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

DEFENDANTS' OPPOSITION TO (I) PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND (II) MOTION FOR EXPEDITED PROCEEDINGS AND DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR A STAY PENDING ARBITRATION

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Dated: September 10, 2019

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Defendants Solera Global Holding Corp. and Solera Holdings, Inc. (collectively, "Solera" or "the Company") submit this brief (A) in opposition to (I) the Motion for Temporary Restraining Order and Preliminary Injunction (the "TRO Motion") and (II) the Motion for Expedited Proceedings of Plaintiff Anthony Aquila ("Plaintiff" or "Aquila"), and (B) in support of Solera's motion to dismiss Plaintiff's Verified Complaint For Specific Performance And Injunctive Relief Regarding Anthony Aquila's Right to Exercise Vested Options ("Complaint") for lack of subject matter jurisdiction.

PRELIMINARY STATEMENT

Plaintiff Aquila breached his fiduciary and contractual duties to Solera, failed to execute a successful business strategy, and treated employees abusively while employed as its President and Chief Executive Officer ("CEO"). Solera terminated Aquila's employment in May 2019 for cause. Aquila challenged his exit compensation package and the parties eventually reached a separation agreement. In that agreement, Aquila promised not to solicit or hire any Solera employees to work for him or his various personal businesses for 18 months. Conditioned on Aquila's compliance with his no-solicit/hire promise, Solera agreed to pay certain employment benefits, bonus and severance payments, and vested stock options that Aquila had forfeited due to his termination for cause.

Aquila has continuously disregarded his obligations under the separation agreement. He has failed to protect and return confidential Solera information, and to timely assign valuable Solera patents. Further, even before Solera's first payment was due, Aquila breached the no-solicit/hire provision by hiring a nearly twenty-year Solera employee named Guy Dibble. Based on Aquila's breach of the no-solicit/hire promise, the amount he was due from Solera—in response to his July 23, 2019 cashless exercise of his stock options and request that they be repurchased by Solera—was zero.

Aquila does not really deny that he violated the terms of his separation agreement by hiring Dibble, or that one of Solera's remedies was to repurchase his options at cost. Instead, Aquila claims that his no-solicit/hire promise, made in connection with his employment agreement and reaffirmed in his recent separation agreement, is unenforceable and he is entitled to the fair market value of his exercised stock options (less the exercise price) from Solera notwithstanding his breach. Aquila is wrong. The no-solicit/hire promise is enforceable as a matter of Texas law. And, more than one month ago, Aquila commenced an arbitration to determine the enforceability of the no-solicit/hire provision, a proceeding which will also determine that Solera is entitled to repurchase of Aquila's stock at its original cost to Aquila: resulting in a payment to Aquila of zero.

The applicable arbitration provision is broad and binding as it covers "any dispute or controversy whatsoever pertaining to or arising out of the relationship between [Aquila] and the Company" and further provides that the "arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to determine the arbitrability of disputes." Under Delaware law, faced with an arbitration provision like this one, this Court lacks subject matter jurisdiction to hear Aquila's claims.

The only way Aquila can argue that his claim belongs in this Court is to seek an injunction "in aid of arbitration." But that is not what he is doing. He is not seeking to preserve the status quo. He is trying to fundamentally change it.

Aquila is asking this Court to force Solera to hand over shares of stock to which Aquila presently has no right. When Aquila provided notice of cashless exercise of his options, he demanded that Solera repurchase the resulting stock and wire him the value of the stock in excess of the exercise price, notwithstanding that he has no right under the applicable agreement and plan to require such a repurchase. Due to Aquila's breach, however, Solera now has a right to repurchase any stock issued pursuant to his exercise of stock options for its original cost, which would result in a contractual amount to be wired of zero. Aquila wants this Court to order a do-over, nullify Solera's option to repurchase, allow him to retract

his repurchase request and order that stock be issued to him anew now. That is not a request to maintain the status quo in aid of arbitration.

Even were Aquila seeking to preserve the status quo (which he is not), there is no emergency here requiring an expedited hearing or a temporary restraining order or preliminary injunction. Aquila's claim that he is being deprived of stock and concomitant "voting rights" as a minority shareholder in a company controlled by affiliates of Vista Equity Partners is fabricated for this motion. Aquila gave up that "voting right" when he demanded the stock be bought by Solera. Aquila is just unhappy with the price that he received. The repurchase price was zero because of Aquila's breach of the no-solicit/hire. This dispute is about the repurchase price and money. It is not about stock or voting rights.

The arbitrator will confirm that the no-solicit/hire promise is enforceable under Texas law and that the amount to which Aquila is entitled for his stock—zero—is correct. On the other hand, if Aquila is correct and prevails in the arbitration (which he will not), it is possible he will eventually be entitled to the fair market value of his stock options (less the exercise price). Solera has even agreed to hold and not encumber the stock at issue until the arbitrator can address the issue. There is simply no actual risk of harm to Aquila, let alone imminent, irreparable harm, that needs to be addressed by this Court now.

Aquila did not bring this suit to protect himself from imminent harm. Rather, this suit is a transparent attempt to end run the pending arbitration that Aquila commenced and the non-disparagement promises he made in the separation agreement. Aquila wishes to publicly cast aspersion on Solera's majority owner (Vista Equity Partners) in a fruitless attempt to bully Solera into excusing his pre-separation fraud, as well as his refusal to comply with a whole variety of ongoing obligations under the separation agreement that are the subject of counterclaims in the pending arbitration.

This Court should deny Aquila's request for injunctive relief and dismiss the Complaint for lack of subject matter jurisdiction in favor of the pending arbitration.

FACTUAL BACKGROUND

A. The Parties

Aquila was the former President and Chief Executive Officer of Solera. Among other things, he describes himself as "a serial entrepreneur, and dealmaker with over 70 transactions worth $15 billion in transaction value" who is "never a conformist" with an "uncommon 'do-it-different'" philosophy.[1]

Aquila formed Solera in 2005, and its initial operations consisted primarily of developing its business plan, recruiting personnel, providing consulting services, raising capital, and identifying and evaluating operating assets for potential

[1] *Tony Aquila*, http://tonyaquila.one/t01 (last visited Sept. 9, 2019).

acquisition. Solera thus was a shell entity that had no significant business operations until it partnered with GTCR Golder Rauner to acquire the business that would form the original Solera business, namely ADP, Inc.'s automotive claim services group (the "ADP Claims Business"). At the time it was acquired by Solera and Aquila, the ADP Claims Business had already been in existence for nearly 40 years, generated over $400 million in annual revenue, and had operations across dozens of countries. Ex. 1; Babin Aff. ¶ 4. This stands in stark contrast to Aquila's misleading statement that he "started" the Solera business in his garage. *See* TRO Motion at 2 n.1.

After this acquisition, Solera became a multi-national, privately owned data and software enterprise that today operates in nearly 90 countries across the world. Solera is now a global leader in risk- and asset-management software-as-a-service (SaaS) solutions for the automotive and insurance industries. Babin Aff. ¶ 5.[2]

The Company completed its initial public offering in 2007. On or about March 3, 2016, affiliates of Vista Equity Partners and other investors acquired Solera in a $6.5 billion take-private transaction.[3] Babin Aff. ¶ 6.

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[2] References to "Babin Aff." refer to the Affidavit of David L. Babin, Esq., filed herewith.

[3] *See In re Solera Holdings, Inc. Stockholder Litig.*, 2017 WL 57839 (Del. Ch. Jan. 5, 2017).

Aquila remained Solera's President and CEO after the take-private transaction. Aquila's employment at Solera terminated in May 2019. Babin Aff. ¶ 6; Breach Aff. ¶¶ 5, 12.[4]

B. The Restrictive Covenant Agreement

On March 4, 2016, as part of the take-private transaction, Aquila entered into an employment agreement (the "Employment Agreement") with Solera. Ex. 2.[5] Appended as "Exhibit C" to the Employment Agreement is the Texas Employees Confidentiality, Invention Assignment, Non Solicit, Non-Compete and Arbitration Agreement (the "RC Agreement" or "Restrictive Covenant Agreement"), which Aquila also executed on March 4, 2016.

Section 6.1 of the RC Agreement is a provision titled "Non-Solicitation of Employees/Consultants," pursuant to which Aquila agreed that, during his employment with Solera and for 18 months thereafter, he would not solicit or hire Solera employees or consultants for employment with or to provide services to him or his personal business. Specifically, Aquila agreed that he:

> **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 [Solera] Group . . . to resign from the

[4] References to "Breach Aff." refer to the Affidavit of David A. Breach, Esq., filed herewith.

[5] References to "Ex. __" refer to exhibits attached to the Transmittal Affidavit of Alexandra M. Cumings, Esq., filed herewith.

> [Solera] 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.

Ex. 5 § 6.1 (emphasis added). Violation of this Section 6.1 is grounds for termination for "cause" under the Employment Agreement. Ex. 2 ¶ 10.

