EFiled: Mar 23 2023 08:30AM EDT
Transaction ID 69615091
Case No. 2021-0918-PAF

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL DEARING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2021-0918-PAF
	)	
MIXMAX, INC.,	)	
	)	
Defendant.	)	

ORDER ADDRESSING PLAINTIFF'S MOTIONS FOR AN AWARD OF ATTORNEYS' FEES AND FOR A RULE TO SHOW CAUSE

WHEREAS:[1]

A. Michael Dearing ("Plaintiff") is a member of the board of directors (the "Board") of Mixmax, Inc. ("Mixmax" or the "Company").[2] Mixmax is a Delaware corporation with a principal place of business in San Francisco, California.[3]

B. Olof Mathé, Brad Vogel, and Chanpory Rith founded Mixmax in 2014.[4] At all relevant times, the Mixmax Board comprised Mathé, Vogel, Plaintiff, and Carl Fritjofsson.[5] Mathé is also the Company's chief executive officer.[6]

[1] Citations to the docket will be in the form of "Dkt. [#]."

[2] Dkt. 1 ¶ 1.

[3] *Id.* ¶ 10.

[4] *Id.* ¶ 14.

[5] *Id.* ¶¶ 16–19.

[6] *Id.* ¶ 18.

C. Plaintiff served on the Board from October 2014 to September 2019 and rejoined the Board in September 2021.[7] Plaintiff is a board designee of Harrison Metal Capital III, L.P. pursuant to a 2018 voting agreement.[8]

D. Upon rejoining the Board in September 2021, Plaintiff asked Mixmax's management to provide him with "the August and September Board materials and resolutions."[9] In response, the Company provided Plaintiff with the most recent Board resolution and investor update emails.[10]

E. On September 30, 2021, Plaintiff renewed his request to management for "Board meetings, minutes, resolutions, written consents, and Board decks for 2021."[11]

F. On October 1, 2021, Mathé notified Plaintiff that for 2021: (i) Mixmax had not held any Board meetings; (ii) the Board exclusively acted by written consent; and (iii) the Board discussed Board business informally via emails and telephone conversations between and among the various directors.[12]

---

[7] *Id.* ¶ 1.

[8] *Id.* ¶ 16.

[9] *Id.* ¶ 21.

[10] *Id.*

[11] *Id.* ¶ 22.

[12] *Id.* ¶ 23.

G. On October 12, 2021, Plaintiff delivered to the Company a demand to inspect the books and records of the Company in his capacity as a director pursuant to 8 *Del. C.* § 220(d) (the "Demand").[13] The Demand sought inspection of several categories of books and records relating to, among other things, Mixmax's consideration and approval of external financing, the resignation or removal of Board members, the compensation and payment of expenses for Mathé and Vogel, the actual and projected financial performance of the Company, and any purported breach of fiduciary duty by the Board.[14] The Demand also sought information contained in the other directors' personal accounts and devices if the directors used the accounts or devices to conduct Company business.[15] Specifically, the Demand sought the following:

> The Request should be construed as seeking inspection of all of the Company's responsive books and records, in any form and wherever stored. Thus, among other things, the Company is required to produce for inspection books and records comprising paper and electronic documents, emails, calendar records, call records and other electronic communications such as text messages, including books and records contained in personal accounts or on personal devices used to conduct the Company's or the Board's business.[16]

[13] *Id.* ¶ 25.

[14] *Id.* ¶ 26.

[15] *Id.* ¶ 27.

[16] *Id.* Ex. A at 2.

H. In response to the Demand, on October 19, 2021, Mixmax informed Plaintiff that the Company "was getting [its] arms around the matter and will revert re next steps to get [Plaintiff] responsive documents. The company of course will comply with its obligations under Delaware law."[17] Plaintiff also proposed that the parties meet and confer on Monday, October 25, 2022. Plaintiff did not directly respond. Instead, on Friday, October 22, 2021, Plaintiff filed this action to enforce Plaintiff's rights to inspect Mixmax's books and records.[18]

I. In response to the Complaint, on October 27, 2021, Mixmax sent an email stating that "the company will produce documents responsive to the Demand" and made a "proposal," to produce documents "starting [] Friday, October 29 and ending Friday November 5."[19]

J. Over the next few days, Plaintiff and Mixmax exchanged emails regarding Plaintiff's contention that Mixmax's proposal was inadequate.[20]

K. On November 5, 2021, in response to the Demand, Mixmax produced a general ledger, trial balance, and a list of Mixmax's top 25 customers.[21]

---

[17] Dkt. 20 Ex. C at 1.

