IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BUZZFEED, INC., JONAH PERETTI, FELICIA DELLAFORTUNA, KATIE SITTER, and ADAM ROTHSTEIN,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2022-0357-MTZ
HANNAH ANDERSON, et al.	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: July 26, 2022
Date Decided: October 28, 2022

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ZURN, Vice Chancellor.

The defendants in this action were employees of the media and entertainment company known as Buzzfeed. Part of the defendants' compensation included stock options in their employer, a private company named BuzzFeed, Inc. ("Old Buzzfeed"). Last year, Old Buzzfeed engaged in a SPAC transaction in which Old Buzzfeed stock automatically converted into the equivalent class of stock in Buzzfeed's post-SPAC corporate form, plaintiff Buzzfeed, Inc. ("New Buzzfeed"). After the transaction closed, New Buzzfeed conducted an IPO, offering a different class of stock than the defendants held. The defendants contend they were unable to participate in the IPO because they could not timely convert their New Buzzfeed stock to tradeable shares. The defendants filed arbitration claims against New Buzzfeed, four of its officers and directors, and the IPO transfer agent, relying on an arbitration provision in their employment agreements with Old Buzzfeed.

New Buzzfeed and its officers and directors named in the arbitrations filed a complaint in this Court seeking (i) to enjoin those arbitrations; (ii) a declaration that the plaintiffs are not bound by the arbitration provisions in the defendants' employment agreements with Old Buzzfeed; and (iii) a declaration that the defendants, as New Buzzfeed stockholders, are instead bound by the forum selection clause in New Buzzfeed's charter. The plaintiffs have moved for summary judgment. In that motion they contend: (i) this Court has the authority to decide whether the plaintiffs' claims are arbitrable; (ii) the Court should decide that those

claims are not arbitrable and retain subject matter jurisdiction; and (iii) the Court should grant the plaintiffs the relief they seek. The defendants moved to dismiss the complaint, arguing this Court lacks subject matter jurisdiction over the plaintiffs' claims because they belong in arbitration. The defendants also argue this Court does not have personal jurisdiction over the nonresident defendants.

For the reasons explained below, I conclude this Court has both subject matter jurisdiction over the plaintiffs' claims and personal jurisdiction over the defendants in this action. The defendants' motion to dismiss is denied. From there, I conclude the plaintiffs are entitled to a declaration that they are not bound by the arbitration provision in the Old Buzzfeed employment agreements, and to an anti-arbitration injunction. But the plaintiffs' request for a declaration that the defendants must bring their claims against the plaintiffs in this Court, as stockholders bound by the forum selection clause in New Buzzfeed's charter, seeks an improper advisory opinion. The plaintiffs' motion for summary judgment is granted in part and denied in part. The parties shall bear their own costs.

I. BACKGROUND[1]

New Buzzfeed is a publicly traded digital media, news, and entertainment company incorporated in Delaware with a principal place of business in New York,

[1] For purposes of the pending motions, I draw the following facts from the Verified Complaint for Declaratory and Injunctive Relief, available at Docket Item ("D.I.") 1 [hereinafter "Compl."], as well as the documents attached to, and integral to it, admissions

New York.[2] New Buzzfeed was previously known as 890 5th Avenue Partners, Inc. ("890"), a Delaware publicly traded special purpose acquisition company that acquired Old Buzzfeed via a reverse merger that closed on December 3, 2021 (the "Combination").[3] Plaintiff Adam Rothstein was an 890 director and its Executive Chairman.[4] Plaintiffs Jonah Peretti, Felicia DellaFortuna, and Katie Sitter were Old Buzzfeed executives and became New Buzzfeed executives (together with New Buzzfeed and Rothstein, "Plaintiffs").[5] Rothstein and Peretti are also New Buzzfeed directors.[6]

The ninety-one defendants (each a "Defendant") are New Buzzfeed stockholders and were Old Buzzfeed employees.[7] Two Defendants are current

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on file, together with any affidavits, and public filings. *See, e.g.*, *Himawan v. Cephalon, Inc.*, 2018 WL 6822708, at *2 (Del. Ch. Dec. 28, 2018); *In re Gardner Denver, Inc. S'holders Litig.*, 2014 WL 715705, at *2 (Del. Ch. Feb. 21, 2014); *In re Rural Metro Corp. S'holders Litig.*, 2013 WL 6634009, at *7 (Del. Ch. Dec. 17, 2013) ("Applying [Delaware] Rule [of Evidence] 201, Delaware courts have taken judicial notice of publicly available documents that 'are required by law to be filed, and are actually filed, with federal or state officials.'" (quoting *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007))); Ct. Ch. R. 56(c).

[2] Compl. ¶ 10.

[3] *Id.*

[4] *Id.* ¶ 14; Compl. Ex. 7, 890 5th Avenue Partners, Inc., Registration Statement (Form S-4) (Nov. 9, 2021), at Cover Page [hereinafter "Registration Statement"].

[5] Compl. ¶¶ 11–13.

[6] D.I. 49, Affidavit of Adam Rothstein in Support of Plaintiffs' Motion for Summary Judgment, ¶ 2 [hereinafter "Rothstein Aff."]; BuzzFeed, Inc., Annual Report (Form 10-K) (Mar. 30, 2022), at 21, 101.

[7] Compl. ¶ 15. The Defendants are Hannah Anderson, Adam Rosenberg, Andrea Hickey, Andy Kraut, Annie Goodman, Aubree Lennon, Ben Mathis-Lilley, Dan Borrelli, Dane

employees of a New Buzzfeed wholly owned subsidiary, BuzzFeed Media Enterprises, Inc. ("Operating Co.").[8]

A. The Parties' Ties To Old Buzzfeed

Old Buzzfeed was a privately owned digital media, news, and entertainment company incorporated in Delaware.[9] Peretti, DellaFortuna, and Sitter were Old Buzzfeed's Chief Executive Officer, Chief Financial Officer, and Chief People Officer, respectively.[10] Peretti was also an Old Buzzfeed founder and director.[11]

Bjorklund, David Spiegel, Emily Levin, Francis Thai, Jason Sweeten, Jenna Porcelli, Jennifer Starr, John Chan, John Urquhart, Josh Fjelstad, Josh Smith, Keith Hernandez, Kenley Bradstreet Busteed, Leah Doctor, Leigh Riemer, Leonora Epstein, Matt Trotta, Megan Chopay, Michelle Broder Van Dyke, Omri Rolan, Ori Barnik, Sam Stryker, Scott Lamb, Sean Burpee, Tanner Greenring, Gabriela Martinez, Liz Una Kim, Tessa Gould, Jeff Smith, Ze Frank, Erica Bromberg, Claudia Lewis, Michelle Kempner, Rebecca Scott, Jina Moore, Rosalie Abrahams-Gray, Vincent Pezzutti, Andrew Kaczynski, Ashley Baccam, Rachel Brandt Greenberg, Ryan Broderick, Patrick Chambers, McKay Alden Coppins, Regis Courtemanche, Ruby Cramer, Isa Nicole D'Aniello, Kirk James Damato, Kathryn Driscoll, Joseph Lester Feder, Julia Furlan, Christopher R. Geidner, Julie Gerstein, Michael Giglio, Hannah Giorgis, Jason E. Gordon, Alan Haburchak, Mary Heaney, Catherine Holderness, Steve Kandell, Alexis Nedd, Matthew Ortile, George Papajohn, Arianna Rebolini, Jeffrey Revesz, Driadonna Roland, Benjamin Running, Rachel Sanders, Beatriz Xochitl Scobie, Hamza Shaban, Mark Shuster, Katrina Ann Oestreich Sosa, Jessica Testa, Lisa Tozzi, Matthew Charles Tucker, Eugene Ventimiglia, Lucy X. Wang, Alison Willmore, Raymond Wong, Doree Shafrir, Stephanie Henry, Lauren Guskin, David Voukydis, and Ilan Ben-Meir.

[8] *Id.* ¶¶ 2, 15.

[9] *Id.* ¶¶ 2, 19, 21.

[10] *Id.* ¶¶ 11–13.

[11] *Id.* ¶ 11.

Each Defendant signed an offer letter employment agreement with Old Buzzfeed (each an "Employment Agreement").[12] The Employment Agreements governed Defendants' employment relationship with Old Buzzfeed, including their compensation.[13] Plaintiffs are not parties to the Employment Agreements.[14] Each Employment Agreement contains a materially similar arbitration provision requiring certain enumerated claims or disputes "arising from or relating to" the employees' Old Buzzfeed employment to be arbitrated by the American Arbitration Association (the "AAA") in "New York, NY, or, at [the employee's] option, the county in which [the employee] primarily worked with [Old Buzzfeed] at the time when the arbitrable

[12] *Id.* ¶ 4; Compl. Ex. 2 at ¶ 43 [hereinafter "Galbraith Arb. Pet."]; Compl. Ex. 3 at ¶ 12 [hereinafter "Harris Arb. Pet."]; Galbraith Arb. at Ex. B at 1 [hereinafter "Employment Agr."] (defining "Company" as Old Buzzfeed); D.I. 44, Affidavit of Rhonda Powell in Support of Plaintiffs' Motion for Summary Judgment (attaching "[t]he 81 available Employment Agreements"). The parties do not dispute that the relevant provisions of Defendants' Employment Agreements are "substantially similar" for the purposes of this matter. *See* D.I. 50 at 3 n.1 [hereinafter "MTD OB"] ("Plaintiffs do not deny, however, that each Defendant is party to a substantially similar arbitration provision."); Compl. ¶ 32 (quoting a single provision of one employment agreement and attributing it to multiple Employment Agreements in the record); D.I. 52 at 13 n.4 [hereinafter "MTD AB"] (noting defendants Haburchak, Martinez, and Papajohn's Employment Agreements "contain arbitration clause with slightly different language").

[13] *See generally* Employment Agr.

[14] Compl. ¶¶ 10–14; D.I. 46, Affidavit of Jonah Peretti in Support of Plaintiffs' Motion for Summary Judgment, ¶¶ 4–6 [hereinafter "Peretti Aff."]; D.I. 47, Affidavit of Felicia DellaFortuna in Support of Plaintiffs' Motion for Summary Judgment, ¶¶ 4–6 [hereinafter "DellaFortuna Aff."]; D.I. 48, Unsworn Declaration of Katie Sitter Pursuant to 10 *Del. C.* §§ 5351 *et seq*. in Support of Plaintiffs' Motion for Summary Judgment, at ¶¶ 5–7 [hereinafter, "Sitter Decl."]; Rothstein Aff. ¶ 4.

dispute or claim first arose" (the "Arbitration Provision").[15] The Arbitration Provision applies to "any and all claims or disputes arising out of [the Employment Agreement] and any and all claims arising from or relating to [the employee's] employment with [Old Buzzfeed]," with some exceptions.[16]

Old Buzzfeed issued three classes of stock: (i) Class A Common Stock; (ii) Class B Common Stock; and (iii) preferred stock.[17] Old Buzzfeed granted Defendants options to purchase Class A or Class B Common Stock in connection with their Old Buzzfeed employment.[18] The options were primarily granted under and subject to Old Buzzfeed's "2008 Stock Option Plan."[19] Defendants held Old Buzzfeed Class B Common Stock before the Combination.[20]

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[15] Employment Agr. § 10.

