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Case No. 2019-0702-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANTHONY AQUILA, an individual, Plaintiff, v. SOLERA GLOBAL HOLDING CORP., a Delaware corporation, SOLERA HOLDINGS, INC., a Delaware corporation, and DOES 1 through 50, inclusive. Defendants.	C.A. No. 2019-0702-SG

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiff ANTHONY AQUILA (hereinafter "Aquila" or "Plaintiff") hereby moves, pursuant to Court of Chancery Rule 65 and upon the Affidavits of Anthony Aquila, Guy Dibble and Sanford Michelman, and the Complaint filed herewith, for a Temporary Restraining Order ("TRO") restraining and enjoining Defendants SOLERA GLOBAL HOLDING CORP. ("Solera Global") and SOLERA HOLDINGS, INC. ("Solera Holdings") ("Solera Global" and "Solera Holdings" hereinafter collectively referred to as "Solera") and their agents, servants, employees and attorneys, and all others acting in active concert or participation with them, upon receiving actual notice, from repurchasing, exercising, or otherwise encumbering Aquila's vested stock options relating to Solera's Common Stock, which Aquila is entitled to exercise pursuant to (1) the stock option agreement dated March 4, 2016, (2) the 2016 Stock Option Plan, entered by and between Aquila and Solera, and (3) the Separation Agreement entered by and between Aquila and Solera.

INTRODUCTION

On July 23, 2019, Anthony Aquila issued notice to Solera that he was exercising his Vested Options pursuant to the Original Stock Option Agreement ("Stock Option Agreement"). After initially agreeing to Aquila's exercise of his Vested Options, in a misguided, deliberate, and malicious attempt to avoid its clear contractual obligations to honor Aquila's exercise of his Vested Options, Solera subsequently reneged and responded by providing a "Notice of Exercise of

Repurchase Option" to improperly take away Aquila's Vested Options. Solera's willful breach of Aquila's Stock Option Agreement is motivated by Solera's largest investor, Vista Equity Partners ("Vista"), being unhappy with and frustrated by its own inability to manage its approximate $6.5 billion acquisition of Solera and Aquila's resulting decision to leave Solera for a new challenge after Vista rebuffed Aquila's offer to repurchase the company.[1] In fact, Vista has publicly stated that it was not happy when Aquila left, and wanted to make it difficult for Aquila in whatever Aquila's new venture may be. In sum, Solera's breach is being orchestrated by Vista simply to disrupt, intimidate and frustrate Aquila.[2]

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[1] As will be revealed during the course of this litigation, immediately after the consummation of Vista's acquisition of Solera (the company Aquila started in his garage and that was previously described by this court In Re Appraisal of Solera Holdings, Inc. as not being able to exist without Aquila), Vista failed to deliver on its promises to Solera and Aquila, and acted with a disregard for other minority shareholders, including, among other things, by over leveraging Solera's business because of its inability to finance the transaction as it originally set forth (significantly impairing Solera's ability to execute on its growth and value-creation plans), disregarding proper corporate governance procedures, and terminating and trying to silence anyone that "whistleblows" about Vista's alleged improper acts. This is, in part, why Aquila decided to attempt to repurchase Solera and ultimately leave: namely, to separate himself from Vista as a business partner and to return to his entrepreneurial passion of building great companies. Vista, knowing that Aquila has information about the reality of Vista's shortcomings, is using the separation to silence and intimidate Aquila.

[2] Aquila is now considering pursuing a claim for tortious interference, among other things, against Vista in the appropriate forum.

To justify its breach, Solera claims Aquila breached the Restrictive Covenant Provision in his May 2019 Separation Agreement by directly hiring an automobile mechanic, Guy Dibble ("Dibble"). However, Solera's alleged breach is so farfetched that it has never provided any evidence or legal authority justifying its position. The reason being is that Solera previously, and expressly, agreed that Dibble did *not* need to work exclusively for Solera and approved his working for one of Aquila's other companies ("Joint Employer Period"). (Affidavit of Guy Dibble ("Dibble Affidavit"), ¶ 1.) Stated another way, Solera knows that its actions are unsupportable, but is simply trying to disrupt and harm Aquila, just as it threatened.

Specifically, Dibble was a former employee of one of Solera's separately owned companies (Identifix, Inc.). During the last two years (May 2017 to June 2019), Dibble also worked for Adventure Motors, LLC ("Adventure"), a company owned by Aquila. Adventure was formed to "fix up" classic cars, in part, as a team building exercise for employees. Dibble is a mechanic that helps fix up Adventure's cars. During the Joint Employer Period, Solera (through Identifix) submitted invoices to Adventure for payment for the time Dibble worked at Adventure. Adventure paid Identifix over $100,000 for Dibble's time fixing up Adventure cars. As Solera knows, Adventure: (1) does not, and has not, had any employees, (2) never had any customers, (3) does not market to the public, (4) does not have a website,

(5) has never made a profit, and (6) sells the cars at auction simply to offset costs. It is in no way a competitor to Solera or any of Solera's other businesses for that matter[3].

Solera's objection to Mr. Dibble's *continued* employment is premised on its goal of wanting to frustrate Aquila. Specifically, Solera is depriving Aquila of his rights to approximately ***$101,772,607*** in compensation that he rightfully deserves and was relying on. Now, Aquila is in the position of having to file suit to obtain what it rightfully his; his compensation. That said, Solera is now taking the position that Aquila has no options any longer since Solera is seeking to "repurchase" them at face value (effectively, zero).

Imminent, irreparable harm to Aquila will occur should the Court refuse to grant the requested temporary restraining order. Solera's breach of Aquila's Vested Option rights found in the 2016 Stock Option Plan undisputedly gives rise to irreparable harm of the kind money will not be an adequate remedy. Specifically, Solera "acknowledge[d] and agree[d]" that money damages may not be an adequate remedy for a breach of the 2016 Stock Option Plan. What is more, Aquila will be deprived of voting on otherwise dispositive and significant matters, such as corporate policy, decisions regarding the board of directors, the issuance of

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[3] Solera is a risk management and asset protection software and services to the property insurance marketplace. There is no cross-over, relationship or possible competition between Adventure and Solera (or its affiliates).

securities, and other substantial changes in corporate operations – all of which will injure the value of Aquila's investment.

At this juncture, Aquila seeks only to preserve the status quo until a preliminary injunction argument can be heard, and the parties' respective rights and obligations can be determined. In light of the significant risk of irreparable harm that Aquila faces, the preservation of the status quo is a relatively reasonable remedy. To preserve the status quo until this issue can be resolved, Aquila respectfully but *urgently* requests that the Court issue a temporary restraining order enjoining Solera from improperly exercising its alleged right to repurchase Aquila's Vested Options, until such time as Aquila can obtain a permanent injunction and order of specific performance directing Solera to honor Aquila's exercise of his Vested Options as permitted under the relevant agreements.

STATEMENT OF FACTS

A. The Parties

Aquila is a resident of Texas and is the founder, and formerly, the Chairman, President and Chief Executive Officer of Solera Global and Solera Holdings, which are global businesses headquartered in Southlake, Texas.

Solera Global is a Delaware Corporation, authorized and licensed to do business in Texas, with its principal place of business in Westlake, Texas.