[18] Dkt. 1 ¶ 27.

[19] Dkt. 31 ¶ 4.

[20] *Id.* ¶¶ 5–9.

[21] *Id.* ¶ 8.

L. On November 12, 2021, the Company made a second production, which included "decks, agendas, minutes, monthly update emails, consents and resolutions."[22] Over the next few days, the Company produced about 48 additional documents.[23]

M. On November 23, 2021, Mixmax answered the Complaint (the "Answer").

N. On December 6, 2021, the court entered a stipulated order (the "Production Order").[24] The Production Order acknowledged Plaintiff's right to inspection, stayed the proceedings in the action, and required the Company to produce specifically enumerated documents no later than December 30, 2021. The documents were to be produced in accordance with a specified protocol, which the parties had attached to the Production Order as Exhibit A (the "Protocol").[25]

O. The Protocol specified, among other things, that the Company would fully answer Request No. 14(iii) of the Demand.[26] That request sought production of "[d]ocuments sufficient to show . . . a detailed sales ledger of the Company as of

[22] Dkt. 20 ¶ 17.

[23] *Id*. ¶¶ 18, 20.

[24] Dkt. 13.

[25] *Id.*

[26] Dkt. 13 Ex. A ¶ 10.

August 31, 2021 (YTD) that reconciles to the general ledger, in Microsoft Excel format with details of all costs of goods sold activity during the period."[27]

P. From December 6–29, 2021, Mixmax produced 101,669 documents.[28] In response to a letter from Plaintiff's counsel raising various issues with this production, on January 25, 2022, Mixmax produced an additional 66,541 documents.[29]

Q. On January 21, 2022, Plaintiff filed a motion for an award of fees and expenses (the "Fee Motion"). The Fee Motion sought fees under the bad-faith exception to the American Rule. The Fee Motion asserted that Defendant forced Plaintiff to file suit to secure his clear right to inspection as a director, that Defendant unnecessarily prolonged or delayed the litigation, and that Defendant made misrepresentations regarding aspects of the information Plaintiff sought.[30]

R. In their discussions over the scope of Plaintiff's inspection, Mixmax represented that Mathé had not used any personal email accounts to conduct Company business. Thus, the parties agreed that only Mathé's Company email account would be searched for responsive books and records, but if it came to the

[27] Dkt. 1 Ex. A ¶ 14.

[28] Dkt. 31 ¶ 20.

[29] *Id.* ¶ 21.

[30] Dkt. 20 ¶ 33.

attention of the Company's counsel that Mathé had used another email account for Company business, that account would also be searched.[31]

S. Plaintiff's review of Mixmax's document production revealed that Company communications had been sent to Mathé's personal email accounts.[32] Plaintiff's counsel demanded that the Company search Mathé's personal email accounts. In response, the Company's counsel stated that it conducted further custodian interviews with Messrs. Mathé, and Vogel, and confirmed that the directors did not use their personal accounts for Company business.[33] The Company discounted the emails sent to Mathé's personal email accounts as emails that Mathé sent accidentally or merely for testing if Mathé's email was working.[34]

T. On February 3, 2022, Plaintiff filed a motion to enforce ("Motion to Enforce"), seeking an order compelling the Company to search Mathé's personal email accounts.[35] The motion also argued that Mixmax had improperly searched Fritjofsson's email account by using underinclusive, unagreed to search terms, and that Mixmax had failed to produce the sales ledger requested by Plaintiff.[36] On

[31] Dkt. 13 Ex. A.

[32] *Id.* ¶ 13.

[33] Dkt. 28 Ex. D at 3.

[34] *Id.*

[35] Dkt. 28.

[36] *Id.* ¶ 15.