[16] Employment Agr. § 10.

[17] Compl. Ex. 6, 890 5th Avenue Partners, Inc., Current Report (Form 8-K) (June 24, 2021), at 1 [hereinafter "June 24, 2021 890 Form 8-K"].

[18] Employment Agr. § 4; Compl. ¶ 20.

[19] Employment Agr. § 4. Two Defendants acquired additional Old Buzzfeed Class B options pursuant to individual stock option agreements entered into under Old Buzzfeed's "2015 Equity Incentive Plan." D.I. 53, Transmittal Affidavit of Kevin P. Rickert in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss the Verified Complaint [hereinafter "Rickert Aff."], at Ex. 1.1; *id.* at Ex. 1.2; D.I. 55 at 18–19 [hereinafter "MSJ AB"]; D.I. 44, Affidavit of Rhonda Powell in Support of Plaintiffs' Motion for Summary Judgment, at Ex. 2.2; *id.* at 2.28.

[20] Compl. ¶¶ 2, 6, 34, 40.

B. Old Buzzfeed Combines With 890

On June 24, 2021, 890 and Old Buzzfeed issued a joint press release announcing an Agreement and Plan of Merger by and among Old Buzzfeed; 890; Bolt Merger Sub I, Inc., a Delaware corporation and a direct, wholly owned subsidiary of 890 ("Merger Sub I"); and Bolt Merger Sub II, Inc., a Delaware corporation and a direct, wholly owned subsidiary of 890 ("Merger Sub II") (the "Merger Agreement").[21]

Under the terms of the Merger Agreement, Merger Sub I first would merge with and into Old Buzzfeed, with Old Buzzfeed surviving and continuing as a wholly owned subsidiary of 890 (the "First Merger").[22] Immediately following the First Merger, Old Buzzfeed would merge with and into Merger Sub II, with Merger Sub II emerging as the surviving company and wholly owned subsidiary of 890 (the "Second Merger" and together with the First Merger, the "Two-Step Merger").[23] After the Second Merger, Merger Sub II was renamed as the entity this opinion refers to as Operating Co.[24] Operating Co. would assume all of Old Buzzfeed's

[21] *Id.* ¶ 22; June 24, 2021 890 Form 8-K at Item 1.01 (discussing the "Agreement and Plan of Merger"); Compl. Ex. 4 [hereinafter "Merger Agr."]. On October 28, 2021, the Merger Agreement was amended in a manner not relevant here. *See* Compl. at n.1; Compl. Ex. 5, Amendment No. 1 to Agreement and Plan of Merger.

[22] Compl. ¶ 23; Merger Agr. at Recitals.

[23] Compl. ¶ 23; Merger Agr. at Recitals.

[24] Compl. ¶¶ 2, 23.

liabilities.[25] This opinion refers to the Two-Step Merger and the other transactions contemplated by the Merger Agreement as the "Combination."[26]

In accordance with the Merger Agreement's terms and subject to its conditions, most shares of Old Buzzfeed Class B common stock ("Old Buzzfeed Class B Shares") would be cancelled, and automatically converted into the right to receive a prorated number of New Buzzfeed Class B common stock ("New Buzzfeed Class B Shares") as provided by a negotiated formula.[27]

On November 9, 2021, 890 filed its fifth amended registration statement (the "Registration Statement").[28] The Registration Statement authorized issuance of 15,825,411 890 Class B shares and stated that upon the Combination closing, Old Buzzfeed Class B Shares would be cancelled and converted into the right to receive a calculable number of New Buzzfeed Class B Shares.[29] The Registration Statement stated that New Buzzfeed Class A common stock ("New Buzzfeed Class A Shares")

[25] Merger Agr. § 2.3(b).

[26] Compl. ¶ 23; June 24, 2021 890 Form 8-K at 1.

[27] Compl. ¶ 24; June 24, 2021 890 Form 8-K at 1. This did not include "[Old Buzzfeed] Restricted Stock Awards, Excluded Shares and Dissenting Shares." *Id.*

[28] Compl. ¶ 27; Registration Statement.

[29] Compl. ¶ 27. *See generally* Registration Statement.

and public warrants would be publicly traded.[30] On November 10, the SEC declared 890's Registration Statement effective.[31]

On December 3, the Combination closed (the "Closing"), 890 was renamed as the entity this opinion refers to as New Buzzfeed, and its certificate of incorporation (the "New Buzzfeed Charter") took effect.[32] Article X of the New Buzzfeed Charter (the "New Buzzfeed FSC") provides that this Court

[30] Compl. ¶ 27; Registration Statement (sharing letter from Rothstein to stockholders before the table of contents).

[31] Compl. ¶ 27; Compl. Ex. 8, 890 5th Avenue Partners, Inc., Notice of Effectiveness (SEC Order) (Nov. 10, 2021).

[32] Compl. ¶¶ 23, 28.

> shall, to the fullest extent permitted by law, be the sole and exclusive forum for: . . . (b) any action or proceeding asserting a claim for breach of a fiduciary duty owed by any current or former director, officer, stockholder, employee or agent of [New Buzzfeed] to [New Buzzfeed] or [New Buzzfeed's] stockholders or any claim for aiding and abetting such alleged breach; (c) any action or proceeding asserting a claim against [New Buzzfeed] or any current or former director, officer, stockholder, employee or agent of [New Buzzfeed] arising pursuant to any provision of the General Corporation Law, this Restated Certificate or the Bylaws . . . or as to which the General Corporation Law confers jurisdiction on the Court of Chancery of the State of Delaware; (d) any action or proceeding to interpret, apply, enforce or determine the validity of this Restated Certificate or the Bylaws . . .; or (e) any action or proceeding asserting a claim against [New Buzzfeed] or any current or former director, officer, stockholder, employee or agent of [New Buzzfeed] governed by the internal affairs doctrine.[33]

Upon the Closing, holders of Old Buzzfeed Class B Shares were granted the right to automatically receive New Buzzfeed Class B Shares.[34]

C. Defendants Cannot Convert Their New Buzzfeed Class B Shares Into Publicly Tradable New Buzzfeed Class A Shares And Cannot Participate In New Buzzfeed's Post-Closing IPO.

On December 6, New Buzzfeed's Class A Shares were listed and traded on Nasdaq under the ticker symbol "BZFD" in an initial public offering.[35] New Buzzfeed Class B Shares were not listed or eligible to trade.[36] Continental Stock

[33] Compl. Ex. 1 at art. X [hereinafter "New Buzzfeed Charter"].

[34] Compl. ¶¶ 24, 28; Compl. Ex. 9, BuzzFeed, Inc., Current Report (Form 8-K) (Dec. 9, 2021).

[35] Compl. ¶¶ 3, 29.

[36] Compl. ¶ 3.

Transfer Corporation d/b/a Continental Transfer & Trust Company served as the transfer agent for New Buzzfeed and 890 in connection with the IPO.[37]

According to Defendants, for a variety of reasons not immediately relevant to the current action before me, they were unable to convert their New Buzzfeed Class B Shares into New Buzzfeed Class A Shares in time to profitably participate in the IPO, or in some cases, to trade at all.[38] Defendants contend they were damaged because they were unable to trade their New Buzzfeed holdings before New Buzzfeed stock dropped from the high opening prices it reached in the first hours of trading.[39]

D. Defendants File Mass Arbitrations.

On March 15, 2022, Defendants filed two mass arbitrations against Plaintiffs and Continental (the "Arbitrations").[40] Defendants filed the Arbitrations with the AAA pursuant to the Employment Agreements' arbitration provision, the AAA's Employment Arbitration Rules, and the Supplementary Rules for Multiple Case

[37] D.I. 54, Affidavit of Rhonda Powell in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss, ¶¶ 3–4.

[38] Compl. ¶¶ 7, 41, 43.

[39] *Id.* ¶ 43.

[40] *Id.* ¶¶ 1, 30; The first arbitration was brought by the Galbraith Law Firm and O'Brien LLP. *Id.* ¶ 30; Galbraith Arb. Pet. The second arbitration was brought by the law firm Harris St. Laurent & Wechsler LLP. Compl. ¶ 30; Harris Arb. Pet. The Arbitrations were later supplemented to include additional claimants. Rickert Aff. Ex. 20.1 at 1; Rickert Aff. Ex. 20.2 at 1.

Filings.[41] Each Defendant in this action is an arbitration claimant in one of the two Arbitrations.[42] Neither Old Buzzfeed nor Operating Co. is a party to the Arbitrations.

Defendants allege they received inadequate or inaccurate information about how to convert their New Buzzfeed Class B Shares to New Buzzfeed Class A Shares they could trade once New Buzzfeed commenced its IPO.[43] The Arbitrations allege negligence by New Buzzfeed, Peretti, and Continental; misrepresentation by New Buzzfeed; breaches of fiduciary duty by Peretti, DellaFortuna, and Sitter; aiding and abetting those breaches of fiduciary duty by Continental; and violation of Section 11(a) of the Securities Act by Rothstein (together, the "Arbitration Claims").[44]

On March 22, the AAA wrote to New Buzzfeed requesting New Buzzfeed pay its share of the Arbitrations' filing fees ($300 per claimant) by April 5.[45] On March 31, New Buzzfeed wrote to the AAA requesting that the filing fees be reallocated based on "[t]he arbitration agreements that the Claimants allege apply here," which require the claimants to split the fees equally.[46] New Buzzfeed

[41] Galbraith Arb. Pet. ¶ 43; *see* Harris Arb. Pet. ¶ 12.

[42] Compl. ¶ 30.

[43] *See generally* Galbraith Arb. Pet.; Harris Arb. Pet.

[44] Galbraith Arb. Pet. ¶¶ 102–44; Harris Arb. Pet. ¶¶ 73–115.

[45] Rickert Aff. Ex. 17.