Solera Holdings is a Delaware Corporation, authorized and licensed to do business in Texas, with its principal place of business in Westlake, Texas.

B. Aquila's Employment With Solera and Vested Option Rights

In January 2005, Aquila started a small software company based in Texas under the name Summertime Holdings Corp. ("Summertime"), which grew to become an international and publicly-traded company doing business in 88 countries across six continents. (Affidavit of Anthony Aquila ("Aquila Affidavit"), ¶ 2.) Aquila was the impetus behind Summertime's vision, growth, and success. Summertime changed its name to Solera Holdings. On or around March 3, 2016, a company by the name of Vista Equity Partners acquired Solera Holdings for approximately $6.5 billion. (Aquila Affidavit, ¶ 2.)

On March 4, 2016, Aquila entered into an Employment Agreement with Solera, whereby Aquila agreed to remain with Solera and serve as Chairman, President and Chief Executive Officer of Solera ("Employment Agreement"). Attached as **Exhibit 1** is a true and correct copy of the Employment Agreement. (Aquila Affidavit, ¶ 3.) Concurrent with the execution of the Employment Agreement, Aquila entered into a stock option agreement ("Original Stock Option Agreement"), dated March 4, 2016, with Solera. Pursuant to the Stock Option Agreement, Aquila holds, amongst other things more fully set forth in the agreement, (i) Service Options to purchase shares of Common Stock of Solera, which are Vested

Options as of the date thereof, and (ii) Return Target Options to purchase shares of Common Stock, none of which were Vested Options as of the date thereof (as any such capitalized terms not defined herein are defined in the Original Stock Option Agreement), amongst other terms. Attached as **Exhibit 2** is a true and correct copy of the Original Stock Option Agreement. (Aquila Affidavit, ¶ 4.) The Original Stock Option Agreement is subject to the terms and conditions of the 2016 Stock Option Plan ("Plan"), a true and correct copy of which is attached as **Exhibit 3**. Aquila Affidavit, ¶ 4.)

In addition to establishing Aquila's Vested Option rights, the Original Stock Option Agreement also sets forth instructions relating to remedies and the governing law concerning any disputes involving the Original Stock Option Agreement. See **Exhibit 2**. Paragraph 10 of the Original Stock Option Agreement says it will be subject to the governing law provisions of the Plan, and paragraph 11 of the Original Stock Option Agreement says the parties are entitled to any of the remedies specified in the Plan.

Paragraph 18 of the Plan (entitled "Remedies") says, in relevant part, as follows:

> Each Participant and the Company acknowledges and agrees that money damages may not be an adequate remedy for any breach of the provisions of this Plan and that any party may in its sole discretion apply to any court of law or equity of competent jurisdiction (without posting any bond or deposit) for specific performance and/or other

> injunctive relief in order to enforce or prevent any violations of the provisions of this Plan. (See, Exhibit 3.)

Paragraph 20 of the Plan (entitled "Governing Law") further says, in relevant part, as follows:

> All issues concerning the Plan will be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to any choice of law or conflict of law provision of rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the law of any jurisdiction other than the State of Delaware. Each of the Company and each Participant submits to the co-exclusive jurisdiction of the United States District Court and any Delaware state court sitting in Wilmington, Delaware over any lawsuit under this Plan and waives any objection based on venue or *forum non conveniens* with respect to any action instituted therein. (See, Exhibit 3.)

Finally, as part of the Employment Agreement, Aquila entered into a Restrictive Covenant Agreement with Solera which is attached to the Employment Agreement as Exhibit C. (Aquila Affidavit, ¶ 5.) Section 6.1 of the Restrictive Covenant Agreement, entitled "Non-Solicitation of Employees/Consultants" ("No-Hire Provision" or "Section 6.1") states:

> During your employment with the Group and for a period of eighteen (18) months thereafter, you will not directly or indirectly hire, attempt to hire, recruit, offer employment, lure or entice away, or in any other manner persuade or otherwise solicit ***anyone*** who is then an employee or consultant of the Group (or who was an employee or consultant of the Group within six months preceding the date of any such prohibited conduct) to resign from the Group or to apply for or accept employment with, or otherwise provide services to, you or any third party, for your own benefit or for the benefit of any other person or entity.

(Italics and bold added.) (Aquila Affidavit, ¶ 5.)

While the Original Stock Option Agreement and Plan are governed by the laws of Delaware, the Employment Agreement specifically states in Paragraph 23 that ***Texas*** law governs the construction, validity and interpretation of that agreement:

> ALL QUESTIONS CONCERNING THE CONSTRUCTION, VALIDITY AND INTERPRETATION OF THIS AGREEMENT AND THE EXHIBITS HERETO WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF TEXAS […]

Thus, pursuant to Paragraph 23 of the Employment Agreement, Section 6.1 of the Restrictive Covenant Agreement shall be interpreted according to ***Texas*** substantive law. Likewise, Exhibit C to the Employment Agreement in which the No-Hire Provision/Section 6.1 is found, states specifically in Section 9.1 that while a dispute over Section 6.1 is arbitrable, Aquila and Solera both may seek a:

> [T]emporary restraining order, preliminary injunction or similar injunctive relief from a court of competent jurisdiction in order to preserve the status quo or prevent irreparable injury pending the full and final resolution of the dispute through arbitration, without the necessity of showing any actual damages or that monetary damages would not afford an adequate remedy, and ***without the necessity of posting any bond or other security.***

(Emphasis added).

As an initial matter, the absence of a bond requirement is significant as it illustrates the parties' intent to ensure the absence of *any* roadblocks to injunctive

relief. *Stated differently, the Employment Agreement is uniquely drafted to encourage the Court to grant injunctive relief.*

Solera's breach of Aquila's Vested Option rights found in the Plan undisputedly gives rise to irreparable harm of the kind for which money will not be an adequate remedy. In fact, Solera "acknowledge[d] and agree[d]" that money damages may not be an adequate remedy for a breach of the Plan. Specifically, Paragraph 18 of the Plan (entitled "Remedies") says, in relevant part, as follows:

> Each Participant and the Company acknowledges and ***agrees that money damages may not be an adequate remedy for any breach of the provisions of this Plan*** and that any party may in its sole discretion apply to any court of law or equity of competent jurisdiction (***without posting any bond or deposit***) for ***specific performance*** and/or other injunctive relief in order to enforce or prevent any violations of the provisions of this Plan.

(Emphases added).

Indeed, the irreparable harm that Aquila can suffer if Solera exercises its repurchase option cannot be overstated. For example, if Solera sells company while the dispute is pending, Aquila will be deprived of any benefits resulting from the sale. Even in a less drastic scenario, Aquila will be deprived of voting on otherwise dispositive and significant matters, such as corporate policy, decisions regarding the board of directors, the issuance of securities, and other substantial changes in corporate operations – all of which will injure the value of Aquila's investment.

C. <u>Solera Consents to Guy Dibble, A Then-Employee Of Solera's Subsidiary, Identifix, Inc., Working For Aquila's Separately Owned Company, Adventure.</u>

In or around May 2017, Aquila's separately owned company, Adventure, a Texas corporation, hired Guy Dibble ("Dibble"), a then-employee of a Solera subsidiary, Identifix, Inc. ("Identifix"), a Texas corporation, to work as an auto mechanic for Adventure. (Aquila Affidavit, ¶ 6.) Identifix invoiced Adventure for Dibble's time. (*Id.*)

Solera provides risk management and asset protection software and services to the automotive and property insurance industry. Identifix provides software solutions for the automotive industry. Adventure is designed to fix up cars as a team building exercise and sell them at auction to offset costs. In no way is Adventure involved in software. (Aquila Affidavit, ¶ 7.)

