2018 SPRING MEETING
OF
ABA SECTION OF BUSINESS LAW

2018 Review of LLC Case Law Developments

2018 SUMMARY OF DELAWARE CASE LAW

RELATING TO

ALTERNATIVE ENTITIES[1]

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February 20, 2018

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 and annual updates are available on the Morris Nichols website at www.mnat.com/practices/commercial under EPublications.

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1. *Dieckman v. Regency GP LP*, C.A. No. 11130-CB (Del. Ch. Feb. 20, 2018) (C. Bouchard)

In December 2017, the Delaware Supreme Court reversed the judgment of the Court of Chancery in a case where plaintiff challenged a merger (the "Merger") between Regency Energy Partners LP ("Regency") and Energy Transfer Partners, L.P. ("ETP"), each of which were entities in the Energy Transfer family. The Supreme Court found that plaintiff pled facts raising sufficient doubt about the Regency general partner's ability to use certain safe harbor provisions in Regency's Amended and Restated Limited Partnership Agreement (the "Regency LPA") when attempting to obtain the requisite approval to consummate the Merger.

Following the Supreme Court's decision, plaintiff filed an amended complaint asserting the following: (1) that Regency's general partner (the "General Partner") and its general partner (the "Regency GP" and, together with the General Partner, the "GPs") breached the Regency LPA by approving the Merger when the GPs did not believe the merger was in the best interests of the Partnership ("Count I"), (2) that the GPs breached the implied covenant of good faith and fair dealing by approving the Merger ("Count II"), (3) that the other defendants, who were entities in the Energy Transfer family and the members of the Board of Directors of the Regency GP, aided and abetted the breach of the Regency LPA ("Count III") and (4) that those same defendants tortiously interfered with the Regency LPA ("Count IV"). Defendants moved to dismiss all counts. The court denied defendants' motion to dismiss Count I and granted defendants' motion to dismiss Counts II, III and IV.

With respect to Count I, the court found that plaintiff pled sufficient facts that made it reasonably conceivable that the GPs did not subjectively believe the merger was in the best interests of Regency. These facts included, among other things: (1) Regency had a bright future as a standalone entity and there was no need to complete the Merger to lower its cost of capital, which was the only purported benefit listed in the proxy statement; (2) the transaction was largely accretive to ETP, not Regency; (3) Regency's conflicts committee was composed in a "musical chairs" fashion, as the members of the committee overlapped or very nearly overlapped in their service as members of Regency's conflicts committee and as members of the Board of Directors of Sunoco, which was also a member of the Energy Transfer family; (4) the merger negotiations were compulsory and spanned no more than a week; and (5) the financial advisor pre-selected by Regency's CFO and used by Regency's conflicts committee provided a wide range of services to ETP and its affiliates in recent years.

In granting defendant's motion to dismiss Count II (the implied covenant claim), the court noted that the good faith provision in the Regency LPA set a contractual standard by which to evaluate the GPs' actions so there was no gap for the implied covenant to fill. In granting defendant's motion to dismiss Count III (aiding and abetting), the court stated that Delaware law does not recognize a claim for aiding and abetting a breach of contract. The court noted that an exception to this rule applies where a contract creates fiduciary duties. However, the court found that the exception did not apply because the Regency LPA expressly eliminated all fiduciary duties and replaced them with a contractual good faith standard, establishing a "purely contractual relationship." Finally, in granting defendant's motion to dismiss Count IV (tortious interference with a contract), the court stated that simple allegations that a director caused her or his company to breach a contract is insufficient to support a tortious interference claim and that analysis would not change here merely because the General Partner, a pass-through entity, sat between the Regency GP's Board of Directors and Regency. Further, with respect to the other non-GP and non-director defendants, plaintiff failed to allege facts from which the court could infer that defendants had the requisite mental state or took any intentional acts to tortiously interfere with the Regency LPA.

