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

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INTRODUCTION

The purpose of Tony Aquila's ("Aquila") lawsuit is to maintain the status quo concerning his *earned* stock options and for this Court to decide whether Solera should be ordered to *specifically perform* its contractual obligations to pay him what he is rightfully entitled to receive. Rather than address these very narrow issues, Solera opted to raise *unrelated* and *irrelevant* issues to mislead and deflect this Court from issuing a Temporary Restraining Order ("TRO"). The best evidence of Solera's attempt to mislead and deflect this Court is that Solera only addressed these issues as its very *last* argument at the end of its Opposition.

As will be seen throughout this Reply, Solera's arguments not only lack merit, but its factual assertions (or omissions) attempt to mislead this Court in violation of the duty of candor owed to this tribunal under Delaware Rules of Professional Conduct, Rule 3.3 and 8.4(c).[1]

[1] Delaware Rules of Professional Conduct, Rule 3.3(a) provides that "…(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to ***correct a false statement*** of material fact … or (3) offer evidence that the lawyer ***knows to be false***." Similarly, Rule 8.4(c) provides that "It is professional misconduct for a lawyer to: … (c) engage in conduct involving dishonesty, fraud, deceit or ***misrepresentation***." See, *Matter of Clyne*, 581 A.2d 1118, 1126 (Del. 1990) (imposing sanctions on attorney resulting from attorney's "misrepresentations to this Court," reflecting "a complete abandonment of the fundamental concept of candor that is essential to the continued practice of law."); see *In re Poliquin*, 49 A.3d 1115, 1142 (Del. 2012) (finding that "even 'a negligent misrepresentation also may form the basis for a charge of misconduct under the

This is not merely rhetoric. For example, if after reading Solera's Opposition, the Court believed that Aquila used Solera's jet without its consent, this Court was misled. As discussed below, what Solera omits from telling the Court is that the jet Aquila used was *not* a Solera jet, but rather, Aquila's own *personal* jet and he *never* received reimbursement from Solera for any of the flights raised in its Opposition. (Supplemental Affidavit of Anthony Aquila ["Supp. Aquila Aff."] at ¶¶ 2 and 4; Supp. Hanson Aff., Exh. A.) Another example is that Solera misrepresents to this Court that Solera was a "shell" company and Aquila did not build it into the global firm it is today, and did not start the Solera business in his garage. Prior to Solera acquiring ADP, Inc. ("ADP"), Solera already had more than 30 employees, customers, and millions of dollars in revenue. (Supp. Aquila Aff. at ¶ 6; see John Schwinn Aff. at ¶¶ 2-7; see Affidavit of Hon. Roxani Gillespie Aff. ["Gillespie Aff."] at ¶ 2 (past State of California Insurance Commissioner). Furthermore, Solera's own website as of July 25, 2019 publicized the very fact that Aquila founded Solera in his garage. (Supp. Hanson Aff., Exh. K.) Stated another way, if this Court was under the impression that Solera's first employees, customers and revenue only came as a result of its acquisition of ADP, this Court was misled by Solera.

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literal terms of DLRPC Rule 8.4(c)"); see, *In re Poliquin*, 49 A.3d 1115, 1142 (Del. 2012) ("There are circumstances where failure to make disclosure is the equivalent of an affirmative misrepresentation"')

Worse yet, Solera defamed and misrepresented that Aquila was terminated for cause and would not voluntarily leave. This statement is false and designed to prejudice this Court and provide a headline for the press (which is what the press is now incorrectly reporting). On May 6, 2019, David Breach ("Breach") wrote a letter to Aquila acknowledging that he ***resigned*** and thanking him for ***remaining*** until they found a replacement:

> Since you informed us last month that you are ***resigning*** your position as CEO of Solera, we have been working diligently on finding a successor. We ***appreciate that you agreed to remain as CEO through the transition.*** In the coming days, we should discuss your last date of employment with Solera. (Supp. Hanson Aff., Exh. C.)

Breach's letter admits that Solera asked Aquila to remain (*i.e.*, "we appreciate you agreed…"). This is hardly Aquila refusing to leave voluntarily. If ever there was evidence of a party using a Court filing to assert a false narrative, Solera's Opposition is the perfect example. Solera has now engaged in a campaign of misrepresentations and deflection to avoid having to honor its contractual obligations to Aquila.

Despite Solera's tactics, Aquila will first address the issues of whether (1) the Court should issue a TRO to not allow Solera to encumber the stock options until final adjudication of the issue, and (2) deny Solera's motion to dismiss.

Thereafter, simply to educate this Court of the true facts, Aquila will address the other issues raised by Solera.

ARGUMENT

A. Solera Admits This TRO Should Be Granted.

Aquila filed his complaint seeking an injunction to maintain the status quo by enjoining Solera from exercising the Repurchase Option under the 2016 Stock Option Agreement or otherwise encumbering Aquila's stock options. The reason being is that Solera can easily encumber or dispose of Aquila's stock options while his rights are being adjudicated. As such, as required by the governance documents, Aquila filed for a TRO.

The standard for issuing a TRO is that "[t]he party seeking a TRO '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) (quoting *Reserves Dev. Corp. v. Wilmington Trust Co.*, 2008 WL 4951057, at *2 (Del. Ch. Nov. 7, 2008). Solera knows there is a low standard when considering issuing a TRO, and when faced with this fact, decided to *concede* the issue and *agree* that a TRO should issue.