While employed with Solera's subsidiary, Identifix, Dibble *never* received any specialized training or had access to, received, or otherwise had knowledge of Solera's confidential or proprietary information, intellectual property, or trade secret information. (Dibble Affidavit, ¶¶ 2, 3.) Moreover, in the last year, Dibble has not worked in any capacity for Adventure or Solera that involves customer service or interaction with any potential or existing customers of Solera. (Dibble Affidavit, ¶ 3.) Dibble is, simply put, an auto mechanic; he fixes cars, and not a software developer. (Dibble Affidavit, ¶ 3.)

Adventure is not a party to the Restrictive Covenant Agreement or No-Hire Provision. (Aquila Affidavit, ¶ 8.) Nor is Adventure a competitor of Solera. Neither Solera nor any of its subsidiaries buy or sell cars for profit. (Aquila Affidavit, ¶ 8.) Solera, and its subsidiaries, develop and sell software. (Aquila Affidavit, ¶ 8.) Moreover, Adventure is in its third year of operations and has never had an employee before hiring Dibble (who was already working for Adventure in the exact same capacity for approximately two years before this dispute), and has never generated profits. (Aquila Affidavit, ¶ 8.)

D. Aquila Ends His Employment Relationship With Solera.

On or about May 23, 2019, Aquila ended his employment relationship with Solera, ready to seek new challenges. (Aquila Affidavit, ¶ 9.) On May 27, 2019, Aquila and Solera executed the Separation Agreement. (Aquila Affidavit, ¶ 9.) Attached as **Exhibit 4** is a true and correct copy of the Separation Agreement. The Separation Agreement plainly contemplated Aquila's ongoing right to exercise of his Vested Options. Specifically, Section 3 of the Separation Agreement (entitled "Treatment of Parent Equity; Promissory Note") goes on to state:

> (a) [Aquila] and [Solera] acknowledge and agree that:
>
> (i) pursuant to that certain Stock Option Agreement, dated March 4, 2016, between [Solera] and [Aquila] ("Original Stock Option Agreement") and the Solera Global Holding Corp. 2016 Stock Option Plan ("Plan"), [Aquila] holds (i) Service Options to purchase up to [. . .] shares of Common Stock of [Solera] ("Common Stock"), [. . .] of which are Vested Options as of the date hereof and (ii) Return Target

Options to purchase up to [. . .] shares of Common Stock, none of which are Vested Options as of the date hereof (as any such capitalized terms not defined herein are defined in the Original Stock Option Agreement);

(ii) pursuant to that certain Stock Option Agreement, dated June 28, 2018, between [Solera] and [Aquila] ("Additional Return Target Option Agreement") and the Plan, [Aquila] holds Return Target Options to purchase up to [. . .] shares of Common Stock, none of which are Vested Options as of the date hereof (as any such capitalized terms not defined herein are defined in the Additional Stock Option Agreement);

(iii) pursuant to that certain Stock Subscription and Rollover Agreement, dated March 3, 2016, between [Solera] and [Aquila] ("Original Subscription Agreement"), [Aquila] owns [. . .] shares of Common Stock, of which [. . .] are Purchased Shares (as defined in the Original Subscription Agreement) and [. . .] are Exchanged Shares (as defined in the Original Subscription Agreement); and

(iv) pursuant to that certain Stock Subscription Agreement, dated March 21, 2017, between [Solera] and [Aquila], [Aquila] owns [. . .] shares of Common Stock, of which [. . .] are treated as Purchased Shares (as defined in the Original Subscription Agreement) and [. . .] are treated as Exchanged Shares (as defined in the Original Subscription Agreement).

(b) [Aquila] hereby acknowledges and agrees that all Service Options that are not Vested Options as of the date of this Agreement and all Return Target Options are forfeited for no consideration as of the Separation Date.

(c) Any Service Options that are Vested Options as of the date hereof may be exercised within the 90 day period immediately following the Separation Date, in accordance with the procedures for exercise set forth in the Original Stock Option Agreement, and such Service Options and any Service Option Shares (as defined in the Original Stock Option Agreement) issued to [Aquila] upon the exercise of Vested Service Options will remain subject to the terms of the Original Stock Option Agreement and the Plan, including with respect

to the Repurchase Option. [Solera] acknowledges and agrees that the payment of the exercise price and any taxes required to be withheld in connection with the exercise of Vested Service Options may be accomplished by [Aquila] directing [Solera] to withhold shares of Common Stock having a Fair Market Value equal to the aggregate amount of such exercise price and taxes. [Aquila] agrees and acknowledges that the price per share set forth in Section 3(d) does not constitute Fair Market Value under the Original Stock Option Agreement.

(d) [Solera] agrees to repurchase [. . .] Exchanged Shares ("Purchase Shares") from [Aquila] at a price per share of [. . .] ("Purchase Price"). The completion of the purchase of the Exchanged Shares shall take place at the principal office of [Solera] on the business day following the Release Effective Date (the "Closing Date"). On the Closing Date, [Solera] will deliver to [Aquila] the total Purchase Price by certified check or by wire transfer of immediately available funds (if [Aquila] provides to [Solera] wire transfer instructions). [Aquila] hereby acknowledges, represents and warrants that (i) [Aquila] has good and valid title to and authority to transfer the Purchase Shares free and clear of any liens, charges, restrictions or encumbrances of any kind (other than any liens, charges or encumbrances on the Exchanged Shares pursuant to that certain Amended and Restated Pledge Agreement, dated March 21, 2016, between [Solera] and [Aquila] ("Pledge Agreement")) and (ii) [Aquila] has full right, power and authority to enter into this Agreement and to consummate the transactions contemplated by this Agreement. Following the date hereof, other than the right to receive the Purchase Price, [Aquila] shall have no rights or claims with respect to the Purchase Shares and, as of the date of this Agreement, [Aquila], on behalf of himself and his heirs, successors and assigns, irrevocably, absolutely and fully release, relieve, relinquish, waive and forever discharge the Company Group (as defined below) from any and all manner of actions, causes of actions, claims, obligations, demands, damages, costs, expenses, compensation or other relief, whether known or unknown, matured or unmatured, whether in law or equity, directly or indirectly arising out of, relating to or by virtue of [Aquila]'s ownership of the Purchase Shares, to the fullest extent permitted by law. For the sake of clarity, [Aquila] is not releasing or otherwise discharging the Company Group with respect to his ownership of any shares of Common Stock other

than the Purchase Shares. [Aquila] and [Solera] agree to perform all such further acts and execute and deliver all such further documents as may be reasonably required in connection with the consummation of the Purchase Share transactions contemplated hereby in accordance with the terms of this Agreement.