2. *Edward M. Weil, et al. v. VEREIT Operating P'ship, L.P*, C.A. No. 2017-0613-JTL (Del. Ch. Feb. 13, 2018) (V.C. Laster)

Plaintiffs, Edward M. Weil, William M. Kahane, Nicholas S. Schorsch and Peter M. Budko, served as senior officers at VEREIT, Inc ("VEREIT"), which conducted all of its business through defendant, VEREIT Operating Partnership, L.P., a Delaware limited partnership. Plaintiffs brought suit to enforce advancement rights and moved for summary judgement. The court granted partial summary judgment for plaintiffs.

Plaintiffs sought advancement under defendant's partnership agreement (the "Partnership Agreement") after plaintiffs were subject to civil actions, internal investigations, and government investigations as a result of financial reporting irregularities and errors in VEREIT's securities filings. For the purpose of summary judgment, the court divided the claims into eight categories and focused on defendant's objections to advancement, not specific amounts due to plaintiffs. The court explained that Section 17-108 of the Delaware Revised Uniform Limited Partnership Act ("DRULPA") gives limited partnerships wide freedom of contract with respect to indemnification and advancement schemes. The Partnership Agreement grants mandatory advancement rights "for reasonable expenses incurred by an Indemnitee who is a party to a proceeding in advance of the final disposition of the proceeding" upon the receipt of certain written affirmations. An Indemnitee is defined in the Partnership Agreement as any person "made a party to a proceeding by reason of its status as . . . a director, manager or member of the General Partner or an officer or employee of the Partnership or the General Partner."

The court first decided whether plaintiffs could recover all of the advancements they sought with respect to the civil actions. Defendant agreed that the civil actions were covered proceedings and that some of the civil action claims were brought against plaintiffs in their covered capacity. Defendants argued, however, that some of the claims were brought against plaintiffs in their capacity as agents of VEREIT's manager, which was not covered under the advancement provision. The court held that, despite the fact that some of the claims were brought against plaintiffs in a non-covered capacity, plaintiffs were entitled to advancement for all of the civil claims. These claims were intertwined and broadly related to plaintiffs' actions in multiple capacities. Figuring out which claims related to plaintiffs' covered capacities could not realistically be done without significant burden on the court, and counsel certified that it would not be practicable to differentiate. Therefore, the court said it would not determine which claims were covered and which were excluded at the advancement stage and any doubts should be resolved in favor of advancement. Even though the court held that plaintiffs were entitled to advancement for all work performed on their behalf, the court said that the fees and expenses relating to non-covered persons performed by plaintiffs' counsel was not entitled to advancement. The court stated that "[w]hen counsel represents both covered and non-covered persons, counsel must allocate fees and expenses depending on whether the activity benefitted the party holding the advancement right." Plaintiffs' counsel must make a good faith determination regarding which fees would have been incurred if plaintiffs were the sole defendants compared to which fees did not benefit plaintiffs.

Next, the court denied summary judgment regarding the government investigation claims. The advancement provision in the Partnership Agreement explicitly stated that the indemnitee must be a party to the proceeding to receive advancement. At this stage in the proceedings, plaintiffs did not definitively know that they were parties to the investigative proceedings. A reasonable belief that an individual could become a target of the investigation was not enough to grant advancement. The court also found that defendant could not unilaterally impose terms on plaintiffs' advancement rights, such as billing guidelines, litigation budgets and a mandatory discount, that were not included in the Partnership Agreement.

Defendant also argued that plaintiffs sought advancement for fees in derivative actions that had already been paid. Defendant reallocated fees previously paid to plaintiffs' counsel for a different purpose and stated that those payments would cover "nearly all" of the costs for the derivative actions. The court held that, under the Partnership Agreement, this type of reallocation was not allowed and summary judgment was granted for plaintiffs. In addition, defendant withheld advancement of certain fees that defendant claimed plaintiffs received from other sources. Plaintiffs did not provide details on the terms of the settlement, causing defendant to take a blanket deduction from the advancement request. Because a dispute of material facts regarding the settlement remained, the court did not decide this issue on summary judgment.

