2010 SPRING MEETING
OF
ABA SECTION OF BUSINESS LAW

LLCs—Important Case Law Developments 2010

2010 SUMMARY OF DELAWARE CASE LAW
RELATING TO
ALTERNATIVE ENTITIES[1]

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1 Morris Nichols maintains a Cumulative Survey of Delaware case law relating to alternative entities which is updated annually, organized by subject area and includes most cases that address significant alternative entity issues. The entire Cumulative Survey is available on the Morris Nichols website at www.MNAT.com under Publications.

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1. *Thor Merritt Square, LLC v. Bayview Malls LLC*, C.A. No. 4480-VCP (Del. Ch. Mar. 5, 2010)

Plaintiffs purchased a shopping center from two Delaware LLCs pursuant to a purchase and sale agreement (the "PSA"). The PSA contained a provision that made the LLCs responsible for all costs incurred in connection with the work required to bring a JC Penney store in the shopping center into compliance with the fire code. In connection with this obligation, the LLCs deposited $242,115 into an escrow account pursuant to an escrow agreement. The escrow agreement provided that the LLCs were obligated to complete and pay for the work, whether or not the escrowed money was sufficient to pay for it. Almost immediately after closing under the PSA, the LLCs distributed virtually all of their assets to their members. The LLCs, however, failed to perform the remedial work required under the PSA. When the LLCs would not respond to plaintiffs' repeated demands to perform the work, plaintiffs arranged to have the work completed, which cost over $1 million. Plaintiffs wrote to the LLCs to inform them that the work had been completed and the cost of the work. However, shortly before such notification, defendants had filed certificates of cancellation terminating the LLCs' legal existence. After learning of the filing of the certificates of cancellation, plaintiffs filed this action seeking nullification of the LLCs' certificates of cancellation on the basis that defendants had failed to make reasonable provision for the unmatured contract claims of the LLCs prior to the filing as required by Section 18-804(b) of the LLC Act. This decision addressed defendants' motion to dismiss.

Defendants contended that the escrow agreement constituted reasonable provision for the LLCs' unmatured contract claims and that the LLC Act cannot be read to require an entity to make reasonable provision for claims that it could not anticipate until after its certificate of cancellation was filed. Plaintiffs argued that defendants were liable for all costs of the remedial work, including costs in excess of the escrow, that the cost of the work exceeded the escrow and that defendants knew before the filing of the certificates of cancellation that the cost of the work would exceed the escrow. In the context of a motion to dismiss, the court assumed the truthfulness of plaintiffs' allegations and thus denied defendants' motion to dismiss on this basis.

Defendants also argued that it was pointless to nullify the filing of the LLCs' certificates of cancellation because any claims that plaintiffs could make against the LLCs would be time-barred. Plaintiffs argued that their claims would not be time-barred, and the court held that defendants had not proven otherwise. The court thus denied defendants' motion to dismiss.

2. *Cline v. Grelock, et al.*, C.A. No. 4046-VCN (Del. Ch. Mar. 2, 2010)

This case involved a failed recovery and towing service; American Asset Recovery ("AAR"). AAR was organized as a Delaware LLC by two friends—the plaintiff ("Cline") and the defendant ("Grelock"). AAR operated mostly at a loss for about six months and was then dissolved unilaterally by Grelock. Grelock then started another similar company called Hound Dog Recovery ("Hound Dog") with his wife ("Crystal") and without Cline. Grelock then used the assets of AAR for the benefit of Hound Dog. Cline sued for damages and an ownership interest in Hound Dog.

There was a dispute over the parties' respective ownership percentages. The tax records for AAR reflected that the company was supposed to be owned equally between Cline and Grelock, 50/50. However, Grelock claimed that Cline had never made the required $25,000 capital contribution. Cline did not dispute the fact that he never made his capital contribution, but he claimed that he never signed the Operating Agreement that required it. In fact, the only contribution that Cline made was as a co-guarantor on the truck that AAR purchased with a loan from Sovereign Bank. The court found that it was unreasonable for Cline to claim he was a 50% owner when he did not make a capital contribution.

Grelock unilaterally dissolved AAR and established Hound Dog, which the court found to be a breach of his fiduciary duty because Cline had been treated as a member of AAR. However, Cline was unable to prove any damages from the dissolution of AAR and did not demonstrate a reasonable basis for assessing damages, if there were any. In the alternative, Cline argued that as a wrongfully excluded co-owner of AAR, he was entitled to an ownership interest in Hound Dog. After agreeing that a former partner (or member of an LLC) may be held accountable for profits earned using partnership assets, the court determined that Cline failed to show what his interest should be or how the court should calculate it. Moreover, the court was not persuaded that a person who failed to make a capital contribution should be allowed to claim an interest in a successor company. Therefore, even though Grelock's unilateral dissolution was a breach of fiduciary duty, the court did not afford Cline relief on his claims because he did not prove that he was harmed in any way.

Next, Grelock asserted a counter-claim asking the court to compel Cline to make his capital contribution for the benefit of AAR. The court assumed the benefit would actually go to Grelock and refused, citing Grelock's breach of fiduciary duty in dissolving AAR. Since Grelock excluded Cline and deprived him of whatever benefit he might have received from the continuation of AAR, the court would not compel Cline to pay.

Finally, the court took up the issue of the outstanding loan on the truck that was purchased by AAR, guaranteed by Cline and Grelock, and used for the benefit of Hound Dog. The court ordered Grelock and Crystal to exercise all good faith efforts to obtain Cline's release from the guaranty. Furthermore, the court said that if they were unable to secure Cline's release, Grelock and Crystal had to individually indemnify and hold Cline harmless from any claim arising out of the guaranty. Lastly, the court assessed the costs of the action against Grelock because of his breach of fiduciary duty.

3. *PT China LLC v. PT Korea LLC*, C.A. No. 4456-VCN (Del. Ch. Feb. 26, 2010)

In this case, the court considered whether Harrison Wang ("Wang"), a Singapore resident, was subject to personal jurisdiction under Section 18-109 of the LLC Act for breach of fiduciary duty claims and breach of contract claims. Wang was one of two

"Principals" of Pine Tree Holdings I LLC, a Delaware LLC ("PT Holdings"), and one of three members of the management committee of PT Holdings. PT Holdings, in turn, was the managing member and minority interest holder of Pine Tree Equity LLC ("PT Equity"), also a Delaware LLC. PT Equity was governed by an LLC agreement, to which Wang was not a party, and a joint venture agreement (the "JV Agreement"), to which Wang was a party.

Wang was sued for breach of fiduciary duty and breach of contract based, among other things, on his alleged usurpation of corporate opportunities and disclosure of confidential information. This decision addressed a motion by Wang to dismiss the claims. While Wang did not contest his status as a manager of PT Holdings under Section 18-109, Wang maintained that the fiduciary duty claims were both factually unsupported and precluded by the contract claims, and therefore failed as a matter of law. Additionally, Wang asserted that he lacked sufficient contact with Delaware to merit personal jurisdiction with respect to the breach of contract claims.

The Court of Chancery began the analysis of Wang's claims by stating that Court of Chancery Rule 12(b)(2) requires the plaintiff to bear the burden of demonstrating a basis for the court's jurisdiction over a nonresident defendant. The court looked to Section 18-109 of the LLC Act for a statutory basis for personal jurisdiction over Wang. Section 18-109 provides that a manager of a limited liability company is deemed to consent to the personal jurisdiction of Delaware courts for any suit "involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company . . . ." A "manager" is defined for purposes of Section 18-109 to include any person who "participates materially in the management of the limited liability company." The court noted that even if a person is served pursuant to Section 18-109, personal jurisdiction must still be consistent with due process.

With respect to the breach of fiduciary duty claims, the court cited to well-settled Delaware case law in the LLC and corporate context for the proposition that service under Section 18-109 is consistent with due process where an action relates to a manager's fiduciary duties. Wang did not contest this point but argued instead that the fiduciary duty claims were not supported by the alleged facts and were otherwise duplicative of the breach of contract claims and thus should be dismissed. The court found that sufficient facts had been pled to support their fiduciary duty claims. As to Wang's contention that the fiduciary duty claims were duplicative of the breach of contract claims, the court stated that under Delaware law "a contractual claim will preclude a fiduciary duty claim, so long 'as the duty sought to be enforced arises from the parties' contractual relationship.'" The court thus had to determine whether an independent basis for the fiduciary duty claim existed apart from the contractual claim, even if both were related to the same or similar conduct. The court, citing to *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842 (Del. Ch. June 13, 2008), permitted the fiduciary duty claims to stand because the fiduciary duty claims were considered distinct in scope from the contract claims. Specifically, the court found that the fiduciary duty claims against Wang arose from Wang's fiduciary duties under the PT Holdings' LLC agreement, not the JV Agreement which he is alleged to have breached.

With respect to the breach of contract claims, while Wang did not contest that Section 18-109 encompasses service on managers for matters that involve or relate to the LLC, Wang claimed that the exercise of personal jurisdiction over him pursuant to Section 18-109 would not comport with due process. The court, citing to the *Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974 (Del. Ch. 2000), stated that the exercise of personal jurisdiction under Section 18-109 would be consistent with due process in this circumstance if "(1) the allegations focused on the defendant's rights, duties, and obligations as the manager of a limited liability company; (2) the matter was inextricably bound up in Delaware law; and (3) Delaware has a strong interest in providing a forum for disputes relating to the actions of managers of a limited liability company formed under its law in discharging their managerial functions." Wang argued that the breach of contract claims did not implicate his rights, duties and obligations as manager of PT Holdings and, because the JV Agreement was not governed by Delaware law, are not inextricably bound up in Delaware law. The court disagreed, finding that the contract claims did involve Wang's management of both PT Holdings and PT Equity and that, under the totality of the circumstances—including the fact that the breach of contract claims were intertwined with Wang's management of Delaware LLCs, the potential usefulness of his involvement in the suit and Delaware's interest in adjudicating disputes involving the management of its LLCs—the court had personal jurisdiction over Wang to hear the breach of contract claims. Wang's motion was thus denied.

4. *Kelly v. Blum*, C.A. No. 4516-VCP (Del. Ch. Feb. 24, 2010)

Plaintiff was a member, manager and the president of Marconi Broadcasting Company, LLC, a Delaware limited liability company (the "Company"). The Company was initially funded by plaintiff, who received Class B common membership units in consideration of his investment, and MBC Investment, L.P. ("MBC Investment"), which provided a loan to the Company plus an equity investment in Class A preferred units. MBC Investment was a wholly-owned subsidiary of ELB Capital Management, LLC ("ELB"). The Company began to experience cash flow problems and entered into an additional loan agreement with another wholly-owned subsidiary of ELB. In connection with this loan, the Company entered into an amended limited liability company agreement of the Company (the "LLC Agreement"), pursuant to which MBC Lender received Class C common membership units in the Company. The LLC Agreement required that all actions of the Company be approved by managers holding a majority of the voting power. The LLC Agreement also provided that the Company could not enter into any merger without the prior written approval of the Class A member or managers and the Class C member or managers. At all relevant times, Class A managers held 24%, Class B managers held 25% and Class C managers held 51% of the voting power. At a March 18, 2009 board meeting for the Company, a Class A manager of the Company, proposed a transaction by which a wholly-owned subsidiary of ELB would merge into the Company with "New Marconi" being the surviving entity (the "Merger"). The purchase price included a cash component, an assumption of the MBC Investment debt, and preferred units in New Marconi to be issued to MBC Investment. Further, all of the Class A, B and C common units in the Company would convert pursuant to the Merger into the right to receive $1 per class. Several weeks after the March 18, 2009 board meeting, MBC Investment and MBC Lender signed a written consent approving the

Merger without plaintiff's consent. On April 8, 2009, MBC Investment and MBC Lender sent a copy of such written consent to plaintiff by fax and email, the confirmation of which was sent by FedEx on April 9, 2009. The Certificate of Merger was filed on April 17, 2009 to consummate the Merger. Plaintiff filed his complaint and all amendments thereto after the Merger was consummated.