Specifically, Solera conceded that if Aquila prevails (which he will), "it is possible he will eventually be entitled to the fair market value of his stock (less the exercise price). Solera has even ***agreed to hold and not encumber the stock at***

issue until the arbitrator [actually, this Court] can address this issue…." Solera Opp., Pg. 4. (Emphasis added). This is an admission that Solera agrees to Aquila's requested TRO. That said, it must be clarified that Solera represented to the Court that there was an "agreement" when in fact there has *never* been an agreement. Aquila had been requesting Solera to "agree not to hold and not encumber the stock," but Solera refused. In fact, three days *after* Solera's Opposition was filed, Aquila (via counsel, Sanford Michelman) sent an email to Solera's counsel (Bryce Friedman) on September 13, 2019 using the *identical* language from Solera's Opposition:

> I am following up from a few days ago. Are your clients agreeing to the TRO (i.e., ***agreeing to hold and not encumber the stock at issue***) or are they still 'considering it,' as you have been telling me… (Emphasis added.) (Supp. Hanson Aff., Exh. D.)

Solera immediately responded: "Same answer," that is, "still considering it." And Aquila (via counsel) immediately responded confirming "we still don't have an agreement" and that "[h]opefully, Solera will let [Aquila] know prior to the hearing." Amazingly, Solera filed an Opposition saying there was an "agreement," when no such agreement existed, and then three days later admitted no agreement exists, but yet never told this Court the truth. Moreover, in an obvious contradiction, Solera's "Same answer" response confirms that Solera is now refusing to agree to the very agreement it told this Court existed (falsely). This alone establishes that Solera misrepresented the facts to this Court.

In support of Solera's Opposition that an agreement existed, Solera submitted the declaration of its Associate General Counsel, David Babin ("Babin"). What is telling is that Babin's own declaration does not support Solera's Opposition. What Babin actually declares is that "Solera will hold and not encumber the stock to which Aquila may be entitled…." (Affidavit of Babin ["Babin Aff."] at ¶ 32). Nowhere does Babin actually declare there was an agreement because to do so would be perjury.

Babin is the stated agent for Solera. Solera has now represented that it will affirmatively agree to the relief sought, *i.e*., to "hold and not encumber the Stock." The Court should bind Solera to its judicial admission. See, *AT & T Corp. v. Lillis*, 953 A.2d 241, 251 (Del.Supr.2008) ["This is a long established principle of law [cit. omitted] 'Admissions made in pleadings will bind the party in the suit in which they are filed'"]; see also, *Merritt v. United Parcel Service*, 956 A.2d 1196, 1201 (Del.2008) ["judicial admissions ... are traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court.]"

Based on this admission alone, the Court should grant Aquila's TRO.

B. <u>The Only Jurisdiction that Can Hear This Dispute is This Court</u>

It is undisputed that on May 27, 2019 Aquila and Solera entered into a "Separation Agreement." As a legal consequence, the obligations of the parties are

solely defined by the terms of the Separation Agreement. In the Separation Agreement, it states what jurisdiction will apply in the event of a dispute. Yet again, Solera is misleading this Court into believing that Arbitration is the proper forum when it is not.

Specifically, Solera represents that in the Separation Agreement's "Dispute Resolution," that "Any controversy or claim arising out of or relating to the interpretation, enforceability or breach of Agreement . . . shall be settled by arbitration in accordance with the Restrictive Covenant Agreement." (Transmittal Affidavit of Thomas Hanson ["Hanson Aff."], Exh. 4.) From this, Solera then jumps to the Restrictive Covenant Agreement ("RC Agreement") and cites to Section 8, which is entitled "ARBITRATION." (Hanson Aff., Exh. 1, Exh. C.) From linking these two Sections, Solera represents that: (1) Arbitration is the *only* venue, and (2) there is *no* other provision in the RC Agreement addressing another venue. Both of these representations are not true. Here is the truth.

The Separation Agreement states that the resolution of disputes will be as set forth in the RC Agreement. There is no dispute on this point. Section 8 of the RC Agreement does discuss arbitration in the event of a dispute. There is no dispute on this point, either. However, that is not the entirety of the RC Agreement concerning dispute resolution – and Solera knows this *since it is a Solera created form document.*

What Solera intentionally fails to tell this Court is that *Section 9.1* of the very same RC Agreement states:

> **Injunctive Relief**. ***Notwithstanding*** the arbitration provision in ***section 8*** or anything else to the contrary in this Agreement, you and the Company understand and agree that the parties' actions or potential actions under sections 2, 3, 4 and 6 of this Agreement may result in irreparable and continuing damage to the other party to which monetary damages will not be sufficient, and ***agree*** that both parties ***will be entitled to seek***, ***in addition to its other rights and remedies hereunder*** or at law and ***both before or while an arbitration is pending*** between the parties under Section 8 of this Agreement, a ***temporary restraining order***, preliminary injunction or similar relief from a court of competent jurisdiction in order to preserve the status quo or prevent irreparable injury while pending the full and final resolution of the dispute through arbitration, ***without the necessity of showing any actual damages or monetary damages would not afford an adequate remedy***, and without the necessity of posting any bond or other security. The aforementioned ***injunctive relief shall be in addition to***, ***not in lieu of***, legal remedies, monetary damages or other available forms of relief through arbitration proceedings. This Section shall not be construed to limit the obligation for either party to pursue arbitration under Section 8 with respect to any Arbitrable Disputes. (Emphasis added)