(e) [Solera] agrees that [Aquila]'s separation of employment with Solera does not constitute an Event of Default (as defined in that certain Promissory Note, dated March 3, 2016, between [Solera] and [Aquila] ("Note")) for purposes of the Note or the Pledge Agreement. Upon and following the Separation Date, the Note and Pledge Agreement remain in full force and effect (including provisions requiring payment upon the occurrence of an Event of Default following the Separation Date) and shall remain outstanding in accordance with the terms thereof. Further, the Exchanged Shares not repurchased by [Solera] hereunder remain Pledgor Shares under the Pledge Agreement.

Section 2(k) of the Original Stock Option Agreement (entitled "Repurchase Option") states:

(k) Repurchase Option. Notwithstanding anything to the contrary in Section 12 of the Plan, (i) the Repurchase Option shall only be applicable if (A) Option holder's employment with the Company or its Subsidiaries is terminated for Cause or (B) Optionholder materially violates Section 6 of Optionholder's Confidentiality, Invention Assignment, Non-Solicit, Non-Compete and Arbitration Agreement, and (ii) the Company Expiration Date shall mean (A) in the case of a termination for Cause, 180 days after the Termination Date and (B) in the event of a willful and material violation of Section 6 of Optionholder's Confidentiality, Invention Assignment, Non-Solicit, Non-Compete and Arbitration Agreement, the date six (6) months following the date the Company becomes aware of such a material violation (but in no event later than the date 24 months following the Termination Date). The price per share upon exercise of the Repurchase Option shall be Original Cost.

Section 8 of the Separation Agreement (entitled "Restrictive Covenants") says as follows:

> [Aquila] acknowledges and agrees that [Aquila] remains subject to all of the terms and conditions contained in the Restrictive Covenant Agreement; provided, however, that notwithstanding Section 6.1 of the Restrictive Covenant Agreement, the Employers acknowledge and agree that [Aquila] (i) will not be deemed to have breached Section 6.1 of the Restrictive Covenant Agreement with respect to any discussions with, offers to, or other solicitations of any Solera employees, consultants or agents, which may have occurred prior to the Separation Date and (ii) may employ or engage, or continue to employ or engage, Renato Giger, Marcia Hensley, Eric Carrion, Michael Horvath, Robert Bell, Christian Kaiser and/or Andrew Balzer (but not, for the avoidance of doubt, Ron Rogozinski) following the Separation Date; and provided, further, the Employers acknowledge and agree that, for purposes of determining [Aquila's] compliance with Section 2 of the Restrictive Covenant Agreement, no information or materials will be Proprietary Information (as defined in the Restrictive Covenant Agreement) unless such information or materials were treated as, or deemed to have been, confidential or proprietary information by Solera. For the avoidance of doubt, the definition of confidential or proprietary information in this Agreement, the Restrictive Covenant Agreement or any other applicable agreements between the Parties shall exclude information or materials that were not treated as, or deemed to have been, confidential or proprietary information by Solera. (Original Emphasis).

(Aquila Affidavit, ¶ 2.)

E. Solera Terminates Dibble's Employment and Adventure *Continues* his Employment.

In June 2019, Dibble was working for both Solera and Adventure. In late June 2019, Solera terminated Dibble's employment with Solera. (Dibble Affidavit, ¶ 4.) Despite Solera's termination of Dibble, Adventure continued to employ him, including through July 2019. (Dibble Affidavit, ¶ 5.) After this termination, Dibble

contacted Solera for that job back and Solera did not return his telephone calls, text or emails. (Dibble Affidavit, ¶ 5.)

In fact, on August 23, 2019, Dibble *finally* was able to speak with a Solera representative. (Dibble Affidavit, ¶ 6.) During that call, Dibble stated he would be willing to work at Solera, effective on September 16, 2019. (Dibble Affidavit, ¶ 6.) Solera ***agreed***. (Dibble Affidavit, ¶ 6.) The issue *should be* and/or should have been resolved, yet consistent with its bad-faith tactics, Solera still refuses to actually confirm its agreement to take Dibble back, and/or to honor its contractual commitments to pay Aquila his Vested Options. Dibble's termination is and has always been about Vista's vindictive attack on Aquila, hence the urgent need for this TRO.

F. Aquila Informs Solera He is Exercising his Vested Options, Solera Accepts, and then, Reneges and Informs Aquila That It Intends to Repurchase His Vested Options, Instead.

As is his contractually bargained for right under the Original Stock Option Agreement, the Plan and the Separation Agreement, on July 2, 2019, Aquila's counsel sent an email to Solera's counsel, Rachel Sparks and Bryce Friedman ("Solera's Counsel"), exercising Aquila's options, and providing instructions for payment. Attached as **Exhibit 5** is a true and correct copy of the Ryan Hong and Sanford Michelman's email to Solera's counsel, dated July 2, 2019. (See also, Affidavit of Sanford Michelman ("Michelman Affidavit"), ¶ 2.)

On July 11, 2019, Solera responds, ***agreeing*** to honor Aquila's Vested Option rights. Specifically, Solera's counsel, Sparks, replied by email:

> Should Mr. Aquila still wish to exercise his Vested Options, we point you to the exercise requirements of the Plan and the Original Stock Option Agreement, including Section 2(d) thereof. If Mr. Aquila complies with all required Vested Option exercise requirements, then the Company ***shall*** promptly deliver to Mr. Aquila the corresponding net amount of post-exercise Company common shares.

Attached as **Exhibit 6** is a true and correct copy of Solera's Counsel's email, dated July 11, 2019. (See also, Michelman Affidavit, ¶ 3.) It is notable that even Solera's Counsel used the appropriate verbiage when stating that "the Company shall promptly deliver to Mr. Aquila the corresponding net amount of post-exercise Company common shares." Solera's Counsel's own use of the term "shall," recognizing and acknowledging Solera's contractual obligations, is both significant and dispositive, as this Court well knows. *Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc*., No. CIV.A. 4095-VCP, 2009 WL 4895120, at *7 (Del. Ch. Dec. 10, 2009), as revised (Apr. 14, 2010) ["In both contracts and statutes, the term 'shall' is used to make an act mandatory. See *Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *6 (Del.Ch. July 14, 2009) ('[T]he plain meaning of 'shall be advanced' is that advancement is mandatory.')."]

Thus, as Solera agreed and requested, on July 23, 2019, Aquila sent a formal letter to Solera giving notice that he is exercising all Vested Options under the Original Stock Option Agreement in a cashless manner under Section 2(3)(ii) of the

Original Stock Option Agreement. Attached as **Exhibit 7** is a true and correct copy of Aquila's July 23, 2019 letter. (Aquila Affidavit, ¶ 10.)

Thereafter, on August 5, 2019, Solera's counsel, Bryce Friedman, sent a letter to Aquila's counsel, Sanford Michelman, Esq., reversing course on something that even he acknowledged was mandatory (hence, his firm's use of the word "shall" to describe Solera's mandatory obligations to "promptly deliver to Mr. Aquila the corresponding net amount of post-exercise Company common shares") and inexplicably rejecting Aquila's cashless exercise of his Vested Options[4]. (See Michelman Affidavit, ¶ 5.)