March 7, 2022, three days before a hearing on the Motion to Enforce, the Company produced 63 documents, largely from Mathé's personal email accounts. The majority of those emails were from a website called "AngelList Venture."[37] Those emails reflect responses from investors in a SAFE offering that Mathé had established in the summer of 2021.[38] The new production also revealed that Mathé appears to have forwarded some emails from his work account to his personal account.[39] The Company contended that it had already produced, in one form or another, all but one inconsequential email found in Mathé's personal account and that the omission of these emails from the initial production was a harmless oversight.[40]

U. Plaintiff also sought to enforce the court's December 6, 2021, Production Order with respect to paragraph 14(iii) of the Demand.[41] The Production Order provided that "Request Nos. 14(iii) and 15 will be fully answered in exactly the form of the Demand."[42] Paragraph 14(iii) of the Demand requested:

> Documents sufficient to show . . . (iii) a detailed sales ledger of the Company as of August 31, 2021 (YTD) that reconciles to the general ledger, in Microsoft Excel format with details of all costs of goods sold

[37] *Id.* ¶ 21.

[38] SAFE is an acronym that stands for Simple Agreement for Future Equity.

[39] Dkt. 13 Ex. A ¶¶ 10, 13.

[40] Dkt. 69 ¶¶ 4–6.

[41] Dkt. 28.

[42] Dkts. 13–14. Dkt. 13 Ex. A ¶ 10.

> activity during the period; and (iv) the Company's 25 largest customers as of August 31, 2021.

V. In its Motion to Enforce, Plaintiff claimed that paragraph 14(iii) remained unsatisfied because:

> The Company has produced an invoice file (the "Invoice File") and related schedule relating to deferred revenue (the "Deferred Revenue File" together with the Invoice File, the "Revenue Documents" attached hereto as Ex. A and B, respectively). Although Plaintiff would be willing to accept the Revenue Documents if they enabled him to accomplish his purpose and verify the Company's financials, the Revenue Documents are insufficient to do so.
>
> Specifically, the Invoice File contains revenue information on a customer-by-customer basis, with unique alphanumeric codes for customer IDs, while the Deferred Revenue File with revenue, discounts and refund information does not include customer IDs. In other words, Plaintiff cannot reconcile the general ledger revenue amounts with the Revenue Documents because the Deferred Revenue File does not include customer IDs for revenue, discounts and refunds.
>
> Plaintiff therefore remains unable to verify the Company's financials. Yet, management continues to market and sell SAFEs based on those financials.

W. The Company countered that it had been responsive to Plaintiff's request, that the information requested did not exist in the ordinary course, and that the Company had worked diligently with the Company's outside accountant to

produce the requested information.[43] The Company also agreed to have its accountants meet with Plaintiff and his accounting team.[44]

X. At the September 9, 2022 status conference, the court asked whether Plaintiff had requested a meeting between Plaintiff's forensic accounts and defendant Mixmax, Inc's accountants, and whether that meeting had occurred.[45] Plaintiff informed the court that Plaintiff had not requested such a meeting.[46] On September 19, 2022, Plaintiff requested that Mixmax agree to a meeting between Plaintiff's forensic accountants and Mixmax's accountants.[47] Mixmax agreed to arrange a meeting if Plaintiff agreed to pay for the meeting and agreed to dismiss this action. Plaintiff did not agree to Mixmax's terms.[48] On September 29 and October 6, 2022, the parties filed letters explaining the areas of their disagreement.[49]

Y. On November 2, 2022, the court entered an order resolving the dispute regarding the parties' accountants.[50] The order provided that Mixmax was to make the Company's outside accounting service available to Plaintiff and Plaintiff's

---

[43] Dkt. 31 ¶ 8.

[44] Dkt. 61 at 67, 80.

[45] Dkt. 102, at 19:23–21:18.

[46] *Id.*

[47] Dkt. 103, at 2.

[48] *Id.* at 2–3.

[49] *See id.*; Dkts. 104–05.