In addition, attached to the RC Agreement is the "Schedule 2: Dispute Resolution Addendum." ("RC Addendum"). In the RC Addendum, paragraph "b" states that the "Dispute Resolution" in the RC Agreement is *not* subject to arbitration. Specifically, it says:

> Except in the event either party seeks injunctive relief in accordance with ***Section 9.1*** of the Agreement, Employee and Company agree that, prior to the service of an Arbitration Demand…the parties shall negotiate in good faith…. (Hanson Aff., Exh. 1, Exh. C, Schedule 2.)

There is no doubt that both the RC Agreement and the RC Addendum specifically carve out Aquila's request for a TRO from arbitration.

The question is: why did Solera fail to disclose this fact to the Court when it omitted Section 9 from its Opposition? The answer is that Solera tried to mislead this Court in believing that only Section 8 applies. It is without dispute that Solera "agreed" that Aquila is "entitled to seek" a "temporary restraining order" "in addition to, not in lieu of" an arbitration. In fact, the very first sentence of Section 9 states "*Notwithstanding* the arbitration provision in Section 8 or anything else to the contrary in this Agreement…." The definition of "notwithstanding" means "regardless of," and taken as a whole, means "regardless of Section 8" the parties can seek a TRO "in addition to" other remedies.[2] As such, Section 9 states that Section 8 does not control venue.

Furthermore, Section 18 of the 2016 Stock Option Plan, which is the very agreement at issue in this dispute, states:

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[2] Webster's New World College Dictionary, 4th Ed., definition for "Notwithstanding: in spite of; although; nevertheless; despite." Following standard principles of contract interpretation, courts may rely upon common usage as reflected in a standard dictionary. *Brandow Chrysler Jeep Co. v. DataScan Techs*., 346 F. App'x 843, 846 (3d Cir. 2009). See also, *Watkins v. Beatrice Companies, Inc*., 560 A.2d 1016, 1021 (Del. 1989) [the Court will recognize the "plain meaning" of language used in a contract when there is "a generally prevailing meaning and there is no evidence that the parties intended the language to have any other meaning."]

> 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.) (Hanson Aff., Exh. 3.)

The 2016 Stock Option Plan contemplates that specific performance and injunctive relief are appropriately before this Court. There is no reference to arbitration or an arbitrator having authority to issue a TRO or specific performance. In fact, Section 20 reserves jurisdiction exclusively to the United States District Court and any Delaware state court sitting in Wilmington, Delaware:

> All issues concerning this Plan ***will be*** governed by and construed in accordance with the laws of 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. (Emphasis added.) (Hanson Aff., Exh. 3.)

In addition, Solera agreed that a party seeking a TRO to enforce the Stock Option Plan, and even the RC Agreement, would only have to meet the *lowest* possible threshold when they: (1) *waived* the requirement to show actual damages, (2) *agreed* that monetary damages would be inadequate, and (3*) waived* the requirement to post a bond or other security.

- Section 9 of the RC Agreement: "without the necessity of showing any actual damages or monetary damages would not afford an

adequate remedy, and without the necessity of posting any bond or other security." (Hanson Aff., Exh. 1, Exh. C)

- Section 18 of the 2016 Stock Option Plan: "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…injunctive relief in order to enforce or prevent any violations of the provisions of this Plan." (Hanson Aff., Exh. 3)

In sum, Solera agreed that Aquila could seek – *and the lowest standards applied to* – the granting of a TRO. For Solera to, first, concede a TRO should issue, and then second, argue this Court is without jurisdiction to do so, is a waste of this Court's judicial resources. This Court should grant Aquila's TRO.

C. Pursuant to Delaware Law the TRO Should Be Granted.

As set forth above, Aquila's request for a TRO is not really disputed, as Solera agreed in Babin's declaration that it "will hold and not encumber the stock to which Aquila may be entitled…." Still, Aquila independently satisfies the threshold for the requested TRO in all respects.

1. Aquila's Specific Performance Claim Is Colorable.

Solera argues that Aquila's TRO should be denied because "Aquila cannot show a reasonable probability of success on the merits of his claim." Solera Opp., pg. 46. But, as Solera knows, that is not the standard to issue a TRO. It is well-settled that "[t]he party seeking a TRO 'need only state a colorable claim for relief, which is essentially a non-frivolous cause of action.'" *Newell Rubbermaid Inc.*,

(quoting *Reserves Dev. Corp.*); see also *CBS Corporation v. National Amusements, Inc.*, 2018 WL 2263385, at *3 (Del. Ch. May 17, 2018) ("The 'colorable claim' requirement means that a plaintiff must state 'essentially a non-frivolous cause of action'".) This is a "lenient standard." *Reserves Development Corp.*, supra at *2. The Delaware Courts have consistently held that if a colorable, *i.e.*, non-frivolous claim is presented, a TRO will issue.