The RC Agreement also includes several other provisions regarding proprietary and confidential information, intellectual property, and the return of Company property upon termination of employment. Ex. 5 §§ 2, 4, 6, 7. Among other things, Aquila agreed:

- To keep confidential, both during and after his employment, all "proprietary information" belonging to Solera, and to never use such information for his own benefit (Section 2);

- To execute, upon Solera's request, any documents necessary for Solera to file, prosecute, register, enforce its rights to any patents or other intellectual property (Section 4.5);

- To return to Solera, upon leaving Solera's employment, all documents and materials pertaining to his work at Solera and any property (computers, electronics, keys, etc.) belonging to Solera (Section 7.1); and

- "Upon Company request, [to] execute a document confirming your compliance with this provision and the terms of this [RC] Agreement." (Section 7.1).

The RC Agreement includes a broad, mandatory arbitration provision that provides for "any controversy of dispute" to be resolved by arbitration:

> **ARBITRATION**. In the event of **any controversy or dispute** between you and the Company or between you and any affiliate or an agent of Company, including but not limited to directors, officers, managers, other employees or members of the Group,

> who are being sued in any capacity, as to **all or any part of this Agreement, any other agreement, any dispute or controversy whatsoever pertaining to or arising out of the relationship between you and the Company and/or the Group or the dissolution or termination of same, and/or the arbitrability thereof** (collectively, "Arbitrable Disputes" as further defined below) shall, subject to Section 9.1 herein, be resolved exclusively by binding arbitration solely between yourself and the Company and/or person or entity described above, conducted in Dallas, Texas. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq*., as amended, and shall be administered in accordance with the procedures set forth in the Dispute Resolution Addendum appended hereto as Schedule 2, all of which are incorporated into this Agreement by reference.

Ex. 5 § 8.1 (emphases added). "Arbitrable Disputes" is explicitly defined to incorporate disputes regarding the validity and scope of the RC Agreement as well as the arbitrability of such disputes:

> For avoidance of doubt, **all disputes** regarding the validity of this Agreement, the validity of the arbitration provisions of this Agreement, or whether any particular claim or matter is included within the scope of the arbitration provisions of this Agreement, are Arbitrable Disputes subject to arbitration as described herein.

Ex. 5 § 8.2 (emphasis added). Section 8.1 of the RC Agreement incorporates the rules set forth in the Dispute Resolution Addendum, which similarly provides that the arbitrator must resolve the arbitrability of disputes:

> The arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to determine the arbitrability of disputes and to resolve any dispute relating to the interpretation, applicability, or enforceability of the Agreement and this Addendum.

Ex. 5 § 8.1; *id.* at Schedule 2 ¶ f.

C. The Stock Option Agreement

Also on March 4, 2016, Aquila entered into a stock option agreement with Solera (the "Stock Option Agreement"), whereby Solera granted Aquila, subject to the terms and conditions of Solera's 2016 Stock Option Plan (the "Plan"), options to acquire certain shares of Solera stock. Ex. 4.[6] One of the terms and conditions included in the Plan is the "Repurchase Option." The Repurchase Option gives Solera the discretion to repurchase options from Aquila in certain circumstances. Ex. 4 at Plan ¶ 12. One of these circumstances is if Aquila violates Section 6 of the RC Agreement. Section 2(k) of the Stock Option Agreement provides:

> (k) **Repurchase Option**. Notwithstanding anything to the contrary in Section 12 of the Plan, (i) the Repurchase Option shall only be applicable if (A) Optionholder'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. . . . The price per share upon exercise of the Repurchase Option shall be Original Cost.

[6] The March 4, 2016 Stock Option Agreement was executed between Aquila and Summertime Holding Corp. Summertime Holding Corp. was subsequently renamed Solera Global Holding Corp. The Plan is appended to the Stock Option Agreement as Exhibit A.

Ex. 4 § 2(k). The Plan defines "Original Cost" as "equal to the price paid therefor"—*i.e.*, the price paid for each option. Ex. 4 at Plan ¶ 2. Options granted under the Stock Option Plan have an Original Cost of $0. *See* Ex. 4 § 1.

Additionally, the Stock Option Agreement provides that if Aquila's employment is terminated for "cause," all of his options, whether vested or unvested, are immediately forfeited and cancelled. Ex. 4 § 2(c)(iv)(C).

Standing alone, the Stock Option Agreement provides that Delaware law will govern the interpretation of any issues related to the Plan. The parties to the Plan also consent to jurisdiction in Delaware. Ex. 4 at Plan ¶ 20.

D. Aquila's Employment Is Terminated For "Cause"

Following the take-private transaction, Aquila's leadership failures and misplaced spending priorities, among other things, led to Solera missing its plan objectives. Breach Aff. ¶ 5. Aquila's brash, vulgar, and belittling comments to colleagues resulted in significant personnel turnover, including in the executive ranks. A 2018 investigation initiated after a complaint from one of Aquila's subordinates uncovered aggressive and abusive behavior by Aquila in violation of Solera's code of conduct, substantiated by Aquila's own admissions. His behavior had a significant adverse impact on Solera's ability to retain employees. *See* Breach Aff. ¶ 5.

In the fall of 2018, Dr. Kurt Lauk (who served on Solera's Board of Directors and was a paid consultant to Solera, both at Aquila's request) joined Aquila in trying to have Solera's Board sweep Aquila's behavior under the rug. Aquila and Lauk were unsuccessful. In November 2018, the Solera Board formally reprimanded Aquila for his conduct and policy violations and directed remedial measures. Breach Aff. ¶ 6. Aquila's response was to distance himself from the Company's operations, begin preparations for his exit from the Company and the commencement of an alternative business, and solicit Solera employees to join his next venture, while still serving as Solera's CEO. Over the next six months, Aquila spent the significant amounts of time flying Solera's jet around the world at Solera's expense to raise money for his next venture, as well as for personal matters, including but not limited to, service as the Chairman of the Board of Sportradar AG, a provider of sports data and content solutions headquartered in St. Gallen, Switzerland. Breach Aff. ¶ 7; Babin Aff. ¶¶ 26-27.

In or about March 2019, Aquila informed a group of Solera executives and employees that he intended to leave Solera. Around that time, Aquila moved out of his normal Solera office and began working regularly from the business location of an entity he owns called Aquila Family Ventures LLC ("AFV"). Then, in approximately April 2019, Aquila informed members of the Board that he was

resigning as CEO. He set no date for his departure from the Company. Breach Aff. ¶¶ 7-8.

In approximately early May 2019, at a Solera gathering at his ranch in Jackson, Wyoming, Aquila announced that he would be leaving Solera as soon as possible to embark on a new business venture he called "Founders Select." The new venture would operate under the auspices of AFV and would co-invest in businesses and provide operational and strategic advice to such businesses' management teams. Aquila further announced that four then-current Solera employees and Dr. Lauk, who was still serving on the Solera board and owed Solera fiduciary duties, would leave Solera to join Aquila as employees of Founders Select. The then-current employees were Renato Giger, Solera's Chief Financial Officer; Ron Rogozinski, Solera's Chief Accounting Officer; Andy Balzer, Solera's Head of R3PI (Solera's "Innovation Hub"); and Michael Horvath, Chief of Staff in Solera's Office of the CEO. Breach Aff. ¶ 9.

In a May 6, 2019 letter to Aquila, the members of the Solera Board of Directors appointed by the controlling shareholders of Solera confirmed their understanding of Aquila's resignation and Solera's search for a new CEO. Breach Aff. ¶ 10; Ex. 8. In light of Aquila's announced departure and conduct violating his fiduciary and contractual obligations owed to the company (including self-dealing transactions), Aquila was instructed not to negotiate, offer, approve, or

enter into any significant internal or external contracts, agreements, or arrangements without prior express Board approval. Additionally, among other things, the letter also reminded Aquila of his continuing obligations to Solera, including his obligations not to pursue any personal business opportunities at Solera's expense and his obligations to Solera under Section 6 of the RC Agreement. Ex. 8.

Although his breaches of Section 6 of the RC Agreement regarding Dr. Lauk and Messrs. Giger, Rogozinski, Balzer, Horvath gave Solera grounds to terminate Aquila's employment for "cause," Solera provided Aquila the opportunity to leave his position voluntarily. But over the ensuing weeks, despite Solera's good-faith efforts to resolve the terms of Aquila's departure from Solera, Aquila refused to confirm that he would abide by the Section 6 non-solicitation provision in the RC Agreement. Solera thus concluded that Aquila intended to continue to strip Solera of as much valuable human capital (in the form of its knowledgeable, technical, and specialist employees, including the two most senior finance leaders in the company) as he possibly could to staff his new venture or other personal businesses. Breach Aff. ¶ 11.

Moreover, during this time, Solera learned of additional then-current Solera personnel who Aquila, while he was Solera's CEO, solicited to leave Solera to join his anticipated new business venture. These employees performed a broad scope

of tasks for Solera, ranging from technical to administrative jobs. Breach Aff. ¶ 11.

By letter dated May 24, 2019, Solera provided formal notice to Aquila that he was in violation of his Employment Agreement and the RC Agreement. Ex. 10. On May 26, 2019, a special committee of the Board (the "Special Committee") held a special meeting to consider the consequences of Aquila's repeated and material violations of his obligations to Solera, including Section 6 of the RC Agreement. The Special Committee provided Aquila with notice of the meeting and an opportunity to address the Special Committee. Aquila (and Lauk) refused to attend. After deliberation, the Special Committee determined that Aquila had willfully and materially violated Section 6.1 of the RC Agreement by soliciting employees and consultants of the Group for his own benefit, and resolved to terminate his employment for "cause" pursuant the Employment Agreement. At that time, in light of Lauk's prior history of protecting Aquila and not acting in the best interests of Solera, Lauk was removed from the Board. Breach Aff. ¶ 12.

