IT IS ORDERED as set forth below:

Date: January 14, 2015

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	**Chapter 11**
CDC CORPORATION,	:	**Case No. 11-79079-PWB**
Debtor.	:	
MARCUS A. WATSON, as Liquidation Trustee Under The Confirmed Chapter 11 Plan of CDC Corporation,	:	
Movant,	:	
vs.	:	**CONTESTED MATTER**
RAJAN VAZ,	:	
Respondent/Claimant.	:	

MEMORANDUM OPINION WITH REGARD TO TRUSTEE'S MOTIONS FOR SUMMARY JUDGMENT ON OBJECTIONS TO PROOF OF CLAIM AND PROOF OF INTEREST OF RAJAN VAZ

The confirmed Chapter 11 plan for CDC Corporation (the "Debtor")[1] provides for a Liquidation Trust funded with all of the Debtor's assets to pay allowed claims and administrative expenses (including postconfirmation expenses) in full and to distribute remaining funds to holders of common stock. Marcus A. Watson is the Liquidation Trustee (the "Trustee"). The Trustee has the authority under the Plan to object to proofs of claim and to proofs of interest other than interests arising from shares of common stock in the Debtor.

Rajan Vaz filed a proof of claim (No. 27) and a proof of interest (No. 128).

The proof of claim states a number of claims. One set of claims arises out of Mr. Vaz's assertion that the Debtor is obligated on a Convertible Promissory Note (the "Note")[2] executed in March 2000 by China.com Corporation, Ltd. ("CDCL"), then a subsidiary of the Debtor, in connection with a Stock Purchase Agreement ("SPA")[3] under which CDCL was to acquire the shares of his company, Software Galleria, Inc. ("SGI"). The promissory note was convertible into shares of the Debtor. The Debtor, CDCL, SGI, and Mr. Vaz were parties to the SPA.

The proof of claim also states claims arising out of Mr. Vaz's employment and the allegedly wrongful termination of it in August 2010. These claims involve an Employment and Non-Competition Agreement (the "Employment Agreement"),[4] executed in March 2000 in

[1] The confirmed plan is the Second Amended Joint Plan of Reorganization, filed by CDC Corporation and dated August 29, 2012, as modified by the Confirmation Order (the "Plan").

[2] A copy of the Note is attached to Proof of Claim No. 27 as Exhibit "A".

[3] A copy of the Stock Purchase Agreement is attached as Exhibit "A" to the Trustee's Objection to Mr. Vaz's proof of claim. [736-1 at 23].

[4] A copy of the Employment and Non-Competition Agreement is attached to Proof of Claim No. 27 as Exhibit "E". [POC 27, at 26].

connection with the SPA. The parties to the Employment agreement are CDCL, SGI, and Mr. Vaz, but not the Debtor.

Although Mr. Vaz's total claim is $29,421,631, any recovery on his claim is limited to $10,000,000 under a Stipulation and Agreement dated July 17, 2012. [585].

Mr. Vaz's proof of interest asserts equity interests in the debtor based on his ownership of shares of stock of the Debtor and option rights.

The Trustee has objected to the proof of claim [736] and the proof of interest [737] filed by Mr. Vaz on various grounds. In accordance with a Scheduling Order that the Court entered at the request of, and with the consent of, the Trustee and Mr. Vaz [761], Mr. Vaz filed a response to the Trustee's objections. [745].

Now before the Court are the Trustee's motions for partial summary judgment with regard to certain aspects of the proof of claim [838] and for summary judgment on his objection to the proof of interest. [845].

With regard to the objection to proof of claim No. 27, the Trustee seeks partial summary judgment with regard to: any claims relating to the Note; any claims relating to the SPA; any claims for an allegedly unpaid bonus; and any claims for wrongful termination of Mr. Vaz's employment. His motion for summary judgment on proof of interest No. 128 contends that Mr. Vaz does not have any allowable interest other than his shares of common stock, on account of which he is entitled to (and has received) distributions to the same extent as other holders of interests based on the ownership of common stock.

The filing of an objection to a proof of claim or interest initiates a contested matter under Fed. R. Bankr. P. 9013 and 9014. The pleadings of the parties in this contested matter consist of Mr. Vaz's proofs of claim and of interest, as amended and supplemented by his response, and the

Trustee's objections. Mr. Vaz's proof of claim, proof of interest, and response are the equivalent of a complaint in civil litigation in a federal district court and the Trustee's objections are the equivalent of an answer. In considering the Trustee's motions, the Court applies the standards of Fed. R. Civ. P. 56 that govern a defendant's motion for summary judgment on one or more of the claims of a plaintiff's complaint in civil litigation in a federal district court. Fed. R. Civ. P. 56, *applicable under* Fed. R. Bankr. P. 7056 and 9014(c).

The Memorandum sets forth the Court's analysis of the issues raised by the Trustee and Mr. Vaz based on the record before the Court[5] with regard to the summary judgment motions[6] in

[5] The Court held a status conference with regard to the Trustee's motions for summary judgment and other issues on September 30, 2014. One of the matters the Court considered at the status conference was Mr. Vaz's motion [880] to preclude the Court's consideration of the untimely supplemental declaration of Joseph Stutz [879] in connection with the Trustee's summary judgment motions.

At the status conference, the Court determined that it would consider the supplemental declaration of Mr. Stutz as well as the additional declaration that Mr. Vaz submitted in connection with his motion. [880 at 5-23]. The Court also directed the parties to file supplemental briefs and scheduled oral argument on the Trustee's summary judgment motions. The Court entered an Order on October 3, 2014, that set forth these rulings. [895].

[6] The record consists of the following matters, to which this Order refers as described in the parentheticals:

Mr. Vaz's pleadings: Proof of Claim No. 27 ("POC 27"); Proof of Interest No. 128 ("POI 128"); Response of Rajan Vaz to Objection to Proof of Claim No. 27 and Proof of Interest 128, and Motions for Order Disallowing Such Claim and Interest [745] ("Vaz Response").

Trustee's objections: Objection to Proof of Claim No. 27 Filed by Rajan Vaz and Motion for Order Disallowing Such Claim [736] ("Objection-27"); Objection to Proof of Interest No. 128 Filed by Rajan Vaz and Motion for Order Disallowing Such Claim [737] ("Objection-128").

Trustee's moving papers with regard to objection to Proof of Claim No. 27: Liquidation Trustee's Motion for Partial Summary Judgment on His Objection to Proof of Claim No. 27 [838]; Trustee's Statement of Material Facts Not in Dispute as to Proof of Claim No. 27 [839] ("Trustee Facts-27"); Brief in Support of Liquidation Trustee's Motion for Partial Summary Judgment on His Objection to Proof of claim No. 27 [840] ("Trustee Brief-27"); Reply Brief in

Support of Liquidation Trustee's Motion for Partial Summary Judgment on His Objection to Proof of Claim No. 27 [867] ("Trustee Reply Brief-27").

Trustee's moving papers with regard to Proof of Interest No. 128: Liquidation Trustee's Motion for Summary Judgment on His Objection to Proof of Interest No. 128 [845]; Trustee's Statement of Material Facts Not in Dispute as to Proof of Interest No. 128 [846] ("Trustee Facts-128"); Brief in Support of Liquidation Trustee's Motion for Summary Judgment on His Objection to Proof of Interest No. 128 [847] ("Trustee Brief-128"); Reply Brief in Support of Liquidation Trustee's Motion for Summary Judgment on His Objection to Proof of Interest No. 128 [868] ("Trustee Reply Brief-128").

Declarations filed in support of Trustee's motions: Declaration of Donald L. Novajosky [841] ("Novajosky Decl."); Declaration of Joseph D. Stutz to Authenticate Business Records [842] ("Stutz Decl."); Declaration of Trudy Naimy to Authenticate Business Records [843] ("Naimy Decl."); Supplemental Declaration of Joseph D. Stutz [879] ("Stutz Supp. Decl.").

Additional briefs filed by Trustee: Supplemental Brief in Support of Liquidation Trustee's Motion for Partial Summary Judgment on Objection to Proof of Claim No. 27 and Motion for Summary Judgment on Objection to Proof of Interest No. 128 [897] ("Trustee Supp. Brief"); Supplemental Brief Regarding Stock Options Issued to Vaz [910] ("Trustee Post-Arg. Brief").

Mr. Vaz's responsive papers in opposition to Trustee's motions: Rajan Vaz's Brief in Opposition to Liquidation Trustee's Motion for Partial Summary Judgment of Claim No. 27 and Motion for Summary Judgment of Claim No. 128 [859] ("Vaz Brief"); Rajan Vaz's Counterstatement to Trustee's Statement of Material Facts Not in Dispute as to Claim No. 27 [860] ("Vaz Facts-27"); Rajan Vaz's Counterstatement to Trustee's Statement of Material Facts Not in Dispute as to Claim No. 128 [861] ("Vaz Facts-128").

Declarations filed in support of Mr. Vaz's opposition to motions: Declaration of Respondent/Claimant Rajan Vaz in Opposition to Liquidation Trustee's Motion for Partial Summary Judgment on Trustee's Objection to Proof of Claim No. 27 and Claim No. 128 ("Vaz Decl."); Declaration of Respondent/Claimant Rajan Vaz in Response to The Untimely Supplemental Declaration of Joseph D. Stutz [880 at 6 – 23] ("Vaz Supp. Decl.").

Additional briefs filed by Mr. Vaz: Supplemental Brief of Rajaz Vaz in Opposition to the Liquidation Trustee's Motion for Partial Summary Judgment on Objection to Proof of Claim No. 27 and Motion for Summary Judgment on Objection to Proof of Claim No. 128 [899] ("Vaz. Suppl. Brief"); Letter Brief, November 21, 2014 [909] ("Vaz Post-Arg. Brief-1"); Letter Brief, November 24, 2014 [911] ("Vaz Post-Arg. Brief-2").

Transcripts of hearings: Transcript of Hearing on Status Conference, September 30, 2014 [901] ("Status Tr."); Transcript of Hearing on Motion for Summary Judgment, November 14, 2014 [908] ("Arg. Tr.").

five parts. Parts I, II, III, and IV deal with the motion for partial summary judgment with regard to, respectively, the portion of Mr. Vaz's claims on the Note, any claims arising from the SPA, his claim for an unpaid bonus, and his claim for wrongful termination of employment. Part V deals with the Trustee's motion for summary judgment with regard to Mr. Vaz's proof of interest.

As Part I explains, the Trustee asserts three alternative defenses to Mr. Vaz's claim on the Note: (1) the Debtor is not liable on the Note; (2) any obligation on the Note was released under a settlement agreement executed in 2003; and (3) the six-year statute of limitations applicable to the Note bars any claim on it. As Part II explains, the Trustee asserts that the release and statute of limitations also preclude any claim against the Debtor under the SPA. In addition, the Trustee asserts that the Debtor did not incur any obligations to Mr. Vaz under the SPA.