The basis for Aquila's request is simple: he has stock options under the Stock Option Agreement and Stock Option Plan. Solera is trying to take away Aquila's options because Aquila's separate company, Adventure Motors, continued to employ an auto mechanic (Dibble). Solera alleges Dibble's continued employment violated a "No-Hire" provision. Aquila contends the No-Hire provision is not applicable since Dibble was already employed, it is overbroad, and therefore, unenforceable. Aquila's claim is "colorable."

In support of Aquila's colorable claim, it must be noted that the long-standing rule in Texas is that restrictive covenants are enforceable only if the limitations are reasonable as to time, geographic area, and scope of activity, and the agreement does not impose a greater restraint than is necessary to protect the goodwill or other business interest of the company. Tex. Bus. & Com. Code § 15.50; *see also Gallagher Healthcare Ins. Services v. Vogelsang*, 312 S.W.3d 640 (Tex. 2009).

Furthermore, Texas law holds that a restraint on solicitation that covers "any" or "all" employees is deemed overbroad and unenforceable. The Court in *Ally Fin., Inc. v. Gutierrez*, 02-13-00108-CV, 2014 WL 261038 (Tex. App.—Fort Worth Jan. 23, 2014, no pet.) addressed this very issue. In *Ally*, the defendant (Gutierrez) was a former employee in Ally's IT department. The IT department was responsible for managing personnel and "ensuring work performed adheres to company standards and ... business requirements." Gutierrez (1) supervised "approximately 89 information technology employees," (2) evaluated their performance, (3) was also responsible for "all aspects" of the operation of the IT department, (4) had access to personnel records for those employees she supervised, and (5) access to Ally's strategic and confidential business plans. In 2008, Ally adopted a "Long–Term Equity Compensation Incentive Plan" ("CIP") under which certain employees would receive award payments "based on Common Stock Value". The CIP included a non-solicitation covenant:

> 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…(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.

On October 14, 2011, Gutierrez left her employment with Ally and began working for one of Ally's competitors as its chief technology officer. After "several more employees voluntarily left," Ally filed suit against Gutierrez alleging unfair competition, tortious interference with contractual relations, tortious interference with employment relations, and conspiracy. Ally also alleged Gutierrez breached the CIP and misappropriated Ally's trade secrets.

The Texas Court of Appeals affirmed summary judgment in favor of Gutierrez because the non-solicitation agreement was unreasonable in scope and, thus, unenforceable. The Texas Court of Appeals explained:

> Here, the non-solicitation covenant barred [former employee], for a two-year period, from soliciting or employing (1) all [former employer's] employees who work for [former employer] or any of [its] subsidiaries and (2) all [former employer] employees who worked for [former employer] or any of [its] subsidiaries between August 14 and October 14, 2011. **While it might be considered reasonable to limit [former employee's] solicitation of [former employer's| employees located in the IT department, which was where [former employee] worked, the non-solicitation covenant in the CIP was not so limited.** [Former employee] was barred for two years from soliciting or employing both all current [former employer] employees and all [of its] employees who were so employed in late 2011. The undisputed summary-judgment evidence showed that in 2012, [former employer] 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 [former employer's] non-solicitation covenant**. (Emphasis added.)

Also, in *Brown Services, Inc. v. Brown*, 1999 WL 681964 (non-published), the Court examined a general "no-hire" provision. Specifically, "Paragraph 8(iii)

provides that [former employee] cannot 'offer to hire, or in fact employ or enter into any partnership, corporation or other business relationship with, directly or indirectly, any of the then-current employees, managers or independent contractors of Employer or one of its subsidiaries.' This clause prevents [former employee] from hiring ***anyone*** employed by [former employer], ***in any capacity***. Under this clause, if [former employee] hired a [former employer] employee to paint his house, he would be in violation of this agreement. Because this clause is ***not limited*** to hiring away employees to work in a competing business, it too is overbroad." (Emphasis added).

In *Cooper Valves, LLC v. ValvTechnologies, Inc.*, 531 S.W.3d 254, 257 (Tex. App.—Houston [14th Dist.] 2017, no pet.), reh'g denied (Sept. 28, 2017), the court found a non-solicitation agreement to be unenforceable where it prohibited the defendant former employee from "solicit[ing] the employees [former employer] for purposes of hiring such individuals to enter into competition with [former employer]" in-part because the agreement's restrictions were unreasonable. Specifically, the Court of Appeals explained, "[n]either nonsolicitation provision in [former employee's Agreement] contains...specifies the ***types of customers or employees*** that are off-limits to [former employee]."

Like the non-solicitation agreements in *Ally*, *Brown Services* and *Cooper Valves LLC*, which were deemed overbroad and unenforceable, Section 6.1 of the

RC Agreement similarly applies to "*anyone* who is…an employee of the Group or consultant of the Group," as well as anyone "who was an employee or consultant of the Group within the six months preceding the date," at any of Solera's numerous world-wide affiliates. This restraint is unenforceable because it bars anyone from hiring "any" employee, regardless of that employee's "position." By way of example, Section 6.1 would prohibit Aquila from hiring a janitor, including one that Solera hires four months from now. The No-Hire provision is overbroad and unenforceable. This is not just argument – Solera *admitted it in writing.*

On July 20, 2019, Aquila sent Solera a letter asking questions regarding the enforceability of the RC Agreement, and in response, Solera *admitted* that it is unenforceable under Texas law. First, Aquila's counsel asked, "Does Solera contend that the 'no hire' prohibition in the Restrictive Covenant Agreement applies to all employees? Stated another way, is it Solera's contention that Tony Aquila is prohibited from hiring anyone from Solera?" (Transmittal Affidavit of Alexandra M. Cumings ("Cumings Aff."), Exh. 27). On July 22, 2019, Solera responded: "The language above is clear that Mr. Aquila agreed not to, among other things, hire *anyone* who is, or has been in the six months prior to his hiring by Mr. Aquila, an employee of Solera or its affiliates." (Cumings Aff., Exh. 28). Solera admits that the provision applies to *anyone*, regardless of company, affiliate, capacity, position, role, or geography. This alone invalidates the no-hire provision.