[50] Dkt. 106.

forensic accountants.[51] The order further provided that the parties were to submit a joint report within ten days of the meeting and that the court was deferring the issue of attorneys' fees and the motion for contempt until after reviewing the joint status letter.[52]

Z. On December 2, 2022, the parties submitted their joint status report.[53] Plaintiff stated that following the accountants' meeting, Plaintiff understood how the Company's general ledger and sales ledger do not reconcile by design.[54] Defendants noted that they understood that the issue of the accountants had been resolved. Plaintiff did not disagree.

The Status Quo Order

AA. The parties stipulated to, and on February 10, 2022, the court entered a status quo order. The order provided that Mixmax "shall not take, approve, or authorize . . . marketing or selling securities, including, but not limited to, the SAFEs . . . until after the Company provides 10 days' advance electronic notice to Plaintiff."[55] The court entered a nearly identical order on March 11, 2022, which maintained the status quo until the latter of the dismissal of this action or ten days

[51] *Id.* ¶ 1.

[52] *Id.* ¶ 4.

[53] Dkt. 108.

[54] *Id.* at 2.

[55] Dkts. 39, 60.

after the parties were to deliver a status report at the end of March 2022.[56] Those two orders are collectively referred to as the "SQO."

BB. On February 11, 2022, Mathé began discussions with Silicon Valley Bank ("SVB") about refinancing Mixmax's existing debt and taking on an additional $700,000 of debt.[57] The new financing arrangement with SVB contemplated a warrant component similar to Mixmax's existing debt with SVB.[58] The proposed transaction would increase SVB's warrant coverage from 0.10% to 0.12% on a fully-diluted basis.[59] Mathé did not provide Plaintiff with advance notice of his discussions with SVB.

CC. On March 14, 2022, Mathé, on behalf of the Company, executed a refinancing term sheet with SVB.[60] On March 21, 2022, Mathé attempted to call a Board meeting to approve and close the refinancing.[61] Plaintiff responded to Mathé's call for a Board meeting with an email raising Plaintiff's concern that the negotiation of the refinancing violated the SQO. In this email exchange, Mathé

---

[56] Dkt. 61.

[57] Dkt. 109 ¶ 3(k).

[58] *Id.* ¶ 3(l).

[59] Dkt. 118 Ex. F at 2.

[60] Dkt. 109 ¶ 3(p). The loan was subject to "Final loan approval (including satisfactory investor calls), legal diligence, and loan documentation. Material Adverse Assessment prior to each advance." *Id.* Ex. 11, at MIXMAX0452504.

[61] *Id.* ¶ 3(r).

replied that he did not believe his negotiations with SVB violated the SQO.[62] Nevertheless, Mathé agreed to delay the Board meeting until April 4, 2022.[63] In fact, the Board did not act on the proposed refinancing until May 2022.[64]

DD. On March 29, 2022, Plaintiff filed a motion for the entry of an order to show cause as to why Mathé's negotiations with SVB did not violate the SQO.[65] As relief, Plaintiff's motion requested an extension of the duration of the SQO, an express finding that Mixmax and Mathé violated the SQO, the unwinding of any securities sales completed by Mixmax in violation of the SQO, an order directing Mixmax to make a full and complete disclosure to SVB regarding this action, and an order shifting Plaintiff's fees and costs incurred in connection with the motion.[66]

EE. The SQO expired under its terms on April 9, 2022.

FF. At a May 26, 2022, Board meeting, the Board approved an amendment to the Company's credit facility with SVB, which included the issuance of a warrant to purchase up to 27,586 shares of Mixmax common stock for a per share price of $0.99.[67] Plaintiff voted against the proposal.[68]

---

[62] *Id.*

[63] *Id.* Ex. 20–21.

[64] Dkt. 118, at 13.

[65] Dkt. 67 ¶ 25.

[66] *Id.* ¶ 35.

[67] Dkt. 118 Ex. F at 2.