[46] Rickert Aff. Ex. 18.1 at 1; Rickert Aff. Ex. 18.2 at 1.

reserved its rights to "make any further procedural or jurisdictional objections."[47] On April 6, the AAA denied New Buzzfeed's request.[48] New Buzzfeed timely paid its portion of the Arbitrations' fees while continuing to reserve its rights to contest jurisdiction, and did not otherwise participate in the Arbitrations.[49] On April 13, the AAA indicated that the Arbitrations' respondents must respond to the claimants' petitions by May 27.[50] On April 22, Plaintiffs requested the AAA stay the Arbitrations under Rule 1(f) of the AAA's Supplemental Rules for Multiple Case Filings because Plaintiffs here had sought "judicial intervention" with respect to the Arbitrations.[51] Later that day, the AAA stayed the Arbitrations.[52]

E. Litigation Ensues.

The same day, Plaintiffs filed their Verified Complaint for Declaratory and Injunctive Relief.[53] Plaintiffs seek (a) an injunction against the Arbitrations; and (b) declarations that (i) Plaintiffs are not bound by the Arbitration Provisions, and (ii) Defendants, as New Buzzfeed stockholders, must instead bring their claims in

[47] Rickert Aff. Ex. 18.1 at 2; Rickert Aff. Ex. 18.2 at 2.

[48] Rickert Aff. Ex. 19 at 1–2.

[49] D.I. 63 at 87 [hereinafter "Hr'g Tr."]; Rickert Aff. Ex. 19 at 1; Rickert Aff. Ex. 20.1 at 2; Rickert Aff. Ex. 20.2 at 2.

[50] Rickert Aff. Ex. 21.1 at 1; Rickert Aff. Ex. 21.2 at 1.

[51] Rickert Aff. Ex. 22.1 at 1; Rickert Aff. Ex. 22.2 at 1.

[52] MTD OB Ex. 6 at 4.

[53] Compl.

this Court under the New Buzzfeed FSC. Plaintiffs also moved for a preliminary injunction and expedited proceedings.[54] On May 31, Plaintiffs filed a Motion for Summary Judgment and Defendants filed a Motion to Dismiss under Rules 12(b)(1) and 12(b)(2) (together, the "Motions").[55] The parties briefed the Motions and I heard argument on July 26.[56]

II. ANALYSIS

This opinion concludes that this Court has subject matter jurisdiction over Plaintiffs' claims and personal jurisdiction over Defendants. It then concludes that Plaintiffs are not bound by the Arbitration Provision and Plaintiffs are entitled to the injunctive relief they seek. I decline to weigh in on whether Defendants' claims are governed by the New Buzzfeed FSC, because to do so would be advisory.

A. The Court Of Chancery Has Subject Matter Jurisdiction Over Plaintiffs' Claims.

Plaintiffs' claims ask this Court to conclude the Arbitration Claims are not arbitrable. Defendants assert this Court lacks subject matter jurisdiction over Plaintiffs' claims because the Employment Agreements require an arbitrator to decide if Plaintiffs' claims are arbitrable.

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[54] D.I. 2; D.I. 3.

[55] D.I. 34; D.I. 35.

[56] D.I. 43 [hereinafter "MSJ OB"]; MTD OB; MTD AB; MSJ AB; D.I. 59 [hereinafter "MSJ RB"]; D.I. 60 [hereinafter "MTD RB"]; D.I. 62.

The standard for a motion to dismiss for lack of subject matter jurisdiction is well-settled. Plaintiffs bear the burden of establishing subject matter jurisdiction.[57] The Court of Chancery has subject matter jurisdiction to "interpret, apply, enforce or determine the validity of the provisions" of a corporation's charter.[58] But "Delaware courts lack subject matter jurisdiction to resolve disputes that litigants have contractually agreed to arbitrate."[59] "There is a strong public policy in favor of arbitration in Delaware; thus, a motion to dismiss for lack of subject matter jurisdiction will be granted if the dispute is one that, on its face, falls within the arbitration clause of the contract."[60] "An arbitration clause 'is, in effect, a specialized kind of forum-selection clause.'"[61]

The parties' dispute is governed by a decision tree with deep roots in the common law. The decision tree guides who decides if the claim is arbitrable (i.e., substantive arbitrability) and, if the Court decides, the claim's arbitrability. The decision tree has three forks. Delaware courts first look to see if there are one or

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[57] *Burkhart v. Genworth Fin., Inc.*, 250 A.3d 842, 851 (Del. Ch. 2020) (citing *Acierno v. New Castle Cty.*, 2006 WL 1668370, at *3 (Del. Ch. June 8, 2006)).

[58] 8 *Del. C.* § 111(a)(1).

[59] *HBMA Hldgs., LLC v. LSF9 Stardust Hldgs. LLC*, 2017 WL 6209594, at *3 (Del. Ch. Dec. 8, 2017) (citing *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 429–30 (Del. Ch. 2007)).

[60] *Id.* (internal quotation marks omitted) (quoting *SBC Inter., Inc. v. Corp. Media P'rs*, 714 A.2d 758, 761 (Del. 1998)).

[61] *Nat'l Indus. Grp. (Hldg.) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 384 (Del. 2013) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

more potentially relevant dispute resolution provisions; if there are, the Court may retain the decision over substantive arbitrability.[62] Here, I consider if the Employment Agreements' Arbitration Provision clashes with the New Buzzfeed FSC, in which case the Court would be charged with determining substantive arbitrability. As I will explain, there is no relevant clash.

If a single operative provision indicates an intent to arbitrate, "[t]he court presumes that parties intended courts to decide issues of substantive arbitrability."[63] "Delaware courts follow the 'general rule, announced by the United States Supreme Court . . . that courts should decide' the issue of substantive arbitrability."[64] But under the familiar *Willie Gary* test, if the relevant agreement presents "clear and unmistakable evidence" that the parties intended to delegate issues of substantive arbitrability to an arbitrator,[65] "a court possesses no power to decide the arbitrability issue."[66] I conclude Plaintiffs are not bound by the Employment Agreements, so those agreements cannot serve as evidence of Plaintiffs' intent to arbitrate.

The third step for a court charged with determining substantive arbitrability would be to decide whether the operative "arbitration clause is broad or narrow in

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[62] *AffiniPay, LLC v. West*, 2021 WL 4262225, at *5 (Del. Ch. Sept. 17, 2021).

[63] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006).

[64] *AffiniPay*, 2021 WL 4262225, at *4 (citing *Willie Gary*, 906 A.2d at 78).

[65] *Willie Gary*, 906 A.2d at 78–79.

[66] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

scope," and then "apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration."[67] I do not reach this final step because Plaintiffs are not bound by the Employment Agreements.

This Court—not an arbitrator—has subject matter jurisdiction over Plaintiffs' claims.

1. The Employment Agreements' Arbitration Provision Does Not Conflict With The New Buzzfeed Charter's Forum Selection Clause.

In the first of those three steps, Plaintiffs argue the Court must decide substantive arbitrability because the Arbitration Provision and the New Buzzfeed FSC present "multiple agreements providing for dispute resolution . . . . and those contracts diverge on the matter of arbitral dispute resolution."[68] Defendants assert those two provisions do not conflict, and so the Court should proceed to step two and perform the *Willie Gary* test.[69]

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[67] *Parfi Hldg. AB v. Mirror Image Internet*, 817 A.2d 149, 155 (Del. 2002).

[68] MTD AB at 33 (internal quotation marks omitted) (quoting *AffiniPay*, 2021 WL 4262225, at *5); MSJ OB at 37–38; MSJ RB at 7; Hr'g Tr. 60, 70, 79.

[69] MSJ AB at 15–26; MTD RB at 13–14.

When a claim is caught between an arbitration provision and another forum selection provision, that claim's substantive arbitrability may be for the Court to decide.[70]

> This court has cautioned that the *Willie Gary* framework should not be applied "reflexively in the multiple-contract scenario." Rather, if various contracts are implicated in a claim and those contracts diverge on the matter of arbitral dispute resolution, *Willie Gary*'s requirement that a provision mandate the arbitration of "all disputes" is impossible to satisfy.[71]

When conflicting arbitration provisions muddy the parties' intentions regarding substantive arbitrability, it cannot be said that the parties intended to submit the question of substantive arbitrability to the arbitrator.[72] In that circumstance, Delaware law entrusts substantive arbitrability to the courts.[73]

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[70] *AffiniPay*, 2021 WL 4262225, at *4–6.

[71] *Id.* at *5 (emphasis omitted) (quoting *UPM-Kymmene Corp. v. Renmatix, Inc.*, 2017 WL 4461130, at *6 (Del. Ch. Oct. 6, 2017), and citing *TowerHill Wealth Mgmt, LLC v. Bander Fam. P'ship*, 2008 WL 4615865, at *3 (Del. Ch. Oct. 9, 2008)).

[72] *UPM-Kymmene Corp.*, 2017 WL 4461130, at *7 ("In the face of such dueling arbitration clauses, I cannot discern an intention, much less a clear and unmistakable intention, that the parties wished to have one arbitrator rather than the other determine where the claims asserted in the Demand should be arbitrated. Accordingly, it falls to the Court to decide that issue.").

[73] *AffiniPay*, 2021 WL 4262225, at *5 (recognizing "when the court is faced with multiple agreements" providing for conflicting dispute resolution procedures, it "falls to the court to determine substantive arbitrability . . . even where the dispute resolution provisions reserve questions of arbitrability for the arbitrator" (citing *UPM-Kymmene Corp.*, 2017 WL 4461130, at *3); *see also TowerHill*, 2008 WL 4615865, at *3 ("[W]here there are various dispute resolution clauses in play in various contracts, it is impossible to select one and say it applies generally to all disputes.").

This case does not present multiple contracts "contain[ing] a dispute resolution provision empowering a different arbitrator to determine arbitrability."[74] Among the agreements in play here, only the Employment Agreements have an arbitration provision.[75] The Employment Agreements' Arbitration Provision does not conflict with any other dispute resolution provisions in play on the question of whether substantive arbitrability should be submitted to an arbitrator. (To the extent there is any clash at all between the Arbitration Provision and the New Buzzfeed Charter, it pertains to substantive arbitrability, not the higher-level question of who decides substantive arbitrability.) Absent a conflict about who decides substantive arbitrability, this Court cannot bypass an analysis of the parties' intent to keep the decisionmaking power for itself.

So, I turn to the second step, and consider whether the Employment Agreements alone provide evidence of the litigating parties' clear and unmistakable intent to delegate the question of substantive arbitrability to an arbitrator.

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[74] *AffiniPay*, 2021 WL 4262225, at *6.

[75] *Compare* Employment Agr. § 10 (providing for arbitration), *with* New Buzzfeed Charter at art. X (providing for litigation in the courts of the State of Delaware), *and* D.I. 43, Transmittal Affidavit of Elena C. Norman in Support of Plaintiffs' Opening Brief in Support of Plaintiffs' Motion for Summary Judgment, at Ex. 1.1 at 40 ("For purposes of litigating any dispute that may arise directly or indirectly from this [Old Buzzfeed 2015 Equity Incentive Stock Plan], the parties hereby submit and consent to the exclusive jurisdiction of the State of New York and agree that any such litigation shall be conducted only in the courts of New York or the federal courts of the United States located in New York an no other courts."), *and id.* at Ex. 1.2 at 40 (same).