Because the parties and the Court have devoted substantial time and effort to all of the Trustee's alternative positions, the Court will rule on each defense, even though a ruling in the Trustee's favor on one defense would make it unnecessary for the Court to address any others. To the extent that the Trustee is entitled to prevail on more than one defense, this approach promotes judicial economy because an appellate court will have the opportunity to review all of the legal issues at one time.

For reasons set forth in Section D of Part I, the Court concludes that the statute of limitations bars Mr. Vaz's claims on the Note. As explained in Sections (B)(1) and (C)(1) of Part I, the Court will defer ruling on the Trustee's alternative defenses to the Note to permit Mr. Vaz to supplement the record with regard to certain factual issues that he contends preclude summary judgment in favor of the Trustee on the alternative defenses.

The statute of limitations also bars any claims under the SPA, but consideration of the Trustee's alternative defenses involves the same facts with regard to which Mr. Vaz may supplement the record. Accordingly, the Court will similarly defer ruling on the Trustee's motion for summary judgment with regard to claims under the SPA.

For reasons set forth in Parts III and IV, the Court concludes that disputed issues of material fact exist with regard to Mr. Vaz's claims for an unpaid bonus and for wrongful termination of his employment.

For reasons set forth in Part V, the Court concludes that disputed issues of material fact exist with regard only to Mr. Vaz's assertion of an equity interest based on options granted in 2009 with a strike price of $2.76. The Trustee is entitled to summary judgment that Mr. Vaz is not entitled to any other equity interest.

The Court will defer the entry of an Order ruling on the Trustee's motion concerning Mr. Vaz's proof of claim pending Mr. Vaz's supplement of the record and the Trustee's response. After considering the supplement and the response, the Court will address any issues they raise and enter an appropriate Order granting the Trustee's motion in part and denying it in part in accordance with the Court's analysis of the issues in this Memorandum Opinion and its determination of the issues raised by Mr. Vaz's supplement and the Trustee's response.

I. CLAIMS BASED ON THE NOTE

A. Factual Background and Positions of the Parties

In March 2000, Mr. Vaz and other shareholders of Software Galleria, Inc. ("SGI") entered into a Stock Purchase Agreement ("SPA")[7] with China.com Corporation ("CDCL")

[7] A copy of the Stock Purchase Agreement is attached to the Trustee's Objection as Exhibit "A". [736 at 22].

and Debtor.[8] At the time, CDCL was a wholly owned subsidiary of the Debtor.

The SPA provided for CDCL to purchase all of the shares of SGI held by Mr. Vaz and the other shareholders over three years in four tranches. CDCL agreed to purchase 55 percent of the SGI shares at the closing of the SPA and the remaining 45 percent in three tranches of 15 percent each on the last day of March of 2001, 2002, and 2003.

The consideration due at closing for the first 55 percent of the shares was $198,400 in cash and convertible promissory notes issued by CDCL to Mr. Vaz and the others in the total amount of $1,785,600. Each promissory note was convertible into registered shares of the Debtor. The Debtor was a party to the SPA, but the SPA did not call for the Debtor to execute the convertible promissory notes and the Debtor is not a party to the convertible promissory notes.

At the closing on March 2, 2000, CDCL paid the cash consideration, issued the convertible promissory notes, and became the owner of 55 percent of the shares of SGI. CDCL did not purchase any further shares.

In September 2003, the parties to the SPA executed a Settlement Agreement, dated as of September 14, 2003 (the "Settlement Agreement")[9] that dealt with their disputes under the SPA. The parties dispute the effect of the Settlement Agreement and whether it effected a release of any obligations under the convertible promissory notes.

[8] The name of the Debtor at the time was chinadotcom corporation, a Cayman Islands corporation.

[9] A copy of the Settlement Agreement is attached to the Trustee's Objection as Exhibit "C". [736 at 85].

At issue here is the convertible promissory note that CDCL issued to Mr. Vaz in the amount of $1,623,272.73 (the "Note").[10] Nothing was paid on the Note, and it had not been converted into shares of the Debtor as of September 2003.

The Trustee contends that, as a matter of law based on the material facts that are not in dispute, the Debtor is not obligated on the Note for three reasons:

1. Because the Debtor did not execute the Note, the Debtor is not obligated to pay it.

2. Pursuant to the Settlement Agreement, Mr. Vaz released the Debtor from any liability on the Note.

3. The expiration in 2006 of the statute of limitations applicable to enforcement of the Note under Hong Kong law, prior to the filing of the Debtor's bankruptcy case, bars enforcement of the Note.

It is undisputed that the Debtor did not execute the Note, but Mr. Vaz contends that the Debtor is nevertheless obligated to pay it for four reasons discussed in Section I(B) below.

With regard to the alleged release under the Settlement Agreement, Mr. Vaz contends that disputes of fact exist with regard to whether conditions precedent to the effectiveness of the release occurred and whether he was coerced into executing it. Section I(C) discusses these issues.

Although Mr. Vaz agrees that the applicable statute of limitations is six years, he asserts that the limitations period was tolled by the Debtor's continuing acknowledgement of liability under the Note or its conduct that was intended to create the impression that the Debtor was attempting to perform its contractual obligations. Section I(D) addresses these contentions.

[10] A copy of the Convertible Promissory Note is attached to the Trustee's Objection as Exhibit "B". [736 at 80].

B. The Debtor's Obligation Under the Note

The Court first addresses the Trustee's contention that the Debtor is not obligated under the Note because it did not execute it and Mr. Vaz's positions as to why the Debtor is nevertheless liable.

Mr. Vaz asserts four reasons that the Debtor is obligated on the Note:

(1) The Debtor's complete dominion and control over CDCL with regard to the transactions makes it liable on the Note;

(2) The Debtor acknowledged or assumed the obligation to pay the Note through execution of the Settlement Agreement;

(3) Under the terms of a Shareholder's Agreement[11] executed by Mr. Vaz and CDCL on March 2, 2000, upon CDCL's initial acquisition of SGI stock under the SPA, the Debtor became bound to pay the Note when it later acquired the SGI shares CDCL had purchased; and

(4) Other conduct of the Debtor and statements on its behalf constituted an acknowledgement or assumption of its liability on the Note.

The Court considers each theory in turn.

1. The Debtor's complete dominion and control over CDCL

Mr. Vaz asserts the Debtor is liable on the Note because it exercised complete dominion and control over its subsidiary, CDCL. The specific facts on which he relies are: (1) that Mr. Peter Yip, the Debtor's chief executive officer, negotiated and executed the SPA on behalf of both the Debtor and CDCL; (2) that CDCL was a wholly owned subsidiary of the Debtor; (3) that §2.03(a) of the SPA specifically references and incorporates the Note and provides for the

[11] A copy of the Shareholder's Agreement is attached to the Vaz Declaration as Exhibit "A". [862-2 at 2].

conversion of the principal amount due into registered shares of the Debtor; and (4) that the Debtor's approval was required for payment of the Note and/or its conversion into an equivalent amount of stock.[12]

The references in the SPA to the Note, the SPA's incorporation of the Note, and the convertibility of the Note do not as a matter of law establish that the Debtor is obligated on the Note. If the parties to the SPA had intended that the Debtor be liable for payment of the Note, they could have so provided. The willingness of the Debtor to issue shares does not result in liability to pay the Note it did not sign or agree to pay.

Nothing in the record supports the proposition that CDCL, as a contractual matter, could not pay the Note without the approval of the Debtor. The evidence in the record establishes nothing more than the existence of a parent-subsidiary relationship and (presumably) of common directors and management and the participation of the Debtor's CEO, Mr. Yip, as principal negotiator in connection with the transaction. It may be, and the Court will assume *arguendo*¸ that the Debtor, as the parent of CDCL, had some degree of control over CDCL as a practical matter through its right, as its only shareholder, to select its directors.

But these facts, as thus assumed, are not sufficient as a matter of law to establish the obligation of a parent to pay the debts of its wholly-owned subsidiary. Corporations are entitled to organize subsidiaries and to expect that courts will recognize their separate existences in the absence of fraud, abuse of the corporate form, or other facts that support a veil-piercing, alter ego, or similar theory that results in imposition of liability on the parent for the obligations of a subsidiary.

[12] Vaz Facts at 3, ¶¶ 6, 9; at 45, ¶¶ 8-11.

The question is whether the record demonstrates a genuine issue of material fact with regard to these types of non-contractual liability theories.

As explained earlier, Mr. Vaz's proof of claim and his Response are the equivalent of a complaint that states the bases for his claim that the Debtor is obligated on the Note that it did not sign. The Response states his non-contractual liability theories. The Trustee in his moving papers does not address the issue of liability under any of these theories, and he has not provided evidence that none of them apply here.

But the Trustee is not obligated to do so. The Trustee asserts that the Debtor is not liable on a note it did not sign. He addresses potential theories of liability that may exist under the record in this case. The Trustee's motion for partial summary judgment necessarily raises the issue of whether any evidence supports recovery on any other theory. In other words, the motion asserts that he is entitled to judgment as a matter of law that the Debtor is not obligated on the Note for any reason.

To defeat the Trustee's motion for summary judgment based on a non-contractual theory of liability, Mr. Vaz must show that admissible evidence exists to present a triable issue of fact on one or more of them. He has not done so. His mere assertion of the possible existence of the non-contractual theories of liability does not preclude the grant of summary judgment in the Trustee's favor in the absence of admissible evidence to support them.

Mr. Vaz, however, asserts that he should have the opportunity to conduct discovery to show that the Debtor assumed the obligation to pay the Note under theories of successor liability, alter ego, fraud, constructive trust, unjust enrichment, and/or conversion, which the Court refers to as "non-contractual liability theories." (Vaz Brief at 18, Vaz Supp. Brief at 1 [899 at 5]). Mr

Vaz asserted these same theories when he filed his Response to the Trustee's objections to his claims on May 14, 2013.[13]

The initial Scheduling Order, entered with the agreement of the parties, set October 1, 2013, as the deadline for non-expert discovery and February 14, 2014, as the deadline for the completion of depositions of experts. [761].

The Court modified the schedule in later scheduling orders entered at the request of the parties. The scheduling order entered on May 12, 2014, after the filing of the Trustee's motions for summary judgment, states that the parties had completed discovery with regard to production of documents and that party and third-party depositions would be completed by July 29, 2014.

On September 26, 2014, the Court entered a further scheduling order that extended the time for depositions until February 15, 2015. [890 ¶ (f) at 2].

Although Mr. Vaz has had over a year from the filing of his response to the Trustee's objections to his claim to conduct discovery with regard to his non-contractual liability theories, he continues to assert that the Court should deny the Trustee's motion for summary judgment based on non-contractual liability theories because of the prospect that future discovery will reveal some factual basis for them. (Vaz Supp. Brief at 1 [899 at 5-6]; Arg. Tr. 89.)

The Court is reluctant to expand this litigation to permit additional discovery at this juncture. Out of an abundance of caution, however, the Court will defer ruling on this issue and will permit Mr. Vaz to supplement the record with regard to his non-contractual theories of liability within 30 days from the date of entry of this order. The Trustee may respond to any such supplement within 20 days of its filing.