Aquila was informed of the Special Committee's decision on May 26, 2019. Ex. 11. Aquila disputed that there were grounds to terminate him for cause, yet did not deny that he was poaching current Solera employees for his personal benefit. Breach Aff. ¶ 13.

E. The Separation Agreement And Related Agreements

To resolve the parties' dispute about the terms of Aquila's departure from Solera, the parties negotiated an exit package in the form of the Separation and Release Agreement, dated May 27, 2019 (the "Separation Agreement") (and certain related agreements). Babin Aff. ¶ 9; Ex. 12. The negotiated "Separation Date" was May 23, 2019, which preceded the Board's termination resolution. Ex. 12 § 1. The Separation Agreement was negotiated less than four months ago by the same counsel who filed this case and the Pending Arbitration (described *infra*) claiming that material terms of the Separation Agreement are unenforceable.

Section 2 of the Separation Agreement—the first substantive provision of the Agreement—provides that Solera will make payments totaling more than $4.5 million to Aquila "subject to . . . [Aquila's] continued compliance with Section 6 of" the RC Agreement. *Id.* § 2. Specifically, Section 2 provides as follows (where "Executive" is defined to mean Aquila):

> **Separation Payments**. Upon the Separation Date, Executive will receive payment for any accrued but unpaid Base Salary. **Subject to** (i) the occurrence of the Release Effective Date and (ii) **Executive's continued compliance with Section 6** of that certain Confidentiality, Invention Assignment, Non Solicit, Non-Compete and Arbitration Agreement, dated March 4, 2016, between Executive and the Company (the "Restrictive Covenant Agreement") (as amended by Section 8 below), **Executive shall be entitled to the following payments** . . .

Id. § 2 (emphases added). The payments themselves include (a) a bonus payment of $1,796,000; (b) a severance payment of $2,700,000, "payable in equal installments during the 18 month period following the Separation Date"; and (c) a payment of $23,946 "representing 18 times the monthly amount of COBRA premiums as of the Separation Date." *Id.*

Section 3 of the Separation Agreement provides that Solera will purchase 7,000 of Aquila's Solera shares for more than $9.5 million, which was consummated promptly following the closing. Ex. 12 § 3(d). It also provides that Aquila will retain 75,433 vested options, which he could exercise within 90 days following the Separation Date. *Id.* § 3(a), 3(c). Aquila expressly agreed that this exercise was "subject to the terms of the [ ] Stock Option Agreement and the Plan, including with respect to the Repurchase Option"—*i.e.*, subject to Aquila's compliance with Section 6 of the RC Agreement. *Id.* § 3(c).

Further, Aquila explicitly acknowledged that he remained "subject to all of the terms and conditions contained in the Restrictive Covenant Agreement." *Id.* § 8. But he negotiated an exception to Section 6.1 of that agreement, specifically, that his (i) solicitation of any Solera employees, consultants, or agents prior to May 23, 2019 and (ii) employment of certain named Solera employees would not be deemed breaches of Section 6.1. Section 8 provides:

> **Restrictive Covenants**. Executive acknowledges and agrees that Executive 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 Executive (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. . . .

Ex. 12 § 8. The seven listed (six of which are now former) Solera employees are the *only* Solera employees or consultants Aquila is permitted to employ in his personal ventures without breaching Section 6.1. Aquila did not negotiate for an exception for any other Solera employee or consultant.

Additionally, in Section 4 of the Separation Agreement, Aquila further agreed to promptly return all Solera-owned property (*i.e.*, "all of his company credit cards, electronic building/facility access cards, keys, desktop and laptop computers, tablet computers (including iPads), communication devices, vehicles, and all other property of Solera") and not retain any other confidential and proprietary materials or information of Solera or any of its affiliates (defined as "Solera Information and IP"). Ex. 12 § 4 (providing that "Executive shall not retain, take or copy in any form or manner any of Solera's files, correspondence, data, software, intellectual property assets, financial or operational information,

customer lists, price lists, or any other confidential and proprietary materials or information of Solera or any of its affiliates").

The Separation Agreement also provided for mutual releases between Solera and Aquila. As to Aquila, Solera released all claims pre-dating May 23, 2019, *except* for "claims (i) arising out of or relating to fraud, misappropriation, embezzlement or theft, in each case committed by Executive, in respect of the business or assets of Solera, except for any *de minimis* claims for damages that could not exceed $5,000 in the aggregate." Ex. 12 § 5(a).

Along with the Separation Agreement, the parties (including both Aquila and his business AFV) executed a series of related agreements, including the Omnibus Related Party Transactions Settlement Agreement (the "Omnibus Agreement") as well as two Bills of Sale and Assignment for various property owned by Solera and a Lease Assignment and Assumption of Lease for certain premises in Jackson, Wyoming. Ex. 13.

Among other things, the Omnibus Agreement set forth the terms for Solera's transfer to Aquila of a lease for premises located in Jackson, Wyoming (the "Jackson Office") on October 1, 2019 as well as certain information technology ("IT") assets (*e.g.*, computers and other related equipment) owned by Solera and customarily located at the Jackson Office. The transfer of Solera-owned IT assets was subject to a "Security Condition" that gave Solera the right to permanently

delete or otherwise remove any and all proprietary, non-public and confidential information prior to any transfer to Aquila or his affiliates. Ex. 13 at Annex 3.

As in the RC Agreement, Aquila agreed that all disputes arising out of or related to the terms of the Separation Agreement would be resolved by the arbitration procedures set forth in the RC Agreement. Specifically:

> **Dispute Resolution**. This Agreement shall be governed by the laws of the State of Texas, irrespective of its choice of law rules. **Any controversy or any claim arising out of or relating to the interpretation, enforceability or breach of this Agreement** (including, for the avoidance of doubt, the scope of the release set forth in Section 5 hereof) **shall be settled by arbitration in accordance with the Restrictive Covenant Agreement**. If for any reason the arbitration procedure set forth in the Restrictive Covenant Agreement is unavailable, Executive agrees to arbitration under the employment arbitration rules of the American Arbitration Association or any successor thereto. The Parties hereto further agree that the arbitrator shall not be empowered to add to, subtract from, or modify, alter or amend the terms of this Agreement. Any applicable arbitration rules or policies shall be interpreted in a manner so as to ensure their enforceability under applicable state or federal law.

Ex. 5 § 13 (emphases added).

F. Aquila Breaches The Separation Agreement And Related Agreements

Almost immediately after execution, and continuing Aquila's pattern of not complying with his contractual agreements, Aquila breached the terms of the negotiated agreements, including the express terms of the Separation Agreement. As relevant to the parties' dispute, the key breach is Aquila's wrongful solicitation of Solera employees in violation of Section 6.1 of the RC Agreement (and Section

8 of the Separation Agreement), which is detailed below. But Aquila's pattern of willful breaches include the following:

- Jackson Office. On June 6, 2019, Solera learned that Aquila and certain of his affiliates had trespassed and wrongfully possessed the then-Solera-leased Jackson Office by changing the access codes so that Solera personnel could not enter to ensure that the agreed-upon Security Condition was satisfied. Aquila claimed that he had the right to immediately access the Jackson Office. Aquila's claim flatly contradicted the terms of the Omnibus Agreement, which provided that Solera would assign its rights, title and interest as tenant to Aquila on October 1, 2019—*i.e.*, several months later. By trespassing and wrongfully possessing the Jackson Office, Aquila also wrongfully converted the then-Solera-controlled IT equipment at the Jackson Office by preventing Solera from ensuring that the Security Condition agreed to in the Omnibus Agreement was met with respect to this equipment. Babin Aff. ¶ 11.

- Possession of Solera-Owned Property. Following his separation from Solera, Aquila kept certain Solera-owned property, including a Solera-owned iPad and laptop computer, at the offices of AFV. It was not until June 19, 2019, that an employee of AFV—a third party given custody and control of these items in violation of Aquila's confidentiality obligations—returned to Solera this Solera-owned property. When he returned the items to Solera, their data had been wiped. Babin Aff. ¶ 13. Aquila, therefore, destroyed Solera's business information in violation of Solera's May 26, 2019 notice of termination. Ex. 11.

- Refusal to Execute IP Assignments. After Aquila's separation from Solera, and in accordance with Section 4 of the RC Agreement (which, as described above, requires Aquila to execute any document deemed necessary by Solera as to Solera-owned intellectual property), Solera requested that Aquila execute certain declarations and assignments to allow Solera to prosecute certain Solera-owned patents that were in Aquila's name. Aquila refused, holding the declarations and assignments hostage until Solera agreed to an Addendum to the Separation Agreement. Ex. 23. Though Solera had first requested Aquila's signature on the declarations and assignments on June 14,

2019, it was not until July 11, 2019 that Aquila transmitted the executed documents. Babin Aff. ¶ 12.