[68] *Id.*

GG. The court granted Plaintiff limited discovery into the motion for rule to show cause, including a half-day deposition of Mathé.[69] On December 5, 2022, Plaintiff filed a supplemental submission regarding Mixmax's and Mathé's alleged contempt of the court's SQO.[70] In that submission, Plaintiff consented to a resolution of the motion on the papers, without argument.[71] On January 12, 2023, Defendants filed a response to Plaintiff's supplemental submission.[72]

NOW, THEREFORE, the court having carefully considered Plaintiff's motion for an award of attorneys' fees and his motion for a rule to show cause, IT IS HEREBY ORDERED, this 23rd day of March 2023, as follows:

Attorneys' Fees

1. Under the well-established American Rule, parties to litigation bear their own attorneys' fees. *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002). "An exception exists in equity . . . when it appears that a party, or its counsel, has proceeded in bad faith, has acted vexatiously, or has relied on misrepresentations of fact or law in connection with advancing a claim in litigation." *Rice v. Herrigan-Ferro*, 2004 WL 1587563, at *1 (Del. Ch. July 12, 2004). There is not a single standard of bad faith that gives rise to an award of attorneys' fees; rather, bad faith

[69] Dkt. 102.

[70] Dkt. 109.

[71] *Id*. at 1.

[72] Dkt. 118.

turns on the particular facts of each case. *Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *16 (Del. Ch. Nov. 1, 2002).

2. "A subset of this 'bad faith' exception is that attorneys' fees may be awarded if it is shown that the defendant's conduct forced the plaintiff to file suit to secure a clearly defined and established right." *McGowan v. Empress Entm't Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000). Where a company takes on an overly aggressive litigation strategy that includes litigation practices such as blocking legitimate discovery, misrepresenting the record, and taking positions for no other purpose than obstructing a § 220 plaintiff's clear statutory rights, fee shifting under the bad-faith exception to the American Rule may be warranted. *Pettry v. Gilead Scis., Inc.*, 2020 WL 6870461, at *30 (Del. Ch. Nov. 24, 2020). Further, a pre-litigation failure to provide any documents despite ample evidence of a credible basis for the request and obvious responsiveness of certain categories of documents to that request may enhance a court's willingness to shift fees. *Id.* This court, however, does not invoke the "bad faith exception" lightly and imposes the stringent evidentiary burden of producing "clear evidence" of bad-faith conduct on the party seeking an award of fees. *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005); *Nagy v. Bistricer*, 770 A.2d 43, 64 (Del. Ch. 2000).

3. A director of a Delaware corporation has a statutory "right to examine the corporation's . . . books and records for a purpose reasonably related to the

director's position as a director." 8 *Del. C.* § 220(d). That inspection right "is correlative with [the director's] duty to protect and preserve the corporation." *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 128 (Del. Ch. 1969); *see Holdgreiwe v. The Nostalgia Network, Inc.*, 1993 WL 144604, at *3 (Del. Ch. Apr. 29, 1993) ("The rights of directors to access the corporate books and records are recognized by Delaware law as of fundamental importance and a necessary concomitant to the imposition upon directors of fiduciary duties.").

4. Plaintiff argues that he was forced to file this suit to secure his clear right, as a director, to inspect Mixmax's books and records. Plaintiff states: "By October 22, ten days had passed. The Company had retained Delaware counsel but had not met and conferred about a production. Thus, Plaintiff was forced to file suit to enforce his clear rights."[73] The court is not convinced that Defendant forced Plaintiff to file suit to obtain inspection or that Mixmax engaged in bad-faith conduct warranting fee shifting.

5. Plaintiff delivered his Demand on October 12, 2021. Mixmax promptly responded and informed Plaintiff that Mixmax would provide Plaintiff with responsive documents and would comply with its obligations under Delaware law.[74] The Company did not contest Plaintiff's right to inspection. Rather, in response to

[73] Dkt. 20 ¶ 4.

[74] Dkt. 1 ¶ 30.

Plaintiff's Demand, Mixmax proposed a meet and confer to be held on October 25, 2022.[75] The Demand sought to inspect 15 categories of documents, some of which included subparts, and many of them sought "all documents and communications referring or relating to" certain decisions or events for a two-and-a-half-year period.[76] For example, the Plaintiff demanded all documents and communications "referring or relating to reimbursement or payment of expenses for travel, meals, entertainment, and any other similar expense paid, requested to be paid or reimbursed by the Company, by Messrs. Mathé and/or Vogel."[77] Given the granularity and breadth of some of the requests, it was not unreasonable for the Company to request a meet and confer to develop a rational approach to identifying the types of documents reasonably related to Plaintiff's position as a director and a timetable for production.