That said, all that is required to issue the TRO is a "colorable claim" and Solera's response established a colorable claim.

Second, Aquila also asked Solera: "Does Solera contend that the "no hire" prohibition includes employees hired by Solera after May 27, 2019 (the date of Tony Aquila's Separation Agreement)?" (Cumings Aff., Exh. 27). Solera again responded, *yes*, "Mr. Aquila agreed to abide by this agreement for eighteen months after leaving Solera." (Cumings Aff., Exh. 28). Again, this concession establishes that the provision is overbroad and unreasonable. Hence, Aquila's TRO should be granted since he has a colorable claim.

Next, pursuant to Texas law, the RC Agreement must "not impose a greater restraint than is necessary." It is well-settled that when determining the enforceability of a provision, a court should "… instead inquire 'whether the [provision] 'contains 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 the business interest of the promisee.' " *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011).

Here, the No-Hire provision is greater than necessary to protect Solera's goodwill or other business interests. An employer's goodwill has previously been defined as the advantage or benefits which are acquired by an establishment *beyond the mere value* of the capital stock, funds or property employed therein, in

consequence of the general public patronage and encouragement which it 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 764, 768 (Tex. 2011).

Solera cannot reasonably contend that prohibiting the hiring of *all* employees - including a mechanic like Dibble - is necessary to "protect the goodwill or other business interest of" Solera. Solera states that Dibble received specialized training and possessed specialized skills from Identifix, Inc. The "evidence" comes from Babin who does not work at Identifix. In fact, Solera's evidence, does not come from anyone with actual personal knowledge of Dibble's work at Identifix. And most importantly, the only admissible evidence submitted on the issue is that of Dibble himself:

> While employed with Solera, I ***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. Moreover, in the last year, I have not worked in any capacity for Adventure or Solera that involves customer service or interaction with any potential or existing customers of Solera. My work with Adventure involves auto mechanic work fixing up classic cars. I do not do any software development, nor did I do that kind of work at Solera, either. (Affidavit of Guy Dibble ["Dibble Aff."] at ¶ 3.)

In addition, Dibble reviewed Babin's foundationless testimony and disagrees with him. Specifically, Dibble declares that he never saw Babin at Identifix, does

not know Babin, and re-affirms that "Contrary to Mr. Babin's claims, while at Solera, I 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." (Supplemental Affidavit of Guy Dibble ["Supp. Dibble Aff."] at ¶ 5.)

Again, it defies logic that Solera would claim the paramount importance of Dibble to Identifix, when it consensually allowed Dibble to work at Adventure Motors for the last two years. Solera's claim that it lost an irreplaceable employee is not colorable because otherwise they would not have allowed Dibble to work at Adventure Motors in the first place. Regardless, all that is necessary at this stage is to demonstrate a non-frivolous claim. Aquila has done so, and as such, the TRO should issue.

2. A "Potential Claim" Equates to Irreparable Harm.

"Indeed, in the analogous context of a party seeking a preliminary injunction, this court has held that a contractual ***stipulation*** of irreparable harm is ***sufficient*** to demonstrate irreparable harm." (Emphases added) *Gildor v. Optical Sols., Inc.*, 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006); *see Kansas City Southern v. Grupo TMM, S.A.*, 2003 WL 22659332, at *5 (Del. Ch. Nov. 4, 2003) (upholding contractual stipulation of irreparable harm, and finding that "[s]everal

decision of this Court support [the plaintiff's] position that "stipulation by the parties is sufficient to establish irreparable harm").

Solera's RC Agreement states in Section 9.1:

> ***Notwithstanding*** the arbitration provision in section 8 or anything else to the contrary in this Agreement, you and the Company understand and agree that the parties' actions or potential actions under sections 2, 3, 4 and 6 of this Agreement ***may result in irreparable*** and continuing damage to the other party to which monetary damages will not be sufficient, and ***agree*** that both parties ***will be entitled to seek***, in addition to its other rights and remedies hereunder or at law and both ***before or while an arbitration*** is pending between the parties under Section 8 of this Agreement, a ***temporary restraining order***… (Emphasis added.)

Under the contractual agreement of the parties, Aquila has contractually established "irreparable harm."

D. Solera's Motion to Dismiss Should Be Denied.

Even if the Court thought arbitration appropriate, the only venue for injunctive relief is this Court. Under Section 18 and 20 of the Stock Option Plan "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." In addition, under Section 9.1 of the RC Agreement, injunctive relief claims can and must be brought in front of a court of law or equity, not "in lieu of" arbitration. The dispute before this Court for

specific performance and injunctive relief is not arbitrable. As such, Solera's Motion to Dismiss must be denied.