[13] Response [745 at 17, ¶ 43] ("Vaz believes that discovery will show that the Debtor assumed the liabilities under the [Note] or, if not, the Debtor is liable to Vaz for payment of the debt or the value of the SGI shares under a theory of (1) successor liability; (2) alter ego; (3) fraud; (4) constructive trust; (5) unjust enrichment; and/or (6) conversion.").

2. The Debtor's execution of the Settlement Agreement

Mr. Vaz contends that a consequence of the Debtor's execution of the Settlement Agreement was the Debtor's assumption of liability on the Note.[14] This theory invokes various provisions of the Settlement Agreement. Recall that the Settlement Agreement was executed by the Debtor, CDCL, Mr. Vaz, the other shareholders, and SGI, the same parties who executed the SPA.

The Settlement Agreement defines CDCL and CDC as the "CDC Parties."[15] It defines Mr. Vaz and the other shareholders as the "Management Parties."[16] It then states that the CDC Parties, the Management Parties, and SGI are collectively referred to as "Parties."[17]

The recitals in the "Whereas" part of the Settlement Agreement immediately after the Definitions[18] then refers to the "CDC Parties" and the "Parties" in ways that, Mr. Vaz contends, establish that the Debtor acknowledged an obligation to pay the Note.

Paragraph A of the recitals states that "the Parties" "entered into a Stock Purchase Agreement [i.e., the SPA] and executed Convertible Promissory Notes [including the Note] related thereto." Paragraph B states that the "CDC Parties" attempted to perform certain obligations under the Note and the SPA,[19] and Paragraph C states extension agreements that extended the time for the CDC Parties to perform under the SPA and Note had expired.[20]

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[14] Vaz Brief at 6, 17.
[15] Settlement Agreement at 1, second paragraph under "Definitions".
[16] Settlement Agreement at 1, second paragraph under "Definitions".
[17] Settlement Agreement at 1, second paragraph under "Definitions".
[18] Settlement Agreement at 1-2.
[19] Paragraph B refers to obligations under the "Agreement." The Settlement Agreement defines the "Agreement" as, collectively, the SPA and the Note. Settlement Agreement at 1, ¶ A.
[20] The record before the Court shows no details with regard to the negotiation or terms of the extension agreements.

Paragraph D states that "certain other obligations of the CDC Parties" in favor of Mr. Vaz and the other shareholders remain outstanding. Further, Paragraph D states that the Settlement Agreement refers to "any and all outstanding obligations of the CDC Parties" under the SPA and Note as the "CDC Obligations."

Mr. Vaz contends that the statement in Paragraph A that "the Parties . . . executed Convertible Promissory Notes" constitutes an acknowledgement by the Debtor that it executed the Note.[21] This proves too much. Mr. Vaz's interpretation would mean that *all* of the Parties executed the Note, but no one could seriously contend that this occurred or that each payee of each note became liable on all of them by executing the Settlement Agreement.

The statements in paragraphs B, C, and D refer to various obligations under the SPA and Note, but none of them refers specifically to a payment obligation under the Note. None of those paragraphs contain language that constitutes an acknowledgement by the Debtor of any obligation on the Note or an assumption of such an obligation.

The Court concludes as a matter of law that the Debtor's execution of the Settlement Agreement did not make it liable on the Note that it did not execute.

3. The Debtor's acquisition of SGI shares

In connection with CDCL's original acquisition of 55 percent of the shares of SGI under the SPA, all of the parties to the SPA except the Debtor executed a Shareholders Agreement (the "Shareholders Agreement)."[22] Section 3.03 of the SGI Agreement deals with permissible transfers of shares and states conditions and requirements in connection with a permissible

[21] Vaz Brief at 6, 17.
[22] A copy of the Shareholders Agreement is attached to the Vaz Declaration as Exhibit "A". [862-2 at 2].

transfer. Those requirements include execution of a writing by the transferee that evidences its agreement to be bound as § 3.03 requires.

Mr. Vaz contends that, under § 3.03, a purchaser of shares that CDCL acquired under the Shareholders Agreement becomes liable to perform CDCL's obligations under the SPA, including payment of the Note.[23]

Because the Debtor became the owner of the purchased SGI shares in January 2007,[24] Mr. Vaz continues, the Debtor became liable for all of CDCL's obligations under the SPA, including payment of the Note.

Mr. Vaz contends that the Debtor acquired shares of SGI in 2007. (Vaz Decl. at 51, ¶ 55). The Trustee conceded at oral argument that the Debtor acquired the SGI shares. (Oral Arg. 112).

Mr. Vaz has produced no evidence, however, that the Debtor executed a writing as § 3.03 requires. This raises the legal question of whether the Debtor assumed the obligations of CDCL under the SPA and the Shareholders Agreement if it did not execute a writing in which it agreed to assume those obligations. For purposes of the Trustee's motion, the Court will assume, without deciding, that either the Debtor signed a writing in compliance with § 3.03 of the Shareholders Agreement or that the requirement of a writing is not necessary given the Debtor's involvement in, and knowledge of, the terms of CDCL's acquisition of the SGI shares and the provisions of the Shareholders Agreement.

[23] Shareholders Agreement at 3. Section 3.03 requires the transferee to assume "all terms and conditions set forth in the Transaction Documents." The SGI defines "Transaction Documents" as the Shareholders Agreement and the SPA. Shareholders Agreement, § 1.
[24] Vaz Brief at 17-18.

The Court must first examine § 3.03 to determine whether the Debtor assumed CDCL's obligations under the SPA based on its acquisition of SGI shares from CDCL. The exact language of § 3.03 is important.

Section 3.03 deals with two types of transfers. First, it deals with the transfer of "Shares," which are defined as "the authorized capital stock of [SGI]," consisting of 1,000 shares, par value $1.00 per share. Second, it deals with the transfer of all of CDCL's "rights, interests and obligations under the Transaction Documents." The "Transaction Documents" are defined as the Shareholders Agreement itself and the SPA.

Much of the text of § 3.03 states a restriction on the transfer of shares by the "Seller" (Mr. Vaz) and the "Employee Shareholders" (the minority shareholders in SGI prior to the acquisition under the SPA). Mr. Vaz and the Employee Shareholders agreed not to sell their shares to anyone other than the Purchaser or any of its affiliates without the prior written consent of the Purchaser, except for transfers to a personal representative upon death or incompetency.

Section 3.03 deals with CHCL's transfer of shares in two sets of provisions.

Section 3.03 begins by permitting CDCL to transfer "Shares or all of its rights, interests and obligations under the [Shareholders Agreement and the SPA], provided that each assignee agrees in writing to be bound by all of the terms, conditions and provisions contained in the [Shareholders Agreement and the SPA]." Upon the occurrence of such an event, the Purchaser must provide Mr. Vaz with notice of it as well as "a copy of all documentation in which the transferee assumes all terms and conditions set forth in [the Shareholders Agreement and the SPA]."

Two later sentences in § 3.03 state (1) that CDCL may "freely assign the Shareholders Agreement" to any of its Affiliates and (2) that in the event CDCL intends to transfer the shares

to a non-affiliate, it shall inform Mr. Vaz. Section 3.03 continues with terms that permit Mr. Vaz to offer to purchase the Shares, after which CDCL may accept his offer, reject it, or continue negotiations with him.

Section 3.03 concludes by stating that any person receiving shares is a "Permissible Transferee" who must execute and deliver a "Joinder Agreement" in the form of Exhibit "A" attached to the Shareholders Agreement.

For convenience in the discussion of these provisions, the Court sets out the full language of the provisions of § 3.03, edited to number the sentences of the provision, to replace certain terms with their defined meanings, and to omit language dealing with transfers of shares by Mr. Vaz or the other SGI shareholders. The excerpt also omits language dealing with transfers of shares by CDCL to a non-affiliate, which are relevant to the discussion, as the Court explains below. The language is:

> 3.03 Permissible Transfers.
>
> **[1]** [CDCL] may transfer Shares or all of its rights, interests and obligations under [the Shareholders Agreement and the SPA], provided that each assignee agrees in writing to be bound by all of the terms, conditions and provisions contained in the [Shareholders Agreement and the SPA].
>
> **[2]** Upon the occurrence of such an event, [CDCL] shall provide [Mr. Vaz] with notice of the Transfer as well as a copy of all documentation in which the transferee assumes all terms and conditions set forth in the [Shareholders Agreement and the SPA].
>
> **[3]** CDCL may freely assign this agreement to any of its Affiliates.
>
> **[Provisions dealing with intended sale to non-affiliate are here.]**

> **[4]** Any person receiving any Shares in a transaction pursuant to this Section 3.03 is herein referred to as a "Permissible Transferee" with respect to such transaction, and shall execute and deliver to [SGI] and each of the Shareholders a Joinder Agreement substantially in the form of Exhibit A hereto.

Exhibit "A"[25] recites that the person signing it is acquiring SGI shares from an existing Shareholder, that it "has agreed to join in [the Shareholders Agreement]," and that it "understands that execution of this Agreement is a condition precedent to the acquisition of the Shares." It then states that the acquiring shareholder "agrees to become a party to the [Shareholders Agreement] and agrees to be bound by all of the terms and provisions thereof as a Shareholder to the full extent that [the transferor] [sic] Shareholder is bound thereby and represents and warrants to [SGI] and the Shareholders as to those matters set forth in Section 2 of the [Shareholders Agreement]." The document does not refer to the SPA or require the transferee of SGI Shares to become bound by it.

Section 3.03 is not a model of clarity. It does not expressly deal with the situation that a transfer to the Debtor – an affiliate – presents.

Sentence 1 deals with both a transfer of shares by CDCL or a transfer of its rights, interests, and obligations under the Shareholders Agreement and the SPA. This sentence clearly contemplates the possibility that, after its execution but before the completion of the *future* acquisition of further shares of SGI under the SPA, CDCL might want to have an affiliate acquire the additional shares. In the case of the acquisition of additional shares, the requirement in Sentence 1 and Sentence 2 of an assumption of obligations under both the Shareholders Agreement and the SPA makes sense. If CDCL is assigning its rights with regard to the

[25] Shareholders Agreement, Exhibit "A" [862-2 at 17].

acquisition of future shares, the assignee must perform CDCL's obligations under the SPA because it governs the price for the shares and the manner of paying it.

If a transaction involves only CDCL's transfer of shares it *already* owns to an affiliate, however, the payment provisions in the SPA with regard to the acquisition of future shares are immaterial.

Nevertheless, Sentences 1 and 2 could arguably require an affiliate acquiring shares from CDCL to become bound by the SPA and to pay the purchase price for the transferred shares. Sentences 3 and 4, however, lead to a different conclusion.

Sentence 3 permits CDCL to "freely assign" the Shareholders Agreement to any affiliate. No condition is attached to this permission. Specifically, unlike Sentences 1 and 2, it contains no reference to assumption of obligations under the SPA.