In addition to the above arguments, defendant claimed that plaintiffs' counsel's fees were unreasonable. Specifically, defendant alleged the rates of staff attorneys were too high, the matter was overstaffed and overworked, and the descriptions of work were too vague. The Partnership Agreement stated that advancement was provided for "reasonable expenses". The court noted that, in determining whether fees are reasonable, it must consider the factors set for in the Delaware Lawyers' Rules of Professional Conduct and whether the number of hours is "excessive, redundant, duplicative or otherwise unnecessary. However, it should not independently assess each amount that was charged. The court explained that it would be hazardous for a court to second guess an attorney's judgment and, specifically in an advancement proceeding, it should not engage in a detailed, analytical review of the fees, strategy and staffing. Instead, "[p]laintiffs' counsel must make a good faith determination regarding the fees and expenses to which its clients are entitled."

The court decided that for legal charges going forward, the senior member of the Delaware bar representing each side would assume responsibility for the advancement process and the court laid out the *Fitracts* procedures for the parties to follow. Finally, the court concluded that plaintiffs were entitled to fees on fees for their successes, which the court stated were indemnification, not advancement payments. Because plaintiffs had only limited success, the award was reduced proportionately to plaintiffs' entitlement and reasonableness.

3. *In re Oxbow Carbon LLC Unitholder Litigation,* C.A. No. 12447-VCL (Del. Ch. February 12, 2018) (V.C. Laster)

This case involved a dispute over the interpretation and application of provisions of a limited liability company agreement (the "LLC Agreement") governing the forced sale of Oxbow Carbon LLC (the "Company"). When making their initial investment in the Company in 2007, two minority members of the Company (the "Minority Members"), negotiated for a liquidity right that would provide the Minority Members with the option (i) to put (the "Put Right") their limited liability company interests (the "Units") to the Company (the "Put") or (ii) if the Put were rejected by the Company, to cause all members of the Company and/or the Company to sell (the "Exit Sale Right") all, but not less than all, of the outstanding securities of the Company and/or all of the assets of the Company to a non-affiliated third-party in a bona fide arms'-length transaction equal to or exceeding Fair Market Value (as defined in the LLC Agreement) (the "Exit Sale"). The Exit Sale Right was conditioned, however, on the requirement that the other members of the Company receive 1.5 times their aggregate capital contributions, accounting for any prior distributions to such members (the "1.5x Clause"). The court found that the Minority Members had negotiated for these liquidity rights due to their minority position in the Company and the control that William Koch ("Koch") and certain affiliated entities (collectively with Koch, the "Majority Member") retained over the Company and the Company's board of directors (the "Board").

Several years after the Minority Members made their investment, the Majority Member sought to have the Company admit two minority members, a limited liability company benefiting certain family members of Koch (the "Family LLC") and a limited liability company benefiting certain employees of the Company (the "Executive LLC" and together with the Family LLC, the "Small Holders"), in exchange for capital contributions from the Small Holders. The Minority Members did not object to the admission of the Small Holders and the Board proceeded to authorize their admission. However, the Board failed to follow the formalities specified in the LLC Agreement for the admission of the Small Holders as members of the Company, including failing to set the terms and rights that would apply to the Small Holders.

Following the admission of the Small Holders, the relationship between the Minority Members and Koch began to deteriorate. The Minority Members sought to wrest control of the Company from Koch and pursued a path to liquidity for their Units, soliciting offers from investors, including ArcLight Capital Partners LLC ("ArcLight"). Koch resisted what he perceived as attempts to take away his control over the Company and was antagonistic towards the Minority Members and any attempted Exit Sale. The Minority Members ultimately exercised the Put Right, which the Majority Member rejected, and the Minority Members exercised the Exit Sale Right. In connection with the

Exit Sale, the only offer that appeared to satisfy the Exit Sale terms, and that was also supported by the Minority Members, came from ArcLight. The Exit Sale, however, was impeded by Koch, who disrupted the sales process by presenting interpretations of the LLC Agreement that would preclude the Minority Members from forcing an Exit Sale or at the very least hinder the sales process with ArcLight. Koch also obstructed the Exit Sale by filing the suit that is the subject of this litigation.