In this letter, Friedman notified Michelman that Solera was not only rejecting Aquila's cashless exercise, but instead and in retaliation, exercising its repurchase option under Section 2(k) of the Original Stock Option Agreement because of Aquila's alleged breach of Section 6 of the Restrictive Covenant Agreement due to Adventure hiring Dibble – despite the fact that Dibble was already working for Adventure. In effect, Solera has refused to honor Aquila's notice of cashless

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[4] It is important to note that Simpson, Thacher & Bartlett, LLP ("Simpson"), Bryce Friedman's firm, represented Vista and *not Solera.* Once a dispute arose between Aquila and Solera, Michelman asked Friedman who he represented. It was then that Simpson also began representing Solera. To highlight the control Vista has over Solera, and that Simpson is merely the agent of Vista, in Friedman's letter to Michelman, he copied the Vista funds that invested into Solera *and no other shareholders*. This is additional evidence that Vista and Solera are creating these issues to frustrate and harm Aquila due to their unhappiness with Aquila's departure.

exercise of Vested Options, which he is legally entitled to and which Solera is obligated to honor, based on their manufactured claim that Aquila's (really, Adventure's) hiring of Dibble violated Section 6.1 of the Restrictive Covenant Agreement. Attached as **Exhibit 8** is a true and correct copy of Friedman's August 5, 2019 letter to Michelman. (See Michelman Affidavit, ¶ 4.)

The egregiousness, and callousness, of Solera's actions can be summed up in one sentence by Solera's counsel to Aquila's counsel in August 2019 when Solera rejected Aquila's cashless exercise of his Vested Options and informed him that they would be repurchasing his shares instead because Adventure hired Dibble:

> Under the circumstances, there is no need for a closing or other action regarding Mr. Aquila's Vested Options. Mr. Aquila's breach and Solera's exercise of the Repurchase Option at Original Cost results in Mr. Aquila receiving zero Option Shares and zero proceeds therefrom on account of his Vested Options, and also renders the requested election to exercise appraisal moot.

Aquila has no adequate remedy for Solera's breach of the Plan. In fact, not only has Solera "acknowledge[d] and agree[d]" that money damages may not be an adequate remedy for a breach of the Plan, Paragraph 18 of the Plan (entitled "Remedies") says, in relevant part, as follows:

> Each Participant and the Company acknowledges and ***agrees that money damages may not be an adequate remedy for any breach of the provisions of this Plan*** and that any party may in its sole discretion apply to any court of law or equity of competent jurisdiction (without posting any bond or deposit) for ***specific performance*** and/or other ***injunctive relief*** in order to enforce or prevent ***any*** violations of the provisions of this Plan.

(Emphasis added).

As set forth in Paragraph 20 of the Plan, the Delaware courts have exclusive jurisdiction over all issues concerning the Plan where Aquila's Vested Option rights arise:

> All issues concerning the Plan will be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to any choice of law or conflict of law provision of rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the law of any jurisdiction other than the State of Delaware. Each of the Company and each Participant submits to the co-exclusive jurisdiction of the United States District Court and any Delaware state court sitting in Wilmington, Delaware over any lawsuit under this Plan and waives any objection based on venue or *forum non conveniens* with respect to any action instituted therein. (See, Exhibit 3.)

ARGUMENT

A. Legal Standard.

A TRO is a special remedy of short duration designed primarily to prevent imminent irreparable injury pending a preliminary injunction or final resolution of a matter. *Arkema Inc. v. Dow Chem. Co.*, 2010 WL 2334386, at *3 (Del. Ch. May 25, 2010). A temporary restraining order is appropriate where the moving party can show "(i) the existence of a colorable claim, (ii) the existence of irreparable harm if the relief is not granted, and (iii) a balancing of hardships favoring the moving party." *Newman v. Warren*, 684 A.2d 1239, 1244 (Del. Ch. 1996).

In evaluating a motion for a temporary restraining order, the Court follows a relatively straightforward analysis. That is, "if imminent irreparable harm exists, the remedy ought ordinarily to issue unless the claim is frivolous, granting the remedy would cause greater harm than denying it, or the plaintiff has contributed in some way to the emergency nature of the need for relief." *Trilogy Portfolio Co., LLC v. Brookfield Real Estate Financial Partners, LLC*, 2012 WL 120201 (Del. Ch. Jan. 13, 2012) (internal quotation marks omitted); *Cottle v. Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1988).

As further explained below, because (1) Aquila has demonstrated a colorable claim for specific performance and injunctive relief, (2) Aquila faces a significant risk of irreparable harm in the absence of a temporary restraining order, (3) and the balance of hardships weighs overwhelmingly in Aquila's favor, this motion for temporary restraining order should be granted.

B. Aquila Properly Brings This Motion for Temporary Restraining Order Under The Plain Terms the Stock Option Agreement, Which Allow Either Party To Seek Injunctive Relief in Delaware Without Posting a Bond.

Paragraph 10 of the Stock Option Agreement says the Stock Option Agreement will be subject to the governing law provisions of the Plan, and paragraph 11 of the Stock Option Agreement says the parties are entitled to any of the remedies specified in the Plan. Paragraph 18 of the Plan (entitled "Remedies") says, in relevant part, as follows:

> Each Participant and the Company acknowledges and agrees that money damages may not be an adequate remedy for any breach of the provisions of this Plan and that any party may in its sole discretion apply to any court of law or equity of competent jurisdiction (***without posting any bond or deposit***) for specific performance and/or other injunctive relief in order to enforce or prevent any violations of the provisions of this Plan.

Once again, like the Employment Agreement, Paragraph 18 of the Plan illustrates the parties' intent to make injunctive relief an easily obtainable remedy, *i.e.*, by eliminating the bond or deposit requirement. In light of this, and well-settled legal principles concerning contractual interpretation, "the Court [should] give priority to the parties' intentions as reflected in the four corners of the agreement." *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

Furthermore, Paragraph 20 of the Plan (entitled "Governing Law") says, in relevant part, as follows:

> All issues concerning the Plan will be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to any choice of law or conflict of law provision of rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the law of any jurisdiction other than the State of Delaware. Each of the Company and each Participant submits to the co-exclusive jurisdiction of the United States District Court and any Delaware state court sitting in Wilmington, Delaware over any lawsuit under this Plan and waives any objection based on venue or *forum non conveniens* with respect to any action instituted therein.

Accordingly, enforcement and injunctive relief rights relating to the Plan are governed by Delaware law, but pursuant to Paragraph 23 of the Employment

Agreement,[5] the substantive law of the State of Texas governs interpretation of Section 6.1 / the No-Hire Provision. This is significant here, as Texas law routinely holds that overbroad No-Hire provisions of the type Solera is hiding behind now to avoid Aquila's cashless exercise of his Vested Options, are invalid.

C. <u>Aquila Has Demonstrated a Colorable Claim.</u>

To satisfy the "colorable claim" factor, Aquila need only demonstrate that his claim is "colorable, litigable, or…raise[s] questions that deserve serious attention" enough to warrant maintaining the status quo for the short period necessary to develop a record and bring a motion for preliminary injunction. *Cottle*, 1988 WL 10415, at *3. Aquila need not show he is likely to prevail on the claim (which he is); he need only show the claim is not frivolous. *See UIS, Inc. v. Walbro Corp.*, 1987 WL 18108, at *2 (Del. Ch. Oct. 6, 1987). This is because Courts have consistently recognized that "[o]ne cannot at this stage responsibly form any tentative judgment about the relative merits of these positions beyond a conclusion that plaintiffs' claims are colorably valid." *Id.* Aquila therefore "'need only state a colorable claim for relief, which is essentially a non-frivolous cause of action.'" *Newell Rubbermaid Inc. v. Storm*, 2014 WL 1266827, at *9 (Del. Ch. Mar. 27, 2014).