The Delaware Court of Chancery first addressed plaintiff's motion for partial summary judgment on his claim for a declaratory judgment that the Merger was void either (1) because plaintiff did not receive adequate notice of its approval by written action as required by the LLC Agreement or (2) because the Merger closed before the notice period required by the LLC Agreement elapsed. The court noted that notwithstanding Section 18-209(b) of the LLC Act which provides that a merger of a Delaware limited liability company generally must be approved by members who own more than 50% of the then current percentage or other interest in the profits of such company, parties may contract to impose additional requirements as was the case in the LLC Agreement. As noted above, the LLC Agreement required prior written approval of the Class A member or Class A managers and the Class C member or Class C managers. The LLC Agreement further provided that any written consent that is not executed by any member "must be delivered to such Member no less than five (5) business days prior to the effective date of such consent." The LLC Agreement also provided that in the event notice was given by fax, a confirmation copy must be sent on the same day of the fax "by first class mail." plaintiff asserted that the defendants that approved the Merger technically violated this notice provision because the confirmation copy was sent the day after the fax. The court held that if the notice provision applied to a written consent (the court acknowledged that it may not apply as these provisions could be construed as ambiguous), the notice was in "substantial compliance." The court cited to corporate case law by analogy in indicating that substantial compliance "is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met."

The court then turned to defendants' motion to dismiss each of plaintiff's other claims (each as explained below) for lack of standing. In this regard, defendants claimed that plaintiff could not maintain standing subsequent to the Merger because plaintiff's claims were derivative in nature, plaintiff was no longer a member of the Company as a result of the Merger, and only members of the Company could assert derivative claims. The court agreed that under Section 18-1002 of the LLC Act, a plaintiff must be a "member or an assignee of a limited liability company interest" at the time of bringing a derivative action, and thus, plaintiff could only assert direct claims. The court noted two exceptions to this general rule under corporate case law precedent whereby a former shareholder could bring a derivative suit following a merger that terminates its interest (1) if the merger itself is subject to a claim of fraud being perpetrated merely to deprive shareholders of standing to bring a derivative action and (2) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise. Plaintiff did not allege these situations and thus they did not apply to this case. The court then applied the standing analysis set forth in the corporate case of *Tooley* to determine whether plaintiff's claims were direct or derivative.

The court first addressed plaintiff's claim that the defendants that were members and managers of the Company violated their fiduciary duties of loyalty and care, which each owed to plaintiff as the minority equity holder, in approving a self-interested transaction (i.e., the Merger) on terms unfair to plaintiff. The court noted that Delaware cases interpreting Section 18-1101(c) of the LLC Act have concluded that despite the contractual freedom to restrict or eliminate duties owed by members and managers of a limited liability company, in the absence of a contrary provision in a limited liability company agreement, traditional fiduciary duties of loyalty (including good faith) and care apply. The LLC Agreement provided in a section entitled "Duties" that the board of managers "shall manage the Company in a prudent and businesslike manner . . . ." The LLC Agreement also contained an exculpatory provision which provided that managers of the Company would not be liable for money damages "for breach of fiduciary duty to the Company nor to any Member for their good faith actions . . . but only for their own willful or fraudulent misconduct or willful breach of their contractual or fiduciary duties under [the LLC Agreement]." The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the defendant managers of the Company entered into the Merger, as plaintiff alleged, to profit from squeezing out plaintiff and obtaining control of property held by the Company, this stated a direct duty of loyalty claim sufficient to survive a motion to dismiss. With respect to the exculpatory provision, the court noted that members could limit or eliminate a manager's or member's liability for breach of contract and fiduciary duties under Section 18-1101(e) of the LLC Act except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC Agreement to require plaintiff to allege a "willful" breach of the defendant managers' contractual or fiduciary duties to have a valid claim. The court did not determine whether "willful" required "evil intent to harm" or "acting recklessly and outside the bounds of reason" as the defendant managers asserted, but found that plaintiff had satisfied this standard by alleging facts sufficient to suggest that the defendant managers "actually and specifically intended to extinguish [plaintiff's] membership interest in [the Company], knowing that such action would harm plaintiff." Accordingly, the court denied the motion to dismiss.

The court next addressed whether MBC Investment and MBC Lender owed fiduciary duties to plaintiff as controlling members of the Company. The court noted that, like managers of a limited liability company, in the absence of provisions to the contrary in a limited liability company agreement, controlling members in a manager-managed limited liability company owe minority members "the traditional fiduciary duties" that controlling shareholders owe to minority shareholders. Citing to corporate precedent, the court stated that these fiduciary duties include the duty "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders." In respect of the Company, MBC Investment and MBC Lender were controlling members as they had the authority to appoint managers with 24% and 51% of the voting power, respectively, and further, they had the collective power to cause the Company to enter into merger agreements, among other things. The court found that plaintiff sufficiently alleged facts that, if true, showed that MBC Investment and MBC Lender, with the aid of their respective managers of the Company, effected the Merger to benefit themselves at the expense of plaintiff, and accordingly, the court denied the motion to dismiss.

With respect to plaintiff's claim that MBC Investment and MBC Lender breached their implied contractual covenant of good faith and fair dealing under the LLC Agreement by approving the Merger, not seeking alternative strategies for the Company and allowing the Company to enter into a self-interested transaction, the court noted that to have a valid claim, plaintiff must have alleged a "specific implied contractual obligation and allege how the violation of that obligation denied [plaintiff] the fruits of its contract." The court found that plaintiff did not sufficiently allege any specific implied contractual obligation, how it was breached, or how he was damaged by such breach. In this regard, the court observed that the LLC Agreement expressly addressed self-interested transactions. Therefore, the court granted the motion to dismiss this claim.

The court then addressed plaintiff's claim that ELB aided and abetted the alleged breaches of fiduciary duties explained above. The court stated that under Delaware law, to state such a claim, plaintiff must show "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) the defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that plaintiff had sufficiently alleged that ELB knowingly participated in the breaches of fiduciary duty by the other defendants through the acts of ELB's officers and its two wholly-owned subsidiaries (MBC Investment and MBC Lender) that directly harmed plaintiff for the same reasons as discussed above. Accordingly, the motion to dismiss was denied.

Finally, plaintiff also sought a declaratory judgment to invalidate the loan agreement between the Company and MBC Lender. The court specifically noted that plaintiff consented to such loan and pledged his membership interest in the Company to obtain the loan. On that basis, the court dismissed this claim.

5. *The Homer C. Gutchess 1998 Irrevocable Trust v. Gutchess Companies, LLC*, C.A. No. 4916-VCN (Del. Ch. Feb. 22, 2010)

In this decision, the Court of Chancery amplified a bench ruling in a case in which a petitioner sought judicial dissolution of a Delaware LLC. Petitioner apparently was seeking dissolution on equitable grounds in the absence of a deadlock and cited to the Court of Chancery's decision in *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004), as precedent. The court distinguished this case from *Haley* because in *Haley*, the court found that the members of the LLC had envisioned co-equal management and, under the circumstances of that case, one of the members had become unable to influence the management of the LLC. In this case, the court found that the LLC was not intended to be a joint venture, but rather the intention was that one of the members would have 100% voting control over the LLC. The court did not find it compelling that another member of the LLC disagreed with how that member was managing the LLC. Petitioner also cited to the court's decision in *In re Arrow Inv. Advisors, LLC*, C.A. No. 4091-VCS (Del. Ch. Apr. 23 2009), for judicial dissolution of an LLC on equitable grounds in the absence of a deadlock. Similar to the facts in *Arrow*, petitioner alleged breaches of fiduciary duty as the basis for judicial dissolution. In *Arrow*, the court held that, where judicial dissolution is requested because of alleged breaches of fiduciary duty, the petition fails to state a claim unless such breaches have (i) been proven in a plenary action and (ii) there exists some basis for a dissolution notwithstanding whatever relief was granted in that plenary action. In this case, the court found that whether the manager was breached any fiduciary duties owed to the members had little affect on whether the LLC was carrying out the broad business purposes for which it had been organized. In addition, the court found that petitioner had not alleged the type of absolute frustration or futility required for the court to order judicial dissolution of the LLC in the absence of unachievable business purpose and/or deadlock. The court stated that if relief were appropriate for the alleged breaches of fiduciary duty, it appeared that such relief could be granted through less extreme judicial remedies than the remedy of judicial dissolution of the LLC.

6. *Harris v. RHH Partners, LP*, C.A. No. 1198-VCN (Del. Ch. Jan. 27, 2010)

Robert H. Harris was the sole limited partner of a Delaware limited partnership (the "Partnership"), the sole asset of which was his personal residence. The sole general partner of the Partnership was 1015 Broadway, Inc. ("Broadway"), a corporation owned by Harris's former friend and business partner, Don L. Hartman. Harris brought this action requesting the Court of Chancery to replace Broadway with a new general partner, or alternatively, to judicially dissolve the Partnership.

The court was unable to determine the purpose for which the Partnership was formed but suspected that Harris, who was in some financial distress at the time the Partnership was formed, caused the formation of the Partnership with the intent to shield his personal residence from the claims of his creditors. The Partnership's partnership agreement included a general purpose clause providing that the Partnership was formed "to engage in any activity permitted to be carried out by a Delaware partnership" and neither Harris nor Hartman provided any further explanation for the purpose of the Partnership. The court also could not determine why Broadway became the general partner of the Partnership. Hartman claimed that he acquired ownership of Broadway, the general partner of the Partnership, as a means of securing debts owed by Harris to Hartman. The court, however, found that Hartman had failed to prove that Harris owed any debts to him or that the purpose of Broadway's service as general partner of the Partnership was to provide security to Hartman for Harris's obligations to him.

Harris claimed that Broadway should be removed as general partner because it had failed to meet its obligations as general partner, such as timely filing the Partnership's tax returns. The court stated that Harris's claim presumes that there is the judicial option of replacing a general partner and divesting it of its interest in the Partnership. The court further stated that, even if it assumed that this was a potential viable remedy, Harris had not convinced the court that Broadway's shortcomings, generally minor and ministerial in nature, reached the level of malfeasance that would justify such an extraordinary remedy. The court thus denied Harris's request to replace the general partner.

Turning to Harris's claim for judicial dissolution, the court stated that it was abundantly clear that leaving Harris and Hartman in any kind of business relationship would serve no useful purpose, noting that there was no apparent purpose for the Partnership and that the Partnership holding title to Harris's personal residence had no cognizable relationship to any business purpose for which the Partnership might exist. The court thus held that it was not reasonably practicable for the Partnership to carry on its business in conformity with the partnership agreement and ordered judicial dissolution of the Partnership pursuant to Section 17-802 of DRULPA. With respect to the liquidation of Harris's personal residence as the sole asset of the Partnership upon dissolution, the court determined that Broadway should receive a 1% undivided fee simple interest in the real property and Harris should receive a 99% fee simple interest in the real property. However, because Broadway had failed to make a $1,000 capital contribution as required under the partnership agreement, Broadway's interest in the real property would be subject to a charge for the $1,000.

7. *Amirsaleh v. Board of Trade of New York*, C.A. No. 2822-CC, 2008 WL 4182998 (Del. Ch. Sept. 11, 2008); *Amirsaleh v. Board of Trade of New York*, C.A. No. 2822-CC, 2009 WL 3756700 (Del. Ch. Nov. 9, 2009); *Amirsaleh v. Board of Trade of New York*, C.A. No. 2822-CC, 2010 WL 177681 (Del. Ch. Jan. 19, 2010)

Plaintiff brought suit alleging that defendants breached the implied covenant of good faith and fair dealing when defendants accepted all late elections of merger consideration except for plaintiff's. In December 2006, the Board of Trade of the City of New York, Inc. ("NYBOT") entered into an agreement to be acquired by IntercontinentalExchange, Inc. ("ICE"). The agreement provided that the holder of each NYBOT membership interest could elect to be converted into either newly issued shares of ICE or a specified amount of cash. If either type of consideration were over or undersubscribed, then the merger agreement provided that one's chosen consideration might be affected. Under the agreement, if a member failed to make an election, then the member would receive whatever type of consideration was undersubscribed. The agreement included a provision that required elections to be made by a deadline to be determined by ICE and NYBOT.

Plaintiff owned two membership interests in the predecessor NYBOT entity that were converted into cash because ICE asserted that he failed to make his election within the allotted time. The official deadline for election was January 5, 2007, and plaintiff's election form was not received until January 19, 2007. From January 6 to January 18, late forms from twenty-five other NYBOT members were accepted. Plaintiff alleged, in part, that NYBOT and ICE breached an implied covenant of good faith and fair dealing in denying him the opportunity to elect the type of consideration he would receive based on an arbitrary deadline determined by the two companies. Plaintiff's theory was that defendants had extended the election deadline for "connected" members and then once the "connected" members' elections were in, defendants refused to accept any more late elections. Defendants claimed that the election period was extended as long as possible, but had to be closed to allow sufficient time for preparing the merger consideration payout by its January 29, 2007 deadline.