2. Defendants Failed To Demonstrate Evidence Of The Parties' Clear And Unmistakable Intent To Arbitrate Issues Of Substantive Arbitrability.

In *James & Jackson, LLC v. Willie Gary, LLC*, the Delaware Supreme Court repeated "[t]he general rule, announced by the United States Supreme Court and followed by this Court, [] that courts should decide questions of substantive arbitrability" unless there is "'clear and unmistakable evidence' that the parties intended otherwise."[76] Defendants argue the Arbitration Provision provides the necessary evidence of intent to delegate the substantive arbitrability of Plaintiffs' claims to an arbitrator.[77] Plaintiffs assert the Arbitration Provision cannot demonstrate their intent to do so because they are not parties to the Employment Agreements.[78]

"It is not unusual for courts to require arbitration of claims involving parties who were not formally parties to an arbitration agreement, a situation that especially arises when affiliates of signatories are subject to or make claims."[79] "A non-

[76] 906 A.2d at 78. Delaware courts have found such clear and unmistakable evidence where "the arbitration clause [(1)] generally provides for arbitration of all disputes and also [(2)] incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." *Id.* at 80.

[77] *E.g.*, MTD OB at 22–28; MSJ AB at 4–14; MTD RB at 6–16; Hr'g Tr. 11, 26.

[78] *E.g.*, MSJ OB at 35–41; MTD AB at 4, 31–39; MSJ RB at 3–6, 15–17; Hr'g Tr. 63–70.

[79] *McLaughlin v. McCann*, 942 A.2d 616, 627 (Del. Ch. 2008) (citing *Thomson–CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995), and 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)).

signatory to a contract cannot be bound by an arbitration clause unless 'traditional principles of contract and agency law' equitably confer upon that party signatory status with regard to the underlying agreement."[80] Courts have "recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel."[81]

Defendants argue Plaintiffs are bound by the Arbitration Provision under the last three theories. I conclude Plaintiffs are not bound agents of a signatory, the alter ego of a signatory, or estopped.[82] The Employment Agreements cannot evince their intent to delegate substantive arbitrability to an arbitrator.

i. Peretti, DellaFortuna, And Sitter Are Not Bound By The Employment Agreements As Agents Of Old Buzzfeed.

Plaintiffs Peretti, DellaFortuna, and Sitter are not parties to the Employment Agreements.[83] Old Buzzfeed is. Defendants assert Peretti, DellaFortuna, and Sitter

[80] *NAMA Hldgs.*, 922 A.2d at 430 (*quoting E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001)).

[81] *Thomson-CSF*, 64 F.3d at 776.

[82] *Cf. GNH Grp., Inc. v. Guggenheim Hldgs., L.L.C.*, 2020 WL 4287358, at *5 (D. Del. July 27, 2020) ("The Court, guided by federal caselaw, cannot conclude that there is clear and unmistakable evidence that these parties (Plaintiff on the one hand, and the Non-Signatory Defendants on the other hand) agreed that an arbitrator should decide arbitrability with respect to Plaintiff's claims against them. How could there be such evidence when Plaintiff and the Non-Signatory Defendants have not signed an agreement with each other containing an arbitration provision with respect to any such claims?" (collecting cases)).

[83] *Supra* note 14.

are bound by the Employment Agreements as agents of Old Buzzfeed. Peretti, DellaFortuna, and Sitter were Old Buzzfeed's Chief Executive Officer, Chief Financial Officer, and Chief People Officer, respectively.[84] Peretti also served as an Old Buzzfeed director.[85]

As a foundational principle, "Delaware law clearly holds that officers of a corporation are not liable on corporate contracts as long as they do not purport to bind themselves individually."[86] Here, there is no evidence that Peretti, DellaFortuna, and Sitter, as Old Buzzfeed officers or directors, purported to bind themselves individually to the Employment Agreements.[87] Still, "[t]raditional principles of agency law may bind a non-signatory to an arbitration agreement" in circumstances that evidence the agent's intention to be bound.[88] These are not those circumstances.

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[84] Compl. ¶¶ 11–13.

[85] *Id.* ¶ 11.

[86] *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008) (internal quotation marks omitted) (quoting *Amaysing Tech. Corp. v. CyberAir Commc'ns, Inc.*, 2005 WL 578972, at *3 (Del. Ch. Mar. 3, 2005)); *accord Brown v. Colonial Chevrolet Co.*, 249 A.2d 439, 441 (Del. Super. 1968) ("As a general rule, so far as personal liability on corporate contracts is concerned, officers of corporations are in the same position as agents of private individuals and are not liable on corporate contracts as long as they do not act and purport to bind themselves individually." (citing 19 AM. JUR. 2D, *Corporations* § 1341 (1965)).

[87] Peretti Aff. ¶¶ 5–6; DellaFortuna Aff. ¶¶ 5–6; Sitter Decl. ¶¶ 6–7.

[88] *DuPont*, 269 F.3d at 198 (citing *Thomson–CSF*, 64 F.3d at 776).

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[89] In considering whether nonsignatory agents have consented to arbitrate, courts have distinguished cases that "involved nonsignatory agents who sought to *invoke* an arbitration agreement entered into by their corporate principal" from cases that "involved nonsignatory agents who sought to *avoid* their principal's agreement to arbitrate."[90] This distinction is significant: the latter situation threatens to compel a nonsignatory to arbitrate when they have not evidenced any intent to do so.[91] When a nonsignatory agent of a signatory principal seeks to compel a signatory counterparty to arbitrate,

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[89] *Homsey Architects, Inc. v. Nine Ninety Nine, LLC*, 2010 WL 2476298, at *6 (Del. Ch. June 14, 2010) (internal quotation marks omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

[90] *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 224 (3d Cir. 2007) (contrasting *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993), and *Letizia v. Prudential Bache Sec.*, 802 F.2d 1185 (9th Cir. 1986), with *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999)); *cf. Aviation W. Charters, LLC v. Freer*, 2015 WL 5138285, at *4–5 (Del. Super. July 2, 2015) ("Delaware courts have held that a forum selection clause applies to non-signatory officers and directors who are 'closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound.' . . . Plaintiff contends that the same test may be used when a signatory is attempting to enforce a forum selection clause against a non-signatory. However, the Court does not agree." (emphasis omitted) (quoting *ASDC Hldgs., LLC v. The Richard Malouf 2008 All Smiles Grantor Retained Annuity Tr.*, 2011 WL 4552508 at *7 (Del. Ch. Sept. 14, 2011))). Delaware courts routinely look to the federal courts' jurisprudence on arbitration. *See, e.g., Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *18 (Del. Ch. Apr. 8, 2011) (relying on federal precedent to determine that the issue of plaintiffs' standing was a question for the arbitrator).

[91] *Tracinda*, 502 F.3d at 224–25 (citing *DuPont*, 269 F.3d at 202, and *Thomson–CSF*, 64 F.3d at 779).

the nonsignatory agent and the signatory counterparty have both shown they intend to arbitrate: the agent by seeking to compel arbitration, and the signatory by agreeing to the arbitration provision. "[T]he result turn[s] on a construction of the arbitration clause to which the [signatory claimants] had agreed—i.e., whether it was broad enough in scope to encompass claims against the agents of the [principal] arising out of the relationship between the [principal] and the [signatory claimants]."[92]

But when a signatory seeks to compel a nonsignatory agent of a signatory principal to arbitrate, the Court must answer whether a nonsignatory "employee or agent who did not agree to arbitrate can be compelled to arbitrate his personal liability on the basis of a commitment made by the corporation he serves."[93] That answer turns on principles of agency law, not contract construction.[94] Generally, an agent of a disclosed principal does not become a party to the principal's contract, even if the agent negotiated and signed the contract on the principal's behalf.[95] A

[92] *Bel-Ray*, 181 F.3d at 444 (discussing *Pritzker*, 7 F.3d 1110).

[93] *Id.* at 444–45.

[94] *Id.* at 445.

[95] *Id.* (citing *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503 (3d Cir. 1994), and Restatement (Second) of Agency § 320 (Am. L. Inst. 1958)); *accord Lazard Debt Recovery GP, LLC. v. Weinstock*, 864 A.2d 955, 975 n.44 (Del. Ch. 2004) ("An agent who contracts on behalf of a disclosed principal and within the scope of his authority, in the absence of an agreement to the contrary, or other circumstances showing that he has expressly or impliedly incurred or intended to incur personal responsibility, is not personally liable to the other contracting party." (internal quotation marks omitted) (quoting *Pa. House, Inc. v. Kauffman's of Del., Inc.*, 1998 WL 442701, at *2 (Del. Super. May 20, 1998))).

principal may only bind its agent to a contract by making the agent a party to the contract, and only if the principal does so "on [the agent's] behalf with actual, implied, or apparent authority."[96] The agent's authority evidences that intent to arbitrate which is a fundamental requirement to compel arbitration.

Peretti, DellaFortuna, and Sitter are former agents of Old Buzzfeed, but are not parties to the Employment Agreements, and Defendants have brought arbitration claims against each of them in their personal capacities. Because the agents are not the ones seeking to compel arbitration, the requisite intention to be bound by the Arbitration Provision must be sourced in the agents' own grant of authority to Old Buzzfeed to bind them to the Arbitration Provision. In other words, whether the signatory Defendants can enforce the Arbitration Provision against Peretti, DellaFortuna, and Sitter, as nonsignatory agents of a signatory principal, depends on whether the agents ever granted to Old Buzzfeed the authority to bind them. Defendants have not presented any basis to conclude that Old Buzzfeed bound Peretti, DellaFortuna, or Sitter by the Employment Agreements with any sort of authority from them; for example, there is no evidence they "personally authorized" Old Buzzfeed or its agents to bind them personally.[97] Old Buzzfeed entered most of

[96] *Bel-Ray*, 181 F.3d at 445.

[97] *See, e.g.*, *Cura Fin. Servs. N.V. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *17 (Del. Ch. Oct. 22, 2001) (citing *Bel-Ray*, 181 F.3d at 445).

the Employment Agreements before either DellaFortuna or Sitter began their employment with Old Buzzfeed, and cannot retroactively bind them.[98] So, Defendants have offered no basis to conclude that Peretti, DellaFortuna, or Sitter are bound by the Arbitration Provision as Old Buzzfeed agents.

ii. Peretti, DellaFortuna, And Sitter Are Not Bound By The Employment Agreements Under Principles Of Estoppel.