E. Solera Offers No Competent Evidence in its Opposition.

"A witness may testify to a matter only if evidence it introduced sufficient to support a finding that the witness has personal knowledge of the matter." (See, D.R.E. 602, Need for Personal Knowledge). The only evidence submitted by Solera are the declarations of Babin and Breach. But neither have personal knowledge of the facts attested to in their declarations.

1. Babin's Declaration is Not of his Personal Knowledge.

In what can only be described as a "sleight of hand" maneuver, Babin declares "This affidavit is based on my personal knowledge and information that I have reviewed in my position as Associate General Counsel at Solera, including my review of relevant documents that have been provided to me." (Babin Aff. at ¶¶ 1 and 3). First, a review of undisclosed documents does not render the content of a document of one's "personal knowledge." Rather, this statement is saying that Babin relied on *multiple* hearsay statements and, in turn, is representing it as of his own personal knowledge. For example, Babin declares that the following is of his own personal knowledge: "Solera's Human Resources department asked Dibble about his status given his failure to report to work for much of the month." This is

per se hearsay; Babin was not a part of this alleged conversation. Of the 35 paragraphs in Babin's declaration, it fails to actually identify what statements are of his own "personal knowledge" or undisclosed information provided to him by undisclosed third parties. As such, the entirety of Babin's declaration is inadmissible.

2. Breach's Declaration is Not of his Personal Knowledge.

As with Babin's declaration, Breach admits his statements are based on hearsay. Specifically, Breach declares that the information is "based on my personal knowledge and information that I have received in my position as Chief Operating Officer and Chief Legal Officer of Vista and a member of the Board, including my review of relevant documents that have been provided to me." (Affidavit of David Breach ["Breach Aff."] at ¶ 4). In Breach's declaration, he does not state what is actually information of his own personal knowledge, versus what he read or was told to him. As such, the entire declaration is inadmissible.

For example, "Aquila appears to have directed his hand-picked Board member, Dr. Kurt Lauk, to challenge the process for conducting the investigation (which was done at the initiation of Solera's General Counsel ***without any input or knowledge by Vista or me***) and have the Board sweep Aquila's behavior under the rug." (Emphasis added). Breach admits that he has no such personal knowledge – despite declaring under oath it is "true." The true facts are that Dr. Lauk was a

Vista appointed Board member – not an Aquila appointed Board Member. (Supp. Aquila Aff. at ¶ 7.) Further, Breach admits he was not involved in the alleged investigation (which is disputed to have occurred), but yet tries to declare it is of his own "personal knowledge." Breach's failure to identify what statements are really of his own personal knowledge versus what he may have read in his "review of relevant documents" provided to him renders his entire declaration inadmissible.

In sum, Delaware law rejects testimony that is not identified as based on the declarant's personal knowledge. See, Del. R. Evid. 602 [Need for Personal Knowledge]; see also, Del. R. Evid 801 *et seq.* [Hearsay]. Under Delaware law "a witness may not testify or attest to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." *WBCMT 2006-C29 Office 4250, LLC v. Chestnut Run Inv'rs, LLC*, No. CV N14L-03-040 FWW, 2015 WL 4594538, at *10 (Del. Super. Ct. July 30, 2015), citing *CNH Industrical Am. LLC v. Am. Cas. Co. of Reading*, 2015 WL 1242650, at *3 (Del.Super. Mar. 10, 2015) (quoting Del. R. Evid. 602) [The Court struck portions of the witness' affidavit where the witness testified to facts that occurred prior to his employment at the company and involvement with the case].

It is not for the Court to guess what statements are of the declarant's personal knowledge or hearsay. Here, both declarants admit that the declarations are replete with hearsay; as such, they must be deemed inadmissible.

F. Solera's Additional Misleading Statements.

Finally, Solera asserts many mud-slinging arguments that have nothing to do with whether Aquila has a colorable claim. Rather, Solera raises these issues simply to deflect and misdirect this Court and to use it when pushing out its press statements. Despite that, none of these arguments prevent Aquila's right to a TRO.

1. Solera Misrepresents to this Court the Use of *Aquila's* Jet.

Solera represents that "Aquila used a private jet chartered by Solera." Solera's statements literally have nothing to do with Opposing the TRO. Despite this, the reason Solera's raised this is to distract this Court. Solera's tactic will not work because there are two reasons why such statement is not true.

First, Solera misrepresents that Aquila used Solera's jet for personal flying. What Solera fails to tell this Court is that the jet is *Aquila's* and not Solera's. Rather, Aquila agreed to enter into a "Charter Agreement" with Solera so that it could use *Aquila's* jet when he is not otherwise using it. In fact, the Charter Agreement is memorialized between Solera and Solarius (an independent Jet management company). (Supp. Hanson Aff., Exh. A.) In the Charter Agreement, it states Solera: (1) *may* use *Aquila's* jet for 504 hours a year, (2) has "priority" over others that may also charter it, and (3) is obligated to pay for the "greater of [Solera's] actual flight hours utilized for that billing month, **or** 42 hours..." (Supp. Hanson Aff., Exh. A (Emphasis added).) Solera does not contend it was refused

"priority" use of the jet or that Aquila breached the Charter Agreement. Rather, Solera simply tosses out that Aquila billed Solera for his use of his own jet. What Solera misleads this Court into thinking is that Aquila sent an invoice or received payment from Solera; *this is absolutely false.* Aquila never sent an invoice or received payment for these flights; Solera is not being truthful. (Affidavit of Lori K. McCutcheon ["McCutcheon Aff."] at ¶¶ 4-6.)