The court found that plaintiff had standing to bring suit as a third-party beneficiary because of the agreement's "unambiguous intent" to benefit the NYBOT members. The court granted defendants' summary judgment motion on plaintiff's literal breach of contract claims, but denied defendants' motion as to plaintiff's claim of a breach of the implied covenant of good faith and fair dealing. Plaintiff moved for summary judgment on his implied covenant of good faith and fair dealing claim, which was also denied. The court noted that the "exact contours" of the implied covenant are "not always easily discernable." For the court, the implied covenant is "'best understood' as a judicial tool used to imply terms in a contract that protect the reasonable expectations of the parties." The parties' "reasonable expectations" are themselves "determined by inquiring whether the parties would have bargained for a contractual term proscribing the conduct that allegedly violated the implied covenant had they foreseen the circumstances under which the conduct arose." The court explained that the implied covenant is particularly important in situations where the contract endows one party with discretion in performance. In the *Amirsaleh* case, under the agreement defendants had the discretion in setting the deadline for accepting elections, and, thus, defendants were required by the implied covenant to exercise that discretion in good faith.

A breach of the implied covenant of good faith and fair dealing "implicitly indicates bad faith conduct." Plaintiff had argued that he did not need to show "bad faith" but only "conduct not in good faith" to carry his burden. The court found that there was "no meaningful difference" between the two concepts. The court first cited to a Supreme Court case explaining that the term "good faith" does not have a set meaning, but rather "serv[es] only to exclude a wide range of heterogeneous forms of bad faith." In the court's view, a party acts in "good faith" when it does not engage in "bad faith" conduct, i.e., "'good faith' conduct can only be understood by reference to 'bad faith' conduct." The court rejected the idea that there is such a thing as "neutral faith," explaining that if there were one would expect that concept to have been already accepted in American law. The court buttressed its position on a parallel to the corporate law context in which the Court of Chancery had "firmly rejected the notion that the words 'not in good faith' mean something different than 'bad faith.'" Therefore, the court required plaintiff to demonstrate bad faith on the part of defendants to prevail on his implied covenant claim. To prove bad faith a plaintiff is required to show that a defendant's conduct was "motivated by a culpable mental state," or, in other words, "driven by an improper purpose."

At the summary judgment phase, it was entirely unclear whether defendants properly exercised their discretion in accepting elections after the original January 5, 2007 deadline and then abruptly refusing to accept plaintiff's election received on January 19, 2007.

After a full trial, the court found that defendants used a poor process for deciding whether to accept late elections, but that defendants did not act in bad faith. Defendants "vacillated" in deciding whether to accept late elections, but the court found that the decision to accept late elections was "primarily driven" by the ICE CEO's "desire to accommodate as many late elections as possible." After the decision to accept late elections was made on January 17, defendants decided "in the moment" and "on the fly" to close the period and accept no elections received after January 18. However, despite these "shortcomings" in defendants' process for extending the election deadline, and the fact that their process could have been "better coordinated," nothing defendants did was a breach of the implied covenant of good faith and fair dealing. Defendants were not motivated by a desire to help certain "connected" members, but rather by a desire to accommodate all members. The court also found that defendants had not provided "connected" members with any other special treatment.

8. *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, *LLC*, C.A. No. 2427-VCL (Del. Ch. Jan. 15, 2010)

In this decision, the Court of Chancery considered a settlement to resolve two representative actions by holders of limited partnership units of Teppco Partners L.P. ("Teppco"). The first action, styled as the "derivative action," challenged two transactions between Teppco and Enterprise Products Partners, L.P. ("Enterprise"). Teppco and Enterprise were under common control and the transactions allegedly unfairly favored Enterprise. The second action, referred to as the "merger action," related to Enterprise's proposal to acquire Teppco by merger.

A series of transactions moving assets from Teppco to Enterprise and relating to a joint venture gave rise to the derivative action. The Teppco audit committee approved the joint venture without obtaining a fairness opinion, and according to the opinion of the financial advisor employed by Enterprise, the deal was more favorable for Enterprise than comparable transactions. In the derivative action, plaintiffs alleged breaches of fiduciary duties and aiding and abetting of such breaches. (In addition, plaintiffs had earlier challenged disclosures made in connection with proposed transactions as inadequate, but the court had previously dismissed such claims. Brinckerhoff v. Tex. E. Prods. Pipeline Co. in Section II.I.)

During the pendency of the derivative action, defendants decided to pursue the merger between Teppco and Enterprise. The audit committee of Teppco's general partner engaged special legal counsel and considered the effect of the merger on the derivative action. After receipt of Enterprise's initial offer, which was deemed unacceptably low, the Teppco audit committee retained special Delaware legal counsel to advise the committee and independently assess the derivative action and a financial advisor to provide a sensitivity analysis. At this point, independent directors were appointed to the board of Teppco's general partner and the audit committee formed a special committee with the exclusive power to evaluate, negotiate and approve or reject the merger. The financial advisor and legal counsel previously employed by the audit committee were retained by the special committee.

During the course of the merger negotiations, defendants advised plaintiffs of the merger proposal, which would extinguish plaintiffs' standing in the derivative action. Upon the public announcement of the merger, plaintiffs filed the merger action but did not move to expedite the proceedings or enjoin the merger. At this point, the special committee negotiated with both Enterprise over the merger and with plaintiffs' counsel over the derivative action, to ultimately reach an agreement among the three sides. The special committee negotiated the exchange ratio of Teppco units for Enterprise units and then obtained plaintiffs' agreement to a settlement of all litigation in consideration for the merger. The special committee's financial advisor opined that the exchange ratio was fair but did not assign any value to the derivative action. The special committee did, however, receive a separate valuation that considered the derivative action, which was presented as supplemental evidence.

In assessing the settlement agreement as a resolution of both the derivative action and the merger action, the court noted that the claims in the derivative action actually afforded plaintiffs with a derivative right on behalf of Teppco and a direct right as limited partners for breach of the limited partnership agreement. Therefore, the court noted, after the merger, the Teppco unitholders could have pursued the direct claims in the derivative action after the merger as a de facto class action. Further, even in derivative actions, the continuous ownership requirement under Delaware law is suspended in cases in which a principal purpose of a merger is to terminate pending derivative claims. Because the derivative action could have been pursued post-merger in some form, the settlement agreement was properly considered as a resolution of the derivative action as well as the merger action.

Considering the fairness of the settlement, the court noted that in the context of representative litigation, a court must balance the policy favoring settlement with the need to fairly represent the interests of the class of plaintiffs because of the fiduciary nature of the litigation, weighing the value of the claims being compromised against the value to the class of the settlement. The court observed that the plaintiffs' claims in the derivative action seemed to be strong, given the language of Section 6.6(e) of the Teppco limited partnership agreement requiring that affiliate transactions be fair and reasonable to Teppco, considered in the context of all similar or related transactions. Under the limited partnership agreement, this standard would be deemed satisfied if the terms of the subject transaction were no less favorable to Teppco than those provided to or available from unrelated third parties. Defendants attempted to counter the application of this provision with the grant of full power and authority to the general partner to conduct the business of the partnership, including disposition of assets and entry into joint ventures, in its sole discretion under Section 6.1(a) of the limited partnership agreement. The court rejected defendants' argument, as it did not comport with a reading of the limited partnership agreement as a whole or in accordance with its plain meaning. Section 6.1(a) was a general grant of authority, while Section 6.6(e) was a specific provision as to transactions authorized under Section 6.1(a) and involving affiliates, and if Section 6.1(a) were to control, Section 6.6(e) would be read out of the agreement. The court also noted that if there was ambiguity, the agreement would be construed against the general partner who drafted it. With respect to the sole discretion standard, the court explained that Gelfman v. Weedon Investors, L.P. does not stand for the proposition that sole discretion language will trump any conflict of interest provision and that such language could not override a provision such as Section 6.6(e), which explicitly barred affiliate transactions that did not satisfy the standard set forth in the agreement. Applying Section 6.6(e) to the challenged transactions, the court found that there was a strong case for plaintiffs' breach claims, given that the transactions undervalued Teppco's assets, were pursued by fiduciaries who were conflicted and had reason to favor Enterprise, were not as favorable as a third party transaction and were unlikely to be fair and reasonable. As to plaintiffs' claims for common law breaches of fiduciary duty, however, the court found that the LP Act allows for a limited partnership agreement to limit or eliminate fiduciary duties and that Section 6.9(b) of the Teppco limited partnership agreement utilized this authority by providing an express standard displacing default fiduciary duties.

In contrast to the derivative action, the merger action was judged under an amended and restated limited partnership agreement. The operative provisions were modified to provide a more flexible standard for affiliate transactions, under which affiliate transactions were deemed to be fair and reasonable if blessed by special approval of a majority of the members of the audit committee. To the court, these provisions provided a weighty defense but not an automatic judgment for defendants. When such provisions are employed, the special approval remains subject to the implied covenant of good faith and fair dealing, which cannot be eliminated by a partnership agreement. Further, these particular provisions did not grant authority to the audit committee in its sole discretion and some form of reasonableness standard would likely apply. In the view of the court, the claims in the merger action were weaker but still a meaningful litigation threat.

The court then assessed the value of plaintiffs' claims and plaintiffs' and defendants' contentions as to potential damages in the derivative action and noted that both plaintiffs and defendants, as well as the special committee, had given the derivative action real value. The court questioned the premium obtained on the exchange ratio of units, and noted that there were no appraisal rights in the merger, that the majority of the minority votes were based on units voting rather than units outstanding, that plaintiffs did not challenge the merger and that the fees defendants agreed to were among the largest awarded by the court. However, the transaction was at a premium and negotiated by a special committee of independent, outside directors without ties to the controlling company who appeared to have acted in good faith and retained experienced financial and legal advisors. As to plaintiffs, the court found that they engaged in real work and created a substantial litigation risk. Balancing these factors, the court approved the settlement as fair and reasonable.

9. *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126 (Del. Ch. 2009)

Plaintiffs sought a declaratory judgment that they were not liable under an asset purchase agreement for failure to market a product during a corporate crisis, and defendant counterclaimed on a range of theories. Except for two minor items, the court granted plaintiffs' motion for judgment on the pleadings.

Defendant developed a soap dispenser for children that leaves a small ink spot on a child's hand that can only be washed off with at least twenty seconds of hand washing. The product ("Squid Soap") sold well, but lacked a "nationwide marketing platform and brand-name recognition." In 2007, defendant engaged in discussions with a range of potential partners for capitalizing on Squid Soap, including Proctor & Gamble and HBK Investments. The various potential partners all expressed great interest in Squid Soap. Plaintiff Airborne also "aggressively pursued" Squid Soap as an opportunity. Airborne itself had started by selling a vitamin product marketed as preventing and curing the common cold.

Airborne eventually agreed to purchase defendant's assets and the parties signed an asset purchase agreement. Under the agreement, defendant sold its assets for $1 million cash, and potential earn-out payments of $26.5 million if required targets were met. Airborne purchased defendant's brand name, goodwill and intellectual property, but was required to return those assets within one year if certain targets were not met. The agreement contained no specific requirements on the level of effort or resources that Airborne was required to devote to marketing Squid Soap. Within the year following the parties' signing the agreement, Airborne's business came under scrutiny from an ABC special investigation attacking Airborne's germ fighting claims, Airborne had to settle a class action for $23.5 million and Airborne settled suits filed against it by the FTC and various states for a total of $37 million. As a result of these problems, Airborne did nothing to market Squid Soap, and the targets specified in the asset purchase agreement were not met.

Defendant claimed that because targets were not met the assets automatically reverted to it. But the court explained that the agreement provided that if the targets were not met Airborne was required to return the assets, but the assets did not automatically revert. Airborne attempted to return the assets on September 9, 2008, but on September 29, 2008 Airborne assigned an interest in patents that it was obligated to return in order to secure financing. Airborne continued to try to return the assets, but defendant continued to refuse to accept them.

The court granted plaintiffs judgment on the pleadings on defendant's fraud claims because Airborne's challenged representations in the agreement were accurate, the challenged extra-contractual representations were not pled with particularity and no equitable considerations were present that would have merited the court going "beyond the traditional framework of common law fraud." The court also granted plaintiffs judgment on the pleadings on defendant's breach of contract claim because, among other reasons, the agreement provided no specific requirements as to the marketing that Airborne had to engage in. Rather, the agreement merely provided that defendant would "get the assets back if Airborne fail[ed] to make Squid Soap successful to the extent described."