- Possession of Solera Information and IP. Following his separation from Solera, Aquila retained confidential Solera material, including Solera Information and IP as defined in Section 4 of the Separation Agreement. This includes not only the information contained on the Solera-owned property that he did not return for several weeks, but also highly confidential documents prepared for the Solera Board on a "box.com" website under AFV's name and "owned" (that is, controlled) by Aquila and his executive assistant. Ex. 15. Solera has repeatedly demanded that Aquila delete and destroy this material. He has refused. Moreover, in the Motion (as in the Pending Arbitration), Aquila pretends that Solera is using as a "pretext" an *entirely separate* "box.com" website that has *never been at issue*. Compl. ¶ 33 *see also* Ex. 31 ¶ 26; Ex. 32 ¶ 27. The only "box.com" website as to which Solera has demanded Aquila remove confidential information from is the one that Solera *cannot access* as it is under AFV's name and owned by Aquila and his employees using "aquilafamilyventures.com" email addresses. *See* Ex. 15. To date, despite repeated requests, Aquila still has not provided a certification that he has removed this confidential Solera information. Babin Aff. ¶ 14.

- Certificate Of Compliance. In accordance with Section 7.1 of the RC Agreement, Solera requested that Aquila execute a document confirming his compliance with the RC Agreement, including with respect to the return of Company property and the deletion of Solera Information and IP from Aquila's (or his business's) electronic devices or possession. Ex. 5 § 7.1 ("Upon Company request, you will execute a document confirming your compliance with this provision and the terms of this Agreement."). As part of this certification, Solera also requested that Aquila confirm his compliance with Section 6.1 regarding the solicitation or hiring of Solera employees. *See, e.g.*, Ex. 25. Aquila refused. Babin Aff. ¶ 15.

Further, after the parties executed the Separation Agreement—in which Aquila confirmed that he would comply with Section 6.1 of the RC Agreement for

18 months after his separation date—Solera learned that Aquila, since his separation date of May 23, 2019, had solicited and hired Guy Dibble, then an employee of Solera and previously of Solera's subsidiary Identifix, Inc. ("Identifix").[7] Babin Aff. ¶ 17. Dibble was a valued, skilled, long-term employee. He began working at Identifix in 1999. Ex. 17. At Identifix, Dibble was a master mechanic and an Asian carline specialist (*i.e.*, a specialist in brands such as Toyota, Honda, etc.). In addition to supervising other Asian carline specialists at Identifix, he created significant content for Identifix's marquee "Direct-Hit" product. Direct-Hit is the largest and most reliable online database of continually updated, experience-based information for automotive service, maintenance, and repairs. More than 250,000 automotive technicians and shop owners in the United States, Canada, and Latin America use Direct-Hit. Dibble was involved in creating the content for this key product—adding information, data, and analysis regarding vehicle fixes for end-users of the database (technicians and repair shops) to access and rely on to efficiently complete repairs. He also worked directly with technicians and repair shops on the Direct-Hit hotline. His specialized skills were developed, refined, and improved over nearly two decades at Identifix. Babin Aff. ¶¶ 18-19.

[7] Solera believes that Aquila has also been discussing employment with other current Solera employees, potentially in violation of Section 6.1. Babin Aff. ¶ 17.

Before the Separation Agreement was signed and while Aquila was CEO of Solera, Dibble performed some work for Adventure Motors, LLC ("AM LLC"), Aquila's business in Justin, Texas, between 2017 and May 2019. There was no written agreement between Solera and Aquila regarding Dibble's work. Rather, this arrangement was the result of Aquila, exercising his power as CEO, usurping the time and skills of Solera employees for his own benefit.[8] To recover some of what it lost through this arrangement, Solera invoiced AM LLC for Dibble's time. Ex. 18. To Solera's knowledge, Dibble received compensation *solely* from Solera during this period, however, and was reported to be Solera's employee to all relevant governmental authorities, *not* an employee of AM LLC. Exs. 19−20. Dibble does not claim otherwise. In the Omnibus Agreement, Aquila explicitly agreed Dibble would not perform further services for him. Ex. 13 § f; Babin Aff. ¶ 20.

Aquila poached this valuable, long-time employee from Solera. On June 6, 2019, Dibble informed Solera that he "will be working for Tony [Aquila] on one of his other ventures." Dibble continued to be employed by, and paid by, Solera during the month of June. Babin Aff. ¶ 21; Ex. 20. He was not, however, regularly reporting to work at Solera. Instead, Dibble was observed on several separate dates working at AM LLC. Babin Aff. ¶ 21. That is, Aquila had not only

[8] Aquila did the same with other Solera employees, such as IT personnel.

solicited Dibble, but actually hired Dibble, and Dibble was working at AM LLC during June *even though* he was still employed by Solera.[9] Babin Aff. ¶ 21 Ex. 20. Pressed by Solera's Human Resources department as to his status given his failure to report to work for much of the month, Dibble informed Solera on June 28, 2019 that Aquila had "worked an offer with him" and he would not be working at Solera any longer. On July 1, 2019, Solera terminated Dibble's employment for job abandonment, effective June 28, 2019. Babin Aff. ¶ 22; Ex. 17. Aquila executed a letter of employment stating that Dibble's employment start date for the position of "Chief Mechanic – Adventure Motors for Aquila Family Ventures, LLC" was July 1, 2019. Ex. 22; Babin Aff. ¶ 23.

G. Aquila Commits Misappropriation Of Solera Assets And Resources

After execution of the Separation Agreement and Omnibus Agreement, Solera confirmed that prior to his separation from the Company, Aquila had misappropriated Solera's resources and money by fraudulently claiming that certain flight and hotel expenses were for Solera business, when in fact, Aquila

[9] Aquila claims that AM LLC is not a party to the RC Agreement, as though such is relevant to Aquila's breach of Section 6.1 of the RC Agreement. *See* TRO Motion at 12. Aquila does not dispute that he owns AM LLC. Section 6.1 explicitly prohibits solicitation or hiring by Aquila of Solera employees "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*." Ex. 5 § 6.1 (emphasis added).

incurred these expenses solely on personal, non-Solera business—including fundraising for his intended new investment venture. Babin Aff. ¶ 25.

Specifically, Aquila used a private jet chartered by Solera (Gulfstream IV-SP-N910AF) solely for Aquila's personal business, but nevertheless charged the flights to Solera, between November 2018 and May 2019—*i.e.*, when Aquila was still Solera's President and CEO. For example, Aquila had Solera pay over $700,000 for 45.8 hours of flight time for Aquila's trips to, among other places, Austria, Switzerland, Germany, Bulgaria, Qatar, Kuwait, and France, as well as thousands of dollars for certain hotel expenses associated with certain of these trips. These trips were not for Solera business. Aquila traveled for personal purposes, including in connection with his position as the Chairman of the Board of Sportradar and to fundraise for his new "Founders Select" venture.[10] Babin Aff. ¶ 26.

Solera is continuing to investigate Aquila's pre-separation activities with respect to any further instances of fraud, theft, misappropriation, or other actions of Aquila giving rise to claims that are not released under the Separation Agreement.

[10] For flights between London, England; Sofia, Bulgaria; and Zurich, Switzerland for which Solera paid $73,876, Aquila (through AFV) also separately billed Sportradar AG, a company not affiliated with Solera on whose board Aquila serves as Chairman, $25,152 for the same flights. *See* Babin Aff. ¶ 27; Ex. 9. Aquila also billed Sportradar for first-class commercial tickets for several flights that Aquila and other individuals actually took on Solera's plane. *Id.* ¶ 27.

H. Solera Exercises Its Rights As A Result Of Aquila's Breach Of Section 6 Of the RC Agreement And Aquila Initiates The Pending Arbitration

Aquila Attempts To Exercise His Vested Options

On July 2, 2019, Aquila sent Solera a "notice of exercise" of the 75,443 vested options he retained pursuant to Section 3 of the Separation Agreement. Ex. 21. Under the terms of the Stock Option Agreement and Plan, Aquila's notice of exercise was deficient in several respects, which Solera identified in its response on July 11, 2019. Ex. 24. In addition to not providing the required documentation and other information required for a valid exercise, *see* Ex. 4 § 2(e), Aquila incorrectly calculated the value of Aquila's vested options by using a "fair market value" ("FMV") amount that Aquila had expressly agreed *would not apply to exercise of his vested options*. Ex. 12 § 3(c). The notice also failed to account for mandatory tax withholding. Ex. 4 § 2(a). Based on his inaccurate overvaluation, Aquila demanded that Solera repurchase shares resulting from his exercise calculation for $27,731,337.94. Ex. 27.[11]

As part of its July 11 response regarding the exercise deficiencies, Solera provided Aquila with an exercise calculation that accounted for the agreed-upon

[11] This calculation represents the number of Aquila's vested options (75,443) multiplied by the difference in price between Aquila's alleged FMV ($1,367.58) and the exercise price ($1,000), *i.e.*, 75,443 x (1,367.58 – 1,000), without any accounting for mandatory tax withholding.

strike price of $1,000 per option, the Board's good-faith determination of current FMV for Solera shares (as it is entitled to do pursuant to Section 2(e)(i) of the Stock Option Agreement), and mandatory tax withholding. Significant to this proceeding, Aquila did not exercise his options in order to hold the resulting shares; he exercised them and demanded that Solera immediately buy back the resulting shares (even though there is no provision in the Stock Option Agreement or Plan requiring such a buyback). Ex. 24.