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[5] Paragraph 23: "ALL QUESTIONS CONCERNING THE CONSTRUCTION, VALIDITY AND INTERPRETATION OF THIS AGREEMENT AND THE EXHIBITS HERETO WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF TEXAS […]"

Aquila easily meets that standard here. The Complaint's well-pled facts establish that (1) the Separation Agreement constitutes a valid contract, (2) Aquila performed all conditions, covenants, and promises required of him under the terms of the Separation Agreement, and (3) the balance of equities tips in Aquila's favor. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (A party seeking specific performance must establish that (1) a valid contract exists, (2) he is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance).

1. The Separation Agreement Is A Valid Contract.

First, the Separation Agreement is a valid contract because (1) Aquila and Solera intended that it would bind them, (2) the terms of the Separation Agreement are sufficiently definite, and (3) both Aquila and Solera exchanged legal consideration. *Id.* at 1158.

Solera cannot seriously argue otherwise.

2. Aquila Has Performed All Conditions, Covenants And Promises Required Of Him Under The Separation Agreement.

Second, Aquila has performed all conditions, covenants, and promises required of him under the terms and conditions of the Separation Agreement, except for those promises, conditions, and covenants Aquila was excused from having to discharge.

3. Section 6.1 – the No-Hire Provision – is Overbroad and Not Enforceable.

To avoid its obligations relating to Aquila's Vested Options, Solera will likely rehash its manufactured argument that Aquila violated the "No-Hire" Provision contained in the Confidentiality, Invention Assignment, Non-Solicit, Non-Compete and Arbitration Agreement ("Restrictive Covenant Agreement"), which is governed by Texas law, because Adventured hired Dibble and continued to employ him after Solera terminated Dibble's employment with Identifix. But this argument fails for several reasons.

As a general matter, Texas law recognizes restrictive covenants, though employers are subject to certain limitations. Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' employees are restraints on trade governed by the Covenants Not to Compete Act, codified at Section 15.50(a) of the Texas Business and Commerce Code (the "Act"). *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-682 (Tex. 1990) ; *see also* *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464-465 (5th Cir. 2003) (non-solicitation covenants restrain trade and competition and are governed by the Act*); Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 438-439 (S.D. Tex. 2008) (a "non-solicitation covenant is also a restraint on trade and competition and must meet the criteria of section 15.50 of the Texas Business and

Commerce Code to be enforceable"). "The purpose of [this] Act is to maintain and promote economic competition in trade and commerce ... and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose...." Tex. Bus. & Com. Code § 15.04; *see also Marsh USA Inc.*, supra at 795.

Non-solicitation agreements are treated in the same manner as non-competition agreements and are governed under the same "reasonableness" standard. *Marsh USA Inc.*, supra at 768; *DeSantis*, supra at 681-682; *Guy Carpenter & Co.*, supra at 464-465 (5th Cir. 2003) (non-solicitation covenants restrain trade and competition and are governed by the Act); *Rimkus Consulting Grp., Inc.*, supra at 438-439 (a "non-solicitation covenant is also a restraint on trade and competition and must meet the criteria of section 15.50 of the Texas Business and Commerce Code to be enforceable").

"To be enforceable, noncompetition provisions … must contain limitations as to time, geographic area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than necessary to protect the goodwill or other business interest of the employer." *Cooper Valves, LLC v. ValvTechnologies, Inc.*, 531 S.W.3d 254, 265 (Tex. App. 2017), *reh'g denied* (Sept. 28, 2017) (citing Tex. Bus. & Com. Code Ann. § 15.51(c) (West 2015); *Marsh*, 354 S.W.3d at 777). "[T]he absence of a geographical restriction will generally render a covenant not to compete

unreasonable." *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197, 211–12 (5th Cir. 2018) (citing *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 387 (Tex. 1991)) (reversing summary judgment in favor of employer, finding non-competition provision could not be enforced as written as it contained no geographic limitation and therefore constituted an unreasonable restraint on trade).

Here, the Non-Solicitation Agreement contains no geographic limitation or scope of work with respect to the solicitation of employees. Nor does the agreement contain any terms that would limit the solicitation to employees Aquila had worked with directly or employees performing any type of specific job function that could be linked to the services Aquila had provided to Solera. When this was pointed out to Solera in a July 20, 2019 letter from Sanford Michelman to Bryce Friedman, Solera doubled down on the scope of the provision and confirmed it means what it said, that it restrains Aquila from hiring *anyone*:

> "The language of [Section 6.1] is clear that Mr. Aquila agreed not to, among other things, hire *anyone* who is, or has been in the six months prior to hiring by Mr. Aquila, an employee of Solera or its affiliates."

Letter from Bryce Friedman dated July 22, 2019 (emphasis in original). Thus, as written and as construed by Solera, the Non-Solicitation Agreement purports to prohibit Aquila from hiring ***any*** current or former employee of Solera, a company

that globally employs over 7800 employees; including a receptionist or janitor that one of Solera's affiliate companies hire a year from now.

Solera's precise argument was considered and rejected in *Ally Fin., Inc. v. Gutierrez*, No. 02-13-00108-CV, 2014 WL 261038, at *8 (Tex. App. Jan. 23, 2014). Ally Financial was a leading vehicle financial services company operating as a bank holding company. In 2008, Ally Financial adopted a Long-Term Equity Compensation Incentive Plan (the "CIP") which provided stock options to employees participating in the plan. The CIP contained a non-solicitation covenant which stated:

> "While the Participant is employed by the Company or a Subsidiary, and during the 2–year period immediately following the date of any termination of the Participant's employment with the Company or a Subsidiary, such Participant shall not at any time, directly or indirectly, whether on behalf of ... herself or any other person or entity … (ii) solicit or employ any employee of the Company or any Subsidiary, or any person who was an employee of the Company or any subsidiary during the 60–day period immediately prior to the Participant's termination, for the purpose of causing such employee to terminate his or her employment with the Company or such Subsidiary.

Id. at *1. If a CIP participant violated the non-solicitation covenant, the CIP required the participant to repay any award payments under a claw-back provision. *Id*.

Gutierrez was a participant under the CIP and received some but not all of the payments that had vested under the terms of the agreement. Gutierrez left her employment with Ally Financial and began working for Homeward, one of Ally's competitors in the mortgage market. Subsequently, eight former Ally Financial employees left the company to work for Homeward, and five of them spoke with Gutierrez to obtain information about job openings at Homeward. After sending a cease and desist letter with respect to these defections and additional employees leaving Ally Financial to join Homeward, Ally Financial filed suit against Gutierrez and pursued breach of contract as one of its causes of action, seeking damages arising from Gutierrez's alleged violation of the CIP. Gutierrez moved for summary judgment arguing, *inter alia*, the non-solicitation covenant was unenforceable under Texas law as overly broad and unrelated to a legitimate business interest. The trial court granted the motion and the Court of Appeals affirmed.