Turning to defendant's implied covenant of good faith and fair dealing claim, the court explained that this doctrine "operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer. In the Venn diagram of contract cases, the area of overlap is quite small." In addition, the court cautioned that a court "should be most chary" about finding an obligation under the implied covenant "when the contract easily could have been drafted to expressly provide for it."

The court rejected some of defendant's implied covenant claims out-of-hand, but did remark that its argument that Airborne was under an obligation to expend some funds on marketing had "a tinge more color." While the agreement did not require Airborne to actually expend resources, it did contain specific financial targets that the parties agreed on. As a result, defendant could "contend plausibly" that the implied covenant was implicated here. Defendant's basic argument was that Airborne "could not arbitrarily refuse to expend resources and thereby deprive [defendant] of the prospects for the earn-out" and "at least had to make an honest go of it." The court found merit in defendant's contention to the extent that one party to a contract has discretion in performance, that discretion must be exercised "reasonably and in good faith." Therefore, Airborne "could not have refused arbitrarily or in bad faith to pursue the Squid Soap business."

There was not, however, any allegation that Airborne acted "arbitrarily, in bad faith, or for no reason." Instead, the allegations were that Airborne did not expend funds on marketing Squid Soap as a result of a corporate crisis. Moreover, defendant acknowledged that Airborne was "[u]ndoubtedly restrained by the legal and financial burdens of the settlement and systemic market damage." As a result, this "as-pled scenario" could not support a claim for breach of the implied covenant. The court also considered it important that defendant could have bargained for specific contractual obligations to expend certain amounts of marketing resources, but did not. Beyond that, in the court's view the transaction's structure was not irrational, and provided defendant downside protection in the form of the return of the assets. The court granted plaintiffs judgment on the pleadings as to defendant's implied covenant claim.

The court dismissed claims against plaintiff Weil because they were premised on theories of aiding and abetting and conspiracy, and the court had already concluded that there was no underlying wrong to support them. The court granted plaintiffs a declaratory judgment that Airborne had not breached the agreement. The court did not grant plaintiffs specific performance forcing defendant to accept the return of the assets, because it viewed such relief as unnecessary. The court found that a claim that defendant had breached the agreement by initiating suit in Texas in violation of a forum selection clause was not subject to judgment on the pleadings.

10. *Deloitte LLP v. Flanagan*, C.A. No. 4125-VCN (Del. Ch. Dec. 29, 2009)

Plaintiffs were two accounting firms formed as Delaware limited liability partnerships. Defendant was a former partner of each firm and a certified public accountant who had provided audit services to a number of the firms' clients. As a partner, defendant had been required to enter into agreements with the firms setting forth his fiduciary obligations to the firms and requiring him to comply with the firms' policies regarding independence. Under the firms' independence policies, defendant was obligated, among other things, to disclose all of his investments on a tracking system and to make annual representations to the firms as to his compliance with such policies.

Following defendant's resignation, the firms accused defendant of having engaged in more than 300 instances of insider trading in contravention of his agreements with the firms and the fiduciary duties he owed to the firms and of fraudulently misrepresenting his trading activity in both the firms' tracking system and his annual representations to the firms. The firms sued defendant in the Court of Chancery for breach of contract, breach of fiduciary duty, equitable fraud and common law fraud and moved for partial summary judgment as to the question of liability. The court granted the firms' motion for summary judgment.

Focusing on a subset of unauthorized trades for which defendant did not proffer a defense, the court held that defendant had breached his agreements with the firms by trading in securities of the firms' clients and failing to properly report such trades in either the firms' tracking system or in his annual representations to the firms. The court further held that defendant's conduct—namely defendant's misrepresentations with respect to his holdings—constituted a breach of his fiduciary duty to be "just and faithful" to the firms, which was the express fiduciary obligation to which defendant was subject under his agreement with the firms, and also satisfied the principal elements of equitable fraud and common law fraud. With respect to the fraud claims, the court dismissed defendant's assertion that the firms had failed to establish the requisite element of reliance by not presenting any evidence that they had actually relied on defendant's misrepresentations. The court held that there was no material issue of fact as to the firms' reliance on defendant's misrepresentations because it is a "truism" of the accounting profession that "because an auditor sells at base, its independence and integrity, the firm relies heavily on the purported honesty and independence of its professionals."

11. *Phillips v. Schifino, et al.,* C.A. No. 3644-VCL (Del. Ch. Dec. 18, 2009)

This case was before the court on a motion for partial summary judgment. The dispute arose out of a start-up business that was to be conducted through a Delaware LLC. The court said that the agreements involved were so ambiguous that it was unclear whether the central document was even a limited liability company agreement. The document was entitled "Agreement," dated February 20, 2007 and appeared to list objectives to be accomplished, one of which included forming an LLC. Finding the facts to be too undeveloped and messy for disposition on summary judgment, the court denied defendant's motion.

12. *Olson v. Halvorsen*, No. 338, 2009 (Del. Dec. 15, 2009)

This case addressed an appeal of the decision by the Court of Chancery that the statute of frauds applies to LLC agreements. In that case, the plaintiff, a former member of a Delaware LLC, sought enforcement of a multi-year earnout provision in the LLC's unsigned operating agreement. The Court of Chancery concluded that although the LLC Act permitted oral LLC agreements, the statute of frauds nonetheless applied to LLC agreements and, consequently, the earnout provision at issue was unenforceable because it could not be performed within one year. In reaching this conclusion, the court held that those provisions of an oral LLC operating agreement that could be performed within one year would not fall within the scope of the statute of frauds and would remain enforceable.

The Delaware Supreme Court, in a de novo review of the issue, affirmed the Court of Chancery's judgment. The Delaware Supreme Court held that the LLC Act's explicit recognition of oral and implied LLC agreements does not preclude the application of the statute of frauds to LLC agreements but, rather, gives maximum effect to LLC agreements by treating them similarly to most other contracts by permitting oral, written, or implied agreements. The court further held that because the statute of frauds and the LLC Act can be construed together and nothing in the text or legislative history of the LLC Act supports the inference that the legislature clearly intended the LLC Act to render the statute of frauds inapplicable, there had been no implied repeal of the statute of frauds. The court stated that if the legislature intends to limit the application of the statute of frauds by removing LLC Agreements from its scope, it must say so explicitly.

13. *Grunstein v. Silva*, C.A. No. 3932-VCN (Del. Ch. Dec. 8, 2009)

This action arose from the alleged breach of an oral partnership agreement between plaintiffs Leonard Grunstein ("Grunstein") and Jack Dwyer ("Dwyer") to form a Delaware general partnership for the purpose of acquiring Beverly Enterprises, Inc. ("Beverly"), an eldercare and rehabilitative services company. Following the formation of the partnership, defendant Ronald E. Silva ("Silva") allegedly accepted an invitation to join the partnership for purposes of participating in the proposed acquisition of Beverly as an equal partner with Grunstein and Dwyer. Plaintiffs asserted that the three partners orally agreed to share profits and losses resulting from the acquisition and that "each partner would share in all economic benefits received by any of them (or any entities controlled by them) resulting from the [acquisition]." The acquisition was structured to occur through a merger with Beverly pursuant to a merger agreement (the "Merger Agreement") among Beverly and three special purpose entities established to make the acquisition for the partnership. The Merger Agreement was signed by the special purpose entities, with the consent and approval of each of the partners, and an initial deposit to Beverly of $7 million was advanced on behalf of the partnership by an entity owned and controlled by Dwyer. Pursuant to an amendment to the Merger Agreement consented to by Grunstein and Dwyer, the three special purpose entities assigned their rights and obligations under the Merger Agreement to three entities owned and controlled by Silva. Plaintiffs asserted that the substitution of Silva's entities for the special purpose entities originally party to the Merger Agreement was based on Silva's representations and promises that Grunstein, Dwyer and Silva were still partners and that the agreements between plaintiffs and Silva would be carried out by Silva's companies. When the merger was completed, Beverly was owned solely by Silva's companies.

Plaintiffs asserted in this action that Silva and the entities controlled by Silva, in violation of the Partnership Agreement, retained all economic benefits of the acquisition to the exclusion of plaintiffs. Silva, however, denied the existence of the Partnership Agreement.

Plaintiffs brought, among other causes of action, claims for breach of fiduciary duty and breach of contract against Silva and the entities controlled by Silva. In this decision, the Court of Chancery addressed defendants' motion to dismiss the breach of fiduciary duty and breach of contract claims as well as other claims.

Plaintiffs asserted that Silva and those entities controlled by Silva breached their fiduciary duties to plaintiffs, in part, by taking all of the economic benefits from the acquisition for themselves and failing to provide plaintiffs with their share of such benefits. Defendants argued that plaintiffs' fiduciary duty claim should be dismissed under the principle of Delaware law that a breach of fiduciary duty claim will be dismissed where such claim completely overlaps a breach of contract claim and arises from the same underlying conduct or nucleus of operative facts. Plaintiffs argued that this case falls within a narrow exception to this rule, which was delineated in *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842 (Del Ch. June 13, 2008), that permits joint pleading of breach of contract and breach of fiduciary duty claims when additional, broader facts and remedies distinguish the two causes of action. The court held that the breaches of fiduciary duty alleged by plaintiffs would also constitute breaches of the Partnership Agreement and that any remedy for breach of the Partnership Agreement would encompass the same remedies sought for breach of fiduciary duty and thus granted defendants' motion to dismiss the fiduciary duty claims.

Defendants moved to dismiss Dwyer's breach of contract claims based on Delaware's statute of frauds. Defendants asserted that Dwyer's primary responsibility under the Partnership Agreement was to underwrite the portfolio of Beverly nursing homes for HUD financing, which defendants' argued constituted a contract for the lending of money for an amount greater than $100,000 and, therefore, was required to be in writing pursuant to the statute of frauds. Plaintiffs claimed that Dwyer's obligation was not to lend money, but rather to function as an underwriter, and therefore was not subject to the statute of frauds. Accepting plaintiffs' assertions as true for purposes of the motion, the court denied defendants' motion to dismiss, stating that Dwyer's obligation appeared to fall outside the statute of frauds, which governs only a "contract, promise, undertaking or commitment to loan money."

14. *Vichi v. Koninklijke Philips Electronics N.V., et al.,* C.A. No. 2578-VCP (Del. Ch. Dec. 1, 2009)

This case involved an individual ("Vichi") who loaned a substantial amount of money to a Delaware LLC ("Finance"), a subsidiary of a joint venture ("LPD") between a Netherlands holding company ("Philips") and South Korean Company ("LGE"). Philips, LGE, LPD, Kiam-Kong Ho ("Ho"), and Peter Warmerdam ("Warmerdam") were defendants. Ho was an employee of LPD and another LPD subsidiary ("International," which was the sole member and manager of Finance). Warmerdam was an employee of Philips. LPD and Finance went bankrupt and defaulted on the loan to Vichi. Vichi then sued the defendants, claiming that he entered the transaction with the belief that the loan was done on behalf of, and would be backed directly by, Philips.

Among other claims, Vichi had brought breach of fiduciary duty claims against Ho. Ho successfully moved to have the court dismiss the claims against him for lack of personal jurisdiction. However, the court stated that even if it had not dismissed the claims against Ho for lack of personal jurisdiction, it would have dismissed Vichi's breach of fiduciary duty claims against Ho for failure to state a claim because Vichi failed to demonstrate that his fiduciary claims were cognizable under Delaware law.

The court cited *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), for the proposition that creditors of a Delaware corporation that is either insolvent or in the zone of insolvency may have standing to bring derivative claims but have no right to assert direct breach of fiduciary claims and relied on *VGS, Inc. v. Castiel*, 2003 WL 723285 (Del. Ch. Feb. 28, 2003), to apply the same rule to creditors of LLCs. The court then turned to *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), in order to determine whether Vichi's fiduciary claim was direct or derivative. The *Tooley* test directed the court to consider solely (1) who suffered the alleged harm, and (2) who would receive the benefit of recovery. The court found that, in his complaint, Vichi alleged that Ho breached his fiduciary duty to Vichi as a creditor and that Vichi had personally suffered damages. Moreover, Vichi's prayer for relief demanded that he personally receive recompense for the value of the notes, among other damages. The court therefore found that (1) under *Tooley*, Vichi's breach of fiduciary duty claims were direct, and (2) applying *Gheewalla*, Vichi, as a creditor of a Delaware LLC, could not bring a direct claim for breach of fiduciary duty. Thus, the court concluded that Vichi had failed to state a claim for which relief could be granted under Delaware law with respect to his fiduciary duty claims against Ho.