Aquila's Breach Of Section 6.1 Results In No Bonus Payment

After several weeks of attempting to address Aquila's breaches of Section 6.1 of the RC Agreement (and thus the Separation Agreement), by letter dated July 12, 2019, Solera notified Aquila that Solera may exercise any rights it had as a result of Aquila's breaches, including exercising its right not make the payments contemplated by Section 2 of the Separation Agreement if Aquila had not remedied his breaches by July 15, 2019, which was the date on which the payments were scheduled to begin. *See* Ex. 25; Ex. 12 § 2 ("Subject to . . . Executive's continued compliance with Section 6 of [the RC Agreement], Executive shall be entitled to the following payments . . . ."). The scheduled July 15 payment was a bonus payment of $1,796,000. In the weeks leading up to that date, Solera had sought to reach a resolution with Aquila regarding his breaches of

the Separation Agreement, so that Solera could proceed to make the bonus payment on July 15. Aquila rejected all of Solera's proposals. Babin Aff. ¶ 16.

Accordingly, as a result of Aquila's failure to meet the condition to payment set forth in Section 2 of the Separation Agreement, Solera did not pay Aquila the contemplated bonus payment on July 15. Ex. 26.

Aquila Disputes The FMV Of His Options

On July 20, 2019, Aquila delivered to Solera a second notice of exercise of his vested options and requested an appraisal to determine the FMV of his vested options under Section 2(e)(i) of the Stock Option Agreement. Ex. 27. But Aquila once more failed to provide the information and documentation required for a valid exercise. Solera accordingly informed Aquila of these continued deficiencies and its view that his request for a FMV appraisal was thus premature. Ex. 28.

Aquila's Breach Of Section 6.1 Results In No Severance Or COBRA Payments

Under Section 2 of the Separation Agreement, but for Aquila's uncured breach of Section 6.1 of the RC Agreement, Solera would have begun making the first of 18 monthly installments of the $2,700,000 severance payment and the $23,946 COBRA insurance premium. Ex. 12 § 2. In a separate letter on July 22, Solera again demanded that Aquila stop violating his continuing obligations under Section 6.1 of the RC Agreement. Solera reaffirmed its willingness to fulfill its

obligations under the Separation Agreement if Aquila fulfilled his. Ex. 29. Aquila has continued to refuse to do so.

Aquila Initiates The Pending Arbitration

On July 26, 2019 and August 2, 2019, Aquila served two demands for arbitration against Solera pursuant to the mandatory arbitration provision in the Separation Agreement (together, the "Pending Arbitration").[12] Ex. 31; Ex. 32. He claims that Solera breached the Separation Agreement by not paying Aquila the bonus, severance, or COBRA payments because Section 6.1 of the RC Agreement is unenforceable under Texas law. Aquila seeks a declaration in the Pending Arbitration that he has no obligation to comply with Section 6.1—*i.e.*, that he is not subject to the contractual consequences of a breach of Section 6.1 of the RC Agreement. His papers in the instant action are largely cut-and-paste of the arbitration demands. *E.g.*, *Compare* Compl. ¶ 33 *with* Ex. 32 at ¶ 27.

Solera Notifies Aquila Of Its Right To Exercise The Repurchase Option

On August 5, 2019, Solera notified Aquila that, in light of Aquila's unremedied breach of Section 6 of the RC Agreement, Solera was exercising its discretion regarding the Repurchase Option pursuant to Section 2(k) of the Stock

[12] The two demands are all but identical. The only substantive difference is that the first demand, dated July 26, 2019, focuses on the bonus payment of $1,796,000 while the second demand, dated August 2, 2019, focuses on the severance payment of $2,700,000 and the COBRA premium payment of $23,946.

Option Agreement. Ex. 33. Solera explained that as a result, Aquila would receive no proceeds from the exercise and buyback that he had requested Solera perform in his initial notice of exercise. Babin Aff. ¶ 31.

Solera Continues To Seek Resolution Of The Parties' Dispute

Though it is under no obligation to do so, Solera has continued to seek to resolve Aquila's Section 6 breach such that Solera could then make the bonus payment, begin the scheduled monthly severance and insurance premium payments, and allow Aquila to exercise his vested options without exercising the Repurchase Option described above. Babin Aff. ¶ 16. In an attempt to mitigate the harm it has suffered as a result of Aquila's poaching of Dibble, Solera offered to rehire Dibble as a Senior Carline Specialist at Identifix, at a salary in excess of that normally paid for such a position and with numerous other benefits (some at Dibble's demand, reflecting key concessions by Solera in an effort to resolve key parts of the parties' dispute), including accrued vacation time, payment of an annual bonus to which he would not otherwise be entitled, and permission to work from Texas rather than Minnesota. As of this date, Dibble has not resumed working at Identifix. Babin Aff. ¶ 24. And, as Aquila admits, "[i]t is now unknown whether Dibble will ultimately commence work on September 16, 2019 . . . .". Compl. ¶ 49.

I. Solera Files Its Answer In The Pending Arbitration And Aquila Then Initiates The Instant Action

Solera answered the demands for arbitration on August 26, 2019. Ex. 35. Solera asserted eight counterclaims against Aquila in the arbitration, including breach of contract (for Aquila's breaches of the RC Agreement and for his breaches of the Separation Agreement), equitable estoppel, fraudulent inducement, specific performance, theft, fraud, and for a declaration that due to Aquila's breach of Section 6.1 of the RC Agreement, Solera properly exercised and/or may exercise all of its contractual remedies, specifically including exercise of the Repurchase Option at cost. *Id.* At the same time that it answered the demands, Solera requested that the parties promptly move to the next phase of the arbitration as set forth in the agreed-upon procedures: selection of an arbitrator. Ex. 34. Aquila did not respond to Solera's request.

Instead, on September 4, 2019 (a full 30 days after Solera notified Aquila that it elected to exercise the Repurchase Option), Aquila filed the Complaint in this Court. Aquila seeks to force Solera to give him back his shares on the grounds that Section 6.1 of the RC Agreement is unenforceable (despite that issue having not yet been resolved in the Pending Arbitration). Aquila claims that the value of his vested options is $101,772,607[13]—*over $70 million more* (*i.e.*, nearly four

[13] Aquila's calculation of the value of his vested options seemingly approximates the number of his vested options (75,443) multiplied by the FMV

times greater) than what Aquila *himself* calculated twice when he noticed his exercise of options and demanded that Solera buy back the resulting for $27,731,337.94. *See* Exs. 21, 30. This claim is a shallow attempt to exaggerate the size of the dispute to garner press coverage. Everything at issue in the Complaint filed in this Court is at issue in the Pending Arbitration. Exs. 31−32.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER AQUILA'S CLAIM AND SHOULD DISMISS THE COMPLAINT IN FAVOR OF THE PENDING ARBITRATION

A. Standard Applicable To This Motion To Dismiss

"Delaware courts lack subject matter jurisdiction to resolve disputes that litigants have contractually agreed to arbitrate." *Glazer v. All. Beverage Distrib. Co., LLC*, 2017 WL 822174, at *1 (Del. Ch. Mar. 2, 2017) (internal quotation marks omitted). "Delaware public policy favors arbitration, and in recognition that contractual arbitration clauses are generally interpreted broadly in furtherance of that policy, a Rule 12(b)(1) motion will be granted if the parties contracted to arbitrate the claims asserted." *Id*. at *1. "In considering a motion to compel arbitration, a court must consider: (1) whether the issue of arbitrability should be decided by the court or the arbitrator"—*i.e.*, the issue of substantive arbitrability—and "if by the court, (2) whether the claims should be resolved in arbitration."

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erroneously alleged by Aquila ($1,367.58)—completely ignoring the $1,000 per-share exercise price and mandatory tax withholding, *i.e.*, 75,443 x $1,367.58.

Legend Nat. Gas II Holdings, LP v. Hargis, 2012 WL 4481303, at *4 (Del. Ch. Sept. 28, 2012).

Here, because the RC Agreement contains an arbitration provision that explicitly states that the arbitrator should determine issues of arbitrability, this Court lacks jurisdiction to address the issue of substantive arbitrability and should dismiss this action in favor of the Pending Arbitration. *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) ("*Willie Gary*"). If the Court determines that it may resolve the substantive arbitrability question notwithstanding the plain language of the RC Agreement, then it should dismiss this action in favor of arbitration because Aquila's claim is arbitrable. Alternatively, even if the Court were to determine that Aquila's claim is not arbitrable (which it is), the Court should stay this action until resolution of the Pending Arbitration because Aquila's claim depends *entirely* on whether he breached the RC Agreement, a question that is the central issue in the Pending Arbitration that Aquila himself initiated.

