfill, as nearly as possible, the reasonable shared expectations of the parties at the time they contracted.[26]

---

[23] Settlement Agmt., Ex. A, FP Settlement Term Sheet, at 1.
[24] *Id.* at 1-2.
[25] *W.L. Gore & Assocs., Inc. v. W*u, 2006 WL 2692584, *15 (Del. Ch. Sept. 15, 2006); *Rowe v. Rowe,* 2002 WL 1271679, at *3 (Del. Ch. May 28, 2002).
[26] *Bell Atlantic Meridian Systems v. Octel Comm'ns Corp.*, 1995 WL 707916, at *5 (Del. Ch. Nov. 28, 1995); *Interactive Corp. v. Vivendi Universal, S.A.,* 2004 WL 1572932, at *9 (Del. Ch. June 30, 2004); *Supermex Trading Company, Ltd. v. Strategic Solutions Group, Inc.,* 1998 WL 229530, at *2-3 (Del. Ch.); *Interim Healthcare, Inc. v. Spherion Corp.,* 884 A.2d 513, 547 (Del. Super. 2005).

Delaware law adheres to an objective theory of contracts.[27] Under an objective theory of contracts, the court must first determine whether the contractual language in dispute is ambiguous—that is, whether the contract language, read in the light of the entire contract, is reasonably susceptible to multiple meanings.[28] When the contract language is not ambiguous, courts should ascribe to the words their "common or ordinary meaning," and interpret them as would "an objectively reasonable third-party observer."[29]

In interpreting an unambiguous contract, the court should stay within the four corners of the document.[30] The court may, however, consult extrinsic evidence secondarily to confirm the "conclusion that the contract language is unambiguous, evidencing . . . the shared intent of the parties" at the time of they entered the contract.[31] Situations exists where the court may "consult undisputed background facts to place the contractual provision in its historical setting without violating" the principle that the court not consider extrinsic evidence when interpreting an unambiguous contract.[32]

---

[27] *Supermex,*1998 WL 229530, at *3; *Bell Atlantic*, 1995 WL 707916, at *5.
[28] *Interactive Corp.,* 2004 WL 1572932, at *9.
[29] *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008) (citations and quotations omitted); *Supermex,*1998 WL 229530, at *2.
[30] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997); *Interim Healthcare,* 884 A.2d 513, 547; *O'Brien v. Progressive Northern Ins. Co.,* 785 A.2d 281, 288-89 (Del. 2001).
[31] *Supermex,*1998 WL 229530, at 3.
[32] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232 n.7 (Del. 1997).

Here, the parties agree that the provisions at issue are unambiguous, but disagree as to their meaning.[33] Simply because the parties disagree, however, does not render the language in the provision ambiguous.[34]

Fox focuses on the word "obligations" in the settlement agreement. He contends that an "obligation" means "a *legal* duty" and argues that there was no such legal duty attached to the disputed grants at the time of settlement because they were never properly authorized. Thus, because the disputed grants are not "obligations" of FPC at the time of settlement, Fox argues that they are not covered by the settlement agreement. In any event, Fox contends, he should be allowed to submit to an arbitrator the issue of whether the disputed grants were properly authorized, because the granting documents and the employment contracts of the executives to whom the grants were made both contain arbitration provisions. If an arbitrator determines the grants were properly authorized, and therefore "obligations" within the meaning of the settlement agreement, Fox then agrees that he should be responsible for 50% of the payments owed.

Black's Law Dictionary defines "obligation" as a "legal or moral duty to do or not do something" and elaborates on the definition by stating, "[t]he word has many wide and varied meanings. It may refer to anything that a person is bound to

---

[33] Defs.' Reply Br. 8, 12; Pls.' Br. 12-13, 18 n.5.
[34] *See E.I. du Pont*, 693 A.2d at 1061; *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007).

do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness or morality."[35] Thus, the common or ordinary definition of the word "obligation" when it is otherwise unrefined, is very broad and can even include moral duties. Nothing within the settlement agreement suggests that the parties intended to have the numerous outstanding incentive compensation grants submitted to arbitration before they could be considered "obligations." Quite the contrary, the very title of the agreement—"settlement agreement"—suggests that the parties were attempting to put an end to their disputes and go their separate ways, not subject themselves to extended further conflict.[36] Additionally, it is clear from the unambiguous language of the settlement agreement that the parties intended to change the nature of the grants and FPC's obligations thereunder in several important ways that plainly acknowledges their validity. To begin with, all of the grants immediately vested, notwithstanding any contrary vesting schedule in them. Next, all escrowed amounts, whether then owing or not, were immediately paid out. Perhaps most importantly, the settlement agreement substitutes Fox and Paine as the obligors and requires Paine to secure modifications to the grants to release FPC from any obligation with respect to Paine's new 50% direct obligation.

---

[35] BLACK'S LAW DICTIONARY 1104 (8th ed. 2004).

[36] The provisions at issue benefit both Fox and Paine. Fox's liability as to the grants is reduced to 50% (from 100% if it had stayed with FPC). Also, Paine benefits by assuring that the former FPC executives, many of whom followed him to FPM III, would get paid what they were owed.

All of these provisions, read together, make it clear that the settlement agreement's use of the term "obligations" should not be construed to leave Fox or FPC now free to argue about the legal effect of the grants at the time the settlement agreement was signed.