15. *Lola Cars International Limited v. Krohn Racing, LLC, et al.*, C.A. No. 4479-VCN; *Lola Cars International Limited v. Krohn Racing, LLC, et al.*, C.A. No. 4886-VCN (Del. Ch. Oct. 20, 2009)

This case involved a joint venture named Proto-Auto, LLC, a Delaware LLC (the "Company"), which was formed by an English company ("Lola") and a Delaware LLC ("Krohn"). Lola held 51% of the interest in the Company and Krohn held 49%, but the parties agreed to equal representation on the Company's board, each company appointing one director. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the Company's CEO. Hazell was also a defendant in this case. This decision addressed the defendant's motion to dismiss both of Lola's complaints.

Lola's first complaint alleged that (1) Krohn breached the Company's Operating Agreement (the "Agreement"), (2) Hazell, as CEO and a director of the Company, breached his fiduciary duties of loyalty and care, and (3) Krohn aided and abetted Hazell's disloyalty. On these claims, Lola sought (1) dissolution of the Company and appointment of a liquidating receiver, (2) an injunction to prohibit the Company from taking action outside the ordinary course of business, and (3) damages against Krohn and Hazell.

Krohn argued that the Company should not be dissolved under Section 18-802 of the LLC Act because the facts alleged by Lola could not support a finding that it was "not reasonably practicable to carry on the business [of the Company]." *Id.* Krohn interpreted the statutory reasonable practicability standard to mean that "the business has been abandoned or that its purpose is not being pursued." The court rejected this interpretation and applied the test from *Fisk Ventures, LLC v. Segal*. The three *Fisk* factors, which provide guidance in evaluating a situation in regard to the reasonable practicability standard, are: (1) whether the members' vote is deadlocked at the Board level; (2)

whether there exists a mechanism within the operating agreement to resolve the deadlock; and (3) whether there is still a business to operate based on the company's financial condition.

The court found at least two of the three *Fisk* factors were present. First, Lola and Krohn were deadlocked over whether to replace Hazell as CEO. Second, although the Agreement contained a buy-out provision in case of a member dispute, it was entirely voluntary. Third, there was serious doubt as to whether the Company could continue in light of its financial condition because Lola had been extending the Company significant additional capital to keep it running. Furthermore, the court found that Lola's claims of Hazell's mismanagement and disloyalty, plus the Company's overall failure, added to the reasonable conclusion that dissolution may be appropriate.

Krohn had also argued that judicial dissolution under Section 18-802 was inappropriate because the Agreement defined the circumstances upon which it could be terminated, and such circumstances did not include judicial dissolution. The court rejected Krohn's argument stating that, even assuming that Section 18-802 of the LLC Act could be precluded by contract, the fact that the Agreement (1) contained self-termination options, and (2) did not expressly allow for judicial dissolution, could not render judicial dissolution unavailable. Consequently, the court denied defendant's motion to dismiss the claim for judicial dissolution.

Krohn moved to dismiss Lola's fiduciary claims on the ground that Lola failed to plead demand futility with particularity as required by Section 18-1003 of the Act. The court noted that it relies on corporate precedent in interpreting Section 18-1003 of the Act, and that in the corporate context, demand is considered excused when allegations in the complaint create a reason to doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. (Citing *Wood v. Baum*). The court denied Krohn's motion because Lola satisfied the particularized pleading standard by claiming that Hazell faced a substantial risk of liability due to his failure to maintain appropriate inventory levels and pay state taxes in a timely fashion, and his use of Company assets for Krohn's benefit in violation of his duty of loyalty to the Company. Furthermore, the court noted that where the directors of a two-director board have equal voting power and one is interested, demand should be excused because that one interested director alone has the power to preclude litigation.

Krohn moved to dismiss Lola's claim of breach of the implied covenant of good faith and fair dealing because the Agreement specifically stated that Hazell was to be CEO and that Krohn could replace him if he resigned from that position. The court agreed with Krohn that the implied covenant could not be applied to matters covered by contract. Therefore, Krohn's argument went, since the contract spoke to the issues of who is CEO and which party had the right to replace him, the implied covenant did not apply. Furthermore, Krohn argued that Lola could have bargained for the right to replace the CEO if that is what it wanted. The court determined that although the Agreement did not require Krohn to assent to Lola's wishes regarding replacement of Hazell, Krohn's refusal to even consider replacing him, or even attend board meetings to discuss the matter, allowed the court a reasonable inference of a breach of the implied covenant. In other words, the implied covenant did not apply to who was CEO or who could replace him, but it did apply to Krohn's consideration of Lola's suggestions.

Lola's second complaint relied on the termination clause in Section 10.1 of the Agreement, which allowed a member to terminate the Agreement after a breach by the other by notifying the breaching party of (1) the breach, and (2) the consequences of a failure to rectify the breach. Under Section 10.1 of the Agreement, the breaching party then had 21 days to rectify the breach, after which time the non-breaching party was permitted to terminate. Lola argued that its first complaint served as the requisite notice to Krohn and that more than 21 days had passed since the first complaint was filed, so Lola was entitled to terminate the Agreement. Also, Lola contended that upon termination of the Agreement, it should receive the right to manage and control the Company because of its majority position. Lola requested relief in the form of a TRO and permanent injunction prohibiting Hazell and Krohn from interfering with Lola's control of the Company, or acting as its agents.

The court denied Lola's request for interim injunctive relief, and refused to declare a termination of the Agreement based on Section 10.1 of the Agreement because Lola's first complaint did not notify Krohn of the consequences of failing to rectify the breach. Lola then moved for leave to file a supplemental complaint, alleging that (1) it sent Krohn a letter giving notice that Krohn had materially breached the Agreement and outlining the consequences of Krohn's failure to rectify its breach, and (2) that more than 21 days had passed since the letter was sent. In the alternative, Lola asked the court to dismiss its second complaint without prejudice so that it could file a new complaint that incorporated the letter to Krohn, and the court granted this request.

16. *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park Dr. BNK Investors, L.L.C.*, C.A. No. 4353-VCP (Del. Ch. Oct. 15, 2009)

Plaintiff, Choice Hotels International, Inc. ("Choice"), sought a determination under Section 18-110 of the LLC Act that it validly removed Sam Klein as the sole manager of Columbus-Hunt Park Dr. BNK Investors, L.L.C, a Delaware LLC ("Columbus"), and that Choice was instead the manager of Columbus. In separate suits, Choice, on the one hand, and Columbus and Klein, on the other hand, sued each other in Maryland. Each of these suits related to loans from Choice to Klein pursuant to which Klein pledged his interest in Columbus as security for such loans. Klein allegedly defaulted on these loans and Choice purported to foreclose on Klein's membership interest in Columbus, remove Klein as the manager of Columbus and insert itself as the replacement manager.

In support of Choice's argument against a stay in favor of the Maryland action, Choice contended that the statutory policy behind a summary action under Section 18-110 of the LLC Act superseded application of the conventional *McWane* analysis. In this regard, Choice claimed that Section 18-110 of the LLC Act required the court to give precedence to the summary Delaware action. Section 18-110 provides in relevant part that the Court of Chancery "may hear and determine the validity of any admission, election, appointment, removal or resignation of a manager of a limited liability company, and . . .

may determine the person or persons entitled to serve as managers . . . ." The court noted that the purpose of Section 18-110 is "to expeditiously resolve uncertainty" within an LLC. Consequently, the court continued, where rapid resolution of a corporate governance dispute is needed and a non-Delaware court is not in a position to provide expedited adjudication and prompt justice, the Court of Chancery typically will deny a motion to stay a Section 18-110 action. However, citing Delaware precedent, the court acknowledged that when faced with a request to stay a summary action, the court balances the *McWane* policies of comity and promoting the efficient administration of justice against the policies underlying the summary nature of the Delaware action. Under the *McWane* doctrine, an action will be stayed if the following three questions are answered in the affirmative: (1) whether there is a prior action pending elsewhere related to the action in Delaware; (2) whether such other suit involves the same parties and issues; and (3) whether the foreign court is capable of doing prompt and complete justice.

The court answered each of these three questions in the affirmative, and further, the court found that there was a significant risk that proceeding with the Delaware action would unnecessarily waste time, effort, and expense or result in inconsistent and conflicting rulings. Consequently, the court held that the *McWane* policies of comity and the orderly and efficient administration of justice supported granting a stay of the Delaware action. The court then turned to an analysis of balancing the *McWane* doctrine with the policies underlying the summary nature of the Delaware action. The court cited Delaware precedent where the court gave precedence to Delaware actions, particularly in circumstances in which it was necessary for the subject companies to conduct their business. The court observed that Columbus only had a single asset, a piece of property. Because of this, the court concluded that Columbus would not suffer sufficient harm if the action was stayed in that Columbus could be expected to maintain its business as usual during the Maryland action. Thus, the court concluded that in these circumstances, the first-filed rule applied and principles of comity and promoting the efficient administration of justice required that the Delaware action be stayed, but not dismissed.

17. *Total Holdings USA, Inc. v. Curran Composites, Inc.*, C.A. No. 4494-VCS (Oct. 9, 2009)

Plaintiff, Total Composites, Inc., a Delaware corporation ("Total"), and defendants Curran Composites, Inc., a Missouri corporation and its subsidiary C-Two, LLC (collectively, "Curran"), formed a joint venture, Cook Composites and Polymers ("Cook Composites"), to develop, market, and manufacture composite materials. The original partnership agreement, dated February 9, 1990, stated that "the Participants shall . . . organize and associate themselves as partners in a general partnership . . . in, and in accordance with the laws of, the State of Delaware." At the time the parties entered into the original partnership agreement, the DUPA governed general partnerships organized under Delaware law. In 1999, Delaware enacted the DRUPA, which repealed the DUPA and provided that it would govern all Delaware general partnerships after the expiration of a two year grace period.

In 2004, Total and Curran had entered into a new partnership agreement that restated the original partnership agreement and the amendments thereto. The 2004 partnership agreement included an option for Curran to require Total to buy Curran's interest in the joint venture at book value. In 2009, Curran exercised its right to put its interests to Total. On April 7, 2009, Total filed a complaint in the Court of Chancery seeking to recover the amount it believed it overpaid for Curran's interest in Cook Composites, and on April 9, 2009 Curran responded by filing its own complaint in a Missouri state court alleging that Total underpaid for the interest. Defendants filed a motion to dismiss in this case for lack of personal jurisdiction and this opinion addresses defendants' motion. Before the court could consider whether Curran was subject to jurisdiction in Delaware, it had to determine which partnership statute governed the Cook Composites partnership agreement because the DRUPA, unlike the DUPA, included a personal jurisdictional consent mechanism that allows jurisdiction to be exercised over non-resident partners.

The defendants argued that DRUPA could not apply to them because the statutory language did not explicitly state that it would be applied retroactively. The court disagreed and stated that Section 1206 of the DRUPA makes clear that the DRUPA was intended to apply to all general partnerships, whether formed before or after the DRUPA came into effect. Section 1206 of the DRUPA states that "[o]n and after January 1, 2002, this chapter governs all partnerships." The court noted that the language makes explicit that any general partnership formed under DUPA is on notice that unless it chooses otherwise, the DRUPA will apply to it. In addition, the court rejected the plaintiffs' argument that application of the DRUPA to Cook Composites would violate well-established principles of statutory interpretation used by the court. The court distinguished this situation from the case cited by defendants relating to the deemed consent provisions of the DRULPA in which the court found that Section 17-109 of the DRULPA would not be applied retroactively because the DRULPA did not give sufficient notice to the parties of the particular changes that would affect their relationship, whereas in this case the defendants were on notice that the DRUPA would apply to all general partnerships after January 1, 2002. In addition, the court noted that this dispute could be further distinguished from the cases cited because the parties restated their partnership agreement after the DRUPA was in effect.