Sentence 4 requires a Permissible Transferee to sign a Joinder Agreement in the form of Exhibit "A". The Joinder Agreement requires assumption of obligations of a shareholder under the Shareholders Agreement, but it does not require assumption of obligations under the SPA. Sentence 4 thus makes it clear that CDCL's transfer of SGI shares cannot occur without the affiliate becoming bound by the Shareholders Agreement.

The provisions of Sentence 3 for unconditional assignment and the absence of any requirement in the Joinder Agreement for assumption of obligations under the SPA thus indicate that an affiliate may acquire existing SGI shares without assuming the SPA.

The problem with this conclusion is that Sentence 3 permits only the assignment of the Shareholders Agreement, not the transfer of CDCL's shares to an affiliate. So the questions are whether Sentence 3 permits CDCL to transfer *shares* to an affiliate without the affiliate agreeing

to become bound by the SPA and whether it prevails over the apparently contrary requirements of Sentences 1 and 2.

These four sentences must be interpreted in the context of the Shareholders Agreement and other language in § 3.03. Sentence 3 is followed immediately by the language that introduces the provisions of § 3.03 that govern an intended sale by CDCL of shares to a non-affiliate. Those provisions begin, "In the event [CDCL] intends to transfer the Shares to a non-affiliate…." The immediate introduction of provisions dealing with a sale to a non-affiliate indicates that the preceding sentence 3 governs a transfer of already-purchased shares to an affiliate.

The purpose of the Shareholders Agreement supports this conclusion. The Shareholders Agreement governs the rights of shareholders. Unless a party has acquired shares from CDCL, the free assignment of the Shareholders Agreement makes no sense; it assigns nothing. Consequently, its grant of permission for CDCL to "freely assign" the Shareholders Agreement must necessarily contemplate permission to transfer shares in connection with that assignment.

Under this interpretation, Sentences 1 and 2 govern only a transfer of CDCL's rights, interests, and obligations under the SPA with regard to the acquisition of future SGI shares. Sentences 3 and 4 govern a transfer by CDCL of shares it already owns to an affiliate. In other words, the requirement of assumption of obligations of CDCL under the SPA applies only when a party acquires the rights of CDCL under the SPA to purchase additional shares.

The terms of Exhibit "A" support this conclusion. Exhibit "A" requires only an assumption of the Shareholders Agreement. Except in the case of a transfer of shares to a personal representative of Mr. Vaz or the other minority shareholders, Exhibit "A" has application only to a transfer of shares by CDCL. In this context, the absence of a requirement

for assumption of the SPA demonstrates that an affiliate of CDCL may acquire SGI shares that CDCL already owns without becoming bound by the SPA.

The Court concludes, therefore, that the Debtor's acquisition of shares did not result in an obligation that it perform the obligations of CDCL under the SPA.

Assuming *arguendo* that § 3.03 made the Debtor obligated to perform CDC's obligations under the SPA, a further question is whether those obligations included CDCL's obligation to pay the Note.

The legal question is whether the obligation of CDCL to pay the Note is an obligation under the SPA that a purchaser of the SGI shares assumes. The Court concludes that it is not.

The SPA provided for CDCL to purchase the initial portion of SGI's shares (55 percent) upon payment of cash and promissory notes. Section 2.03(a) states that the price is "payable in the form of cash in U.S. dollars and Promissory Notes" subject to the terms of § 2.05. Section 2.03(a) requires payment of the cash portion on the closing date and then states that the remaining part of the purchase price "shall be payable in the form of Promissory Notes, pursuant to which the Purchaser shall agree to pay" the amounts due.

The Court interprets this language to mean that payment for the shares under the SPA occurred upon payment of cash at closing and delivery of the promissory notes, including the Note. Although the issuance of a note obviously contemplates its payment, it is the note that requires the payment, not the events that give rise to it. In other words, the obligation under the SPA is for CDCL, as the Purchaser, to execute and deliver the Note. And it is the Note, not the SPA, that requires CDCL to pay it.

Section 2.04 of the SPA supports this interpretation. It provides for the delivery of "good and valid title" to the purchased shares, "free and clear of all Liens." The SPA defines a "Lien"

as any "lien, pledge, hypothecation, mortgage, security interest, claim, lease, charge, option, right of first refusal, easement, encroachment, transfer restriction, or other encumbrance of any kind."[26] An interpretation that the transfer of the shares to a transferee carried with it the obligation to pay for them would effectively create an encumbrance. Importantly, this section does not contain an exception for any encumbrance created by the SPA.

The Court concludes that, as a matter of law, the Debtor did not become liable under the Note when it acquired the SGI shares.

4. The Debtor's acknowledgement or assumption of liability under the Note through its conduct and statements

Mr. Vaz contends that the conduct of the Debtor and statements of its representatives establish that the Debtor assumed the liability of CDCL under the Note.[27]

According to Mr. Vaz, negotiations with regard to payment of the Note continued after execution of the Settlement Agreement following its alleged breach by the Debtor and CDCL.[28]

Mr. Vaz points to a December 2005 email from Bob Webster, a representative of the Debtor assigned to address outstanding issues with Mr. Vaz.[29] The subject of the email sent to Mr. Vaz is "Open discussion items," and it asked Mr. Vaz to forward copies of documents. One of the items was "the September 14, 2003 Settlement agreement including the convertible promissory notes and amendments thereto."

In June through August 2010, Mr. Vaz had an exchange of emails with John Clough, who at that time was designated to negotiate with Mr. Vaz.[30] In a June 7, 2010, email to Mr. Clough,

[26] SPA § 1.01, at p 3.
[27] Vaz Brief 12-17.
[28] Vaz Brief 12.
[29] Vaz Decl. Exhibit "C" (Bates RVAZ016721) [862-2 at 27]. See Vaz Brief 13.
[30] See Vaz Brief 14-16.

Mr. Vaz told Mr. Clough, in the context of a discussion of his ongoing issues with the Debtor regarding the lack of payment for the SGI shares, "[P]lease remember that I was reneged on the original Promissory Note (amounting to $1,672,372) for the purchase of the 51% of SGI."[31]

Mr. Clough's email response on July 6, 2010, stated that he had read Mr. Vaz's earlier email and proposed a meeting.[32] The email further states, "I clearly understand the history and will do what I can."

Mr. Clough sent another email on August 17, 2010.[33] The email discusses proposed terms of an agreement and states, "We need to [take] the promissory note you hold into account when we come up with the valuation for the share transfer."

These email exchanges are insufficient to create a triable issue of fact that the Debtor acknowledged or assumed any liability on the Note.

Mr. Webster's email does nothing more than ask for a copy of the Note, among other documents. It does not even hint that he thinks the Debtor is obligated on the Note.

Mr. Clough's statement in his first email displays an understanding of the purchase transaction, and he promises to "do what I can." Nothing acknowledges that the Debtor is obligated to pay the Note or that he thinks the Debtor is liable on it.

Mr. Clough's second statement, likewise, shows an awareness of the promissory note and states that "we" need to take "the promissory note you hold" into account. But again, it does not acknowledge that the Debtor is liable. Moreover, the context of the statement is that it must be taken into account in determining a valuation issue, not for the purpose of satisfying the note.

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[31] Vaz Decl. Exhibit "I" (Bates RVAZ019761) [862-2 at 44].
[32] Vaz Decl. Exhibit "I" (Bates RVAZ019761) [862-2 at 44].
[33] Vaz Decl. Exhibit "J" (Bates RVAZ019799) [862-2 at 48].

Finally, the statement that Mr. Vaz holds the Note merely states a truism. Mr. Vaz did hold the Note, and he had a claim that it had not been paid.

Even if, as Mr. Vaz believes, Mr. Clough's emails constitute an "express acknowledgement of the debt owed to Vaz under the Promissory Note,"[34] they do not even imply that the Debtor owes the debt.

Mr. Vaz has not identified any other admissible evidence that supports the proposition that the Debtor or any authorized representative of the Debtor acknowledged or assumed any liability on the Note. Indeed, the emails that Mr. Vaz has identified do not even expressly assert a contention on his part that the Debtor is obligated on the Note that might have required the Debtor to respond one way or the other. His declarations similarly do not identify any oral statement that he made to any representative of the Debtor that he asserted a claim that the Debtor was obligated on the Note.

The Court concludes as a matter of law that Mr. Vaz has not presented admissible evidence that would give rise to an inference that the Debtor acknowledged or assumed liability on the Note.

5. Summary with regard to Mr. Vaz's claim that the Debtor is obligated on the Note

For reasons set forth above, the Court concludes that the Trustee is entitled to summary judgment with regard to Mr. Vaz's claims that the Debtor is liable on the Note as a contractual matter or because the Debtor contractually or expressly assumed liability for CDCL's obligations on the Note. The Court reserves ruling on the issue of whether the Debtor is obligated for CDCL's debts on non-contractual theories of liability that Mr. Vaz asserts to permit Mr. Vaz to

[34] Vaz Brief 16.

supplement the record with regard to those theories within 30 days from the date of entry of this order. The Trustee may respond to the supplement within 20 days of its filing.

C. The Effect of the Settlement Agreement

The Trustee contends that, even if the Debtor had any liability on the Note, Mr. Vaz released any such claim in the Settlement Agreement that the parties to the SPA, including the Debtor and Mr. Vaz, executed in 2003.[35] Paragraph 9 of the Settlement Agreement provides for the release of the Debtor and CDCL from any claim of Mr. Vaz under the SPA or the Note upon the occurrence of certain conditions, set forth in paragraphs 2, 3, and 4 of the Settlement Agreement.

Mr. Vaz contends that the release in the Settlement Agreement is ineffective because he was coerced into signing it[36] and because three of the conditions precedent in the Settlement Agreement to the effectiveness of the release were not met.

The Court first addresses the coercion claim. Mr. Vaz disputes the Trustee's position[37] that no evidence supports a coercion claim. Mr. Vaz relies on his declarations that the other side's breaches of the SPA and the Note for no apparent reason forced him to renegotiate with the Debtor to obtain value from the Note at a time that the Debtor controlled his employment, which could be terminated without cause on two month's notice.[38] He thought his only alternative was to risk his job, which would subject him to a two-year noncompetition provision in the Employment Agreement, and sue his employer in Hong Kong. This alternative, he explains, was not a feasible one.

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[35] A copy of the Settlement Agreement is attached as Exhibit "C" to the Trustee's Objection (Objection-27) [736 at 85].
[36] Response at 6, ¶ 13.
[37] Trustee Facts-27 at 9, ¶ 56.
[38] Vaz Facts at 17, ¶ 56.

Mr. Vaz has not pursued this position in his brief and the Court deems it abandoned. In any event, the Court, assuming without deciding that his allegations are true, concludes that they do not state a claim for relief from the effects of the Settlement Agreement based on coercion. The Trustee's analysis[39] on this point is persuasive. Under the law that the Trustee cites, the Court need not agree with all of the factual assertions the Trustee makes to conclude that Mr. Vaz has not shown the existence of admissible evidence that would establish a coercion claim with regard to execution of the Settlement Agreement.