Solera's Charter Agreement says it has a 42 hour monthly minimum to obtain a "priority" status. If Solera does not use the 42 hours, it still must pay the 42 hours. That does not mean Aquila could not use *his own jet* for his personal needs. Stated another way, Aquila used his *own jet* for his own business and never billed or charged Solera. Solera is fabricating the narrative that when it paid its 42-hour *minimum*, that means Aquila got paid for personal use. But that is simply not true.

Second, at the time of the Separation Agreement, Aquila and Solera entered into a "Related Party Transactions Settlement Agreement" ("Related Party Agreement") – another fact Solera fails to tell this Court. (Cumings Aff., Exh. 13.) In the Related Party Agreement, it states "Solera entered into that certain Aircraft 'Dry' Lease Agreement….with AF Holdings, LLC a Texas limited liability company owned by Aquila...." It also says:

> On the Separation Date, the Aircraft Dry Lease Agreement shall be immediately and automatically terminated without further action of

> the Parties and of no further force or effect and, upon such termination, none of the parties hereto shall have ***any liability*** or obligations with respect to the Aircraft Dry Lease Agreement. Solera (on its own behalf) and Aquila (on behalf of AF Holdings) each acknowledge and agree that the Aircraft was ***never utilized*** under the Aircraft Dry Lease Agreement. (Emphasis added.)

This agreement eliminated "any" liability Solera falsely contends exists, and even more importantly, acknowledged that Solera opted not to "utilize" the jet. Stated another way, the minimum 42-hour payment(s) were not for the flights Aquila took because Solera admitted it "never" utilized the jet, and that payment was for its "right" to use the jet. Even more egregious is that Solera failed to tell this Court that in the same agreement, Solera had to pay Aquila $1,349,040 "representing payment for a hypothetical eighty-four (84) hours of Aircraft usage…." The reason Solera had to pay this "final payment" was because it still had a minimum even when it terminated the Charter Agreement.

In sum, Solera's statements about the jet are false and designed to distract the Court because they have no relevance to Aquila's TRO.

2. Solera's False Narrative that Solera was a Shell Entity.

Solera attempts to create a narrative that Aquila did not build Solera into the global firm that it is today. However, that representation is simply false. Fortunately, individuals that were actually present then have filed declarations in support of Aquila and to assist the Court. Specifically, the Honorable Roxani

Gillespie, ***past Insurance Commissioner for the State of California***, declared that she has known Aquila for years, served on the Solera Board, was present prior to the time of the ADP acquisition, and the company was not a "shell" but an active company. (Affidavit of Roxani Gillespie ["Gillespie Aff."] at ¶¶ 3-9.) In addition, John Schwinn declared that he was present prior to the acquisition of ADP and Solera had more than 30 employees, customers and millions in revenue. (Affidavit of John Schwinn ["Schwinn Aff."] at ¶¶ 4-6.) Moreover, the Solera website actually states: "We Started in a Garage" – despite the falsity of Solera's Opposition stating otherwise. (Supp. Hanson Aff., Exh. K.) The point being, Solera's representations – and Babin's declaration – are simply false.

3. Aquila is a "Great" Manager and Leader.

Solera misrepresents that Aquila's management style offended employees, resulting in significant personnel turnover, including in the executive ranks. However, neither Solera nor Breach identify *any* executives who left Solera for this reason, nor have they filed an Affidavit from anyone. The reason is because it is not true. Rather, Aquila submitted *numerous* Affidavits from former Solera employees attesting how they never heard or otherwise became aware of any executives or employees who left Solera due to Aquila's management style. To the contrary, they all highly respect Aquila and believe he is a "great manager and leader." Solera's smear campaign is inconsistent with countless accolades it and

Vista gave Aquila over the years. In fact, Vista requested Aquila be a "reference" for it when trying to purchase other companies. (Supp. Hanson Aff., Exh. F.)

The undisputed facts are that under Aquila's "great" management and leadership, he built Solera from its formation into a global firm worth billions of dollars. Moreover, if Solera really believed that Aquila was not a good leader, and was terminated for this reason, then why did Vista – its majority shareholder – request Aquila help Jeff Tarr, Solera' new CEO, in his transition? (Supp. Hanson Aff., Exhs. F and G.) Moreover, Solera's unsupported rhetoric is contradicted by its own Opposition; namely, Solera contends that Aquila was recruiting Solera's management and it was concerned they would all follow him. If that was true, then how could it be that Aquila was a bad CEO, but yet, the entire management team wanted to leave with him?

The truth is that Vista was disappointed when Aquila "resigned." This is why Breach asked him to "remain." ("We ***appreciate that you agreed to remain as CEO through the transition.***" (Supp. Aquila Aff. at ¶ 8 and Supp. Hanson Aff., Exh. C.) In addition, on April 26, 2019, Breach sent Aquila an outline of issues he wanted Aquila's help on. (Supp. Aquila Aff. at ¶ 10 and Supp. Hanson Aff., Exh. F.) Solera's rhetoric is nothing more than a post-resignation lawyer created argument to try and discredit Aquila with this Court and the public via the press.