B. The Arbitrator Should Decide Any Question Of Substantive Arbitrability In The Pending Arbitration

The Federal Arbitration Act ("FAA") "allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019); *see also id.* ("[A] court may not decide an

arbitrability question that the parties have delegated to an arbitrator."). The RC Agreement specifically provides that the FAA will govern arbitrations "as to all or any part of this [RC] Agreement, any other agreement, any dispute or controversy whatsoever pertaining out the relationship between you and the Company . . . or the dissolution or termination of same, and/or the arbitrability thereof . . . ." Ex. 5 § 8.1.

Although the "general rule" is that courts should decide questions of substantive arbitrability, where there is "clear and unmistakable" evidence that the parties agreed to arbitrate the issue of substantive arbitrability, then Delaware courts defer decisions on that issue to the arbitrator. *Willie Gary*, 906 A.2d at 79. A court will deem that parties clearly and unmistakably intended to "submit the issue of arbitrability to the arbitrator" if "(1) arbitration provision . . . generally provide[s] for arbitration of all disputes; and (2) the provision . . . incorporate[s] a set of arbitration rules that empower the arbitrator to decide arbitrability." *Innovation Inst., LLC v. St. Joseph Health Source, Inc.*, 2019 WL 4060351, at *4 (Del. Ch. Aug. 29, 2019). Both prongs of this *Willie Gary* test are easily satisfied here.

The first prong is satisfied because the arbitration provision here plainly requires arbitration of all disputes. Specifically, Aquila agreed that "*any* dispute or controversy *whatsoever* pertaining to or arising out of the relationship between you

and [Solera] . . . or the dissolution or termination of same, and/or the arbitrability thereof . . . shall . . . be resolved *exclusively* by binding arbitration solely between yourself and [Solera]." Ex. 5 § 8.1 (emphases added). Delaware courts have consistently held that this type of broad, mandatory provision satisfies the first prong of the test, even where the arbitration clause contains a carveout for injunctive relief. *See, e.g.*, *Glazer*, 2017 WL 822174, at *2 (agreement at issue satisfied the first prong because it "provides that 'any controversy or claim arising out of or relating to this Agreement, or the breach thereof' shall be submitted to arbitration"); *BAYPO Ltd. P'ship v. Tech. JV, LP*, 940 A.2d 20, 26–27 (Del. Ch. 2007) (arbitration clause with narrow carveout for injunctive relief was sufficiently broad to satisfy the first prong of the *Willie Gary* test); *see also Vertiv Corp. v. Svo Bldg. One, LLC*, 2019 WL 1454953, at *3 (D. Del. Apr. 2, 2019) (holding that the court was lacked authority to determine whether Plaintiff's request for a preliminary injunction was arbitrable in situation where the arbitration provision contained a carveout for injunctive relief).

The second prong is also satisfied. The arbitration provision provides that "all disputes regarding . . . whether any particular claim or matter is included within the scope of the arbitration provisions of this Agreement, are Arbitrable Disputes subject to arbitration as described herein." *Id.* § 8.2. The Dispute Resolution Addendum to the RC Agreement reiterates that "[t]he arbitrator, and

not any federal, state, or local court or agency, shall have exclusive authority to determine the arbitrability of disputes." *Id*. at Schedule 2 ¶(f). Because these rules "empower [the] arbitrator[] to decide issues of substantive arbitrability, prong two [of the test] is also satisfied." *See Li v. Standard Fiber, LLC*, 2013 WL 1286202, at *6 (Del. Ch. Mar. 28, 2013). Therefore, any question over whether the present dispute should be arbitrated is an issue *exclusively* for the arbitrator, not the Court, to decide.

C. If The Court Considers Substantive Arbitrability, It Should Hold That This Matter Must Be Arbitrated In The Pending Arbitration

Even if the Court reaches the question of whether this dispute is properly subject to arbitration, all of Plaintiffs' claims are arbitrable. This court is required to "rigorously enforce agreements to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (internal quotation marks omitted). "*[A]ny doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration." *McLaughlin v. McCann*, 942 A.2d 616, 621 (Del. Ch. 2008) (quoting *Mitsubishi*, 473 U.S. at 626) (emphasis in *McLaughlin*).

This Court employs a two-part test to determine whether a claim is arbitrable under an arbitration provision. First, the court considers "whether the arbitration clause is broad or narrow in scope." *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002). A clause is "broad" if it refers all disputes that arise out of or relate to an agreement to arbitration, *see Majkowski v. Am.*

Imaging Mgmt. Services, LLC, 913 A.2d 572, 582–83 (Del. Ch. 2006), and "contractual arbitration clauses are generally interpreted broadly by the courts," *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 430 (Del. Ch. 2007).

The RC Agreement's arbitration provision is undoubtedly "broad" because it applies to "any dispute or controversy whatsoever *pertaining to or arising out of the relationship* between [Aquila] and [Solera] or the dissolution or termination of same." Ex. 5 § 8.1 (emphasis added). This Court has consistently found provisions containing similar language to be broad. *See, e.g.*, *Li*, 2013 WL 1286202, at *2 (characterizing as broad a clause requiring that "any controversy or claim arising out of or relating to" the agreement be arbitrated); *Orix LF, LP v. Inscap Asset Mgmt., LLC*, 2010 WL 1463404, at *7 (Del. Ch. Apr. 13, 2010) ("Delaware courts have found the use of both 'arising out of' and 'relating to' language in an arbitration provision to be a broad mandate.").

Second, if the clause is broad, then the Court "will defer to arbitration" so long as the claim merely "touch[es] on contract rights or contract performance." *Parfi*, 817 A.2d at 155. A claim will sufficiently "touch" matters covered by the agreement where it pertains to an agreement that contains a broad arbitration provision, even if it arises under a related agreement that does not contain an arbitration clause, particularly when there is "a series of interrelated agreements."

See, e.g., *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (5th Cir. 1998); *Personal Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 394–95 (5th Cir. 2002). Indeed, "it is not necessary that the dispute arise out of [one agreement] to be arbitrable—but only that the dispute 'relate to' or be 'connected with' [that agreement]." *Ramco Energy*, 139 F.3d at 1068. And a forum selection clause in one agreement does not nullify an arbitration clause in another agreement, unless the forum selection clause specifically *precludes* arbitration. *Motorola*, 297 F.3d at 395.

Here, Aquila's claim that Solera did not have the right to exercise the Repurchase Option at zero dollars because his breach of the Separation Agreement and Section 6.1 of the RC Agreement is unenforceable indisputably touches on matters covered by the Separation and RC Agreements—indeed, it expressly involves Aquila's arbitrable breach of the Separation and RC Agreements. Aquila alleges that his claim is properly asserted in Delaware court because the Stock Option Agreement and Plan has a governing law clause and forum selection clause, respectively, that opt for Delaware law and a Delaware forum and to which the Stock Option Agreement is subject. *See* Compl. ¶¶ 13–16. But the Stock Option Agreement and the Separation and RC Agreements are interrelated agreements, as the Stock Option Agreement and RC Agreement were executed the same day and attached to the Employment Agreement (as were two other agreements) and were

incorporated into the Separation Agreement. *See* Ex. 2 at 7; Ex. 12 §§ 2, 3. Since Aquila's claim relates to these interrelated agreements, it "touch[es]" on matters covered by the Separation and RC Agreements and is subject to the Separation and RC Agreements' broad arbitration provision.[14]

Moreover, Aquila's contention that Solera may not exercise its Repurchase Option depends *entirely* on his contention that his breach of Section 6.1 of the RC Agreement is not enforceable under Texas law. *See* Ex. 4 § 2(k). The crux of Aquila's claim turns on whether he violated the RC Agreement. That agreement squarely provides for arbitration of *any* dispute. Consequently, Aquila's claim before this Court, irrespective of its relationship to the Stock Option Agreement, must be resolved through arbitration.

Should the Court reach the issue of whether this matter is subject to arbitration, it should dismiss this case in favor of the arbitration procedures to which the parties agreed.

D. If The Court Determines That Aquila's Claim Is Not Arbitrable, Then The Court Should Stay This Action Pending Arbitration

"This Court . . . possesses the inherent power to manage its own docket and may, on the basis of comity, efficiency, or common sense, issue a stay pending the resolution of an arbitration, even for those claims that are not arbitrable." *Hargis*,

[14] The Separation Agreement requires that disputes be resolved by arbitration in accordance with the RC Agreement. Ex. 12 § 13.

2012 WL 4481303, at *4. Even if Aquila's claim is not arbitrable, it is dependent on whether he breached the non-solicitation provision of the RC Agreement. This is the central issue in the Pending Arbitration. Therefore, should the Court determine that Aquila's claim is not arbitrable (which it is), the Court should stay this action pending arbitration of Aquila's breach of the RC Agreement.

II. AQUILA IS NOT ENTITLED TO THE "EXTRAORDINARY REMEDY" OF A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

A. Applicable Standard

"[I]t is a fundamental principle of this Court that preliminary injunctive relief—especially when sought in the form of a temporary restraining order—will never be granted unless earned." *New Castle Cnty. v. Marrows Corp.*, 1982 WL 17857, at *2 (Del. Ch. Oct. 7, 1982). A temporary restraining order is an extraordinary remedy that is only appropriate when the requesting party has clearly shown a strong likelihood of imminent and irreparable injury absent action by the court. *Trilogy Portfolio Co., LLC v. Brookfield Real Estate Fin. Partners, LLC*, 2012 WL 120201, at *4 (Del. Ch. Jan. 13, 2012); *see also Bertucci's Rest. Corp. v. New Castle Cnty.*, 836 A.2d 515, 519 (Del. Ch. 2003) (the "extraordinary remedy" of a temporary restraining order "is granted only sparingly"). A court has broad discretion in granting or refusing to grant injunctive relief, and preliminary relief is to be avoided, if possible, because controversies should be determined only after

all the parties have had a full opportunity to present the facts. *Wick v. Naidu*, 1987 WL 7957, at *1 (Del. Ch. Mar. 17, 1987).