In its opinion, the court first addressed whether the Small Holders were properly admitted as members of the Company. If they were not, then the issue over the 1.5x Clause would be moot because the 1.5x Clause was satisfied with respect to all other members. The Minority Members contended that the Board failed to obtain the necessary approvals and follow the requisite formalities when issuing Units to the Small Holders and admitting them as members. The LLC Agreement provided that the Board could admit new members to the Company on such terms as the Board determined so long as any such new member executed a counterpart signature page to the LLC Agreement. The Small Holders only provided such signature pages after litigation commenced, several years after receiving Units. Additionally, since the issuance of Units to the Family LLC was a related-party transaction, the LLC Agreement required approval by a supermajority vote of the Board (rather than the majority vote that was obtained), meaning the Minority Members' Board representatives would have had to approve the issuance. The court noted, however, that the LLC Agreement did not provide that the issuance and admission with respect to the Small Holders would have been void if the foregoing formalities were not followed and, therefore, the admission of the Small Holders was voidable and could be validated by the equitable defense of laches. The court held that laches applied to the Minority Members and that the Small Holders were members of the Company despite their admission not strictly complying with the formalities set forth in the LLC Agreement. In so ruling, the court found that all the parties treated the Small Holders as members of the Company after their purported capital contribution and admission—the Small Holders were listed on the Company's financial statements, received monthly reports that went to all members and received distributions—and that the Minority Members accepted that the Small Holders were members for years and only challenged their status as members after the start of litigation.

The court next ruled on the proper interpretation of the Exit Sale provision and the 1.5x Clause considering the following options: (i) the Exit Sale could proceed without the Small Holders (the "Leave Behind Option"); (ii) the Exit Sale could not proceed without Small Holders because the provision called for a sale of all securities or assets of the Company (the "Blocking Option"); (iii) the Exit Sale could proceed only if the Small Holders received additional funds to satisfy the 1.5x Clause, either by the Minority Members, or another source, providing additional consideration to the Small Holders that would not be given to any other member (the "Seller Top Off") or by the sale proceeds first being used to satisfy the 1.5x Clause, with the remaining proceeds going the members pro rata (the "Waterfall Top Off" and together with the Seller Top Off, the "Top Off Options"); and (iv) the Exit Sale could proceed only if each member received the highest amount needed to satisfy the 1.5x Clause for each member, since the LLC Agreement required that an Exit Sale be on the same terms and conditions for each member (the "Highest Amount Option"). The parties had previously filed summary judgment motions seeking the court's interpretation of the 1.5x Clause and the court issued an order at that time holding that the proper interpretation of the LLC Agreement favored the Highest Amount Option. As the court more fully explained in this post-trial opinion, the Exit Sale was defined as an all or nothing sale and therefore no member could be left behind, eliminating the Leave Behind Option and leaving only the Blocking Option and consequently either the Top Off Option or the Highest Amount Option. The Top Off Option created a conflict with a provision of the LLC Agreement requiring that members receive the same terms and conditions in an Exit Sale because the Small Holders would receive greater consideration than other members as a result of the Top Off Option. This left the Highest Amount Option, which would permit the 1.5x Clause to be satisfied while providing all members the same terms in the sale offer.

The Minority Members argued, however, that under the Highest Amount Option, the Exit Sale price would be prohibitively high for ArcLight, and any other commercially reasonable party, thereby nullifying the liquidity right that the Minority Members had negotiated when they initially invested in the Company. The Minority Members therefore contended that the implied covenant of good faith and fair dealing should be applied to the LLC Agreement to permit the Top Off Option. The court agreed and held that the LLC Agreement contemplated that additional members could be admitted on such terms as determined by the Board, but the Board failed to specify precise terms and rights when admitting the Small Holders, creating a gap to be filled by the implied covenant. Had formalities been followed, there likely would have been opportunities for the parties to fill the gap that was created when the Board failed to provide clear terms in respect of the Small Holders' Units. The court concluded that the parties would have bargained for a Seller Top Off at the time of the admission of the Small Holders, since that was what the Minority Members argued was the most commercially reasonable option. Due to issues of compelling fairness, the court imposed on the parties the implied term of the Seller Top Off to fill the gap created when the Small Holders were admitted, i.e., the confusion over the application of the 1.5x Clause.