Defendants also fail to show Peretti, DellaFortuna, and Sitter are bound by the Employment Agreements under principles of estoppel. This inquiry is governed by the framework established in *Capital Group Companies, Inc. v. Armour*.[99]

[98] *See, e.g.*, *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 295 (3d Cir. 2004) (finding no evidence that principals bound agents to an arbitration agreement where the principals entered the arbitration agreement years before the agents began their relationships with the principals). *Compare* Compl. ¶¶ 12–13 (alleging DellaFortuna and Sitter began their Old Buzzfeed positions in 2015 and 2019, respectively), *with e.g.*, Rickert Aff. Ex. 14 (compiling the Galbraith Arbitration claimants' individual statements of claim indicating approximately forty-six of the forty-nine claimants signed Employment Agreements before either DellaFortuna or Sitter became an Old Buzzfeed employee, and only two started or re-started after they were both Old Buzzfeed employees); Rickert Aff. Ex. 16 (compiling the Harris Arbitration claimants' individual statements of claim indicating approximately forty of the 42 claimants signed Employment Agreements before either DellaFortuna or Sitter became an Old Buzzfeed employee, and none started after they were both Old Buzzfeed employees); *see also* Galbraith Arb. Pet. ¶ 12 (alleging "Claimant One" left Old Buzzfeed in 2017); *id.* ¶¶ 47, 50 (alleging "[m]ost of the Claimants joined [Old] Buzzfeed when it was a struggling startup," that did not become profitable for the first time until 2014); Harris Arb. Pet. ¶¶ 18, 20 (same).

[99] 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004).

> [A] court can enforce a forum selection provision against a non-signatory if the following three elements are met: (i) the agreement contains a valid forum selection provision; (ii) the non-signatory has a sufficiently close relationship to the agreement, either as an intended third-party beneficiary under the agreement or under principles of estoppel; and (iii) the claim potentially subject to the forum selection provision arises from the non-signatory's standing relating to the agreement.[100]

"For a non-signatory to be bound by a contract's forum selection clause, the answer to all three questions must be yes."[101]

Here, the Arbitration Provision is undisputedly valid under the first element.[102] "Under the second element of the *Capital Group* test, a forum selection provision can bind a non-signatory that has a sufficiently close relationship to the agreement, either as an intended third-party beneficiary under the agreement or based on principles of estoppel."[103] Defendants do not argue Peretti, DellaFortuna, and Sitter were intended third-party beneficiaries to the Employment Agreements.[104] They assert they are bound under principles of estoppel.

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[100] *Fla. Chem. Co., LLC v. Flotek Indus., Inc.*, 262 A.3d 1066, 1090 (Del. Ch. 2021) (citing *Cap. Grp.*, 2004 WL 2521295, at *5, and *Neurvana Med., LLC v. Balt USA, LLC*, 2019 WL 4464268, at *3 (Del. Ch. Sept. 18, 2019)), *cert. denied*, (Del. Ch. 2021); *see also id.* at 1093 ("Despite making passing mention of standing, the [*Capital Group*] decision seems to have simply analyzed whether the claims fell within the scope of the forum selection provision."); *id.* at 1093–97.

[101] *Sustainability P'rs LLC v. Jacobs*, 2020 WL 3119034, at *5 (Del. Ch. June 11, 2020) (citing *Neurvana*, 2019 WL 4464268, at *3).

[102] *See, e.g.*, MTD OB at 21; MSJ OB at 20; MTD AB at 40–41.

[103] *Fla. Chem. Co.*, 262 A.3d at 1090.

[104] *See* MSJ AB at 34–37.

Principles of estoppel cover not only third-party beneficiaries, but also persons who are "closely related."[105] They do so "only if: '(1) [the party] receives a direct benefit from the agreement; or (2) it was foreseeable that [the party] would be bound by the agreement.'"[106] "Although the direct-benefit and foreseeability inquiries have been articulated as disjunctive, many Delaware cases have relegated the foreseeability inquiry to a subordinate role."[107]

Defendants argue Peretti, DellaFortuna, and Sitter received a direct benefit from the Employment Agreements because employees who signed the Employment Agreements "directly contributed to the successes [Old Buzzfeed] enjoyed that made it an attractive SPAC target in the first place, thereby allowing Plaintiffs to continue to enjoy the benefits of their own relationship with [Old Buzzfeed]."[108] This benefit, assuming it existed, is far from direct. The Second Circuit has held that benefit from a monetizing transaction is not a direct benefit stemming from contracts that contributed underlying value.[109] Here, any benefit from the Combination does not

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[105] *Neurvana*, 2019 WL 4464268, at *4 (quoting *iModules Software, Inc. v. Essenza Software, Inc.*, 2017 WL 6596880, at *2 (Del. Ch. Dec. 22, 2017) (ORDER), and citing *Cap. Grp.*, 2004 WL 2521295, at *6 nn.40 & 41).

[106] *Id.* at *4 (quoting *Weygandt v. Weco, LLC*, 2009 WL 1351808, at *4 (Del. Ch. May 14, 2009)); *accord Fla. Chem.*, 262 A.3d at 1090–94.

[107] *Neurvana*, 2019 WL 4464268, at *5 (citing *McWane, Inc. v. Lanier*, 2015 WL 399582, at *8 (Del. Ch. Jan. 30, 2015)).

[108] MSJ AB at 36.

[109] *Thomson–CSF*, 64 F.3d at 779 (finding the nonsignatory plaintiff had not directly benefitted from a commercial contract eliminating a competitor, but rather directly

directly stem from the employees' underlying contributions to Old Buzzfeed. Each Defendant's contributions to Old Buzzfeed only benefitted Old Buzzfeed's officers and directors in the way a rising tide lifts all boats: indirectly and diffusely. Additionally, Defendants have not alleged that the Employment Agreements' terms were conditioned on the delivery of a benefit to Plaintiffs.[110] Defendants have not shown Peretti, DellaFortuna, and Sitter received any direct benefit from the Employment Agreements that can bind them through estoppel principles.[111]

As to the foreseeability route to estoppel, "Delaware courts apply the foreseeability test cautiously."[112] The foreseeability test operates only when nonsignatory defendants seek to enforce a forum selection clause against signatory plaintiffs,[113] or when the signatory controls the nonsignatory.[114] The facts of this

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benefitted from an acquisition in which it acquired the entity who signed the commercial contract, and accordingly, the nonsignatory plaintiff was not bound by the commercial contract's arbitration clause).

[110] *Neurvana*, 2019 WL 4464268, at *4.

[111] *Id.* ("By contrast, indirect benefits have been deemed insufficient to satisfy the [closely-related] test." (citing *Cap. Grp.*, 2004 WL 2521295, at *7)).

[112] *Fla. Chem. Co.*, 262 A.3d at 1092 (citing *Neurvana*, 2019 WL 4464268, at *6).

[113] *E.g.*, *Ashall Homes Ltd. v. ROK Entm't Grp., Inc.*, 992 A.2d 1239, 1249 (Del. Ch. 2010); *Lexington Servs. Ltd. v. U.S. Patent No. 8019807 Delegate, LLC*, 2018 WL 5310261, at *5–6 (Del. Ch. Oct. 26, 2018); *Neurvana*, 2019 WL 4464268, at *5 (distinguishing *Ashall* and *Lexington* as limited instances of the Court relying on the foreseeability inquiry).

[114] *E.g.*, *iModules*, 2017 WL 6596880, at *3 (citing *Weygandt*, 2009 WL 1351808, at *5); *Neurvana*, 2019 WL 4464268, at *6 ("To ensure a workable closely-related test, Delaware courts are wise to exercise caution in extending the foreseeability inquiry beyond the facts of *Ashall/Lexington* and *iModules*.").

case do not fall into either bucket: signatory Defendants want to enforce the Arbitration Provision against nonsignatory Plaintiffs, and Old Buzzfeed does not control those Plaintiffs.

I conclude that Peretti, DellaFortuna, and Sitter were not closely related parties to the Employment Agreement, as required by Delaware law to bind a nonsignatory to a forum selection clause.[115] Because of this finding, I need not address the third prong of the *Capital Group* analysis.[116]

iii. New Buzzfeed And Rothstein Are Not Bound By The Employment Agreements.

Plaintiffs New Buzzfeed and Rothstein are not bound by the Employment Agreements. Rothstein was 890's Executive Director and Chairman, and later a New Buzzfeed director.[117] Neither he nor New Buzzfeed are parties to any of the Employment Agreements.[118]

Nor are they agents or successors of Old Buzzfeed. Rothstein has never been employed by or had any affiliation with Old Buzzfeed.[119] Defendants try several avenues to convince the Court that New Buzzfeed is a successor of Old Buzzfeed,

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[115] *Sustainability P'rs*, 2020 WL 3119034, at *8.

[116] *Id.*

[117] *Supra* notes 4 & 6.

[118] *Supra* note 14.

[119] Rothstein Aff. ¶¶ 2, 4; Compl. ¶¶ 14, 36, 39.

and thereby snag Rothstein as a New Buzzfeed affiliate. Defendants point out that Operating Co. is bound by Old Buzzfeed's contracts, and urge the Court to disregard the presumptive corporate separateness between New Buzzfeed and Operating Co. to bind New Buzzfeed to those contracts as well.[120] These arguments are not supported.

It is difficult to persuade a Delaware court to "disregard the corporate entity."[121] To succeed, the challenging party must prove that the corporate structure "must be a sham and exist for no other purpose than as a vehicle for fraud."[122] Defendants allege that New Buzzfeed is bound by Old Buzzfeed's contracts because, in the Registration Statement, 890 used a defined term to collectively refer to itself and its subsidiaries, including Operating Co.[123] Using a collective defined term is not, as Defendants contend, an admission that New Buzzfeed and its subsidiaries are "essentially unitary," nor does it demonstrate that Operating Co. "no longer has legal or independent significance of its own."[124]

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[120] *E.g.*, MTD OB at 16–17; MTD RB at 18–20.

[121] *Wallace ex rel. Cencom Cable Income P'rs II, Inc. v. Wood*, 752 A.2d 1175, 1183 (Del. Ch. 1999) (internal quotation marks omitted) (quoting *Harco Nat. Ins. Co. v. Green Farms*, 1989 WL 110537, at *4 (Del. Ch. Sept. 19, 1989)).

[122] *Id.* at 1184.

[123] MTD OB at 16 (quoting Registration Statement at iv, 45).

[124] *Id.*; *Wallace*, 752 A.2d at 1184 (internal quotation marks and formatting omitted) (quoting *Hart Hldg. Co. v. Drexel Burnham Lambert, Inc.*, 1992 WL 127567, at *11 (Del. Ch. May 28, 1992)).

Further, Defendants point to the parent-subsidiary relationship between New Buzzfeed and Operating Co. and conclude that "therefore, the assets of [New Buzzfeed] and [Operating Co.] are one and the same."[125] "Delaware law rejects the theory that 'a parent and its wholly owned subsidiaries constitute a single economic unit.'"[126] Delaware law presumptively treats parents and wholly owned subsidiaries as separate corporate entities.[127] Defendants have not given this Court any reason to treat New Buzzfeed and Operating Co. as a single corporate entity.[128]

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[125] MTD RB at 19.