Three factors guide the Court's consideration as to whether or not to issue the extraordinary relief of a temporary restraining order or preliminary injunction: "(i) the existence of a colorable claim, (ii) the irreparable harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party." *CBOT Holdings, Inc. v. Chi. Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007) (temporary restraining order); *Pell v. Kill*, 135 A.3d 764, 783 (Del. 2016) (preliminary injunction).

The key inquiry is whether there is imminent, *irreparable* harm in the absence of the requested relief. *Am. Messaging Servs., LLC v. DocHalo, LLC*, 2015 WL 1726536, at *2 (Del. Ch. Apr. 9, 2015) (citing *Cottle v. Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1988)). But even if a party seeking a temporary restraining order demonstrates the likelihood of irreparable harm, a court should decline to issue relief where the party cannot show a colorable claim or that the equities are in his favor. *Cottle*, 1988 WL 10415, at *3. Moreover, the Court has broad discretion in deciding whether to grant a TRO and may even deny one where all three of the requirements are met, *see CBOT Holdings*, 2007 WL 2296356, at *6.

Here, Aquila cannot satisfy the preliminary injunction and temporary restraining order standard.

B. Aquila Has No Realistic Fear Of Harm, Much Less Imminent, Irreparable Harm, Absent Injunctive Relief

"[T]he chief focus when reviewing an application for a TRO is the nature and imminence of the allegedly impending injury." *Arkema Inc. v. Dow Chem. Co.*, 2010 WL 2334386, at *3 (Del. Ch. May 25, 2010) (internal quotation marks omitted). Accordingly, Aquila must show that he "faces imminent, irreparable injury absent extraordinary relief." *Am. Messaging Servs., LLC*, 2015 WL 1726536, at *4. The alleged harm must be "genuine, as opposed to speculative," and it must be at risk of occurring immediately, not at some point in the future because "[p]otential harm that may occur in the future . . . does not constitute imminent and irreparable injury for the purposes of a TRO or preliminary injunction." *Trilogy Portfolio*, 2012 WL 120201, at *6. In situations where, as here, a party seeking extraordinary injunctive relief has failed to present a single fact demonstrating that he has suffered, or will suffer, any harm, much less the "imminent and irreparable injury" contemplated by Delaware law, a request for a temporary restraining order and preliminary injunction must be denied.

Here, Aquila's primary basis for his allegedly impending irreparable harm is that "*if* Solera exercises its repurchase option," then Aquila will be deprived of the value of right to obtain shares of Solera's common stock. TRO Motion at 40, 39

(emphasis added). But there is no "if." Solera elected to exercise its Repurchase Option. The repurchase price was zero due to Aquila's breach of Section 6.1 of the RC Agreement. Aquila's complaint is about the price. But even if it were more, Solera agreed to hold and not encumber the stock at issue until the arbitrator can address the issue. Babin Aff. ¶ 32. There is nothing to be enjoined and Aquila has no actual fear of harm. Harm is only "irreparable" if it is "imminent" and "genuine." *Nomad Acq. Corp. v. Damon Corp.*, 1988 WL 383667, at *7 (Del. Ch. Sept. 20, 1988). Even if the arbitrator determines that the no-solicit/hire provision is unenforceable and thus Solera had no right to the Repurchase Option at zero, Aquila still will suffer no irreparable injury. Aquila will be entitled to money damages that would completely redress any injury he may suffer in the future. The availability of money damages moots any possibility of irreparable harm because "[t]o demonstrate irreparable harm, a plaintiff must present an injury of such a nature that no fair and reasonable redress may be had in a court of law," *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002) (internal quotation marks omitted). Aquila asserts that he will also suffer irreparable harm because he and Solera acknowledged that money damages "*may* not be an adequate remedy for a breach of [the Stock Option Plan]." *See* Ex. 4 ¶ 18. This is irrelevant because, here, Aquila has made clear that he did not exercise his option in order to hold Solera stock but rather to be paid the value of that Stock (*see* Exs. 21, 30)—

i.e., damages *are* adequate for any (nonexistent) breach of the Stock Option Agreement by Solera paying the wrong price. This is just a dispute about money. Solera paid Aquila zero and he wants something more.

Aquila additionally argues that he will suffer irreparable harm unless the status quo is preserved because he will be deprived of his voting rights. *See* TRO Motion at 40−41. This is a red herring. First, Aquila gave up that "voting right" when he demanded (twice) that the stock be bought by Solera. Exs. 21, 30. Second, Solera, not Aquila, currently possesses the shares Aquila seeks to obtain. Therefore, preserving the status quo means Solera will maintain these shares, and Aquila will continue to be without their accompanying voting rights. Third, even if Aquila was deprived of these shares' voting rights, this is irrelevant. Aquila already owns Solera stock and can vote that stock. Babin Aff. ¶ 6. But Vista controls Solera, so Aquila's vote would not affect the outcome of any matter, whether or not Aquila has only his present shares or also the additional shares. Babin Aff. ¶ 6. And again, Aquila's suggestion that he wants additional shares for voting rights is disingenuous. When Aquila first sought to exercise his options, he requested that Solera immediately buy back the shares and pay Aquila over $27 million. *See* Ex. 21.

Aquila's failure to demonstrate imminent irreparable harm in his affidavit and moving papers is dispositive of his motion. Imminent irreparable harm is

necessary for a court to issue a TRO. *E.g. Cottle*, 1988 WL 10415, at *3 ("The essential predicate for issuance of [a temporary restraining order] is a threat of imminent, irreparable injury."). Because Aquila falls far short of the irreparable harm requirement, the Court should deny Aquila's motion for a TRO and preliminary injunction.

Section 9.1 of the RC Agreement does not dispose of the law's irreparable harm requirement, as Aquila suggests. Here, Aquila has not shown any risk of an imminent irreparable injury, or one that money will not remedy. Further, a TRO is not necessary to preserve the status quo because Solera has stated that it will hold and not encumber the stock until the arbitrator has addressed the enforceability of Section 6.1 of the RC Agreement. Babin Aff. ¶ 32.

C. Aquila Cannot Show A Reasonable Probability Of Success On The Merits Of His Claim

The crux of Aquila's argument in support of his proposed broad injunctive relief is that the non-solicitation provision is wholly unenforceable or, at least, unenforceable as to Aquila's solicitation of Dibble. *See id*. at 26–38. Aquila's merits argument is for the arbitrator to address. But, his argument lacks sufficient merit on which to base preliminary relief.

First, Section 6.1 of the RC Agreement—its non-solicitation and non-hire provision—is enforceable. Under Texas law, which governs interpretation of the Separation and RC Agreements, the RC Agreement's non-solicitation provision is

per se enforceable. The Texas Business and Commercial Code provides that restrictive covenants not to compete are enforceable if they are "ancillary or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activities to be restrained that are reasonable and do not impose a greater restraint on trade than is necessary to protect the good will or other business interest of the promisee." Tex. Bus. & Com. Code § 15.50. Texas courts have applied the same standard to non-solicitation agreements. *See, e.g., Merritt Hawkins & Assocs., LLC v. Gresham*, 79 F.Supp. 3d 625, 639 (N.D. Tex. 2015), *aff'd*, 861 F.3d 143 (5th Cir. 2017).

Section 6.1 contains an 18-month restrictive period, a reasonable limitation under Texas law. *E.g., Six Dimensions, Inc. v. Perficient, Inc.*, 356 F.Supp. 3d 640, 648 (S.D. Tex. 2018) ("An agreement that spans between two and five years and precludes a former employee from soliciting current employees to terminate their employment is enforceable under the [Texas Covenant Not To Compete Act]."). Its geographic reach and scope are similarly appropriate in light of the undisputed global nature of Solera's business and the wide scope of Aquila's involvement in Solera's business during his lengthy tenure as Solera's President and CEO. *See, e.g., Vais Arms, Inc. v. Vais*, 383 F.3d 287, 296 n.20 (5th Cir. 2004) ("Texas courts have upheld nationwide geographic limitations in non-

compete agreements when it has been clearly established that the business is national in character."); *Daily Insts. Corp. v. Heidt*, 998 F.Supp. 2d 553, 567 (S.D. Tex. 2014) ("The broad geographic scope did not make the covenant unenforceable in light of the defendant's upper management position, in which he was responsible for the business's relationship with major international clients, and especially because the employee possessed intimate knowledge of sensitive company information including many trade secrets."). Robust restrictions are warranted for employees like Aquila in senior management positions. *See, e.g., M-I LLC v. Stelly*, 733 F.Supp. 2d 759, 799 (S.D. Tex. 2010) (finding that a former employee's "upper management position" justified more significant restrictions on his commercial activities following his separation from the employer).