Moreover, it is apparent that Fox's interpretation of the settlement would resurrect the very sorts of disputes that lay at the core of the settled litigation, namely the propriety of Paine's actions after the signing of the Newco Agreement, including his interactions with the now former FPC executives who were awarded the now contested grants. The court will not allow Fox to reargue his case in front of an arbitrator in light of the parties' clear intention to completely settle the dispute and divide *any* obligations with respect to the phantom capital and carried interests equally between Fox and Paine.

Multiple affidavits and attached documents were submitted by both parties in connection with this motion.[37] This extrinsic evidence, upon which the court does not rely in reaching its conclusion, secondarily confirms the court's conclusion that the disputed grants should be included as "obligations" to be divided between Fox and Paine under the settlement agreement. The record contains substantial evidence that Fox and persons working for him received documents and took actions

---

[37] After the hearing, the court gave Fox leave to submit affidavits to counter the affidavits submitted by Paine in connection with the motion.

indicating that they were aware of FPC's phantom capital and carried interest obligations, including the disputed grants, prior to execution of the settlement agreement.[38] Moreover, Fox received confirmatory information regarding the grants after he signed the settlement agreement on December 3, 2007, considered buying out the obligations, and even paid his obligations related to the disputed grants upon the first triggering event.[39] In his affidavit Fox fails to squarely challenge the evidence provided by Paine.[40] There is no material evidence that Fox

---

[38] Some of the evidence includes: a September 20, 2006 email from Amy Ghisletta (FPC's then CFO) to Fox summarizing the July 2005 grants and attaching the bonus and security agreements related to those grants; an October 3, 2006 response from Fox stating that no security interest would be needed for the July 2005 grants; a January 4, 2007 email from Christy Rempel (FPC's controller) to Fox attaching a spreadsheet showing over $2 million in escrow for the July 2005 grants; a June 28, 2007 email from Ghisletta (who was then and is now FPM III's CFO) to Fox attaching a spreadsheet showing the FPC projected cash flow effect of the disputed grants through 2009; a November 30, 2007 email from Meyer to Seth Gersch (FPC's current CFO) with a breakdown of all the disputed grants.

[39] On December 6, 2007, Meyer sent Gersch a schedule of the grants covered by the settlement agreement and the granting documents, which included the disputed grants. This email was forwarded to Gersch on June 6, 9, and 11, 2008. Fox, through the affidavit of Tom Snyder (COO of Xantrion, a company that provides information technology support to FPC), points out differences between the December 6, 2007 email and the forwarded emails. According to Snyder, the forwarded emails contain three additional attachments (Glover Grant, Separation Agreement Chen Signed, and McDonough Separation) and omits a sentence above the disputed grants that states "currently only relate to WJ and Paradigm only (note these were already vested)." Paine, through the supplemental affidavit of Robert Meyer, satisfactorily explained the differences between the emails as modifications made to remedy past oversights and to provide the most complete, accurate, and up-to-date information possible at the time. Meyer Supp. Aff. ¶¶ 3-9. Brett Teele, Fox's director of finance, presumably at Fox's direction, spent a substantial amount of time creating spreadsheets in attempting to value the phantom capital and carried interest grants, including the disputed grants, for a potential buyout of those obligations. Meyer Aff. ¶ 17 and Ex. Q. In April 2008, Fox paid his obligations related to the disputed grants after the sale of Byram Healthcare Centers, Inc. Meyer Aff. ¶ 16 and Ex. P.

[40] Fox's affidavit is full of unsupported assertions and contains substantial hedging language throughout the document. For example, with regard to emails he received from Ghisletta about the disputed grants Fox states that *if* he reviewed those emails he *would* not now have had "any *specific* recollection as to the *precise details* of the grants." Fox Aff. ¶ 64 (emphasis added).

questioned the validity of the disputed grants before or directly after the settlement agreement. On the contrary, the evidence confirms that it was the intent of the parties to divide all of the phantom capital and carried interest grants, including the disputed ones, pursuant to the settlement agreement and that the parties did not intend that either Fox or FPC would be free to challenge the validity of any of those grants via arbitration.

IV.

Paine strenuously argues that Fox's conduct in attempting to avoid his obligations under the settlement agreement warrants the awarding of attorneys' fees to Paine. Delaware follows the American Rule, under which each party generally must bear its own litigation expenses.[41] The court, however, may award attorneys' fees where "the party against whom the fees are assessed has acted, inter alia, in bad faith or vexatiously."[42] Courts "will not find bad faith lightly: to constitute bad faith the conduct at issue must rise to a 'high level of egregiousness.'"[43] While the court by no means approves of Fox's conduct in attempting to avoid his obligations under

---

With regard to the funding of the escrow for the July 2005 grants, Fox states that "I have no *specific* recollection as to the *specific* requests [regarding the escrow arrangements]." Fox Aff. ¶ 62 (emphasis added). In his affidavit, Fox does not flatly deny the allegations that he actually verbally granted some of the disputed grants or that he received documents putting him on notice of FPC's phantom capital and carried interest obligations, including the disputed grants, prior to execution of the settlement agreement.

[41] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989).

[42] *Abex Inc. v. Koll Real Estate Group, Inc.*, 1994 WL 728827, at *20 (Del. Ch. Dec. 22, 1994).

[43] *Id.*

the settlement agreement, the record does not show that his conduct has risen to such a high level.

V.

For all the forgoing reasons, the court will grant Paine's second motion for enforcement of the settlement agreement, and deny Paine's request for fees. Counsel for Paine shall submit a form of order consistent with this opinion, on notice, within 10 days.