4. Solera Breached the Separation Agreement.

Solera identifies five (5) alleged breaches of the Separation Agreement in order to avoid the requested injunction: (1) trespass and wrongful possession of the then-Solera-leased Jackson Office; (2) retention of an iPad and laptop computer; (3) refusal to Execute IP Assignments; (4) possession of Solera Information and IP; and (5) failure to execute a Certificate of Compliance. Ignoring for a moment its falsity, such arguments are not a defense to the TRO where Aquila has presented a colorable claim. Nevertheless, Aquila responds as follows:

(1) Alleged Trespass and Wrongful Possession of the Then-Solera-Leased Jackson Office: The Jackson Office is located on at 150 E. Broadway and was leased by Solera. (Supp. Aquila Aff. at ¶ 11.) Second, Aquila paid his personal staff to look over the Jackson Office. (Supp. Aquila Aff. at ¶ 11.) For security reasons, the digital codes were *regularly* changed as part of standard operating procedure. In the case of the changing of the digital codes Solera now complains of, those were changed as a matter of course, before Aquila resigned from Solera. (Supp. Aquila Aff. at ¶ 11.) Any notion that Aquila changed the codes to lock Solera out are false. Worse yet, Solera failed to disclose that it – as part of the Related Party Agreement – assigned the Jackson Office lease back to Aquila. (Cumings Aff., Exh. 13, Section 1).

(2) Alleged Retention of an iPad and Laptop Computer: All equipment was returned to Solera. Section 4 of the Separation Agreement does not prescribe a

deadline for the return of said items. It is undisputed that Aquila returned them sixteen (16) business days after executing the Separation Agreement. (Supp. Aquila Aff. at ¶¶ 14-15, Exh. I.)

(3) Refusal to Execute IP Assignments: Aquila did execute the IP Assignments and returned it on July 11, 2019, a fact which Solera's own Opposition and their Babin Affidavit concede occurred. See Solera Opp, pg. 22 and Babin Aff., ¶ 12. Moreover, Section 4.5 of the RC Agreement provides that after Aquila's employment, he agrees to execute any document deemed necessary or desirable by the Company in furtherance of perfecting, prosecuting, recording, maintaining, enforcing and protecting the Group's right, title and interest in and to, any of Solera's IP rights. There is no time frame imposed in this Section. The notion that Aquila breach this non-obligatory section when he executed the documents within 31 business days is frivolous.

(4) Alleged Possession of Solera Information and IP and Alleged Failure to Return Confidential or Proprietary Property: All equipment was returned to Solera. Aquila wiped Solera Information and IP from electronic devices. (Supp. Aquila Aff. at ¶¶ 13-14; Supp. Hanson Aff., Exh. I.) Unfortunately, Solera misrepresented to the Court the actual definition of Solera's confidential information in the RC Agreement.

Section 8 *changed* the definition of confidential or proprietary information originally contained in the RC Agreement:

> [T]he Employers acknowledge and agree that, for purposes of determining Executive'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. (Emphasis added).

In other words, if it was not specifically treated as or deemed to have been confidential or proprietary by Solera, it is no longer subject to the RC Agreement's obligations. This is dispositive of Solera's allegations because the property or information that was (he no longer has any such property since it was wiped or returned) Aquila's possession was ***never*** treated as or deemed confidential by Solera. (Supp. Aquila Aff. at ¶ 17.) In fact, Solera has not even stated that it took *any* acts to treat the information "confidential or proprietary." Rather, Solera just makes this allegation, but actually does not submit evidence to support it.

Notwithstanding the above, including Solera's failure to identify what it contends Aquila did not return, most problematic for Solera is the fact that Aquila did return the property. In fact, Aquila even provided Solera with an inventory of returned property and evidence that Aquila's "box.com" account was no longer

accessible to him. (See Supp. Aquila Aff., ¶¶ 14-16 and Supp. Hanson. Aff., Exhs. I and J.)

To demonstrate the falsity of Solera's contention, Aquila and Solera utilized a document sharing site known as "Box.com," and when Aquila attempted to delete the information, the site would not let him access it since the passwords were being sent to his old Solera email account that he no longer received. (Supp. Hanson Aff., Exh. J.) Solera's argument is without merit.

5. Aquila's Right to his Options Do Not Have Any Conditions.

Solera implies that the RC Agreement is a condition precedent to all payments referenced thereunder. However, only Section 2 of the RC Agreement has it as a condition precedent. The other sections just acknowledge the RC Agreement, but not that it is a condition precedent. Stated another way, Section 2 says a condition precedent to receiving those specific payments is based on compliance with the RC Agreement. However, the section concerning the Stock Options have no such conditions; if Solera wanted to make it a condition precedent, the Separation Agreement would have stated as much. The point being, Solera is trying to re-draft the Separation Agreement to avoid paying Aquila his Stock Options.

CONCLUSION

Aquila respectfully requests that this Court temporarily restrain Solera from improperly repurchasing Aquila's Vested Options until a hearing is had on Aquila's application for a preliminary injunction and the ultimate determination of this matter can occur.

Dated: September 16, 2019

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