With the issues around the application of the 1.5x Clause resolved, the court addressed whether the Majority Member breached its obligations to use reasonable efforts to effect the sale under the Exit Sale provision. The court held that the Majority Member breached the reasonable efforts clause by purposefully seeking to obstruct, derail and delay the Exit Sale process. The court cited to, among other things, Koch (i) delaying the engagement of a bank and law firm to represent the Company with the sale, (ii) creating a constrained process for the banker and the other parties, (iii) firing employees who were viewed by him as facilitating the sale, (iv) instructing employees to depress forecasts, (v) slowing the flow of information to ArcLight and the other parties and (vi) commencing this litigation. Importantly, the court found that, but for Koch's actions, the Company would have entered into a deal with ArcLight and the Minority Members would have received at least the value of the ArcLight offer.

The court instructed the parties to brief the issue of what remedies would be warranted as a result of the court's rulings.

4. *CompoSecure, L.L.C. v. Cardux, LLC f/k/a Affluent Card, LLC,* C.A. No. 12524-VCL (Del. Ch. Feb. 1, 2018, *as corrected on* Feb. 12, 2018) (V.C. Laster)

Plaintiff CompoSecure, L.L.C. sought a declaratory judgment that a marketing agreement entered into with defendant Cardux, LLC (the "Marketing Agreement") was not properly authorized under plaintiff's limited liability company agreement (the "LLC Agreement") and as a result was invalid and unenforceable. Defendant counterclaimed for breach of contract, arguing that the Marketing Agreement was enforceable and that plaintiff had failed to pay amounts due thereunder.

Under the terms of the Marketing Agreement, plaintiff (a metal credit card manufacturer) had contracted with defendant (a marketing company) to help increase sales of plaintiff's metal credit cards to large banks by developing co-branding relationships with recognizable companies. Due to industry-specific concerns, the Marketing Agreement was structured in a way that could potentially result in large windfalls for either side unrelated to such party's performance under the contract. At the time of execution, the parties did not focus on or even recognize restrictive language in plaintiff's LLC Agreement that provided that certain transactions could only be entered into if "at arm's length and approved by the Board, the Investors and the Class A Majority" (the "Related Party Provision"). The Marketing Agreement clearly fell within the Related Party Provision, but no formal approvals of the Board, the Investors or the Class A Majority were obtained. After signing the Marketing Agreement, both plaintiff and defendant treated it as a valid contract and performed their duties thereunder for several months. However, disagreement eventually arose as to certain windfalls that, per the specific terms of the Marketing Agreement, were owed to defendant but that plaintiff saw as unfair and unjustified given they were arguably unrelated to defendant's actions. Plaintiff wanted out of the deal. Eventually, this disagreement came to a head when plaintiff's counsel sent a letter to defendant asserting for the first time that the Marketing Agreement never received proper approval under the Related Party Provision of the LLC Agreement and was therefore invalid and void.

The court began by recognizing that the Marketing Agreement was governed by New Jersey law. Thus the threshold question was whether the validity of the Marketing Agreement should be governed by New Jersey law or Delaware law, given that the authorization issue turned on the Delaware law governed LLC Agreement itself. The court determined that the question of whether plaintiff's agent had actual authority to sign the Marketing Agreement on behalf of the company was governed by Delaware law as a matter of the internal affairs doctrine.

The court noted that the LLC Agreement limited the ability of any agent of plaintiff to bind plaintiff to a transaction falling within the scope of the Related Party Provision. Neither party disputed this fact. Since no formal approvals were obtained as required under the Related Party Provision, the court held that the agent did not have actual authority to execute the Marketing Agreement. Plaintiff attempted to circumvent such conclusion by arguing that formal approval was unnecessary. The court noted that the Board could only approve transactions at a meeting or by written consent and neither method was employed. Furthermore, the court noted that the agent signing the Marketing

Agreement on behalf of defendant should have been aware of the applicability of the Related Party Provision because he was actually party to plaintiff's LLC Agreement, as both a member and manager. Such knowledge was therefore imputed to defendant at the time of execution. Defendant argued that even if the execution was unauthorized, it should be entitled to rely on a provision in the Marketing Agreement that provided that any person dealing with plaintiff could rely on an officer's signature (such officer having been authorized by the Board) being conclusive evidence of such officer's authority to sign on behalf of plaintiff and bind plaintiff to the agreement. The court disagreed, reiterating that the record showed no document evidencing that plaintiff's agent had been authorized by the Board to execute the Marketing Agreement.