6. Plaintiff characterizes Mixmax's response to Plaintiff's Demand as dilatory and part of a scheme to keep Plaintiff in the dark while Mixmax approved a Board resolution to ratify Mathé's and Vogel's compensation pursuant to 8 *Del. C.* § 204 and authorize an amendment to an agreement that had been breached by certain compensation grants. In support of its position, Plaintiff cites *McGowan* and

[75] *Id.*

[76] *Id.* Ex. A at 4–9.

[77] *Id.*

Carlson v. Hallinan, 925 A.2d 506 (Del. Ch. 2006), *opinion clarified*, 2006 WL 1510759 (Del. Ch. May 22, 2006). In *McGowan*, the company "misled [the director] for over 16 months, by promising him both orally and in writing that the books and records would be produced forthwith." *McGowan*, 791 A.2d at 2. In *Carlson*, the defendants refused a director's informal information request, purported to remove him from the board two days after he delivered a Section 220 demand, and continued their refusal to provide information after the director filed a Section 220 action. *Carlson*, 925 A.2d at 545. The facts of this case are not comparable to *McGowan* or *Carlson*.

7. Here, Mixmax immediately recognized Plaintiff's rights to books and records and attempted to arrange a meet and confer over how the production of documents should commence.[78] Defendant began document collection on October 27, 2021, only five days after Plaintiff filed his complaint in this action.[79] Defendant conducted multiple custodian interviews with Mathé, Vogel, and Fritjofsson ("Custodians").[80] Moreover, Defendant engaged information technology professionals to collect electronically stored information from the Custodians' work email accounts, Google Drives, Dropbox accounts, work Slack accounts, and

[78] Dkt. 1 ¶ 30.

[79] Dkt. 32 ¶ 4.

[80] *Id.*

iPhones.[81] Defendant's lawyers also personally logged into Mathé's Twitter account using his log-in credentials and reviewed his direct messages for responsiveness to the Demand.[82] On December 3, 2021, Mixmax stipulated to the Production Order, which represented that the parties did not dispute Plaintiff's entitlement to inspection and acknowledged that the remaining dispute was "limited to the burden and expense associated with conducting a review pursuant to the Demand."[83] The Production Order required a rolling production to begin on December 6, 2021, and to be completed by December 30, 2021. Mixmax produced 101,669 documents in the month of December alone, and more than 168,317 in all.[84] The production may not have been as prompt as Plaintiff and his counsel would have liked, but Defendant's conduct, viewed in its totality, does not reflect bad faith.

8. Plaintiff also seeks fees over Mathé's allegedly bad-faith representation that he never used his personal email accounts for Company business. The supplemental discovery this court ordered regarding Mathé's personal emails revealed that Mathé had some automated, work-related emails sent to his personal accounts.[85] It also appears that he forwarded himself a few items from his work

[81] *Id.*

[82] *Id.*

[83] Dkt. 13 at 2.

[84] Dkt. 31 ¶ 20–21. *See* Dkt. 32 (Affidavit of Lauren K. Neal, Esq.).

[85] Dkt. 71 ¶¶ 13, 21.

account.[86] Defendant explained the forwarded emails as emails that Mathé forwarded to himself as a test to see if a technical glitch with Mathé's work email had subsided.[87] Defendant explained that the automated emails resulted from Mathé using his personal email when creating his AngelList account.[88] Importantly, Defendant produced many of the documents sent to Mathé's personal email or documents containing the same information as the documents sent to Mathé's personal email in the course of the rolling production.[89] Although the emails in Mathé's personal account may have presented the information in a more readable format, the documents produced in the rolling production materially duplicated the content of the AngelList emails. The results of the supplemental discovery do not show that Mathé engaged in extensive business dealings from his personal accounts. Mathé's representations to the Company's counsel that he had not used his personal accounts for Company business ware not accurate. The process could have been better, but the Court is not persuaded that this issue, when viewed in context, warrants a finding of bad faith.

---

[86] *Id.*

[87] Dkt. 69 ¶ 2.

[88] *Id.* ¶ 5.