Mr. Vaz correctly observes that paragraph 9 states several conditions precedent to the effectiveness of the release. He asserts that three of them did not occur:

1. The delivery of shares of the Debtor as ¶ 2(a) of the SPA requires;

2. The grant of 50,000 options to purchase shares of the Debtor, as ¶ 2(c) requires; and

3. The timely extension of loans to SGI and in connection with its acquisition of the Ascent Business, as ¶¶ 3 and 4 require.[40]

The Court must, therefore, determine whether the record reflects any material dispute of fact with regard to the Trustee's position that all of these conditions have been met.

1. The delivery of shares of the Debtor

Paragraph 2(a) requires the delivery to Mr. Vaz of (1) share certificates for 118,313 shares of stock of the Debtor; and (2) an emailed copy of the F-3 Registration Statement of the Debtor[41] made effective on or about October 4, 2000. Mr. Vaz does not dispute that he received the registration statement.

[39] Trustee Brief-27 at 14-18.
[40] Vaz Brief at 6-11.
[41] The Debtor at the time was known as chinadotcom corporation.

Mr. Vaz does not dispute that he received the shares, either. Thus, he acknowledges receipt of two certificates, one for 99,284 shares and another for 8,273 shares.[42]

The problem is the certificate for the 99,284[43] shares. This certificate as delivered bore a restrictive legend[44] that stated that the shares had not been registered under applicable securities laws and that they could be resold or transferred only (1) pursuant to an exemption from the registration requirements of the Securities Act of 1933, as amended, provided by Rule 144; (2) outside the United States; or (3) in reliance upon another available exemption from registration requirements.

Mr. Vaz contends that this share certificate did not comply with the requirement of ¶2(a) that the shares be "freely tradable. Paragraph 2(a) does not require that the shares be "freely tradable." Rather, it states:

> CDC represents that such Issued CDC shares when tendered to a qualified broker, together with a copy of CDC's F-3 Registration Statement dated on or about October 4, 2000, should not require registration before trading.

The parties submitted supplemental declarations with regard to this issue.[45] Upon receipt of the legended shares, Mr. Vaz on October 1, 2003, sent a fax to Jason Mueller that requested removal of the restrictive legend.[46] Over the next few days, Mr. Vaz had further

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[42] Vaz Brief

[43] A copy of the stock certificate is attached to Mr. Vaz's Declaration as Exhibit "B". [862-2 at 19-20].

[44] Vaz Decl. Exhibit "B" [862-2 at 20].

[45] The supplemental declarations are those of Joseph Stutz ("Stutz Supp. Decl.") [879] and of Mr. Vaz ("Vaz Supp. Decl.") [880 at 6]. They are part of the record for purposes of the Trustee's motion for partial summary judgment pursuant to this Court's Order entered on October 3, 2014. [895 at 3, ¶ 1].

[46] Vaz Supp. Decl, ¶ 10, Exhibit "B" [880 at 9, 15].

communications with the Debtor through October 9, 2003.[47] Mr. Vaz states that he never received a stock certificate "representing registered, freely tradable shares."[48] Mr. Vaz has otherwise produced no evidence of what happened after October 9, 2003.

The Trustee has shown that the 99,284 shares were registered on a Form F-3 in 2000.[49] In addition, the Trustee On October 20, 2014, filed a declaration of Eliese Guardiola that establishes the removal of the restrictive legend for the 99,284 shares on October 15, 2003.[50]

By the time of oral argument on November 14, Mr. Vaz could point to no evidence to support the propositions that the restrictive legend remained effective and that a restrictive legend prevented him from freely trading the shares,[51] subject to possible restrictions under Rule 144 of the Securities Act of 1933. Even if Mr. Vaz was an affiliate subject to limitations on the timing of trading that Rule 144 imposes,[52] Mr. Vaz could have traded the shares without restriction because the amount of shares was within the volume limitations of Rule 144, as Mr. Vaz concedes.[53]

Mr. Vaz nevertheless opposes the Trustee's motion for summary judgment on this issue on two grounds.

First, he contends that, even if the legend was removed by October 15, the delivery of shares at that time did not comply with the requirements of the condition in the Settlement Agreement for delivery of compliant shares contemporaneously with its execution. The Court

[47] Vaz Supp. Decl. ¶¶ 11-12, Exhibit "C" [880 at 9-10, 18].
[48] Vaz Supp. Decl. ¶ 11-12.
[49] Stutz Supp. Decl. , Exhibit "A". [879 at 7].
[50] Declaration of Eliesee Guardiola To Authenticate Business Records [898].
[51] Oral Arg. [908] at 45-56.
[52] Mr. Vaz contends that he was not an affiliate. (Oral Arg. [908] at 42-44, 57-60).
[53] See Oral Arg. [908] at 40-41.

concludes as a matter of law that a delay of about a month is not material and that delivery of unrestricted, registered stock within that time satisfied the condition.

Second, Mr. Vaz contends that he is entitled to discovery to determine whether the restrictive legend was removed as the Trustee's evidence establishes. (Arg. Tr. 54). It seems to the Court that Mr. Vaz has had ample time to obtain evidence with regard to this question. Moreover, the absence of any indication in the record that Mr. Vaz continued to complain about restrictions on his shares after October 15 strongly indicates that the restrictions were removed. Nevertheless, out of an abundance of caution, the Court will defer ruling on this issue and will permit Mr. Vaz to supplement the record with regard to whether the restrictions on transfer were removed within 30 days from the date of entry of this order. The Trustee may respond to any such supplement within 20 days of its filing.

2. Grant of 50,000 options to purchase stock of the Debtor

Paragraph 2(c) of the Settlement Agreement required CDCL, immediately after the execution of the Settlement Agreement, and prior to closing, to "procure the grant of 50,000 options to purchase shares of [the Debtor]" with described terms. Paragraph 2(c) continues with provisions that provide for the vesting of shares in accordance with performance targets related to the Ascent business that SGI was to acquire.

The date of the settlement agreement was September 14, 2003. Computer records of the Debtor show the grant to Mr. Vaz of 50,000 options on September 17, 2003, three days later.[54]

[54] Stutz Dec. ¶ 9 [842 at 3], Exhibit "C" [842 at 16]. The record shows the grant of 16,666 shares. The declaration of Trudy Naimy [843], an officer of Computershare Shareowner Services, LLC, n/k/a Computershare Inc. ("Computershare") establishes that a reverse stock split that occurred in 2010 and that, therefore, the actual number of options awarded to Mr. Vaz in 2003 would have been 50,000. [843 at 2, ¶¶ 9-10]. Computershare provided transfer agent and related services to the Debtor. [843 at 1, ¶ 3].

Records of the company that provided transfer agent and related services to the Debtor confirm this fact.[55]

Mr. Vaz contends that the Trustee has not shown that Mr. Vaz received stock options in compliance with ¶ 2(c) for several reasons.[56]

First, he asserts that the grant of 50,000 options to him required authorization under a signed Award Agreement under the Debtor's 1999 Stock Option Plan.[57] Because the Trustee has not produced a signed Award Agreement, Mr. Vaz concludes, the options could not have been validly issued.

The Court concludes that, in the absence of some affirmative evidence that the options were not properly granted, the absence of proof of a signed Award Agreement does not affect the validity of the options. The Debtor's business records and other evidence clearly show the grant of options, and the Court does not see any basis in the record for concluding that the grant of 50,000 options did not validly occur.

Mr. Vaz challenges the Debtor's and transfer agent's records on the ground that they do not establish terms that comply with the requirements of ¶ 2(c).[58] Paragraph 2(c) requires that the options be valid for ten years from the date of the grant. Mr. Vaz asserts two problems.

Mr. Vaz correctly notes that the transfer agent's records show a "Cancellation/Transfer Date" of January 1, 2006, whereas ¶ 2(c) requires that they be exercisable for ten years. The record does not establish whether this is an error, as Mr. Vaz contends, or has significance due to

[55] Declaration of Trudy Naimy [843 at ¶¶ 9-10].
[56] Vaz Brief at 7-9.
[57] A copy of the 1999 Stock Option Plan is attached as Exhibit S to the Stutz Declaration. [842 at 73].
[58] Vaz Brief at 8-9.

the occurrence of some other event that resulted in a cancellation or transfer on January 1, 2006. It does not matter.

The transfer agent's record shows the grant of 50,000 options. That happened on September 17, 2003. The material factual question is the terms of those options *when they were granted on September 1, 2003*. The record does not contain any evidence that the terms of the options at that time were different from those set forth in ¶ 2(c), and nothing shows any reasonably contemporaneous complaint from Mr. Vaz that the terms of those granted options did not meet its requirements. The alleged discrepancy in the transfer agent's records does not raise a triable issue of fact in this regard.

Mr. Vaz asserts that the Debtor's computer record – which does not contain an expiration date at all – is inaccurate because it improperly states the *grant* date as September 17, 2003. Mr. Vaz contends that no grant date existed in 2003 because ¶ 2(c) "shows four grant dates commencing on March 31, 2004 and extending to March 31, 2005."[59]

Paragraph 2(c) does not provide for *grant* dates as Mr. Vaz asserts. To the contrary, it quite plainly requires a grant of the options "immediately after the execution of the Settlement Agreement." The date on the Debtor's record, September 17, 2003, qualifies as a date that is "immediately after" September 14, the date of the Settlement Agreement. The dates to which Mr. Vaz refers are the *vesting* dates, which are dependent on the achievement of targets relating to the Ascent business. Thus, the Debtor's record establishes a grant date that is fully consistent with the terms of ¶ 2(c).

[59] Vaz Brief at 8.

3. Delay in extensions of loans

Paragraph 3(a) of the Settlement Agreement requires CDCL to lend $500,000 to SGI, "concurrently with the execution of this Settlement Agreement," on defined terms. Paragraph 3(d) conditioned the use of the proceeds to satisfying SGI's payment obligations in connection with the Ascent acquisition.

Paragraph 4(a) requires CDCL to provide an additional operating loan to SGI in the amount of $750,000 to fund the Ascent business on defined terms. The Settlement Agreement does not set a time for this loan.

Mr. Vaz does not dispute that the loans were made.[60] Undisputed evidence in the record shows (1) a wire transfer of $500,000 to SGI on September 19, 2003, five days after the date of the Settlement Agreement, September 14,[61] and (2) a wire transfer of $750,000 to SGI on October 15, 2003.[62]

Mr. Vaz contends that the loans were not timely made. The delays, he states, caused additional cost and expense in closing the Ascent acquisition and unnecessary cash flow problems as well as a loss of confidence with the Ascent Sellers.[63] The record contains no information about the date of the closing of the Ascent transaction, Mr. Vaz has not described any specific difficulty that SGI incurred in closing the transaction, he has not described any specific cash flow difficulty that the Ascent business encountered, and he has not explained any loss of confidence with the Ascent Sellers or how any such loss of confidence materially affected SGI or Ascent.