Despite the lack of actual authority for plaintiff's agent to sign the Marketing Agreement, the court noted that the validity of the Marketing Agreement was not defeated solely as a result of improper authorization under the LLC Agreement. Delaware law distinguishes between void and voidable acts, that latter of which can be validated through equitable defenses such as ratification and acquiescence. Given that defendant invoked the doctrine of implied ratification (rather than formal ratification, which would have implicated the internal affairs doctrine under Delaware law), the court applied New Jersey law to hold that the Marketing Agreement was merely voidable because plaintiff, as an entity, had the requisite power to enter into the contract and could have done so, but for the defective authorization. Therefore, given that both parties performed under the Marketing Agreement for a substantial time following the invalid execution under the assumption it was a valid contract, the Marketing Agreement was deemed enforceable under New Jersey law because the parties had ratified the contract by their conduct.

Plaintiff attempted to counter the court's conclusion by arguing that defendant had unclean hands because its agent acted disloyally, therefore making equitable ratification improper. The court disagreed, noting that the LLC Agreement expressly eliminated all fiduciary duties. Plaintiff responded by claiming that a contractual duty of loyalty existed by "equating 'good faith' as manifested in the implied covenant of good faith and fair dealing with 'good faith' as a subsidiary element of the duty of loyalty." The court noted that it viewed those concepts as separate and distinct (and not to be equated), further stating in a footnote that it did not believe that *Dieckman v. Regency GP LP*, 155 A.3d 358 (Del. 2017) supported the use of the implied covenant as a fiduciary duty equivalent. However, the court did not reach a final conclusion on that issue because even if a duty of loyalty existed, it did not believe defendant's agent breached it as a factual matter.

5. *Miller v. HCP & Company*, C.A. No. 2017-0292-SG (Del. Ch. Feb. 1, 2018) (V.C. Glasscock)

In this case, defendants, who were the largest holders of membership units in Trumpet Search, LLC, a Delaware limited liability company ("Trumpet"), filed a motion to dismiss an action seeking relief under the implied covenant of good faith and fair dealing. Plaintiffs claim alleged that HCP & Company, together with its affiliates (collectively, the "HCP Entities") violated the implied covenant of good faith and fair dealing when the HCP Entities controlled board of managers of Trumpet (the "Board") sold Trumpet without conducting an auction or open sales process designed to achieve the highest value reasonably available for all of the members of Trumpet. The operating agreement of Trumpet set out a distribution waterfall for determining members' returns on capital investment in the event of a sale or otherwise. The HCP Entities held 78.5% of the Class E units and 87.5% of the Class D units, which were entitled to a first-position payout and second-position payout, respectively. Under this distribution waterfall scheme, if Trumpet were sold roughly 90% of the first $30 million in sales proceeds would go to the HCP Entities. After the first $30 million in sales proceeds, other classes of members would receive millions of dollars in proceeds before the HCP Entities would again share pro rata in the sales price.

Less than a year after the operating agreement was adopted, an unaffiliated third party, MTS Health Partners, L.P. ("MTS") made an initial offer of $31 million to purchase Trumpet. The HCP-affiliated managers elected not to run an open sales process and gave the non-affiliated managers little time to find alternative buyers. Nonetheless, this abbreviated sales process led MTS to increase its initial offer from $31 million to $41 million and Trumpet was eventually sold to MTS for $43 million. Plaintiffs claimed that the HCP Entities breached the implied covenant of good faith and fair dealing in approving the sale of Trumpet to MTS by refusing to pursue an open sales process designed to achieve the highest value reasonably available for all of the members of Trumpet and instead agreeing to a below-market sale that allowed the HCP Entities to achieve a quick exit from Trumpet and a 200% return on their investment due to the waterfall payment scheme set forth in the operating agreement.