[89] *Id.* ¶ 4; *see also id.* Exs. 1A-B–21A-B (providing an A-B analysis of A, the AngelList automated emails, and B, the corresponding documents produced by Plaintiff in the rolling production that contain the same information as provided in the AngelList automated emails).

Contempt

9. Plaintiff alleges that the Company and Mathé should be held in contempt for violating the SQO. To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it. *Arbitrium v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997). The remedy of civil contempt serves two purposes: to coerce compliance with the order being violated and to remedy injury suffered by other parties because of the disobedient behavior. *Delaware State Bar Ass'n v. Alexander*, 386 A.2d 652, 665 (Del. 1978). Civil contempt is a weighty sanction that can be accompanied by a range of punishments, including fines and imprisonment. *TransPerfect Glob., Inc. v. Pincus*, 278 A.3d 630, 644 (Del. 2022), *reargument denied* (June 21, 2022), *cert. denied*, 143 S. Ct. 574 (2023). Whether a party should be held in contempt is a discretionary matter for the Court. *Id*. The violation "must not be a mere technical one, but must constitute a failure to obey the Court in a meaningful way." *Dickerson v. Castle*, 1991 WL 208467, at *4 (Del. Ch. Oct. 15, 1991) (internal quotation omitted).[90] Even where there has been a violation,

[90] Mixmax argues that contempt requires an "element of willfulness or conscious disregard of a court order." Dkt. 80 at 7–8 (quoting *Mitchell Lane Pubs., Inc. v. Rasemas*, 2014 WL 4804792, at *2 (Del. Ch. Sept. 26, 2014)). This argument reflects a misreading of the caselaw. The quote from *Mitchell Lane* is incomplete. The full quote is: "Before exercising its discretion to *award an entry of judgment*, the Court must be satisfied that there was an 'element of willfulness or conscious disregard of a court order.'" *Id*. at *2 (emphasis added) (quoting *Gallagher v. Long*, 940 A.2d 945 (Del. 2007) (ORDER)). In *Mitchell Lane*, the movant sought dismissal of the contemnor's claims and entry of

the Court will consider good faith efforts to comply with the order or to remedy the consequences of non-compliance. *Id.*

10. The standard of proof required in a civil contempt proceeding in Delaware is a preponderance of the evidence. *TransPerfect.*, 278 A.3d at 644 & n.97 (Del. 2022). If the petitioning party is able to meet its burden, the burden shifts to the contemnors to show why they were unable to comply with the order. *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *15 (Del. Ch. Dec. 9, 2009), *aff'd*, 26 A.3d 180 (Del. 2011). "After that, the court must make findings of fact and determine whether each party carried its burden." *TransPerfect*, 278 A.3d at 645.

11. The SQO bound Mixmax. Both the Company and Mathé each had notice of the SQO. The main areas of dispute on this motion are whether Mathé's conduct violated the SQO and, if so, did it do so in a meaningful way.

12. The SQO provided, in pertinent part, that the Company:

> shall not take, approve, or authorize the . . . marketing or selling securities, including, but not limited to, the SAFEs . . . until after the Company provides 10 days' advance electronic notice to Plaintiff of the action to be taken, approved or authorized by the Company.[91]

---

judgment on the movant's counterclaim. In *Gallagher,* the Delaware Supreme Court affirmed the trial court's entry of a final judgment against the appellants for their "repeated contumacious disregard" of the court's orders. *Gallagher*, 940 A.2d at 945. These cases are consistent with the prevailing standard that a movant "is not required to show that the violation was willful or intentional, but the intentional or willful nature of a contemnor's acts may be considered in determining the appropriate sanction." *Litterst v. Zenph Sound Innovations, Inc*., 2013 WL 5651317, at *3 (Del. Ch. Oct. 17, 2013.).

[91] Dkt. 60.

Mathé did not give ten days' notice to Plaintiff before speaking with SBV regarding refinancing Mixmax's SVB loan. The first question is whether the communications between Mathé and SVB constituted marketing or selling securities. There can be no reasonable dispute that the warrants here are securities. *See Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 2173838, at *6 (Del. Ch. May 28, 2010) ("[A]n option to purchase an equity security . . . is itself a security."). Plaintiff contends that by discussing a refinancing transaction with SVB that involved the issuance of additional warrants to SVB, Mixmax marketed its warrants. *See* Merriam-Webster Dictionary (2022) ("Marketing" is "the process or technique of promoting, selling, and distributing a product or service.").