Next, the court considered the defendants' argument that Cook Composites was not a Delaware general partnership at all because it did not meet the prerequisites set forth in Section 15-106(c) of the DRUPA. Essentially, the defendants argued that, except as noted below, Section 15-106(c) of the DRUPA was the exclusive means by which Delaware law would be applied to a general partnership. Under Section 15-106(c), two preconditions must be met for Delaware law to apply to a general partnership, (i) the inclusion of a Delaware choice of law provision and (ii) registration with the Secretary of State of the State of Delaware. Absent compliance with the foregoing preconditions, Curran argued, a general partnership would be governed by the state where its operations were located, unless Delaware had other ties to the general partnership that gave it a claim to apply its law. The court disagreed. First, it noted that to interpret the statute as suggested by the defendants would mean the DRUPA would only apply to general partnerships that register with the State of Delaware, while the statute clearly contemplated that Delaware general partnerships could be both registered and unregistered. Further, the court found that the defendants had overlooked Section 15-106(a) of the DRUPA, which provides that Delaware law will govern to the extent a partnership agreement contains an effective choice of Delaware law.

Thus, the issue before the court was to determine whether Delaware law would apply under the traditional choice of law analysis that Section 15-106(a) of the DRUPA invoked. The Restatement (Second) of Conflict of Laws provides that the law chosen by the parties will apply except if (i) the chosen state has no substantial relationship to the parties or the transaction and there is no reasonable basis for the parties choice or (ii) the application of the chosen state's law would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the matter. The court reasoned that the language used in the partnership agreement was sufficient to indicate that the parties intended Delaware law to govern. In spite of the clear choice of law provision in the partnership agreement, Curran argued that Delaware law should not apply because the State had "no substantial relationship" to the parties or the transaction. The court rejected this argument finding that it ignored the Restatement's language calling for the parties' choice of law to govern if there was a "reasonable basis" for the choice. Citing the Delaware legislature's clear expression that choosing Delaware law amounts to a substantial relationship with Delaware, the court stated that Delaware courts will generally honor a contractually-designated choice of law provision if it is reasonable in light of the parties' objectives. The court found that it was reasonable for the parties, from two different jurisdictions, to choose Delaware law, a shared language of commerce, to govern its internal affairs. Further, Curran failed to argue that Missouri had a "materially greater interest" in adjudicating the dispute or that adjudicating the dispute in Delaware would contravene one of Missouri's fundamental policies. Therefore, finding that Section 15-106(a) was satisfied, the court held that Cook Composites was a Delaware general partnership.

The court then determined whether Curran would be subject to personal jurisdiction under Section 15-114 of the DRUPA. The relevant language in Section 15-114 provides that "[a] partner . . . of a partnership which is formed under the laws of the State of Delaware or doing business in the State of Delaware may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the partnership or a violation by the partner . . . of a duty to the partnership or any partner of the partnership." The defendant argued that the "involving or relating to the business of the partnership" requirement was not satisfied because the dispute was merely a routine contract dispute that did not involve the partnership's core business. The court, however, rejected this argument, finding that the instant dispute, where Curran was alleged to owe a duty to pay money back to a partner because it was overpaid under a put provision in the partnership agreement, fell squarely within the plain language of the statute, and, further, that a disagreement over the partnership's controlling agreement was not a routine contract dispute. Therefore, the DRUPA provided a statutory basis to exercise jurisdiction over Curran.

Finally, based on the language of the consent to jurisdiction provision, the court found that satisfaction of the requirements of Section 15-114 obviated any due process concerns because the dispute concerned Cook Composite's internal affairs and "Curran should not be surprised that a controversy over the interpretation of the governing document of Cook Composites, a Delaware general partnership, provides a basis for adjudicating that dispute in [the Delaware Court of Chancery]." Therefore, the court concluded exercising jurisdiction over Curran would not offend Curran's due process rights and any modest incremental burden it may incur by having to litigate in Delaware, rather than Missouri, would not justify a stay of this first-filed action. Thus the court denied the defendants' motion to dismiss.

18. *ZRII, LLC v. Wellness Acquisition Group, Inc.*, C.A. No. 4374-VCP (Del. Ch. Sept. 21, 2009)

Plaintiff ZRII, LLC, a Delaware LLC (the "Company"), brought an action against several former officers, employees and contractors of the Company alleging that they had conspired to overtake or destroy the Company by improper means. In this decision, the Court of Chancery considered the Company's motion for a preliminary injunction based, among other things, on a claim that certain former officers of the Company (the "Defendant Officers") had breached their fiduciary duties to the Company.

As part of its argument for the injunction, the Company alleged that the Defendant Officers breached their fiduciary duties to the Company by conspiring to either wrest control of the Company from its current ownership or dismantle the Company's distribution system and start a competitive venture. The court stated that under Delaware law, a breach of fiduciary duty claim requires proof of two elements: (1) that a fiduciary duty existed, and (2) that the defendant breached that duty. Citing to corporate precedent, the court stated that the first prong of the test was satisfied because each of the Defendant Officers owed fiduciary duties to the Company as officers, which fiduciary duties the court stated were identical to those typically owed by a company's directors. In fact, the Defendant Officers admitted that they owed fiduciary duties to the Company. In support of its argument that the Defendant Officers breached their fiduciary duties to the Company, the Company alleged that the Defendant Officers organized an effort to take over or dismantle the Company, took confidential information that they used in their competitive venture and encouraged the Company's employees to stage a lockout. The court agreed with the Company and held that the Defendant Officers had breached their fiduciary duties to the Company.

19. *Julian v. Julian, et al.*, C.A. No. 4137-VCP (Del. Ch. Sept. 9, 2009)

This case involved three brothers who owned and operated several LLCs together. The plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. The case also involved two different versions of Section 18-603 of the LLC Act. For those LLC Agreements entered into before July 31, 1996, the LLC Act permitted a member to resign with six months' notice. For LLC Agreements entered into after July 31, 1996, the LLC Act prohibited resignation except after dissolution and winding up, unless the LLC Agreement stated otherwise. In Count 1 of the complaint, Gene sought an award of fair value for his interest in the four pre-1996 companies. Count 2 sought an award of fair value for Gene's interest in the three post-1996 companies, but at argument Gene's counsel conceded that all claims in Count 2 should be pursued in arbitration and the court dismissed Count 2. In Count 3, Gene brought a derivative claim for damages on behalf of two LLCs for recovery of excess management fees that were charged by the management company owned by Francis and Richard.

In response to Count 1, the defendants moved to dismiss the fair value claims against one LLC ("FSG") as unripe, and against the remaining three LLCs as being subject to arbitration. On the issue of ripeness, the defendants noted that Gene filed his fair value claim a mere two days after his resignation from FSG. Section 18-604 of the LLC Act provides an LLC a "reasonable" time after resignation of a member to determine and distribute the resigning member's LLC interest. Defendants argued that two days was not a reasonable amount of time. The court denied the defendants' motion to dismiss for lack of ripeness on the view that when family members are engaged in litigation regarding valuation and other business issues, it is reasonable to infer that the members would not have agreed on the value of the business regardless of how long the plaintiff waited to file suit. In addition, the court noted that the timing of the commencement of the suit was not all that important when the valuation was based on facts as they existed at the time of the member's resignation. Finally, the court noted that dismissing the claim would be inefficient because Gene could simply re-file the action the next day.

In regard to the arbitration issue, the court ultimately granted the defendants' motion to dismiss the fair value claims against the remaining three pre-1996 LLCs because arbitration was appropriate. The court cited *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006), in dividing the arbitrability question into "procedural" and "substantive" arbitrability. The procedural arbitrability question revolved around whether or not the parties complied with the arbitration provisions of the LLC Agreement. A presumption exists that procedural arbitrability questions are answered by arbitrators, not by the courts.

The court noted that substantive arbitrability was less clear-cut. It included a determination of both the scope of an arbitration provision and the broader issues of whether the contract and/or the arbitration clause were valid and enforceable. The court cited *Carder v. Carl M. Freeman Cmtys.*, 2009 WL 106510 (Del. Ch. January 5, 2009), for the proposition that before reaching this question, it must address the question of who decides whether the parties decided to submit a particular dispute to arbitration or to a court. The presumption was that the court, and not an arbitrator, decided whether the parties agreed to arbitrate. Therefore, courts presumed the parties did not intend to arbitrate arbitrability, unless there was clear and unmistakable evidence to the contrary. *Id.*

Clear and unmistakable evidence that the parties intended to arbitrate arbitrability existed if the arbitration clause: (1) generally refers all disputes to arbitration, and (2) references a set of arbitral rules that empowers arbitrators to decide arbitrability. The arbitration clause in the present case stated that any controversy "arising out of or relating to" the agreement shall be settled by arbitration. The court interpreted "arising out of or relating to" broadly, and found the arbitration clause sufficient to satisfy the first prong of the test by generally referring all disputes to arbitration. The provision also satisfied the second prong by requiring that the arbitration be conducted in accordance with the rules of the American Arbitration Association.

Gene also argued that his claims so clearly did not arise out of, and were not related to, the LLC Agreements that a court, and not an arbitrator, should determine that they fell outside the broad scope of the applicable arbitral provisions. Gene argued that his request for an award of fair value was based on Section 18-604 of the LLC Act, and not the LLC Agreement. He further argued that the breach of fiduciary duty claims did not arise out of the LLC Agreements because the agreements were "bare bones." Gene relied on *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156, n. 24 (Del. 2002), for the proposition that "actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract." Essentially, Gene asked the court to decide whether his claims arose out of, or related to, the LLC Agreements. The court found that if it answered that question, it would undermine the *Willie Gary* test. Although the court admitted that common sense required some minor inquiry into whether the arbitration clause covered the underlying dispute, it said that if there was a colorable basis that the dispute is covered by the arbitration clause, and the clause satisfies the *Willie Gary* test, then the question of substantive arbitrability should be answered by the arbitrator, not the court. The court decided that since LLCs were creatures of contract, Gene's request for fair value of his interest was, to some degree, related to the existence of the agreement and its terms. Finally, the court noted that when in doubt, the policy of the court was to defer to arbitration.

In response to Count 3, the defendants moved to stay Gene's prosecution of the derivative claims. The court noted that when considering a stay of claims that were not subject to arbitration, it would consider any preclusive effects of a pending arbitration elsewhere on the action before the court, in addition to any burden imposed by both litigating and arbitrating at the same time in different forums. The LLCs subject to the derivative claims did not have arbitration clauses in their agreements. Ultimately, the court denied the defendants' motion to stay on the basis that the LLCs, the LLC Agreements, and the claims involved in Count 3 were sufficiently different and distinct from those that the court determined would be arbitrated. Therefore, the court did not find that a significant risk of inconsistent judgments would be caused by allowing the litigation on Count 3 to continue while arbitration began on counts 1 and 2.

Furthermore, in response to Count 3, the defendants argued that Gene failed to state a claim for aiding and abetting a breach of fiduciary duty against Richard because the claim failed to state a breach of fiduciary duty by Francis. The court noted that aiding and abetting a breach of fiduciary duty requires (1) knowledge of the breach of a duty, and (2) participation in the wrongful conduct. In this case, Gene alleged a breach of fiduciary duty because the defendants' management company suddenly increased the fees it charged to a few of the LLCs by 400%. The court denied the defendants' motion to dismiss, stating that under the plaintiff-friendly motion to dismiss standard, the allegations that Richard consented to the increase in fees (which benefitted a company controlled by Richard and Francis) were sufficient to support a reasonable inference that Richard participated in the alleged wrongdoing. Finally, the court noted that the fact that one of the defendants could have increased the fees on his own did not negate a reasonable inference that the other may have been involved in the decision.

20. *R&R Capital, LLC v. Merritt*, C.A. No. 3989-CC (Del. Ch. Sept. 3, 2009)

In this proceeding relating to continued disputes regarding the management of nine Delaware LLCs, plaintiffs sought summary judgment declaring that defendant was properly removed as manager of the LLCs. Plaintiffs were members of the LLCs and based their suit on multiple instances of alleged mismanagement by defendant, including: selling certain real estate owned by one of the LLCs without plaintiffs' consent and failing to distribute proceeds from the sale to plaintiffs; using plaintiffs' investments in one of the LLCs to purchase properties that were actually titled in the name of a third party to whom defendant owed an obligation and selling other properties to such third party at below market value; purchasing and maintaining extra horses with a combined value of $1,300,000, either by using common LLC resources or making unauthorized purchases on behalf of one of the LLCs; allowing a building to fall into disrepair, leading to an action against one of the LLCs by the township in which the building was located; failing to dissolve one of the LLCs in accordance with its operating agreement; and failing to pay taxes relating to the LLCs. Further, plaintiffs asserted that based on defendant's conduct, the LLCs were subject to judgments and liens and certain of the LLCs had their certificates of formation cancelled by the State of Delaware for failure to pay their annual franchise taxes or failure to maintain a registered agent. For her part, defendant claimed that plaintiffs interfered with the operation of the LLCs and that her efforts on behalf of the LLCs were affected by the guilty plea of the owner of one of the LLCs in connection with the filing of a false tax return.