[126] *NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *26 (Del. Ch. Nov. 17, 2014) (citing *Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994), and *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006)).

[127] *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 667 (Del. Ch. 2012) (affirming that "the separate legal existence of juridical entities is fundamental to Delaware law"); *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 5994971, at *5 (Del. Ch. Nov. 13, 2018) (noting that "there exists a presumption of corporate separateness, even when a parent wholly owns its subsidiary and the entities have identical officers and directors." (citing *Allied Cap.*, 910 A.2d 1038; 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 26, at 82, 84–85 (perm. ed., rev. vol. 2015)).

[128] Merger Agr. at Preamble and Recitals (describing how Operating Co., as the "Surviving Entity" of the Second Merger, is a wholly-owned subsidiary of New Buzzfeed's predecessor, defined as "Parent"); *cf. Vituli v. Carrols Corp.*, 2015 WL 5157215, at *10 (Del. Super. May 1, 2015) (declining to pierce the corporate veil because "Fiesta and Carrols are separate entities, and Fiesta is not Carrols's successor. Fiesta did not exist when Plaintiff signed his contract with Carrols or when the promises were made. Moreover, the individuals making the promises acted for Carrols, not Fiesta. Although he had no contract with Fiesta, Plaintiff argues that Fiesta adopted Plaintiff's contract with Carrols by accepting the benefits of Plaintiff's work. This, however, is not how contracts are formed").

And so, with Rothstein and New Buzzfeed as strangers to the Employment Agreements, I turn back to the *Capital Group* test for nonsignatories. Again, there is no dispute over the Arbitration Provision's validity.[129] As to the second element, New Buzzfeed and Rothstein are not closely related to the Employment Agreements. Defendants never argued New Buzzfeed and Rothstein were third-party beneficiaries to the Employment Agreements.

They are also not bound under principles of estoppel because (i) they did not accept a direct benefit from the Employment Agreements and (ii) it was not foreseeable New Buzzfeed and Rothstein would be bound.[130] As with the other individual Plaintiffs, Defendants contend New Buzzfeed and Rothstein have "benefitted from the Employment Agreements."[131] Defendants have not explained how New Buzzfeed directly benefitted from the Employment Agreements. Instead, Defendants speculate that "presumably" New Buzzfeed would be interested in the enforcement of "its rights under" Old Buzzfeed's contracts.[132] Even assuming this

[129] *Supra* note 102.

[130] *Fla. Chem.*, 262 A.3d at 1090 ("Under principles of estoppel, a forum selection provision can bind the non-signatory if (i) the non-signatory accepted a direct benefit from the agreement or (ii) the non-signatory had a close relationship to the agreement, a signatory to the agreement controlled the non-signatory, and the circumstances establish that the signatory agreed to the forum selection provision on behalf of its controlled affiliate." (citing *Sustainability P'rs*, 2020 WL 3119034, at *6)).

[131] MTD RB at 20; *see also* MSJ AB at 33, 36.

[132] MTD OB at 17; MTD RB at 20.

is true, the Merger Agreement provides for those contracts' enforcement by making New Buzzfeed's subsidiary, Operating Co., the successor in interest.[133] The rights under the Employment Agreements are not New Buzzfeed's to enforce. Defendants also do not specify how Rothstein personally and directly benefitted from the Employment Agreements. In summary, Defendants offer no support for their claim that Plaintiffs have directly benefitted from Defendants' Employment Agreements.

As explained, New Buzzfeed is neither controlled by, nor a successor in interest to, Old Buzzfeed. Defendants offer no independent basis to bind Rothstein, a New Buzzfeed director.[134] I find that New Buzzfeed and Rothstein were not closely related parties to the Employment Agreements, so I need not address the third and final element of the *Capital Group* test.[135]

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Based on the foregoing, none of the Plaintiffs are bound by the Employment Agreements. Consequently, any evidence of intent in those Agreements cannot be imputed to Plaintiffs.[136] Lacking clear and unmistakable evidence of Plaintiffs'

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[133] Merger Agr. § 2.3(b).

[134] *Supra* notes 4 & 6.

[135] *Sustainability P'rs*, 2020 WL 3119034, at *8.

[136] *Cf. Hilco Cap., LP v. Fed. Ins. Co.*, 978 A.2d 174, 179 (Del. 2009) ("Hilco was not a party to the contract . . . . The intent of the contracting parties, not outsiders, controls the construction of the agreement.").

intent to delegate issues of substantive arbitrability to the arbitrator, this Court retains its presumed power to decide the substantive arbitrability of their claims.[137]

3. The Arbitration Provision Does Not Govern Plaintiffs' Claims.

And so, charged with deciding substantive arbitrability, I find myself at the third branch in the decision tree: the scope of the Arbitration Provision, and whether Plaintiffs' claims fall within it.[138] "When contracting parties provide for the arbitration of claims in their agreement, the arbitration provision, no matter how broadly drafted, can reach only the claims within the scope of the contract."[139]

But I need not go far onto this third limb. The Arbitration Provision cannot encompass Plaintiffs' claims because, as explained, Plaintiffs are not bound by the Employment Agreements. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[140] The Arbitration Provision cannot govern Plaintiffs' claims.

In a final attempt to conjure up some intent to arbitrate by Plaintiffs, Defendants assert Plaintiffs consented to arbitrate by paying the AAA fees requested

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[137] *Willie Gary*, 906 A.2d at 81 (citing *Howsam*, 537 U.S. at 83).

[138] *Parfi*, 817 A.2d at 155.

[139] *Id.* at 151.

[140] *Homsey*, 2010 WL 2476298, at *6 (internal quotation marks omitted) (quoting *Howsam*, 537 U.S. at 83).

in the Arbitrations.[141] The record reveals that while New Buzzfeed paid those fees, it "expressly reserved their rights to challenge jurisdiction."[142] Defendants' payment, with that reservation of rights, cannot suffice as the clear consent to arbitrate that is required for this Court to deny its own subject matter jurisdiction.[143] And Defendants do not cite any authority in support of the proposition that paying fees that were due before answering the arbitration petition, alone, constitutes an intent to arbitrate and waiver of jurisdictional defenses.[144]

In summary, while Defendants are bound by the Arbitration Provision and the New Buzzfeed FSC, those agreements do not conflict on the matter of who decides substantive arbitrability. The Arbitration Provision alone governs whether the parties to this action expressed clear and unmistakable intent that the AAA determine

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[141] MTD OB at 2, 32–34; Hr'g Tr. 40.

[142] Hr'g Tr. 87; *supra* note 49, and accompanying text.

[143] *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1278–79 (9th Cir. 2006) (finding the appellant's "minimal" participation in the arbitration proceedings was "limited to procedural issues and undertaking actions to preserve her rights," while maintaining "her objection to proceeding by way of arbitration at all—[did not] constitute a waiver"); *RBC Cap. Mkts. Corp. v. Thomas Weisel P'rs*, 2010 WL 681669, at *7 n.45 (Del. Ch. Feb. 25, 2010) (same (citing *Nagrampa*, 469 F.3d at 1278)).

[144] Hr'g Tr. 40. Defendants cite a single distinguishable case from the in support of its argument that Plaintiffs consented to the AAA's jurisdiction. MTD OB at 33–34 (citing *Crystallex Int'l Corp. v. Bolivarian Rep. of Venezuela*, 932 F.3d 126, 149 (3d Cir. 2019)). The Third Circuit in *Crystallex* considered the undisputed fact that the state-owned oil company paid $249,000 in "administrative fees Venezuela incurred in connection with the arbitration with Crystallex," one sub-factor in a five-factor analysis considering whether Venezuela was the oil company's alter ego. *Crystallex*, 932 F.3d at 140–49.

substantive arbitrability. I conclude that the Plaintiffs are not parties to the Employment Agreements, so they have not expressed the necessary intent to send the substantive arbitrability inquiry to the AAA. As nonsignatories who are not bound by the Employment Agreements, Plaintiffs' claims do not fall within the scope of the Arbitration Provision. And Plaintiffs did not consent to arbitrate by paying the AAA fees. This Court retains subject matter jurisdiction over Plaintiffs' claims and Defendants' Motion to Dismiss under Rule 12(b)(1) is denied.

B. The Court Of Chancery Has Personal Jurisdiction Over Defendants.

Defendants also seek dismissal of Plaintiffs' claims based on targeted arguments that this Court lacks personal jurisdiction over Defendants. Plaintiffs' personal jurisdiction theory relies on the New Buzzfeed FSC. Defendants' limited as-applied challenge to the New Buzzfeed FSC fails to compel dismissal of this action.

Courts can only adjudicate cases in which they have personal jurisdiction over the parties.[145] When a defendant moves to dismiss under Rule 12(b)(2), courts must construe the record "in the light most favorable to the plaintiff."[146] Plaintiffs faced with a Rule 12(b)(2) challenge are tasked only with responding to those arguments

[145] *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 129 (Del. 2016).

[146] *See Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008).

raised by the moving defendants.[147] Unlike challenges to subject matter jurisdiction, the avoiding party can waive challenges to personal jurisdiction it fails to timely raise.[148]

Delaware courts can exercise personal jurisdiction over nonresident defendants by statutory means,[149] consent through conduct,[150] or by "dint of a

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[147] *See Mack v. Rev Worldwide, Inc.*, 2020 WL 7774604, at *16 (Del. Ch. Dec. 30, 2020) ("The defendant then bears the burden of asserting all grounds supporting the defense in his opening brief, filed either contemporaneously with or shortly after the motion. At that point, substantive arguments not briefed are deemed waived.").

[148] *See Ross Hldg. & Mgmt. Co. v. Advance Realty Grp., LLC*, 2010 WL 1838608, at *11 (Del. Ch. Apr. 28, 2010) ("As our courts have explained, '[a] litigant must exercise great diligence in challenging personal jurisdiction or venue; he should do so at the time he makes his first defensive move.' Indeed, '[t]he personal jurisdiction defense 'may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.'" (footnotes and citations omitted)); *Genuine Parts*, 137 A.3d at 130 ("Further, '[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.' And '[b]ecause the personal jurisdiction requirement is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" (footnotes omitted) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982), and then *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985))); *Ruggiero*, 948 A.2d at 1134 n.21 (noting a party with the burden on personal jurisdiction can waive an argument and the Court does not have to consider the waived argument (citing *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003))); *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *Voigt v. Metcalf*, 2020 WL 614999, at *8 n.3 (Del. Ch. Feb. 10, 2020) (reasoning the defendants "invested so little in those arguments that they can be regarded as waived.").

[149] *E.g.*, *Mobile Diagnostic Grp. Hldgs., LLC v. Suer*, 972 A.2d 799, 803 (Del. Ch. 2009); *BAM Int'l, LLC v. MSBA Grp. Inc.*, 2021 WL 5905878, at *5 (Del. Ch. Dec. 14, 2021).