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[60] Vaz Brief 10].
[61] Stutz Decl. ¶ 12 [842 at 3], Exhibit "F" [842 at 26].
[62] Stutz Decl. ¶ 13 [842 at 3], Exhibit "G" [842 at 28].
[63] Vaz Brief 10; Vaz Decl. ¶ 44.

The evidence shows that SGI got $500,000 to acquire the Ascent business within five days of execution of the Settlement Agreement. This may not literally be "concurrently" with execution of the Settlement Agreement, but the money could be used only in connection with the closing of the acquisition of the Ascent business. Nothing beyond Mr. Vaz's statement shows that the Ascent closing did not occur earlier because of a delay in receiving a loan. Mr. Vaz's mere statement that a delay occurred does not present a triable issue of whether a material delay in providing the $500,000 acquisition loan occurred in violation of ¶ 3(a).

Similarly, nothing shows that the $750,000 operating loan was not timely. The Settlement Agreement specified no time for this funding. The record does not show when SGI requested it. No dispute of fact or law about compliance with ¶ 4(a) exists.

In any event, ¶ 9 of the Settlement Agreement requires only "completion" of the payment obligations and initial loan extension obligations. It does not specify a time for them. The completion of the loan extensions, even if not as timely as Mr. Vaz wanted, occurred, thus fulfilling the conditions of ¶ 9 that they be made.

4. Conclusion with regard to release under the Settlement Agreement

For the foregoing reasons, the Court concludes that the only possible material issue of fact with regard to the effectiveness of the Settlement Agreement between the parties and the occurrence of all conditions precedent to the effectiveness of the release is whether the restrictive legend on shares of the Debtor was removed. The Court concludes as a matter of law that all other conditions to the effectiveness of the release in ¶ 9 of the Settlement Agreement of Mr. Vaz's claims against the Debtor on the Note or the SPA occurred.

The Court will defer ruling on whether stock of the Debtor was delivered in compliance with ¶ 2(a) and will permit Mr. Vaz to supplement the record with regard to removal of the

restrictions within 30 days from the date of entry of this order. The Trustee may respond to any such supplement within 20 days of its filing.

D. The Statute of Limitations

The Trustee asserts that the statute of limitations applicable to the Note under Hong Kong law, which governs the Note, [64] is six years.[65] Mr. Vaz does not contest this proposition.[66]

The maturity date of the Note was December 30, 2000. Thus, the statute of limitations expired on December 30, 2006.

But Mr. Vaz contends that a limitation period runs under Hong Kong law from the date on which the obligor acknowledges the debt. Hong Kong Ordinances, Chap. 347, §§ 23, 24.[67] He cites Hong Kong case law[68] that holds that a defendant's failure to dispute numerous demands for payment of an obligation permits an inference that the defendant acknowledged the debt. The Hong Kong court relied on an inference that the defendant had acknowledged the debt in question because it could not have claimed ownership of shares without paying for them.[69]

Mr. Vaz contends that the Debtor acknowledged its obligation to pay for the SGI shares "in its ongoing negotiations and numerous email exchanges with Vaz."[70]

The Court has carefully examined the evidence that Mr. Vaz identifies in support of Mr. Vaz's factual proposition but cannot agree that it establishes a material dispute of fact over whether an acknowledgement occurred for two reasons. First, Mr. Vaz does not identify, and the

[64] Note, at 4, ¶ 7(d) ("This Convertible Promissory Note shall be governed by and interpreted and construed in accordance with the laws of Hong Kong.").
[65] Trustee Brief-27 at 11-12.
[66] Vaz Brief at 11.
[67] Vaz Brief at 11.
[68] New World Dev. Co. Ltd. V. Sun Hung Kai Securities, Ltd., [2004] H.K.E.C., aff'd [2006] 9 H.K.C.A.R. 403 (C.F.A.).
[69] Vaz Brief at 11-12.
[70] Vaz Brief at 12.

Court has not found, a single assertion by Mr. Vaz during the course of all of the negotiations that the Debtor was obligated to pay the Note. Second, as the Court concluded earlier,[71] the statements that various representatives of the Debtor made during those negotiations do not amount to an acknowledgement of the Debtor's liability on the Note.

Mr. Vaz is correct that the negotiations included references to the Note, and the Court for purposes of ruling on the Trustee's motion assumes, without deciding, that the evidence in the record could support an inference that representatives of the Debtor assured Mr. Yaz that there "would be a resolution" of their disputes.[72] But that evidence does not give rise to an inference that those assurances included an acknowledgement that the Debtor was liable on the Note or that it would be paid.

Nor does an inference arise that the Debtor must have acknowledged the debt because it could not have claimed ownership of SGI shares without paying for them. First, it was CDCL, not the Debtor, who acquired the SGI shares and was obligated to pay for them. Second, these negotiations occurred after execution of the Settlement Agreement which, among other things, established CDCL's ownership of 51 percent[73] of the SGI shares.[74]

The Court concludes, therefore, that the six year statute of limitations applicable under Hong Kong law, which governs the Note, expired prior to the commencement of the Debtor's bankruptcy case.

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[71] Part **, **.
[72] See Yaz Brief at 12.
[73] Paragraph 2(b) of the Settlement Agreement provided for CDCL to transfer four percent of the stock of SGI to Mr. Vaz. The parties agree that this occurred.
[74] Paragraph 2(b) provides for the issuance and delivery of shares amounting to 51 percent of the stock of SGI to CDCL. Paragraph 7 of the Settlement Agreement provides a mechanism by which CDCL would sell its entire stock ownership interest to Mr. Vaz and the other shareholders.

E. Summary With Regard to Mr. Vaz's Claim Based on the Note

As explained earlier, the Court will defer ruling on the Trustee's motion for summary judgment with regard to the Debtor's liability on the Note pending Mr. Vaz's supplement of the record and the Trustee's response with regard to two issues that relate to whether the Trustee is entitled to summary judgment on all of his alternative defenses to the Debtor's liability on the Note. The first is whether the Debtor is obligated on the Note based on any non-contractual theory of liability. The second is whether the Debtor delivered shares of stock in compliance with the requirements of the Settlement Agreement. Mr. Vaz may supplement the record with regard to these issues within 30 days from the date of this Order, and the Trustee may respond within 20 days of the filing of the supplement.

After consideration of Mr. Vaz's supplement and the Trustee's response, the Court will enter an Order granting the Trustee's motion for summary judgment on the Note based on his defense of the statute of limitations and based on any alternative defenses with regard to which summary judgment is appropriate.

II. CLAIMS BASED ON THE STOCK PURCHASE AGREEMENT

The Trustee seeks summary judgment on any of Mr. Vaz's claims arising from the Stock Purchase Agreement (the "SPA").[75] The Debtor was a party to the SPA,[76] but the Court has not found any obligation that the Debtor expressly incurred under the SPA.

Mr. Vaz's response to the Trustee's motion for summary judgment on claims under the SPA does not assert any claims under the SPA beyond the theories that the Debtor was liable

[75] A copy of the Stock Purchase Agreement is attached as Exhibit "A" to the Trustee's Objection to Mr. Vaz's proof of claim. [736-1, at 23].

[76] At the time of execution of the SPA, the Debtor was known as chinadotcom corporation. The SPA refers to the Debtor as "China.com Corporation" or "China.com."

under the SPA to pay the Note. Similarly, Mr. Vaz's proof of claim No. 27, as amended and supplemented by his Response to the Trustee's objections to it [745] does not assert any other claims under the SPA.[77] The Vaz Brief does not assert any other claims. [859].

In his supplemental brief, however, Mr. Vaz asserts that he has a claim under the Stock Purchase Agreement against the Debtor for the purchase of the remaining 45 percent of the SGI stock in the second through fourth tranches.[78]

The Court has doubts about whether such a claim exists. Paragraph 7 of the Settlement Agreement provides that Vaz and the other Management Parties may sell their SGI shares, subject to a right of first refusal granted to CDCL. Paragraph 7 also sets out procedures for the later valuation of SGI and provisions for Mr. Vaz and the Management Parties to sell their shares based on that valuation or to purchase them from CDCL if it declined to do so. Paragraph 8(b) states that, "[t]o the extent applicable, this Settlement Agreement is an express amendment of the [SPA]."

It seems to the Court that the provisions in the Settlement Agreement for the disposition of SGI shares amended the provisions of the SPA with regard to CDCL's obligation to purchase the second through fourth tranches of stock. Arguably, Mr. Vaz might have a claim against

[77] The Court notes that Mr. Vaz asserts indemnification claims (Response at 13, ¶¶ 34(e), 57) but does not identify the basis for them. The indemnification claims appear to arise out of Mr. Vaz's position as a director of SGI and of Trans-Horizon (aka CDC Global Services (India) Limited) and their operations in India.

The indemnification provisions of § 10.01(a) that set forth CDCL's obligation to indemnify Mr. Vaz related to losses resulting from any misrepresentation, breach of warranty or nonfulfillment of or failure to perform any covenant or agreement on the part of CDCL contained in the SPA. Except for Mr. Vaz's claim of a loss due to CDCL's failure to pay for his SGI shares, the Court sees no possible application of this provision to any part of Mr. Vaz's indemnification claims.

[78] Vaz Supp. Brief at 10-11 [899 at 14-15].

CDCL under the SPA for the difference between the purchase price it was obligated to pay and the value of the shares it did not purchase.

The Trustee seeks summary judgment with regard to any claims Mr. Vaz has under the SPA for the same reasons that he urges in support of summary judgment on the Note: CDCL, not the Debtor, agreed to purchase the SGI shares, and no other basis for the Debtor's liability exists; the Settlement Agreement released any claims Mr. Vaz may have; and in any event the statute of limitations bars them. The Court's analysis of these issues with regard to the Debtor's liability on the Note also applies to any claims that Mr. Vaz has under the Stock Purchase Agreement.

The Trustee is entitled to summary judgment with regard to claims under the SPA based on the statute of limitations. Because the Court is deferring a ruling on the Debtor's liability on the Note to permit Mr. Vaz to supplement the record with regard to two issues relating to the Trustee's alternative defenses, the Court will similarly defer a ruling on the Trustee's motion with regard to the Debtor's liability under the SPA

III. CLAIM FOR UNPAID BONUS

Section 2.06 of the Stock Purchase Agreement dated as of March 2, 2000, for the acquisition of SGI shares contemplated the execution of an agreement for SGI to employ Mr. Vaz. SGI and Mr. Vaz executed an "Employment and Non-competition Agreement" dated as of March 2, 2000 (the "Employment Agreement").[79] CDCL was a party to the Employment Agreement and signed it. The Debtor was not a party to the Employment Agreement and did not sign it.

[79] A copy of the Employment and Non-Competition Agreement is attached as Exhibit "E" to the Trustee's Objection to Mr. Vaz's proof of claim. [736-1, at 27].