In the first step of its implied covenant analysis, the court looked to whether the operating agreement in fact contained a gap that must be filled. The court initially noted that the operating agreement explicitly waived default fiduciary duties in accordance with the Delaware LLC Act, and that the operating agreement did not, by its terms, require the Board to conduct an open market sales process designed to achieve the highest value reasonably available for all members of Trumpet. Defendants argued that the operating agreement was not "truly silent" as to how Trumpet could be marketed and sold because Section 8.06(a) explicitly addressed the issue of how Trumpet could be sold. This provision stated that "the Board shall determine in its sole discretion the manner in which [a sale of all Trumpet membership units to an independent third party] shall occur, whether as a sale of assets, merger, transfer of Membership Interests or otherwise." Defendants argued that this provision expressly permitted the Board to sell Trumpet without an open-market sales process, so long as the sale was not to an affiliated party.

Plaintiffs argued that there remained a gap in the operating agreement as to the type of sales process the Board could conduct because Section 8.06(a) addressed only the "form" of a sale and not the methods that could be employed in marketing Trumpet. In the alternative, plaintiffs argued that even if Section 8.06(a) addressed the methods the Board may employ in marketing the sale of Trumpet, the implied covenant required that the Board exercise that discretion reasonably and in good faith.

The court held that the operating agreement did not contain a gap as to how Trumpet could be marketed and sold. The court found plaintiffs reading of Section 8.06(a) to be "unreasonable" and stated that the plain and unambiguous meaning of that provision was that the Board can market the company in whatever manner it chooses to an independent third party, and that such discretion included decisions about the form of the transaction. Turning to plaintiffs' second argument, the court first acknowledged that when a contract confers a discretionary right on one party, the implied covenant requires that right to be exercised reasonably and in good faith. However, the court rejected this argument because the operating agreement specified the scope of the Board's discretion by providing it with sole discretion to determine how to conduct a sales process, so long as the sale was to an unaffiliated third party. The court held that because the scope of discretion had been specified by the parties, there was no gap in the operating agreement as to the scope of discretion and therefore no reason for the court to invoke the implied covenant to determine how discretion should be exercised.

Additionally, in support of its claim for breach of the implied covenant of good faith and fair dealing, plaintiffs cited several cases for the proposition that the implied covenant applies with particular force to contractual grants of sole discretion. The court noted that some courts have applied the implied covenant to sole discretion clauses because an unqualified grant of sole discretion presents the opportunity that a party entitled to exercise that discretion may abuse it for self-interested reasons and thereby deprive the other party of the benefit of its bargain. However, the court found that those cases were not controlling because the parties to the operating agreement had explicitly addressed this concern by providing that the Board did not retain sole discretion to sell the company to affiliates or insiders and therefore the parties had recognized and filled that gap that some courts have found in contracts that provide for an unqualified grant of sole discretion.

Finally, the court noted in dicta that even if plaintiffs were correct and the operating agreement contained a gap as to how Trumpet could be sold, the implied covenant claim would still fail because plaintiffs' reasonable expectations were not frustrated by defendants' conduct during the sales process. The court specifically noted that the express terms of the operating agreement, such as the requirement that the Board notify the members of a sale and the lack of an information right of members for an ongoing sales process, suggested that the parties actually contemplated that Trumpet may be sold through private negotiation rather than an open-market process. The court stated that adding an auction sales process requirement would alter rather than enforce the deal actually struck since "the members agreed to a process that would enable investors to structure and time an exit at a very substantial premium to their investment, in a way that encouraged investment at the cost of fiduciary protections for earlier equity holders."

6. *Reid v. Siniscalchi*, C.A. No. 2874-VCS (Del. Ch. Jan. 30, 2018) (V.C. Slights)

Nominal defendant U.S. Russian Telecommunications L.L.C., a Delaware limited liability company ("USRT"), engaged plaintiff Dennis Reid ("Reid") to help USRT procure financing. After unsuccessful attempts to get financing in the United States, USRT sought financing from the Italian government. Defendants Vincenzo Davide Siniscalchi ("Siniscalchi") and Giorgio Capra ("Capra") assisted USRT in receiving this financing. The Italian government offered to provide financing through defendant Finmeccanica, SpA ("FIN"), which was an Italian state-controlled entity.