[150] *E.g.*, *Ross Hldg.*, 2010 WL 1838608, at *11 (citing *Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 989 (Del. Super. 2000)).

contractual arrangement."[151] "Where the parties to the forum selection clause have consented freely and knowingly to the court's exercise of jurisdiction, the clause is sufficient to confer personal jurisdiction on a court."[152] Consent renders a "minimum contacts" analysis unnecessary.[153] Charters and bylaws are treated as contracts among the stockholders,[154] and forum-selection clauses they contain operate as stockholder consents to jurisdiction in the chosen forum.[155] Contractual consent to jurisdiction only extends to claims identified by and encompassed by the consent provision.[156] "Forum selection/consent to jurisdiction clauses are

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[151] *BAM Int'l*, 2021 WL 5905878, at *6.

[152] *Carlyle*, 67 A.3d at 381 (citing *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964)); *accord Solae, LLC v. Hershey Can., Inc.*, 557 F. Supp. 2d 452, 456 (D. Del. 2008) (citing *Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc.*, 42 F.Supp.2d 423, 431 (D. Del. 1999)).

[153] *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010) ("[W]here contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause, even if, absent any forum selection clause, the [common law] principle might otherwise require a different result." (collecting authorities)); *see BAM Int'l*, 2021 WL 5905878, at *6.

[154] *See BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020) (quoting *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 38 (Del. 2015), and citing *Centaur P'rs, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990)); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 955 (Del. Ch. 2013) ("In an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders." (collecting cases)).

[155] *See BAM Int'l*, 2021 WL 5905878, at *6 ("Where a party is considered bound to a forum selection clause, the court treats that party as having expressly consented to personal jurisdiction." (citing *Neurvana*, 2019 WL 4464268, at *3); *see generally Boilermakers*, 73 A.3d 934.

[156] *Ruggiero*, 948 A.2d at 1132 ("Of course, the party is bound only by the terms of the consent, and such consent applies only to those causes of action that are identified in the

'presumptively valid' and should be 'specifically' enforced unless the resisting party 'could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud and overreaching.'"[157]

The New Buzzfeed FSC provides "any action or proceeding to interpret, apply, enforce or determine the validity of" the Charter is subject to this Court's jurisdiction, and stockholders "shall be deemed to have notice of and to have consented to the provisions of this Article X."[158] Plaintiffs have pled that Defendants, as New Buzzfeed stockholders, so consented.[159] Plaintiffs also pled their claims fall under the New Buzzfeed FSC, and specifically asked this Court to interpret the New Buzzfeed Charter and declare Defendants' Arbitration Claims are bound by the New Buzzfeed FSC.[160] Defendants have not disputed, for purposes of

consent provision."); *Multi-Fineline Electronix, Inc. v. WBL Corp.*, 2007 WL 431050, at *6–7 (Del. Ch. Feb. 2, 2007) (finding defendants did not actually consent to jurisdiction because the complaint did not plead a dispute within the scope of the forum selection clause); *In re Pilgrim's Pride Corp. Deriv. Litig.*, 2019 WL 1224556, at *14 (Del. Ch. Mar. 15, 2019) ("Longstanding Delaware precedent holds that purchasing or owning shares of stock in a Delaware corporation, standing alone, is not enough to enable a Delaware court to exercise personal jurisdiction over a non-consenting party, even in cases of sole ownership." (collecting cases)).

[157] *Cap. Grp.*, 2004 WL 2521295, at *3 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), and citing *Burger King*, 471 U.S. at 472 n.14); *accord Salzberg v. Sciabacucchi*, 227 A.3d 102, 135 (Del. 2020) (citing and quoting *Bremen*, 407 U.S. at 15).

[158] New Buzzfeed Charter at art. X; Compl. ¶ 18.

[159] Compl. ¶¶ 18, 46.

[160] *Id.* ¶¶ 9, 16–17, 52.

personal jurisdiction, that the New Buzzfeed FSC is valid or that it encompasses Plaintiffs' claims.

Rather, Defendants contend the New Buzzfeed FSC is unenforceable as applied to them. The United States Supreme Court has identified, and the Delaware Supreme Court has adopted,

> three bases on which forum-selection provisions might be invalidated on an "as applied" basis: (i) they will not be enforced if doing so would be "unreasonable and unjust;" (ii) they would be invalid for reasons such as fraud or overreaching; or (iii) they could be not enforced if they "contravene[d] a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[161]

To escape the reach of a forum selection clause on grounds that it is unreasonable or unjust, the avoiding party "bears a heavy burden to demonstrate that enforcement here would place it at an unfair disadvantage or otherwise deny it its day in court."[162]

Defendants challenge the New Buzzfeed FSC on an "as applied" basis under the first and third *Bremen* factors. Defendants first assert it would be unjust to apply the New Buzzfeed FSC because the New Buzzfeed Charter "is barely six months

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[161] *Salzberg*, 227 A.3d at 135 (citing and quoting *Bremen*, 407 U.S. at 15).

[162] *Sylebra Cap. P'rs Master Fund, Ltd. v. Perelman*, 2020 WL 5989473, at *11 (Del. Ch. Oct. 9, 2020) (alterations and internal quotation marks omitted) (quoting *Cap. Grp.*, 2004 WL 2521295, at *6); *see also id.* at *12 ("[I]n determining whether a stockholder has met his burden to demonstrate unreasonableness in Delaware, the fundamental inquiry is whether the stockholder has alleged 'well-pled facts calling into question the integrity' of the court chosen in the forum selection bylaw, or 'explain[ed] how the defendants have advanced their 'self-interests' by having the claims . . . adjudicated in those courts instead of a Delaware court.'" (citations omitted)).

old," and the Old Buzzfeed charter did not "contain an equivalent forum-selection clause."[163] These arguments do not color the New Buzzfeed FSC as unreasonable or unjust. Defendants' arguments about the age of the New Buzzfeed Charter, the timing of its adoption, or what predated it are "irrelevant in determining the reasonableness or overall enforceability" of the New Buzzfeed FSC.[164] Defendants have not demonstrated that enforcing the New Buzzfeed FSC "would place [them] at an unfair disadvantage or otherwise deny [them their] day in court."[165]

Defendants next argue enforcing the New Buzzfeed FSC would "violate Delaware's public policy" favoring arbitration.[166] Defendants overlook another Delawarean public policy: our law "requires courts to give as much effect as possible to forum-selection clauses" and to deny enforcement only "to the limited extent necessary to avoid some fundamentally inequitable result or a result contrary to positive law."[167]

Defendants have not carried their heavy burden to demonstrate that it would be unreasonable or unjust to apply the New Buzzfeed FSC to them. They make no

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[163] MTD OB at 9–11.

[164] *Sylebra*, 2020 WL 5989473, at *11 (citations omitted).

[165] *Id.* (alterations and internal quotation marks omitted) (quoting *Cap. Grp.*, 2004 WL 2521295, at *6).

[166] MTD OB at 11–17.

[167] *Salzburg*, 227 A.3d at 132 (citing *Bremen*, 407 U.S. at 15).

other challenge to personal jurisdiction. Viewing the pleadings in a light most favorable to Plaintiffs, I find this Court has personal jurisdiction over Defendants.[168] Defendants' Motion to Dismiss under Rule 12(b)(2) is denied.

C. Plaintiffs Are Not Bound To Arbitrate Defendants' Arbitration Claims And Are Entitled To An Anti-Arbitration Injunction.

Having denied Defendants' Motion to Dismiss for lack of subject matter and personal jurisdiction, I turn to Plaintiffs' affirmative Motion for Summary Judgment. This Court will grant a motion for summary judgment where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[169] In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that no material question of fact exists.[170]

Plaintiffs seek three declaratory judgments. The first two are closely related, and are granted. Plaintiffs seek a declaratory judgment stating they did not enter into arbitration agreements with Defendants. Plaintiffs seek a second declaratory judgment stating Plaintiffs did not agree to arbitrate Defendants' Arbitration Claims. As explained in denying Defendants' Motion to Dismiss, Plaintiffs did not enter into

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[168] In so finding, this Court may exercise ancillary jurisdiction as to each of Plaintiffs' claims in this action. *Cap. Grp.*, 2004 WL 2521295, at *4.

[169] Ct. Ch. R. 56(c).

[170] *Weil v. VEREIT Operating P'ship, L.P.*, 2018 WL 834428, at *3 (Del. Ch. Feb. 13, 2018).

arbitration agreements with Defendants. Plaintiffs are not bound by the Employment Agreements in any capacity.[171] Plaintiffs did not agree to arbitrate the Arbitration Claims. In the absence of a dispute of material fact, I find in Plaintiffs' favor as to the first two grounds on which they seek declaratory judgment.

This Court has recognized that while "ordinarily, a declaration of rights in a proceeding such as this is sufficient to cause the losing parties to conform their future conduct to the court's decree[,] . . . AAA arbitrators may have independent duties to process" arbitration demands, so "it is appropriate to enter an order directing the defendants to dismiss their Demand[s] for Arbitration."[172] Plaintiffs are entitled to a permanent injunction against the Arbitrations. "In order for a movant to be entitled to a permanent injunction, the movant must show '(1) actual success on the merits; (2) irreparable harm; and (3) the harm resulting from failure to issue an injunction outweighs the harm befalling the opposing party if the injunction is issued.'"[173]

Defendants generally dispute that Plaintiffs are entitled to a permanent injunction, but their arguments focus only on the merits and did not address the other

[171] *Supra* Section II.A.2.

[172] *Qwest Commc'ns Int'l Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 821 A.2d 323, 329 (Del. Ch. 2002).

[173] *FriendFinder Networks Inc. v. Penthouse Glob. Media, Inc.*, 2017 WL 2303982, at *17 (Del. Ch. May 26, 2017) (quoting *ID Biomed. Corp. v. TM Techs., Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995)).

two elements.[174] As explained above, Plaintiffs have demonstrated actual success on the merits; they are not bound by the Employment Agreements or required to arbitrate Defendants' Arbitration Claims.

As for irreparable harm, it is well settled that "the procession of an unwarranted arbitration poses the threat of irreparable injury to the party rightfully resisting arbitration."[175] Defendants cannot force Plaintiffs to arbitrate under a provision to which they are not bound without inflicting irreparable harm upon Plaintiffs.[176] Against that harm to Plaintiffs, the balance of the hardships favors enjoining the Arbitrations. Defendants may still pursue their claims in court.[177] I conclude the Arbitrations should be permanently enjoined.

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[174] MSJ AB at 4. *See generally* MSJ AB; *see also Emerald P'rs*, 726 A.2d at ("Issues not briefed are deemed waived.").

[175] *E.g.*, *Parfi Hldg. AB v. Mirror Image Internet*, 842 A.2d 1245, 1259 (Del. Ch. 2004) (citations omitted); *Qwest*, 821 A.2d at 328 (granting injunction to avoid "the irreparable harm of having the disputes made subject to binding arbitration").