13. Mixmax argues that Mathé's discussions with SVB did not constitute marketing or selling securities. Instead, Mixmax contends that Mathé was merely engaged in discussion over debt refinancing, the terms of which included an incidental warrant provision for a *de minimis* number of shares. Mixmax also points to the fact that Plaintiff himself had previously encouraged refinancing the Company's SVB loan facility, and reiterated the same after Mathé called a March 23, 2022, Board meeting to consider the proposal.[92] Mixmax also points to Mathé's

[92] Dkt. 80 Ex. D at 2 (Dearing email to Mathé stating: "The business case in favor of refinancing is obvious and something I have advocated for more than a year.").

having sought and obtained legal advice that his communications with SVB did not violate the SQO.[93]

14. Mathé's interactions with SVB constituted, at worst, a technical violation of the SQO. Mathé was not engaged in a broad marketing campaign to sell Mixmax securities to a wide range of potential investors. It was nothing approaching Mathé's conduct in selling SAFEs in the summer of 2021, a topic that was a major focus of Plaintiff's Demand. The small increase in SVB's warrant coverage from 0.10% to 0.12% as a result of the refinancing indicates that this transaction never contemplated a significant securities issuance. Based on the record presented, the court is not persuaded that Mathé's conduct "constitute[d] a failure to obey the Court in a meaningful way." *Dickerson*, 1991 WL 208467, at *4 (internal quotations omitted).

15. Further, the immediate remedial steps Mixmax took in response to Plaintiff's identifying the alleged violation of the SQO sufficiently rectified any noncompliance. After receiving Mathé's March 21, 2022, email requesting a Board meeting on March 23, 2022, to discuss the proposed debt refinancing, Plaintiff responded that he viewed the refinancing transaction as violating the SQO and

[93] Dkt. 118. Plaintiff takes issue with this assertion arguing that the record shows Mathé did not inform counsel, prior to his discussions with SVB. that the debt refinancing included a warrant component. Dkt. 109 ¶¶ 19–23 and Exs. 8, 19. The court need not resolve this factual issue for purposes of this motion, and it declines to do so.

suggested that the Company "should reschedule for a date consistent with the [SQO]."[94] Mathé's reply stated: "Even though we don't view a refinancing as selling securities, happy to set up another board call one week later."[95]

16. Viewed in full context and considering the overall purpose of the SQO, Mathé's and Mixmax's actions taken in response to Plaintiff's email adequately mitigated the effects of any violation of the order. As Plaintiff acknowledged, the purpose of the notice requirement of the SQO was to give Plaintiff advance warning of certain actions so that he could be sufficiently informed and to provide time to seek an injunction. *See* Dkt. 67 ¶ 6 ("Those 10 days would allow Plaintiff time to move this Court to enjoin in advance the Company's attempts to take actions on subjects as to which Plaintiff remained uninformed."); *id*. ¶ 7 ("[T]he prohibition on marketing securities would ensure that a securities sale would not be presented to the Board unexpectedly . . . ."). Once Plaintiff raised his concern about presenting the refinancing proposal on less than ten-days' notice, the Company immediately deferred consideration of the proposal. Indeed, the Board did not meet to vote on the proposed refinancing until May 26, 2022, nearly seven weeks after the expiration of the SQO and two months after Mathé first sought Board approval. Plaintiff did not seek to enjoin the refinancing or the Board's consideration of it. Thus, it is

[94] Dkt. 80 Ex. D at 4.

[95] *Id*. at 3.

difficult to imagine what harm Plaintiff incurred from this, at worst, technical violation of the SQO, to which Mixmax and Mathé made good faith efforts to comply.

17. Having reviewed the record presented on the motion for a rule to show cause, the motion is denied.

18. For the reasons stated above, Plaintiff's motions are DENIED, and this matter is closed.

/s/ Paul A. Fioravanti, Jr.
Vice Chancellor