Plaintiffs had purported to remove defendant as manager of the LLCs for "cause" pursuant to provisions of the LLCs' operating agreements allowing such removal upon a written demand setting forth with specificity the events giving rise to "cause." Under the operating agreement, "cause" was defined as meaning that the manager "(a) engaged in fraud or embezzlement, (b) committed an act of dishonesty, gross negligence, willful misconduct, or malfeasance that has had a material adverse effect on the Company or any other Member, or (c) been convicted of any felony." Plaintiffs' removal notice to defendant cited an action in federal court in Pennsylvania in which defendant was found to have engaged in fraud in connection with the sale of certain horses to one of the LLCs. The Court of Chancery dismissed defendant's interpretation of the removal provisions of the LLCs' operating agreements that plaintiffs were required to prove that the manager's conduct had a material adverse effect on the LLCs or any other member. In the court's view, the only reasonable reading of such provisions was that the manager could be removed for cause if she committed fraud and the qualification that the manager's conduct have had a material adverse effect only qualified the ability to remove the manager based on dishonesty, gross negligence, willful misconduct, or malfeasance. The court found the provisions of the operating agreements were unambiguous on this point and granted summary judgment in favor of plaintiffs. Stating that the relationship of plaintiffs and defendant had become "completely dysfunctional and beyond repair or reconciliation," the court held that the removal of defendant as manager, which did not affect her continued status as member, was insufficient to resolve the parties' dispute and granted plaintiffs' request for the appointment of a receiver to dissolve and wind up the LLCs.

21. *Credit Suisse Securities (USA) LLC v. West Coast Opportunity Fund, LLC*, C.A. No. 4380-VCN (Del. Ch. July 30, 2009)

Gary Evans was the Chairman, CEO and President of Greenhunter Energy, Inc. ("Greenhunter"). In connection with an investment in Greenhunter by West Coast Opportunity Fund, LLC ("WCOF"), Evans, along with other executives of Greenhunter, executed a lockup agreement prohibiting the direct or indirect transfer of Greenhunter stock for a period of time. Evans wrote "Chief Executive Officer" under his name on the signature block of the lockup agreement but the parties to the lawsuit agreed that Evans signed the lockup agreement in his personal capacity. Evans did not own any Greenhunter stock personally, however. All of his Greenhunter stock was owned by a Delaware LLC, of which he was the sole member and manager. During the period of time in which the lockup agreement prohibited Evans from transferring his Greenhunter stock, Evans executed a pledge agreement on behalf of the LLC in his capacity as the manager of the LLC pledging the LLC's Greenhunter shares to Credit Suisse as security for a margin account. Following a margin call by Credit Suisse, WCOF objected, based on the lockup agreement, to any sale of the LLC's Greenhunter stock to meet the margin delinquency.

In this decision, the Chancery Court addressed the question of whether the LLC was bound by the lockup agreement even though it was not an express party thereto. WCOF argued that, even though the lockup agreement makes no mention of the LLC, it should be interpreted to preclude the pledge of Greenhunter stock held by the LLC based on the language of the lockup agreement prohibiting "direct or indirect" transfers of such stock. The court, with reference to LLC Act Section 18-701 for the proposition that a member has no interest in specific LLC property, stated that the Greenhunter stock was entirely the property of the LLC and that Evans' status as a member of the LLC did not alter that fact. The court, after citing the general rule under Delaware contract law that only the formal parties to a contract are bound by its terms, held that since Evans did not sign the lockup agreement in his capacity as a member or manager of the LLC and that there is no evidence of an intent to act in either of those capacities, the lockup agreement did not bind the LLC. The court went on to state that Evans cannot encumber property that he does not own and, accordingly, that the lockup agreement did not prevent the LLC's transfer of the Greenhunter stock pursuant to the pledge agreement. The court noted that Evans may have violated the lockup agreement by causing the LLC to pledge its Greenhunter stock but that issue was not before the court.

22. *Mickman v. American Int'l Processing, L.L.C.*, C.A. No. 3869-VCP (Del. Ch. Apr. 1, 2009) and (July 28, 2009)

In this decision, the court was presented with the question of whether or not plaintiff was entitled to photocopies of the general ledgers of LFF and another defendant, American International Processing, L.L.C. Plaintiff first claimed that defendants waived any objections to providing copies of the general ledgers because defendants had previously granted her counsel the opportunity to review and take notes on the general ledgers. The court cited Delaware case law in stating that a waiver is the "intentional relinquishment of a known right, either expressly or by conduct, which clearly indicates an intention to renounce a known privilege or power. It involves both knowledge and intent." The court found that, because defendants had taken affirmative steps to deny plaintiff's counsel from photocopying the general ledgers in connection with the prior inspection, this indicated defendants' intent to preserve, not relinquish, their objections to plaintiff obtaining photocopies. The court thus held that defendants had not waived their right to object to plaintiff obtaining photocopies.

The court then turned to plaintiff's alternative arguments—namely, that she had a legal right to photocopies of the general ledgers under defendants' operating agreements and under Section 18-305 of the LLC Act. The court observed that the respective operating agreements of defendants provided that the "Members and their designated representatives shall have access to all books and records of the Company at all reasonable times . . . ." The court further observed that such operating agreements did not define what "access to all books and records" means in terms of specific documents or rights. The court noted that "all books and records" generally denotes a grant of broad inspection rights, which would include general ledgers. Thus, whether or not plaintiff had the right to receive photocopies of the general ledgers depended on whether the right to "access" the general ledgers included the right to photocopy them. The court, noting that it often looks to Delaware corporate statutes and case law when interpreting similar provisions in an LLC agreement, stated that under Section 220(b) of the DGCL, if a shareholder is granted inspection rights, the shareholder has the right "to make copies and extracts" of the document. The court further stated that the right to make copies of documents that a shareholder is entitled to examine was recognized at common law for corporations long before Section 220(b) of the DGCL was enacted. In a similar corporate case, the court determined that a right to access and inspect included a right to make copies. Accordingly, the court thus construed the term "access" under the operating agreements as having its ordinary meaning under Delaware law, which includes the right to make photocopies. The court also denied defendants' arguments that plaintiff should not have the right to make photocopies of the general ledgers because she had not included general ledgers in her inspection demand and that she had not stated a purpose for her inspection request. The court held that the operating agreements did not include a demand requirement, only a requirement that members give at least one day written notice of a request to access documents, which plaintiff had complied with, and did not impose any proper purpose requirement. Because the court found that the operating agreements provide plaintiff with a contractual right to photocopies of the general ledgers, the count did not address her additional arguments for inspection rights under Section 18-305.

23. *Stockman v. Heartland Industrial Partners, L.P. and Heartland Industrial Group, L.L.C.*, C.A. No. 4227-VCS (Del. Ch. July 14, 2009); *Stepp v. Heartland Industrial Partners, L.P.*, C.A. No. 4427-VCS (Del. Ch. July 14, 2009)

Stockman v. Heartland Industrial Partners L.P. considered the advancement and indemnification provisions in a Delaware limited partnership agreement. Plaintiffs were former officers and directors of both the Heartland partnership and a corporation in which the partnership was the majority investor. The advancement provision at issue stated that reasonable expenses incurred by an indemnitee in defense or settlement of any claim that may be subject to a right of indemnification under the partnership agreement "shall be advanced by the Partnership" prior to the final disposition thereof upon receipt of an appropriate undertaking by the indemnitee. The provision went on to say, however, that "[n]o advances shall be made by the Partnership under this Section 4.4(b)(i) without the prior written approval of the General Partner." The partnership contended that the general partner could withhold its approval at its discretion, but the court rejected this reading holding that the general partner's approval was effectively a ministerial function that was intended to ensure that the prerequisites for advancement were met before any funds were disbursed. Although the court concluded that there was only one reasonable reading of the provision and, therefore, it was not ambiguous, the court went on to state that to the extent there was any ambiguity in the advancement provision, under the doctrine of *contra proferentum*, that ambiguity would have to be resolved against the partnership in favor of the reasonable expectations of the officers seeking advancement.

The plaintiffs' indemnification claims were for expenses they incurred in respect of criminal actions that were brought against them and then dismissed without prejudice. The partnership agreement provided for indemnification "[t]o the fullest extent permitted by law" subject to the requirement that the indemnitee's conduct "(A) was in or was not opposed to the best interests of the Partnership, (B) in the case of a criminal action or proceeding, the Indemnitee had no reasonable cause to believe his conduct was unlawful, or (C) did not constitute fraud, bad faith, willful misconduct, gross negligence, a violation of applicable securities laws or any material breach of the Agreement or the Advisory Agreement." In support of its motion to dismiss, the partnership asserted that the plaintiffs had to affirmatively plead satisfaction of the three requirements for indemnifiable conduct and that as they had not done so, their complaint should be dismissed. The defendants countered that, consistent with the approach of Section 145(c) of the Delaware General Corporation Law, success in respect of the criminal action entitled them to indemnification or, at most, the three requirements were an affirmative defense that had to be asserted and proved by the partnership. The court agreed with the plaintiffs holding that although "a plaintiff generally bears the burden of pleading all elements of her claim, in the case of a mandatory indemnification provision, the burden rests on the party from whom indemnification is sought to prove the indemnification is not required." Specifically, the court noted that ["b]y imposing a mandatory indemnification obligation on itself in the Partnership Agreement, Heartland undertook to pay all indemnification requests unless Heartland could demonstrate that indemnification was not required." Based on this holding, the court denied Heartland's motion to dismiss.

24. *Archstone Partners, L.P. v. Lichtenstein*, C.A. No. 4465-CC (Del. Ch. July 10, 2009)

Plaintiffs were investors in the Steel Partners II family of funds (the "Funds"), including Steel Partners II (Onshore) LP (the "Partnership"), a Delaware limited partnership. A number of investors in the Funds submitted redemption requests aggregating to approximately 38% of the Funds' assets under management. In order to address the problems that such a large redemption would cause, the governing bodies of the Funds determined to temporarily suspend redemptions from the Funds. The investors of the Funds were then presented with a plan pursuant to which each investor would receive, in full satisfaction of their investments in the Funds, a cash distribution plus the option to (1) receive units in a publicly traded limited partnership to which assets of the Funds would be transferred or (2) receive a pro rata distribution of securities held by the Funds (collectively, the "Plan").

In a prior decision, the Court of Chancery had denied plaintiffs' motion to enjoin the Plan on the grounds that plaintiffs had failed to establish a sufficient threat of imminent and irreparable injury. This decision addressed plaintiffs' motion for certification of an interlocutory appeal of the court's prior decision.

In seeking the injunction, plaintiffs had argued that dispersing the Funds' assets in accordance with the Plan would cause irreparable harm because plaintiffs could obtain greater value in an orderly liquidation. The court stated that plaintiffs failed to define what such a liquidation would look like, failed to convince the court that such a liquidation would produce an amount greater for plaintiffs than what they would receive under the Plan, and "[m]ore importantly . . . plaintiffs have utterly failed to establish their right to force such a liquidation, or even that such liquidation is likely." The court stated that although plaintiffs may wish to take control of the Funds and conduct a liquidation rather than receiving in-kind distributions, they are not entitled to do so on contractual or statutory grounds. The court noted that even if the Plan was not implemented, plaintiffs would receive the same result under the Funds' constituent agreements as they would under the second option of the Plan. Thus, plaintiffs had not established a sufficient threat of irreparable injury and their application for certification of an interlocutory appeal was denied.

In rendering its decision, the court discussed a provision in the partnership agreement of the Partnership that provided a right to the general partner of the Partnership, in its sole discretion, to terminate an interest of a limited partner if continued participation of such limited partner "would be detrimental to the Partnership or its interests or would interfere with the business of the Partnership . . . ." The managing member of the general partner of the Partnership had submitted an affidavit in connection with the court's prior decision stating that he made a determination that it was in the best interest of the Partnership to redeem those limited partners that did not wish to continue with a restructured entity. The court stated that it is reasonable to infer from this statement that the general partner of the Partnership would likely be able to determine that the standard under above-referenced section of the partnership agreement of the Partnership was met and that plaintiffs, to the extent they were not redeemed pursuant to their own requests, could have their interests in the Partnership terminated. Thus, the court found that plaintiffs likely would not have a successful challenge to this action.