[176] *See, e.g.*, *Homsey*, 2010 WL 2476298, at *6 (concluding that forcing the plaintiff "to arbitrate a dispute it did not agree to arbitrate . . . would affect [the plaintiff]'s substantive rights and, thus, be inappropriate"); *Angus v. Ajio, LLC*, 11895–VCG, at 4 (Del. Ch. Mar. 28, 2016) (TRANSCRIPT) ("[T]o be forced to arbitrate even though [the non-signatory plaintiffs] are not contractually bound to do so does involve a quantum of irreparable harm . . . ."); *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *16 (Del. Ch. Dec. 4, 2007) ("Delaware courts have consistently found that threatened, wrongful enforcement of an arbitration clause constitutes sufficient irreparable harm to justify an injunction." (citing *Bd. of Educ. of Appoquinimink Sch. Dist. v. Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *4 (Del. Ch. Oct. 6, 1999))).

[177] MSJ OB at 43; Hr'g Tr. 55. Defendants have not said they cannot. *Emerald P'rs*, 726 A.2d at 1224 ("Issues not briefed are deemed waived.").

Plaintiffs' Motion for Summary Judgment is granted as to Count II, and as to Count I in part.

D. Plaintiffs Are Not Entitled To An Advisory Declaration That Defendants' Claims Must Be Brought In This Court.

Plaintiffs' third requested declaratory judgment seeks more than just relief from arbitration. Plaintiffs seek a declaration that if Defendants wish to pursue their claims, they must do so in this Court, under the New Buzzfeed FSC. This relief is denied because it is advisory.

Subject matter jurisdiction depends on the existence of an "actual controversy" between the parties.[178] The Delaware Supreme Court has set forth the criteria by which a controversy will be considered an "actual controversy":

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; [and] (4) the issue involved in the controversy must be ripe for judicial determination.[179]

"Established Delaware law holds that this Court will not render an advisory opinion in advance of litigation or in the absence of a factual situation giving rise to an imminent controversy between the parties."[180] "Delaware courts do not render

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[178] *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216–17 (Del. 2014).

[179] *Id.* at 1217 (internal quotation marks omitted) (quoting *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479–80 (Del. 1989)).

[180] *Schlossberg v. First Artists Prod. Co*, 1984 WL 8225, at *3 (Del. Ch. May 22, 1984) (collecting cases); *Beck v. Brady*, 2004 WL 2158052, at *1 (Del. Ch. Sept. 21, 2004)

advisory or hypothetical opinions."[181] "The Declaratory Judgments Act may not be invoked merely to seek legal advice."[182] "And, in the usual case, this Court would not tell a plaintiff how to proceed with litigation."[183]

Plaintiffs' third request for a declaratory judgment seeks "a judicial determination that, if made, would necessarily be premised on uncertain and hypothetical facts that ultimately may never become necessary."[184] Defendants' Arbitration Claims have been enjoined. Plaintiffs no longer face the associated harm of being forced to arbitrate under an agreement that they did not agree to and did not bind them. It remains to be seen whether and where Defendants will renew their claims. I need not, should not, and, indeed, cannot determine whether the Arbitration

("While this Court is obligated to construe the term 'actual controversy' liberally, the Court must not construe it so liberally as to enter the realm of rendering advisory opinions." (footnotes and citations omitted)).

[181] *XL Specialty*, 93 A.3d at 1217 (citing *Stroud*, 552 A.2d at 480); *accord In re Allergan, Inc. S'holder Litig.*, 2014 WL 5791350, at *9 (Del. Ch. Nov. 7, 2014) (declining to render an advisory opinion on "plaintiffs' request for declaratory relief [that] amount[ed] to a hypothetical proxy strategy based on the language of a specific bylaw").

[182] *Marshall v. Hill*, 93 A.2d 524, 525 (Del. Super. 1952); *Anonymous v. State*, 2000 WL 739252, at *4 (Del. Ch. June 1, 2000) ("[T]he Delaware Supreme Court has explained with respect to the Declaratory Judgment Act that although that statute may be employed as a procedural device to advance the stage at which a matter is traditionally justiciable, the statute is not to be used as a means of eliciting advisory opinions from the courts." (internal quotation marks omitted) (quoting *Stroud*, 552 A.2d at 479), and citing *In re Burlington Res., Inc.*, 1989 WL 126571, at *1 (Del. Ch. Oct. 24, 1989), and *Marshall*, 93 A.2d at 525)).

[183] *Schlossberg*, 1984 WL 8225, at *3.

[184] *XL Specialty*, 93 A.3d at 1218.

Claims are in the scope of the New Buzzfeed FSC unless and until those claims are lodged, here or elsewhere. To do so would be tantamount to legal advice on litigation strategy. Plaintiffs' Motion for Summary Judgment is denied in part as to Count I.

E. Plaintiffs Are Not Entitled To Costs, Disbursements, Or Fees.

Finally, Plaintiffs seek costs, disbursements, and attorneys' fees, including fees paid to the AAA.[185] "Under the American Rule, each party is ordinarily responsible for its own litigation expenses. But, this court has discretion to shift attorneys' fees and costs when a party to the litigation has acted in bad faith."[186] Plaintiffs argue they are entitled to fees and damages because Defendants did not litigate their Arbitration Claims in accordance with the New Buzzfeed FSC, which was a "bad faith" violation of both the Arbitration Provision and the New Buzzfeed FSC.[187] Defendants counter that Plaintiffs' fee request should be rejected, because it is "groundless" and was itself made in bad faith.[188] I find Plaintiffs are responsible for all of their own costs, expenses, and fees.

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[185] Compl. at Prayer for Relief ¶ C.

[186] *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 880 (Del. Ch. 2012) (citing *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1164 (1989), and *Barrows v. Bowen*, 1994 WL 514868, at *1 (Del. Ch. Sept. 7, 1994)), *aff'd*, 59 A.3d 1206 (Del. 2012).

[187] MSJ OB at 44.

[188] MSJ AB at 47–51.

Plaintiffs rely on *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.* and *Cornerstone Brands, Inc. v. O'Steen* to argue they are entitled to damages because Defendants brought the Arbitration Claims in the Arbitrations, "even though they are outside the scope of the [Arbitration Provision], and despite their agreement under the [New Buzzfeed] Charter to resolved any claims like the [Arbitration] Claims in Court."[189] In *El Paso*, this Court determined, and the Delaware Supreme Court affirmed, that El Paso could raise the relevant forum selection clause in the first-and-improperly-filed Texas action, "and, if successful, El Paso could measure its damages by the costs of litigation."[190] In *Cornerstone*, this Court concluded *El Paso* "implied that damages may be obtained for a breach of a forum selection clause, and an award of such damages does not contravene the American Rule. Accordingly, Cornerstone is entitled to prove its claim for damages based on O'Steen's alleged breach of the forum selection clause."[191]

El Paso and *Cornerstone* are distinguishable from this case.[192] The *El Paso* plaintiff was only eligible for damages if it succeeded in litigating "its forum-based

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[189] MSJ OB at 44 (citing 669 A.2d 36 (Del. 1995) [hereinafter "*El Paso II*"]), and 2006 WL 2788414 (Del. Ch. Sept. 20, 2006)).

[190] *El Paso Nat. Gas Co. v. TransAmerican Nat. Gas Corp.* (*El Paso I*), 1994 WL 248195, at *3 (Del. Ch. May 31, 1994), *aff'd*, 669 A.2d 36 (Del. 1995); *El Paso II*, 669 A.2d at 40.

[191] *Cornerstone*, 2006 WL 2788414, at *4 (discussing *El Paso II*, 669 A.2d 36).

[192] Defendants argue *El Paso* and *Cornerstone* do not "overcome the high standard for subjective bad faith conduct that Delaware Courts have long upheld as an exception to the American Rule." MSJ AB at 49. I interpret Plaintiffs' reliance on *El Paso* and *Cornerstone*

defense."[193] But Plaintiffs have not raised the New Buzzfeed FSC as a defense in the first-filed Arbitrations. Plaintiffs have no basis for damages under *El Paso*. In *Cornerstone*, the Court concluded the plaintiff was entitled to prove damages based on its allegation that the defendant breached the merger agreement's forum selection clause.[194] But Plaintiffs have not claimed Defendants breached the New Buzzfeed FSC and Plaintiffs were damaged by that breach.

Plaintiffs have offered no authority applying *El Paso* and *Cornerstone* in the circumstances here, in which the party seeking arbitration has not asserted a forum selection clause as a defense in a first-filed action, nor asserted a claim for its breach before this Court. The Court could find none.[195] Plaintiffs are not entitled to recover damages for this forum selection dispute, and must bear their own costs and disbursements.

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as support for their request for damages in the form of costs and disbursements. MSJ OB at 44; MSJ RB at 32.

[193] *El Paso I*, 1994 WL 248195, at *3; *El Paso II*, 669 A.2d at 40.

[194] *Cornerstone*, 2006 WL 2788414, at *4.

[195] There are myriad examples of this Court enjoining arbitration without awarding fees or costs. *See, e.g.*, *City of Wilm. v. Wilm. FOP Lodge#1*, 2004 WL 1488682 (Del. Ch. June 22, 2004) (enjoining arbitration permanently without awarding fees or costs); *Fritz v. Nationwide Mut. Ins. Co.*, 1990 WL 186448 (Del. Ch. Nov. 26, 1990) (same); *Qwest*, 821 A.2d 323 (same); *Bd. of Educ. of Sussex Cnty. Vocational-Tech. Sch. Dist. v. Sussex Tech Educ. Ass'n*, 1998 WL 157373 (Del. Ch. Mar. 18, 1998) (same); *Lidya Hldgs. Inc. v. Eksin*, 2021 WL 963783 (Del. Ch. Mar. 11, 2021) (ORDER) (enjoining arbitration as to certain defendants without awarding fees or costs).

Plaintiffs also seek to recover their fees. "The bad faith exception applies only in extraordinary cases, and the party seeking to invoke that exception must demonstrate by clear evidence that the party from whom fees are sought . . . acted in subjective bad faith."[196] "There is no single standard of bad faith that warrants an award of attorneys' fees in such situations; rather, bad faith is assessed on the basis of the facts presented in the case."[197] Plaintiffs have failed to allege or brief any bad faith conduct by Defendants. Each of the parties shall bear their own fees, costs, and disbursements.

III. CONCLUSION

Defendants' Motion to Dismiss is **DENIED**. Plaintiffs' Motion for Summary Judgment is **GRANTED IN PART**, and **DENIED IN PART** as seeking an advisory opinion. The parties shall submit an implementing order with twenty days of this decision.

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[196] *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (internal quotation marks omitted) (quoting *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1093 (Del. 2006), and then *Auriga*, 40 A.3d at 880).

[197] *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).