The Trustee's motion for partial summary judgment on Claim No. 27 seeks a determination that Mr. Vaz is not entitled to an unpaid bonus. The Trustee Brief discusses Mr. Vaz's claim of wrongful termination extensively and concludes with a request for summary judgment "with regard to any component of Vaz's claim relating to the Employment Agreement or alleged wrongful termination of employment." It does not, however, specifically address any reasons why Mr. Vaz's claim for a bonus should be denied.

Similarly, the Vaz Brief extensively argues the reasons and the evidence in the record that support Mr. Vaz's claim for wrongful termination, but it does not specifically address any issues relating to a bonus.

In these circumstances, the Court declines to grant summary judgment on any claim for an unpaid bonus.

IV. CLAIMS FOR WRONGFUL TERMINATION OF EMPLOYMENT

As set forth above, Mr. Vaz, SGI, and CCDL were parties to an Employment Agreement executed on March 2, 2000, in connection with the acquisition of shares of SGI under the SPA. Section 1(b) of the Employment Agreement provided for its automatic renewal for one-year terms unless either party gave notice of termination not less than 60 days before the expiration of the term. Notwithstanding this provision, § 6(a)(i) allowed immediate termination for cause, and § 6(a)(iii) authorized the Board of Directors of SGI to terminate Mr. Vaz's engagement for any reason upon two months' notice.

The Trustee seeks summary judgment with regard to any claims for wrongful termination of employment. The Court notes that one reason the Debtor would not have any liability for wrongful termination of Mr. Vaz's employment is that he was an employee of SGI, not the Debtor. But the Trustee does not make this argument. Rather, the Trustee Brief contends that

the undisputed material facts show that Mr. Vaz's employment was terminable at will upon 60 days' notice and that his employment was properly terminated under the Employment Agreement for cause.[80]

The applicable provision of the Employment Agreement with regard to termination of employment for Actual Cause is § 6(a)(i). As applicable here, termination of employment for actual cause is permissible under subclauses (2) and (4). These provisions permit termination for cause if:

> (2) the Board determines in good faith that Employee has been grossly negligent or acted dishonestly to the material detriment of the Company,
>
> **[or]**
>
> (4) the Board makes a good faith determination that Employee has engaged in actions amounting to willful misconduct or failed to perform his/her duties hereunder and such failure continues after Employee is afforded a reasonable opportunity to cure such failure.

On August 14, 2010, Don Novajosky, then in-house legal counsel for SGI and a member of its Board of Directors, sent an email to Mr. Vaz advising him of his immediate termination for Actual Cause as defined in the Employment Agreement.[81] The email did not specify any reasons for the termination.

The email reflected the decision of the Board of SGI at a meeting on August 13, 2010. The record does not contain any minutes of the meeting. Mr. Vaz was not invited to attend the meeting and did not attend.[82]

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[80] Trustee Brief-27 at 18-24; Trustee Reply Brief-27 at 14-16.
[81] Novajosky Decl. ¶ 2, 14, Exhibit I [841 at 1, 3, 74].
[82] Vaz Facts at 59, ¶¶ 101-103.

The record includes a copy of a Power Point presentation that the Board received at its August 13 meeting.[83] This presentation lists the grounds for termination of Mr. Vaz's employment. The list contains the same reasons that an internal auditor, Kimberly Fleming, set out as "Rajan issues" in an email sent on August 12, 2010, at 7:59 p.m. to, among others, Mr. Novajosky, in-house legal counsel for SGI and a member of its board of directors.[84] The Power Point notes, as potential legal risks associated with a termination decision, a "lawsuit for wrongful termination and claim for money that may be owed for RV."

Mr. Vaz was employed as the President of SGI under the Employment Agreement. SGI's operations in India included the operation of a Business Process Outsourcing ("BPO") division in India through a subsidiary it acquired known as Horizon/Transhorizon. The Trustee contends that the undisputed facts[85] establish that the Board terminated Mr. Vaz's employment based on his gross negligence and/or dishonesty in connection with his management of the BPO business.[86]

Mr. Vaz contends that the undisputed material facts do not show that termination of his employment under subclause (2) was proper because the Trustee has not established the required "material detriment to the Company." In addition, he asserts that the reasons asserted for his termination were a pretext for the Debtor's continued avoidance of its own obligations to Vaz and in retaliation for complaints Mr. Vaz raised regarding a required Q2 Disclosure Certification, as the head of a business unit, for the Debtor's compliance with Sarbanes-Oxley ("SOX")

[83] Novajosky Decl. Exhibit "G" [841 at 57, 59-60].
[84] Novajosky Decl. Exhibit "F" [841 at 55].
[85] Trustee Facts-27 at 13-27, ¶¶ 65-110.
[86] Trustee Brief-27 at 19.

requirements.[87] Mr. Vaz notes that he sent an email to Kimberly Fleming, the internal auditor, on August 9, 2010 – three days before the Board meeting – that raised these issues.[88]

The Court first summarizes the evidence in the record with regard to these matters and then discusses the issues.

1. Evidence regarding claim of wrongful termination

The controversy regarding termination of Mr. Vaz's employment appears to have begun in December 2009, when the SGI Board received a Power Point presentation about two matters concerning the BPO business.

One matter involved the status of the Sarbanes-Oxley ("SOX") audit of BPO operations that had commenced in October 2009. The audit noted that obtaining documentation had been a very slow process and that many of the items requested should be readily available because they should be used in normal day-to-day operations.[89]

The other matter addressed issues of concerns about the BPO business' compliance with corporate policies and controls.[90] Three of the points were:

> Based on the review of controls at Transhorizon/BPO, we have seen indications that the business is not in compliance with these controls.
>
> SOX deficiencies will be added at the CDC corporate level as a result of these issues. And there is a concern of material weakness implications
>
> It is critical that the India operations follow these policies going forward.

Mr. Vaz attended the December 2009 Board meeting and does not dispute these facts.[91]

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[87] Vaz Brief at 24.
[88] Stutz Decl. Exhibit "R" [842 at 67].
[89] Trustee Facts-27 at 14, ¶ 73.
[90] Trustee Facts-27 at 15, ¶ 74.
[91] Vaz Facts at 23-24, ¶¶ 71-74.

The Trustee contends that, shortly after the Board meeting, the HR department in Atlanta received a whistleblower complaint with regard to BPO operations in India. Internal auditor Kimberly Fleming, with others, prepared a memorandum[92] dated December 10, 2009, to the CDC Corporation Audit Committee.

With regard to the whistleblower call, the December 10 memorandum states that an anonymous employee, directly after announcement of the SOX audit of BPO operations, had alleged fraud by senior BPO management with falsified lead generation reports, that employees had gone on strike because they had not been paid, and that documents requested for the SOX audit had been created as a result of the audit request.

The December 10 memorandum states management's belief that serious breaches of internal policies, all of which had previously been communicated to Mr. Vaz, existed. The memorandum states: that BPO management had entered into multiple revenue sharing agreements with partners without required corporate or legal approval; that BPO management had opened a number of new facilities without proper approvals; that BPO had hired all employees without following corporate hiring procedures and obtaining proper approvals; and that employees were not being paid regularly.[93]

The Conclusions and Recommendations in the December 10 memo were as follows:[94]

> The BPO operations present a control environment issue for the company which needs to be addressed immediately. Based on the information gather to date, as well as the potential fraud risk, management concludes that the BPO business will present a Significant Deficiency for the CDC Corporation SOX opinion for 2009.

[92] Novajosky Decl. ¶ 4, Exhibit "B" [841 at 2, 23].
[93] Novajosky Decl. ¶ 4, Exhibit "B" [841 at 2, 23].
[94] Novajosky Decl. ¶ 4, Exhibit "B" [841 at 2, 26-27].

> The financial terms and conditions surrounding the BPO operations are clearly not fully-known to CDC, notwithstanding repeated request to provide transparency on this matter.
>
> Management believes there are potential financial statement misstatements, AR collectability issues and potential unrecorded liabilities associated with the third party arrangements entered into, not to mention the potential damage to the CDC name/brand as a result of this affiliation with the BPO business and the individuals representing it.
>
> Since the financial results of CDCGS are consolidated into CDC Corp, the foregoing are very significant concerns. It should be noted, however, that the exposure does not appear to be material to the consolidated CDC Corp financials given the size of the business. . . .
>
> Finally, the management team has a duty to follow up on the alleged claims made by the whistleblower to determine if in fact they are true, while taking all necessary steps to protect the identity of the individual. . . .

Following further investigation, internal auditor Fleming (and others) submitted a memorandum dated April 1, 2010, to the CDC Corporation Audit Committee.[95] The memorandum reported the receipt of three more whistleblower calls and stated that corporate policies and controls were communicated to Mr. Vaz in December 2009, including corporate approval controls for new hires, leases, and contracts.

The memorandum recites that the BPO operation continues to be a risk for CDC and management's conclusion that the BPO business presents a Significant Deficiency for the Company's SOX opinion for 2009, although with immaterial exposure in relation to the

[95] Trustee Facts-27 at 18, ¶¶ 80, 81. A copy of the memorandum is attached as Exhibit "D" to the Novajosky Decl. [841 at 33].

Company's consolidated financials. The memorandum then stated management's recommendation that the BPO business in India be shut down or divested immediately.

Mr. Vaz challenges the December and April memoranda on the grounds that he had no prior knowledge of them and that the Trustee has impermissibly withheld them during the course of discovery.[96]

The parties do not dispute that, by May 25, 2010, Mr. Vaz had been directed to shut down the BPO operations in India.[97] Mr. Vaz had his own views about how best to accomplish this.[98] Mr. Vaz contends that the India business was essentially shut down in June 2010.[99] The Power Point presentation to the Board at the August meeting states that he had not yet terminated the management team as directed.

Mr. Vaz's pretext claim arises from an email he sent to the internal auditor, Kimberly Fleming, on August 9, 2010.[100] His email complains that he has not received financial reports and information that he had requested. Paragraph (1) of the email states in part:

> So, effectively, it seems like I am acknowledging and signing off on items that I have no authority on or have incomplete information about. This has gone on for several quarters now and I had attributed it to a temporary problem due to the transition from the local office to Atlanta. I would like to get this rectified on a priority basis going forward. I will not be party to any future disclosure certifications without having a complete set of these reports.

[96] Vaz Facts at 24-31, ¶¶ 75-82.
[97] Vaz Facts at 32, ¶ 83.
[98] See Vaz Facts at 33-35, ¶¶ 86-88.
[99] Vaz Brief at 24.
[100] Stutz Decl. Exhibit "R" [842 at 67].

Paragraph (2) of the email states in part:

> I have been waiting patiently for a clarification on how my situation and my CDC relationship is going to be unfold [sic] going forward. . . . I have a long list of grievances that is growing longer every day. I hope this matter can be resolved soon or at least a firm understanding between CDC and me can be arrived at. I am setting a time line to arrive at an agreement before the Q32010DC.

2. Issues relating the wrongful termination claim

Mr. Vaz first contends that the Trustee cannot show a proper termination under clause (2) of the Employment Agreement because he has not shown that Mr. Vaz's alleged conduct was to the "material detriment of the Company." Mr. Vaz correctly notes that the reports on problems with regard to BPO operations in India state that they are not material to the Debtor's financial situation or income.