25. *B.A.S.S. Group, LLC v. Coastal Supply Co., Inc.*, C.A. No. 3743-VCP (Del. Ch. June 19, 2009)

In this case, Burkett, a former employee of Coastal Supply Co., Inc. ("Coastal") used embezzled funds to form an LLC ("B.A.S.S.") with a friend ("Webb") and purchase a piece of property for development. When Coastal learned of the embezzlement, it fired

Burkett and came to an agreement with him under which B.A.S.S. deeded the property to Coastal.

Webb and B.A.S.S. then sued Burkett for breach of fiduciary duty and sued Coastal to invalidate the transfer of the property from B.A.S.S. to Coastal. The plaintiffs claimed that Burkett did not have authority to transfer the property and that the consideration for the transfer was inadequate. Coastal, as defendant, counterclaimed for unjust enrichment and conversion, and asked the court to impose a constructive trust over the funds and the property.

The court denied Webb's motion for summary judgment to avoid the transfer of the property to Coastal. Webb made two arguments. First, he argued that Burkett did not have authority to transfer the property without Webb's consent. The court found that Burkett was an "Authorized Person" according to the LLC Agreement, and the LLC Agreement stated that each Member was bound by the actions of an Authorized Person acting in good faith. Therefore, whether or not Burkett had actual authority turned on whether he acted in good faith in transferring the property to Coastal. Since there existed disputed issues of fact surrounding Burkett's state of mind, the court could not determine whether or not Burkett had actually authority to enter the transaction on a motion for summary judgment. The court also found that the question of apparent authority was one of fact that could not be decided at summary judgment although it observed that it was debatable whether or not Burkett had apparent authority because Coastal would need to show that it relied on indicia of authority originated by the principal (B.A.S.S.).

Second, Webb argued that the $10 consideration given by Coastal was insufficient for the property. The court noted that it was required to make all inferences in favor of Coastal as the non-moving party, so it found that the consideration may have also included consideration flowing from the Restitution Agreement between Burkett (and B.A.S.S.) and Coastal. Therefore, Webb's motion for summary judgment on the basis of invalid consideration was also denied.

The court granted Coastal's motion for summary judgment on its unjust enrichment claim because (1) B.A.S.S. was enriched; (2) Coastal suffered impoverishment; (3) both the enrichment and impoverishment were a result of Burkett's wrongful actions; and (4) there was no justification for B.A.S.S.'s enrichment or Coastal's impoverishment. The court found unpersuasive Webb's argument that he and B.A.S.S. were innocent and thus should not be penalized for Burkett's actions for two reasons. First, the court held that the knowledge of an officer, director, or manager is generally imputed to the business entity and found it logical to apply the same rule to a member of an LLC who has management rights. Second, in *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999), the Delaware Supreme Court found that restitution was appropriate even if the benefitted party was not a wrongdoer.

Further, the court decided to impose a constructive trust over the funds and the property because the typical remedy for unjust enrichment was restitution and a constructive trust was a type of restitution. Moreover, the court held a constructive trust would be imposed because the embezzled funds were traced directly to the purchase of the property and

B.A.S.S. was not a bona fide purchaser for value because Burkett embezzled the funds and was acting on behalf of B.A.S.S. The only remaining question, which the parties did not address in detail in the pending motion, was who was entitled to the increase in the value of the property (if any). Finally, the court also granted Coastal's motion for summary judgment on its conversion claim because it had shown each element of a conversation claim, namely that (1) Coastal had a property interest in the funds; (2) Coastal had a right to possession of the funds; and (3) the funds were converted.

26. *Nemec v. Shrader*, C.A. Nos. 3878-CC, 3934-CC, 2009 WL 1204346 (Del. Ch. Apr. 30, 2009)

Plaintiffs brought suit alleging a breach of the implied covenant of good faith and fair dealing when defendants redeemed plaintiffs' stock for its book value of $162.46 per share shortly before consummation of a transaction in which plaintiffs would have received about $700 per share if they had still held shares at that time. Plaintiffs had worked for Booz Allen for over 20 years. On March 31, 2006, plaintiffs retired as officers from Booz Allen holding a combined 104,000 shares of Booz Allen stock. Under the Booz Allen stock plan, retired officers could "put" their stock back to Booz Allen at book value for two years from their retirement date. After the put right had expired, Booz Allen had the right to redeem the stock for book value. Plaintiffs retained most of their Booz Allen stock over the two-year put period.

During summer 2007, Booz Allen held discussions concerning a potential sale of its government consulting business to The Carlyle Group. In January 2008, it was reported that the deal was expected to close by March 31. This would have been prior to the expiration of the put period, and plaintiffs expected to receive the benefits of the transaction. The transaction did not close in the expected time frame, but on March 10, 2008 Booz Allen's chairman and CEO assured plaintiffs that they would remain Booz Allen shareholders until the closing of the transaction. After the expiration of plaintiffs' put right but prior to the closing of the transaction, Booz Allen redeemed plaintiffs' stock for its book value. At that time the transaction had not yet been formally approved, but it appeared that there were "no insurmountable impediments" to the transaction's closing. The month after the redemption, Booz Allen entered into a merger agreement with The Carlyle Group to sell its government business for $2.54 billion. Together the Booz Allen directors owned over 300,000 shares of Booz Allen stock, and redemption of plaintiffs' stock increased the consideration received in the transaction by the directors by close to $6 million. The court granted defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

Plaintiffs claimed defendants breached their duty of loyalty as directors to the shareholders by redeeming plaintiffs' stock to increase the consideration the directors themselves received in the transaction. The court dismissed this claim because (1) under Delaware law when a fiduciary duty claim relates to a matter directly governed by a contract, the fiduciary duty claim is dismissed and the claim is resolved as a matter of contract interpretation, and (2) even if there were a separate fiduciary duty claim here, the directors properly took action in the best interest of the shareholders as a whole. Similarly, the court dismissed plaintiffs' unjust enrichment claim because Delaware courts will not recognize an unjust enrichment claim "when the alleged wrong arises from a relationship governed by contract."

The central argument in the case was that Booz Allen had a choice but no obligation to redeem plaintiffs' shares and that "by exercising that choice, to the plaintiffs' detriment, [defendants] violated the implied covenant of good faith and fair dealing." Plaintiffs argued that defendants had discretion under the contract as to whether to redeem plaintiffs' stock, and that the implied covenant imposed an obligation on defendants to exercise that discretion "reasonably and in good faith." Essentially, plaintiffs argued that "Booz Allen was required to exercise its option to plaintiffs' benefit." The court rejected this argument because it was at heart "an attempt to alter the terms of the agreement . . . so as to limit Booz Allen's negotiated contract rights."

While the court recognized that the implied covenant forbids a party from "arbitrary or unreasonable conduct" that deprives the other party of "the fruits of the bargain," the court also explained that utilization of the implied covenant should be "a cautious enterprise" and rarely done. Also, conduct authorized by the terms of the contract cannot violate the implied covenant. In *Nemec*, the contract specifically granted Booz Allen the right to redeem plaintiffs' stock starting two years after plaintiffs' retirement. Booz Allen simply received the fruits of the agreed bargain, and the mere fact that the stock redemption negatively affect plaintiffs' bottom line did not implicate the implied covenant. The court explained that "[c]ontractually negotiated put and call rights are intended by both parties to be exercised at the time that is most advantageous to the party invoking the option," and "assum[ing] the opposite would be illogical and detrimental to the freedom of contract." As a result, the court found that plaintiffs had failed to state a cognizable claim for breach of the implied covenant of good faith and fair dealing.

Notably, the court took time to distinguish *Amirsaleh v. Board of Trade of New York* in which the Chancery Court denied the defendants' motion for summary judgment on the plaintiff's implied covenant claim. The court viewed *Amirsaleh* as a case in which one party was granted discretion in performance. For the court, *Nemec* was not such a case. Rather, Booz Allen was merely exercising its specifically enumerated contract right to redeem plaintiffs' stock. Beyond that, Booz Allen did not have unilateral discretion under the agreement. Plaintiffs had the option for two years after their retirement to force the company to purchase their shares. As noted above, the court explained that Booz Allen was entitled to exercise its "bargained-for" contract rights at the time "most beneficial to its interests."

27. *Liberty Property Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, C.A. No. 3027-VCS, 2008 WL 1746974 (Del. Ch. Apr. 7, 2008); *25 Mass. Ave. Prop. LLC v. Liberty Property Ltd. P'ship*, C.A. No. 188, 2008 Del. LEXIS 611 (Del. Nov. 25, 2008); *Liberty Property Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, C.A. No. 3027-VCS, 2009 WL 224904 (Del. Ch. Jan. 22, 2009)

Plaintiff brought suit under a contract governed by District of Columbia law alleging that defendant breached the contract by refusing to accept a lease that would have in turn allowed plaintiff to purchase a certain property, and defendant counterclaimed alleging that plaintiff breached the implied covenant of good faith and fair dealing by filing the lawsuit and a *lis pendens*. After a full trial on the merits, the court rejected both parties' claims. There was an appeal, a partial remand by the Supreme Court and a further decision by the Court of Chancery.

Plaintiff Republic (the predecessor to named party Liberty Property) had an option to buy a Washington D.C. office property (the "Property") from defendant 25 Mass at a favorable price (the "Option"). Republic's ability to exercise the Option was conditioned on the requirement that the Property be 85% leased. The Option provided for two separate periods during which the Option could be exercised. Between those two periods was a "Gap Period" during which 25 Mass could sell the Property to a third party. As the end of the first option period drew to a close, it appeared that the Property would not be 85% leased by the end of the first option period. Therefore, 25 Mass would have the ability to sell the Property to a third party during the Gap Period. Republic responded to this development by offering 25 Mass a "Master Lease" designed solely to lease the Property up to 85% and allow Republic to exercise the Option. 25 Mass rejected the Master Lease.

Republic sued for breach of contract and specific performance, claiming that 25 Mass had a contractual duty to accept the Master Lease. 25 Mass counterclaimed that Republic breached the implied covenant of good faith and fair dealing by filing the lawsuit and *lis pendens*.

25 Mass also argued that Republic's actions breached a "Further Assurances Clause" in the Option by interfering with its right to sell the Property during the Gap Period. The Further Assurances Clause provided "[E]ach party shall . . . cause to be taken all such other and further actions as any of them may reasonably request in order to effect the transaction contemplated by this Agreement."

In its post-trial opinion rejecting both parties' claims, the court held that the Master Lease was not a commercially reasonable lease that 25 Mass had a contractual duty to accept. The court also held that Republic had not acted in bad faith by filing the lawsuit and the *lis pendens*.

Upon appeal, the Delaware Supreme Court issued a "Remand Order" because it found that the Court of Chancery's post-trial opinion did not explicitly address the counterclaims in two respects. First, the Supreme Court noted that D.C. law on the implied covenant of good faith and fair dealing required the parties to act in good faith and that the post-trial opinion had only found that Republic did not act in bad faith. The Supreme Court explained that "[t]he two concepts—bad faith and conduct not in good faith are not necessarily identical." The Supreme Court did not, however, offer further guidance on the potential distinction between the two concepts. Second, the Supreme Court noted that the Court of Chancery had not addressed the argument that Republic's filing of the specific performance claim and the *lis pendens* violated the Further Assurances Clause.

Following the remand, the trial court held that there was no substantive difference between conduct "not in good faith" and "bad faith" under D.C. contract law. The court explained that "one would think th[e] concept of 'neutral faith' would have been embraced in American law before now if it had any logic or utility." Notably, the court cited DGCL Section 102(b)(7)'s use of the phrase "not in good faith" and explained that "in our corporate law, this court has firmly rejected the notion that the words 'not in good faith' mean something different than 'bad faith,' and has done so on sensible policy, logical, and linguistic grounds."

The court interpreted the Further Assurances Clause as "a covenant imposing affirmative obligations on the parties to take actions toward closing transactions that are specifically addressed in the Option Agreement" and observed that 25 Mass's right to sell the Property during the Gap Period was not "an affirmative contract right." The court also reasoned that "[h]ad the parties wished to impose contractual liability on Republic for any harm it occasioned to 25 Mass by litigating over its Option rights, one would have expected the Option Agreement to contain an explicit non-suit or liability-shifting clause of some kind that actually mentioned litigation, or at least some provision far less remote than [the Further Assurances Clause]." In summary, the court declined to write into the contract a consequence to the filing of a *lis pendens* and dismissed the counterclaim.

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