In affirming the trial court's decision, the Court of Appeal held that an "enforceable non-solicitation covenant will contain reasonable limitations as to time, geographical area, and scope of activity to be restrained." *Id*. at 8 (citing Tex. Bus. & Com. Code Ann. § 15.50(a)). It further held that "a non-solicitation covenant is unreasonable if it is greater than required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted." *Id*. (citing *Zep Mfg. Co. v. Harthcock,* 824 S.W.2d 654, 660 (Tex.App.-

Dallas 1992, no writ)). The Court found the non-solicitation covenant did not comply with these restrictions for the same or similar reasons as are applicable to Aquila's dispute with Solera now:

> Here, the non-solicitation covenant barred Gutierrez, for a two-year period, from soliciting or employing (1) all Ally employees who work for Ally or any of Ally's subsidiaries and (2) all former Ally employees who worked for Ally or any of Ally's subsidiaries between August 14 and October 14, 2011. ***While it might be considered reasonable to limit Gutierrez's solicitation of Ally's employees located in the IT department, which was where Gutierrez worked, the non-solicitation covenant in the CIP was not so limited.*** Gutierrez was barred for two years from soliciting or employing both all current Ally employees and all former Ally employees who were so employed in late 2011. ***The undisputed summary-judgment evidence showed that in 2012, Ally had approximately 14,000 employees located across the nation, with some located in foreign countries. These 14,000 employees were included in the scope of Ally's non-solicitation covenant. This covenant goes beyond what was necessary to protect Ally's goodwill or other business interest of Ally.***

Id. (emphasis added; citations omitted).

This is exactly what is happening here. Solera drafted a non-solicitation covenant that prohibits the hiring of ***any*** member of a large global work force consisting of over 7800 employees, without regard to any such employee's geographic location, job function, or previous relationship with Aquila. Such provisions are unenforceable as a matter of law.

The Court reached the same conclusion in *Cooper Valves, LLC v. ValvTechnologies, Inc.*, 531 S.W.3d 254 (Tex. App. 2017), *reh'g denied* (Sept. 28, 2017). There, former employee Hoeffner was a party to multiple confidentiality agreements that purported to restrict, *inter alia*, his ability to solicit the company's employees to work for any competing venture. The non-solicitation covenants at issue did not contain any geographical limitations. Notwithstanding this deficiency, the trial court found it likely that the employer would prevail on the merits and issued a preliminary injunction that prohibited Hoeffner from soliciting ***any*** of the employer's current employees. On appeal, the Court reversed the issuance of the preliminary injunction finding the trial court had abused its discretion by enforcing a non-enforceable non-solicitation covenant that rendered anyone and everyone off-limits like Solera's provision does here:

> Neither nonsolicitation provision in Hoeffner's 1997 Agreement contains geographic or time limitations. ***Neither specifies the types of customers or employees that are off-limits to Hoeffner. Because the nonsolicitation provisions in the 1997 Agreement do not include reasonable restrictions, they are unenforceable***.

Id. at 265 (emphasis added) (citing *Marsh*, 354 S.W.3d at 771; *Ally Financial, Inc.*, supra at *8 (holding overbroad non-solicitation covenant unenforceable because it "goes beyond what was necessary to protect Ally's goodwill or other business interest of Ally").

An agreement lacking a geographic restriction also will not be enforced where it would impose a harsh economic penalty against the party governed by the agreement. "To be enforceable, a covenant must contain limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee. ***A restraint is unnecessary if it is broader than necessary to protect the legitimate interests of the employer.***" *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, 263 S.W.3d 232, 249 (Tex. App. 2007), *rev'd on other grounds, sub nom. Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009) (internal citations and quotations omitted) (emphasis added). In *Hardy*, the former employee's non-solicitation covenant prohibited her from soliciting any of her employer's clients for a period of two years and imposed a harsh penalty in the form of a liquidated damages provision that amounted to 150% of the fees billed and accepted by the employer's client in the 12 months preceding any breach. The Court found this provision excessive and unenforceable.

> The restrictive covenant here is unreasonable and imposes a greater restraint than is necessary to protect Mann Frankfort's goodwill or other business interest. *See* Tex. Bus. & Com.Code Ann. § 15.50; *DeSantis,* 793 S.W.2d at 682. ***The pricing terms were unreasonable. They required Hardy to pay 150% of the fees billed and accepted by the client during the entire year before the client hired Hardy. Thus, as Hardy points out, if Hardy prepared a $500 tax return for a client, and if the same***

> ***client paid $50,000 during the previous year for accounting serviced provided by Mann Frankfort, Hardy would have to pay $75,000 to Mann Frankfort.***
>
> * * *
>
> The agreement contains no geographical restrictions, no restrictions to clients that were actually served by Hardy while he was employed by Mann Frankfort, and an exorbitant fee for Hardy's service to clients that did business with Mann Frankfort. We hold the restrictive covenant is unenforceable due to its failure to comply with the requirements of the Texas Business Code. *See* Tex. Bus. & Com.Code Ann. § 15.50; *Stroman,* 923 S.W.2d at 84. Because Hardy's agreement fails to comply with the Covenants Not to Compete Act, it is unenforceable, as written.

Hardy, supra at 250.

Here, Solera will argue that the Dibble hire excuses it from honoring its obligation to honor Aquila's exercise his Vested Stock Options which have a value in excess of ***$101,772,607***. Texas law does not compel such an absurd result.

The absurdity of Solera's position is further established by the fact that Adventure is not a competitor of Solera. Adventure is in the business of buying and selling classic cars for profit. No division of Solera buys and sells cars for profit, much less classic cars. Moreover, Adventure has never generated profits, and has experienced net losses ranging between $550,000 to $750,000 a year since its formation in 2016. Enforcing the Non-Solicitation Agreement to prohibit Adventure

from hiring Dibble does not serve any protectable interest of Solera and is therefore a prohibited restraint on trade.

"To be reasonable, a covenant restricting an activity of an employee must be shown as having some bearing on the activities of the employer." *Hodgson v. U.S. Money Reserve, Inc.*, No. 09-13-00074-CV, 2013 WL 2732736 (Tex. App. June 13, 2013) (citing Tex. Bus. & Com.Code Ann. § 15.50(a); *Peat Marwick Main & Co. v. Haass,* 818 S.W.2d 381, 387 (Tex.1991)). In *Hodgson*, defendants were former employees of USMR which was in the business of selling precious coins. Pursuant to their former employment, defendants were subject to a non-competition agreement which prohibited them from competing in a limited geographic area, prohibited them from soliciting their former USMR clients, and prohibited them from soliciting any USMR employees to work with them. Defendants formed a new business to sell coins, UGCB. As a result, USMR filed suit and sought preliminary injunctive relief to enforce the non-competition agreement, including the non-solicitation provision. On appeal, the court found there was no evidence that UGCB competed within the restricted geographic territory or that it had made any sales to former USMR customers. Thus, there was no evidence in the record that UGCB was engaged in any restricted competition with USMR. As a result, the Court dissolved the portion of the preliminary injunction that restricted UGCB's ability to work with former USMR employees.

> A restriction prohibiting competition in a geographical area must not impose a greater restraint than the restraint that is necessary to protect the goodwill or other business interest of the employer. *See* Tex. Bus. & Com.Code Ann. § 15.50(a). … ***There is no evidence in the record showing that restrictions preventing Hodgson and Kitchens from working with a former employee of USMR in a noncompeting business are necessary to protect USMR's business interest***.