But the question is not material detriment to the Debtor. The Employment Agreement is between Mr. Vaz and SGI, not CDC, and SGI is the "Company" within the meaning of the termination provision. Thus, "material detriment" must be determined with reference to detriment to SGI, not CDC. The record is silent on SGI's financial condition or the effect of Mr. Vaz's conduct on it.

Termination under clause (2) requires that the SGI Board determine two questions in good faith: (1) whether Mr. Vaz engaged in gross negligence or dishonesty and (2) whether the conduct was to the material detriment of SGI. Termination under clause (4) similarly requires a good faith determination of whether Mr. Vaz engaged in willful misconduct or failed to perform his duties and such failure continues after a reasonable opportunity to cure. The Court notes that

Mr. Vaz's declaration contains evidence that challenges or explains a number of the allegations that the Power Point presentation makes.[101]

The good faith language raises the question of whether a claim of wrongful termination is established by showing that either the conduct or the material detriment did not actually occur. It may be that termination is proper if the Board determined in good faith that both required events had occurred, even if one or both of them had not. The parties have not addressed this legal issue, and the Court does not decide it at this point.

In any event, permissible termination under either clause (2) or (4) requires the Board's good faith determination. Mr. Vaz's assertion that "actual cause" for termination was a pretext that the Board used to eliminate an employee who was raising concerns about future certifications and other issues challenges the existence of the Board's good faith that the Employment Agreement requires.

The evidence in the record establishes that the Board terminated Mr. Vaz's employment on the basis of actual cause, but it does not establish what the actual cause was because the Board did not specify the grounds for it when it terminated Mr. Vaz. The Power Point presentation to the Board, which incorporates the "Rajan issues" the auditor, Kimberly Fleming, set out in her email the day before, states several grounds that could constitute cause. But the evidence does not establish how the Board evaluated the truth of the allegations, how it concluded that the alleged conduct amounted to gross negligence or dishonesty, how it decided that the conduct had been to the material detriment of SGI, or why the conduct required termination of employment.

[101] Vaz Brief at 21-24.

Mr. Vaz's declaration provides a sufficient evidentiary basis for an inference to arise that actual cause was a pretext. He sent an email that raised his lingering concerns, potentially troublesome to the Debtor, unrelated to his performance as the President of SGI. He sent it to Ms. Fleming, the auditor, who was also the author of the email on the conduct alleged to support his termination that was incorporated into the Power Point presentation to the Board a few days later. The timing gives credence to Mr. Vaz's position. An inference could arise that, in essence, the Board decided to terminate Mr. Vaz's employment to eliminate a "troublemaker."

The Trustee argues that the evidence does not show that the Board took Mr. Vaz's email into account in terminating his employment and that the other reasons provided sufficient grounds for termination. But the problem for the Trustee is that the evidence also does not show anything with regard to the Board's decision other than that allegations were presented and the Board terminated Mr. Vaz's employment for cause after receiving them.

Mr. Vaz, in essence, attacks the causal relationship between the allegations and the termination decision. He makes the plausible argument that the Trustee is relying on documents previously withheld in the discovery process to support the Board's action and that other withheld documents might shed further light on how and why the Board reached its decision.

Moreover, at least some disputes of fact exist with regard to whether Mr. Vaz engaged in all of the alleged conduct and other circumstances that may explain or justify some of it. The Court has declined to answer the question of whether proof that the allegations are not true is sufficient to establish a wrongful termination claim, but evidence with regard to the allegations nevertheless appears to remain relevant to determination of the Board's good faith.

In these circumstances, the Court concludes that material issues of fact exist with regard to the Board's termination of Mr. Vaz's employment.

The Trustee raises the question of whether Mr. Vaz's claims should in any event be limited to compensation and benefits for two months in view of the provisions of the Employment Agreement that permit termination of his employment with two months' notice.[102] Mr. Vaz correctly notes that Mr. Vaz was not terminated under this provision.[103] Because the parties otherwise do not address the issue, the Court declines to rule on this issue in the context of the current motion.

V. THE EQUITY INTERESTS

Mr. Vaz has filed Proof of Interest No. 128 that asserts three equity interests:

(a) Equity interests (with BNY Mellon) related to ESPP and ESOP (approximately 6,000 shares at $5/share);

(b) Equity interests with various brokers (approximately 12,000 shares at $5/share); and

(c) Various stock options (approximately 100,000 option awards).

The Trustee objects to allowance of any interest based on common stock that Mr. Vaz holds through any brokers or in ESPP or ESOP plans on the ground that the only interest on account of which a proof of interest is properly allowable is an interest other than common shares. This is because, under the Plan confirmed in this case, holders of common stock are entitled to receive, and have received, distributions on account of their holdings of common stock.

In other words, the Trustee does not dispute Mr. Vaz's holdings of any common stock of the Debtor, but contends, correctly, that the Plan otherwise provides treatment for such holdings.

[102] Trustee Brief-27 at 19, n. 14.
[103] Vaz Brief at 19.

Allowance of a separate proof of interest for them, therefore, would result in duplicative distributions.

Mr. Vaz does not dispute that his shares of common stock have been converted to Beneficial Interests under the Chapter 11 plan and that he has received distributions in connection with his ownership of those interest, but he contends that the Trustee nevertheless has no basis to object to his interest.[104]

In this case, under the terms of the Plan, an equity interest is allowable pursuant to a proof of interest only with regard to interests that are not common stock. The Trustee is entitled to summary judgment to the extent that Mr. Vaz's proof of interest is based on his ownership of common stock of the Debtor. His holdings of common stock, if any, are treated under the Plan as Beneficial Interests, and this ruling has no effect on his rights with regard to them.

The Trustee contends that Mr. Vaz has options with various strike prices and that the strike prices for all but one of the options are "under water" such that the options have no value.[105] The Trustee has produced evidence to support his position with regard to the strike prices, and Mr. Vaz has produced nothing to the contrary.[106] Mr. Vaz agrees that, except for the options issued in 2009 with a strike price of $2.76, the options have a strike price in excess of what holders of common stock will receive under the Debtor's plan.[107]

With regard to the options with an "underwater" strike price, Mr. Vaz contends that they nevertheless have value because, based on his wrongful termination, he was denied the opportunity to exercise the options.[108] This allegation is immaterial to his proof of interest. If he

[104] Vaz Facts-128 at 5, ¶¶ 18, 19.
[105] Trustee Facts-128 at 3-4, ¶ 15-17.
[106] Vaz Facts-128 at 5, ¶¶ 15-17.
[107] Vaz Facts-128 at 5, ¶ 16.
[108] Vaz Facats-128 at 5, ¶ 17.

was wrongfully terminated, and if the damages that he has suffered include a loss because of the denial of his right to exercise stock options, that may be a part of his claim.

But the Plan in this case provides for distributions to a holder of an equity interest based on what the holder actually has. It is clear that the "underwater" options Mr. Vaz now has have no value as an interest in the Debtor. Accordingly, the Trustee is entitled to summary judgment disallowing any interest in any stock options, except for the options granted in 2009 with a strike price of $2.76 (the "2009 Options"), which the Court discusses below.

The Trustee asserts in his brief that the 2009 Options were awarded under the Debtor's 2005 Stock Incentive Plan (the "2005 Plan").[109] Mr. Vaz does not dispute this contention in his brief.

Section 9.5(c) of the 2005 Plan provides that, upon termination of employment by the Company and its subsidiaries for cause, all stock option rights are forfeited. If Mr. Vaz was properly terminated for cause, therefore, he does not have any exercisable options.

A different provision applies if termination occurs other than for cause. Section 9.5(d) of the 2005 Plan provides in material part:

> (d) Notwithstanding any other provision hereof, unless otherwise provided in the Award Agreement, if (1) the Grantee's employment is terminated by the Company and its Subsidiaries (other than for Cause), (ii) the Grantee voluntarily terminates employment with the Company and its subsidiaries (other than on account of death or Disability) or (iii) the Grantee's employment with the Company and its subsidiaries terminates due to Retirement, the Grantee's Awards, to the extent then unexercised, unvested or unsettled, shall thereupon cease to be capable of vesting, and no exercise of an Award may occur

[109] Trustee Brief-128 at 5.

after the expiration of the one-month period to follow such termination or, if earlier, the expiration of the term of the Award in accordance with Section 7."

It is undisputed that SGI terminated Mr. Vaz's employment on August 14, 2010. What is disputed is whether the termination was for cause. The Trustee contends that, even if his employment was not terminated for cause, his employment nevertheless ended and that, under the terms of § 9.5(d), Mr. Vaz had to exercise any options by September 13, 2010. Because he did not do so, the Trustee concludes, his option rights terminated.

Mr. Vaz's position is that his wrongful termination precluded him from exercising any options. He posits that any attempt to timely exercise his option would have been futile because the company would have rejected the exercise based on his wrongful termination.

The Court concludes that Mr. Vaz may have a remedy based on the option if he establishes that his termination was unlawful. The Court declines to determine at this point whether that remedy, if available, takes the form of monetary damages for wrongful termination or is some other form of relief that permits him to retain his option rights. The Court will take up that issue if it becomes important in this matter.

The Trustee is entitled to summary judgment on his objection to Mr. Vaz's proof of interest with regard to all of his interests except those based on the 2009 options with a strike price of $2.76.

VI. CONCLUSION

For reasons set forth above, the Court rules as follows on the Trustee's Motion for Partial Summary Judgment on His Objection to Proof of Claim No. 27 [838] and his Motion for Summary Judgment on His Objection to Proof of Interest No. 128 [845]:

1. The Court concludes that the Trustee is entitled to summary judgment with regard to Mr. Vaz's claims on the Note and the Stock Purchase Agreement because the applicable statute of limitations barred their enforcement at the time of the filing of the Debtor's Chapter 11 case. The Court will defer ruling on whether the Trustee is entitled to summary judgment on these claims based on his alternative defenses to permit Mr. Vaz to supplement the record within 30 days with regard to certain factual questions, as set forth above. The Trustee may file a response to the supplement within 20 days of its filing. The Court will enter an Order with regard to summary judgment on the Note and the SPA after determination of the remaining issues following consideration of the supplement and response.

2. The Court concludes that the Trustee is not entitled to summary judgment with regard to Mr. Vaz's claims for a bonus or wrongful termination of his employment. The Court will enter an Order denying summary judgment on these claims in connection with its final rulings on the Note and SPA claims.

3. The Court concludes that the Trustee is entitled to summary judgment with regard to all of Mr. Vaz's equity interests except his interest based on stock options issued in 2009 with a strike price of $2.76. (This ruling does not affect any interests Mr. Vaz holds based on common stock, for which the filing of a proof of interest is not required.) The Court will enter an Order granting in part and denying in part the Trustee's motion for summary judgment with regard to Mr. Vaz's equity interests.

[End of Order]

This Memorandum Opinion has not been prepared for publication and is not intended for publication.