Further, Aquila freely accepted Section 6.1's reasonable restrictions after he negotiated its scope. He even reaffirmed his acceptance of the provision when he and his counsel, who is Aquila's counsel in this dispute, negotiated Section 8 of the Separation Agreement to incorporate Section 6.1 of the RC Agreement. Accordingly, Section 6.1 is an enforceable non-solicitation provision. The speciousness of Aquila's "unenforceability" claim is underscored by the requirement that employees at his personal business, which is also based in Texas, agree to a restriction on soliciting or hiring away its employees that is substantively nearly identical to Section 6.1. *See* Ex. 22 at Exhibit A.

Even if the non-solicitation provision were unenforceable (which it is not) Aquila would be equitably estopped from so arguing because he expressly agreed to abide by is terms. A party may be equitably estopped where "(1) a false representation or concealment of material facts; (2) is made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations." *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 221 (Tex. App. 2003). In his Separation Agreement, Aquila acknowledged and agreed—in a provision that he expressly negotiated—that he remains subject to all terms and conditions contained in the RC Agreement for 18 months, with the exception of his solicitation of seven Solera employees, who do not include Dibble. *See* Ex. 12 § 8. This representation was significant to Solera and a key inducement for the Company to sign the Separation Agreement. In particular, Section 2 of the Separation Agreement, which provides for Solera's payment of more than $4.5 million over that 18-month period, was formed as a direct result of Aquila's representation. *See* Ex. 12 § 2.

At the time Aquila negotiated the Separation Agreement, he knew that he was making material misrepresentations by affirming that he would remain bound by the terms of the RC Agreement. It is clear from his actions since signing the Separation Agreement that he never considered himself bound by and never

intended to comply with Section 6.1 of the RC Agreement. Aquila made a false promise and material misrepresentation with the intention that Solera act upon it by entering the Separation Agreement, agreeing to pay him over $4.5 million, and deeming his pre-separation actions, which would otherwise have been breaches of Section 6.1, not breaches of it. Solera did not know or have any means of obtaining knowledge that Aquila would continue to disregard his obligations under Section 6.1 of the RC Agreement after he expressly promised he would comply with that provision.

Instead of complying with the reasonable restrictions of Section 6.1 that Aquila expressly acknowledged he would remain subject to, Aquila now argues that Section 6.1 is unenforceable. *See* TRO Motion at 26-34. It would be inequitable to allow Aquila to adopt this position after Aquila induced Solera to enter into the Separation Agreement by making an express representation to the contrary. *See City of Fredericksburg*, 126 S.W.3d at 221 ("[O]ne who by his conduct has induced another to act in a particular manner should not be permitted to adopt an inconsistent position and thereby cause loss or injury to the other."). Therefore, equitable estoppel prevents Aquila from arguing that Section 6.1 is unenforceable under Texas law.

The cases on which Aquila relies to further his argument are unpersuasive and readily distinguishable. Some involved employees who did not hold any

senior position at their companies, *see Ally Fin., Inc. v. Gutierrez*, 2014 WL 261038, at *1 (Tex. App. Jan. 23, 2014) (employee worked as an IT Leader); *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, 263 S.W.3d 232, 239 (Tex. App. 2007) (employees in company's tax department), *rev'd sub nom.*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009), and none involved an employee as senior as Aquila. The non-solicitation provision at issue in *Cooper Valves* was deemed unenforceable because it contained neither geographic nor time limitations, unlike Section 6.1, which contains a clear time limitation of 18 months. *See Cooper Valves, LLC v. ValvTechnologies, Inc.*, 531 S.W.3d 254, 265 (Tex. App. 2017). The Court in *Hodgson* also determined that the non-solicitation *may* be unenforceable, in part because defendant had not explained why a geographic limitation was necessary, *see Hodgson v. U.S. Money Reserve, Inc.*, 2013 WL 2732736, at *3-4 (Tex. App. June 13, 2013), but Solera, in contrast, has explained that Section 6.1 necessarily lacks a geographic limitation because of the global reach of Solera's business and Aquila's involvement in all aspects of the entire business. Finally, the Texas Supreme Court reversed *Hardy* on appeal and found that the non-solicitation provisions (which had to do with solicitation of the company's customers) were *enforceable* as ancillary to or part of an otherwise enforceable agreement. *See Mann Frankfort Stein & Lipp Advisors*, 289 S.W.3d at 848–52.

Second, Aquila's breach of Section 6.1 of the RC Agreement is not excused because Aquila believes the Solera employee he hired, Dibble, was not "important" or "knowledgeable" enough. The covenant is enforceable as to all Solera employees because under Texas law, "an employee non-solicitation covenant extending to *all* current employees is a reasonable protection of the employer's interest in maintaining its employees." *Everett Fin. Inc. v. Primary Residential Mortg.*, 2016 WL 7378937, at *8 (N.D. Tex. Dec. 20, 2016) (emphasis added). Moreover, even if the non-solicitation provision does not cover all Solera employees, the RC Agreement legitimately protects Solera's interests in employees with specialized training, like Dibble. *See, e.g.*, *McKissock, LLC v. Martin*, 267 F. Supp. 3d 841, 855 (W.D. Tex. 2016). Aquila calls Dibble a "mechanic" in an effort to minimize his unique value, knowledge, and skill. But Dibble's knowledge base and expertise, including as to content-creation for Direct-Hit, cannot be replicated or replaced with an off-the-shelf "mechanic."[15] Babin Aff. ¶ 19. Therefore, the non-solicitation provision is enforceable as to Aquila's solicitation of Dibble.

[15] Aquila claims that Dibble did not have access to confidential or proprietary information in the last year. Whether accurate or not, this is irrelevant to Aquila's violation of the RC Agreement with respect to Dibble, as that violation—under clear Texas law, described *supra* at 45−51—is not premised on whether Dibble had access to confidential or proprietary information, but simply on whether Dibble was a Solera employee (which he was) and whether *Aquila wrongly solicited and hired him* (which he did).

Aquila argues that Dibble is also excused from the non-solicitation provision because Dibble had been working at AM LLC with Solera's knowledge since 2017. *See* TRO Motion at 37. But Dibble worked at AM LLC only because Aquila, abusing his power as CEO, required Dibble to spend time at AM LLC. Between 2017 and May 2019, Dibble received compensation and employee benefits only from Solera and was reported to be Solera's employee to all governmental authorities. Therefore, Aquila's recruitment of Dibble was indeed Aquila's recruitment of Dibble *away from* Solera, Dibble's employer, and was, consequently, a violation of the non-solicitation provision.

Aquila also suggests that this non-solicitation is unenforceable here because AM LLC was not a competitor of Solera. This is irrelevant. Solera does not argue that Aquila's solicitation of Dibble breached the non-competition provision of the RC Agreement. It argues only that this was a breach of a non-solicitation provision. But in any event, Aquila's soliciting and hiring away Solera employees is *itself* a competitive activity that Solera legitimately protects against through the RC Agreement. *See Smith v. Nerium Int'l, LLC*, 2019 WL 3543583, at *4 (Tex. App. Aug. 5, 2019) (holding that "competing for salespeople [employees], not directly for customers or clients" "*is itself a form of competing*" (emphasis added)).

Finally, because Section 6.1 of the RC Agreement is fully enforceable, Aquila's wrongful solicitation and hiring of Dibble breached that Agreement and

therefore afforded Solera the right to exercise its Repurchase Option under Section 2(k) of the Stock Option Agreement. Contrary to Aquila's arguments, Dibble is not excused from the non-solicitation provision, and Dibble moreover remained a paid employee of Solera throughout June 2019, *see* Ex. 20. Because Aquila solicited and hired Dibble for Aquila's own venture while Dibble remained employed by Solera, Aquila breached Section 6.1 of the RC Agreement. Therefore, his claim that Solera breached the Stock Option Agreement is not colorable because Aquila's breach of Section 6.1 of the RC Agreement means that under Section 2(k) of the Stock Option Agreement, Solera may exercise its right of repurchase.

D. A Balance Of The Equities Militates Against Injunctive Relief

Aquila's motion for a temporary restraining order should be denied because he has not established that he "will suffer greater hardships if the TRO is not granted than the defendants would if the relief were granted." *Arkema*, 2010 WL 233486, at *1. Aquila has failed to show that the balance of equities tips in his favor.

Aquila has alleged no actual harm that he will suffer if the Court denies the TRO. *See* TRO Motion at 41. As shown *supra*, Aquila is at risk of no irreparable injury whatsoever.

In sum, "because [the plaintiff] has failed to demonstrate a reasonable probability of success on any of his claims and because the injury he complains of appears to be minimal . . . the balance tips in favor of the Defendants." *Goggin v. Vermillion, Inc.*, 2011 WL 2347704, at *6 (Del. Ch. June 3, 2011).

CONCLUSION

For all these reasons, Defendants respectfully request that this action be dismissed or stayed in favor of the Pending Arbitration, and that Plaintiff's request for a temporary restraining order and preliminary injunction and for expedited proceedings be denied.

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September 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2019, copies of the foregoing document were served, by File &Serve*Xpress*, on the following attorneys of record:

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