Id at *3-4 (emphasis added). Solera cannot articulate any reasonable claim that prohibiting Dibble from working for non-competitor Adventure protects any legitimate business interest of Solera.

To the contrary, Solera cannot reasonably contend that prohibiting the recruitment of *all* employees - including auto mechanics like Dibble - is necessary to "protect the goodwill or other business interest of" Solera. Respectfully, it is difficult to see how prohibiting the recruitment of a receptionist, mechanic, or janitor of Solera would protect Solera's goodwill, *i.e.* the "advantage or benefits" which Solera "receives from constant and habitual customers on account of its local position, or common celebrity, or reputation for skill, or influence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." *Marsh USA Inc. v. Cook*, 354 S.W.3d at 768. Similarly, such prohibitions are far from necessary to protect Solera's business interests. Solera will be hard-pressed to show that Dibble (and employees with similar positions) had access to, received, or otherwise had knowledge of Solera's confidential or

proprietary information, intellectual property, or trade secrets. Solera will be equally hard-pressed to show the difficulty of recruiting employees like Dibble – he is a mechanic; (2) or that Solera spent significant time and money training Dibble or other similar employees, or (3) that Dibble received any specialized training. *Cf. Neurodiagnostic Tex, L.L.C. v. Pierce*, 506 S.W.3d 153, 164 (Tex. App.—Tyler 2016, no pet.)

Further undercutting Solera's loss of goodwill argument is the fact that Dibble has been, with Solera's full knowledge and *consent*, working with Advantage since 2017, and without injury to Solera's goodwill. In fact, any argument that Solera makes in this regard will be *per se* frivolous. Solera's prior conduct belies any contention that the restraints set forth in Section 6.1 are necessary to protect its goodwill or other business interests given that Solera sanctioned, willingly participated in, and never objected to Dibble working with Adventure from May 2017 to June 2019, while Dibble was concurrently employed by Identifix. Had Solera believed that prohibiting Dibble's employment with Adventure was necessary to protect its goodwill or other business interests, Solera would not have agreed to the Joint Employer Period or otherwise consented and supported Dibble's work with Adventure from 2017-2019.

In fact, confirming once and for all the frivolousness of the claim, Solera terminated Dibble's employment with Identifix, Inc., showing that Dibble was not "essential" or "necessary" to Solera's business interests or goodwill.

4. The Balance of Equities

Solera breached and continues to breach the plain terms of the Separation Agreement, which clearly provide Aquila the right to exercise specific Vested Options relating to Solera's Common Stock, among other things. A party seeking specific performance must establish that (1) a valid contract exists, (2) he is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010); *Morabito v. Harris*, 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002). Aquila has met his burden.

D. <u>Aquila Will Suffer Imminent Irreparable Harm In the Absence of a Temporary Restraining Order.</u>

It is fundamental that the purpose of a temporary restraining order is to preserve the *status quo* pending the resolution of a case, where necessary to prevent irreparable harm. *Gimbel v. Signal Cos., Inc.,* 316 A.2d 599, 602 (Del. Ch. 1974), *aff'd* 316 A.2d 619 (Del. 1974). "Harm is irreparable unless 'alternative legal redress [is] clearly available and [is] practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *In re Del Monte Foods Co. S'holder Litig.*, 25 A.3d 813, 838 (Del. Ch. 2011) (quoting *T. Rowe Price Recovery*

Fund, L.P. v. Rubin, 770 A.2d 536, 537 (Del Ch. 2000)). Once a plaintiff has shown a threat of imminent, irreparably injury, '"the remedy ought ordinarily to issue."' *Id.* (citation omitted). Here, imminent, irreparable harm to Aquila would occur should the Court refuse to grant the requested temporary restraining order.

Aquila's purpose in exercising his Vested Options was to obtain possession of specific shares of Solera's common stock – something he expressly bargained for as part of the Separation Agreement. Ownership of these shares of Solera's common stock holds legal and equitable value separate and apart from any monetary value – which Aquila estimates to be in ***excess of $101,772,607*** – that could be attributed to each share. Perhaps most importantly, if Solera exercises its Repurchase Option of Aquila's Vested Options under Section 2(k) of the Original Stock Option Agreement, as it claimed it will do unless enjoined because of Aquila's purported breach of Section 6 of the Restrictive Covenant Agreement, Aquila will have no legal recourse to obtain possession of those shares of Solera's Common Stock because Aquila's Vested Options and right to possession of Solera Common Stock will be extinguished. Put simply, absent a temporary restraining order, Aquila will be wrongfully deprived of his right to obtain possession of shares of Solera's common stock in an amount exceeding ***$101,772,607***.

Moreover, Aquila and Solera both "acknowledge[d] and agree[d]" that money damages may not be an adequate remedy for a breach of the Plan. Paragraph 18 of the Plan (entitled "Remedies") says, in relevant part, as follows:

> Each Participant and the Company acknowledges and ***agrees that money damages may not be an adequate remedy for any breach of the provisions of this Plan*** and that any party may in its sole discretion apply to any court of law or equity of competent jurisdiction (without posting any bond or deposit) for specific performance and/or other injunctive relief in order to enforce or prevent any violations of the provisions of this Plan.

(Emphasis added)

Given the parties' clear intent to avoid roadblocks to injunctive relief, "the Court [should] give priority to the parties' intentions as reflected in the four corners of the agreement." *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

In addition, it is well-settled that enjoining the dissipation of assets is particularly appropriate where the relief sought is only a temporary restraining order to "preserve that status quo through what . . . will be a rather brief period" until a preliminary injunction argument can be heard. *CelestialRX Invs., LLC v. Krivulka*, No. 11733-VCG, at *37-*38 (Del. Ch. Nov. 24, 2015).

The irreparable harm that Aquila can suffer if Solera exercises its repurchase option cannot be overstated. For example, if Solera sells company while the dispute is pending, Aquila will be deprived of any benefits resulting from the sale. Even in

a less drastic scenario, Aquila will be deprived of voting on otherwise dispositive and significant matters, such as corporate policy, decisions regarding the board of directors, the issuance of securities, and other substantial changes in corporate operations – all of which will injure the value of Aquila's investment.

E. <u>The Balance Of Equities Overwhelmingly Favors Aquila.</u>

Given the threat of irreparable harm to Aquila, and Solera's unequivocal contractual obligations and Aquila's contractual rights as made clear under the plain terms of the Separation Agreement – *i.e.,* Aquila's contractual right to exercise his Vested Options and Solera's contractual obligations to honor the same – the balance of the equities here tips decidedly in Aquila's favor. If the Court temporarily restrains Solera from improperly repurchasing Aquila's Vested Options, Solera will suffer only a *minor or no inconvenience whatsoever.* On the other hand, in the absence of a temporary restraining order briefly prohibiting Solera from exercising its alleged repurchase option, Aquila will suffer *irreparable harm for which he has no legal remedy, a fact which Solera has already agreed to in Paragraph 18 of the Plan*.

<u>CONCLUSION</u>

Aquila respectfully requests that this Court issue an Order, in the form attached hereto, temporarily restraining Solera from improperly repurchasing

Aquila's Vested Options, until a hearing is had on Plaintiff's application for a preliminary injunction and the ultimate determination of this matter can occur.

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