In his complaint, Reid argued that FIN, Siniscalchi and Capra conspired to misappropriate the satellite project from USRT for the benefit of FIN. FIN responded by filing a motion to dismiss on the grounds of lack of personal jurisdiction. Reid argued that the court had personal jurisdiction over FIN through the conspiracy theory of personal jurisdiction doctrine, alleging that FIN, Siniscalchi and Capra misrepresented that USRT must be Italian-owned to obtain financing from the Italian government. To satisfy this ownership requirement, Capra and Siniscalchi formed USRT Holdings, L.L.C., a Delaware limited liability company ("Holdings"), to take control and ownership of USRT. Reid alleged that Siniscalchi's act of forming Holdings in Delaware to further the conspiracy between FIN, Siniscalchi and Capra should be imputed to FIN for purposes of determining whether there was personal jurisdiction over FIN.

In this decision, the court ruled on defendants' motion for summary judgement on the grounds of lack of personal jurisdiction. Defendants argued that, based on the evidence found in discovery, the conspiracy claimed by Reid was untrue and thus the action of forming Holdings should not be imputed to FIN for jurisdictional purposes. The court noted that under "the conspiracy theory of personal jurisdiction, the parties to a conspiracy are treated as each other's agents with respect to acts in furtherance of the conspiracy." The court agreed that the conspiracy claimed by Reid was a sham based on evidenced unearthed during the discovery process. The court found that Reid had not proffered any evidence proving the essential fact in Reid's conspiracy theory that FIN, Siniscalchi and Capra misrepresented that USRT had to be Italian-owned to receive financing from the Italian government. Conversely, the court found evidence that it was Reid who proposed that USRT become Italian-owned. Additionally, FIN was not aware that Holdings acquired USRT until after the fact because Reid took actions preventing FIN from finding out this fact. Accordingly, FIN's motion for summary judgement was granted.

7. *Richard B. Gamberg 2007 Family Trust v. United Restaurant Group, L.P.*, C.A. No. 10994-VCMR (Del. Ch. Jan. 26, 2018) (V.C. Montgomery-Reeves)

This case involved a dispute regarding distributions to partners of a Delaware limited partnership (the "Partnership") pursuant to the terms of its limited partnership agreement (the "Agreement"), which provided that excess distributions in any given year would be treated as prepayment of distributions in later years. The Partnership experienced financial distress during the economic downturn in 2009 and the general partner decided to refinance the Partnership's debt. In preparation for the refinancing, the general partner realized that, under prior leadership, it had made excess distributions to partners of the Partnership that were not treated as prepayments of distributions in later years. The general partner reclassified these distributions accordingly; thus, the limited partners were not owed any amounts in connection with the refinancing. The general partner also determined that the refinancing would result in a rather large tax liability for the owners of the general partner. Therefore, the general partner proposed an amendment to the Agreement that would allow the Partnership to apply proceeds from the refinancing to cover that liability, which amendment a majority of the limited partners approved. Plaintiff, a trust established to hold limited partner interests in the Partnership, objected both to the reclassification of the distributions on grounds that the prepayment terms did not reflect the intent of the original agreement between the general partners and limited partners and the amendment to the Agreement on grounds that the amendment required unanimous approval of the limited partners. In this decision, the court addressed plaintiff's motion to amend its complaint, which the court denied, and defendants' motion to dismiss, which the court granted.

The court first addressed plaintiff's motion to amend, which the court denied because Rule 15(aaa) does not permit a plaintiff to amendment a complaint after filing an answering brief to a motion to dismiss. Plaintiff filed its answering brief and did not put forth any evidence that it uncovered new information after filing its brief. Therefore, the court denied plaintiff's motion to amend.

The court next addressed each of the five counts of plaintiff's complaint—one count for reformation of the Agreement, three counts for breach of contract against the general partner for enacting the amendment without unanimous limited partner approval, seeking a cash distribution from the Partnership and advancing legal fees, and one count for breach of fiduciary duty against the directors and owners of the general partner for a disclosure allegedly made in bad faith when seeking the limited partners' approval of the amendment.

The court held that plaintiff failed to state a claim for reformation of the Agreement. Plaintiff alleged scrivener's error, stating that the person drafting the agreement made a mistake when he included the prepayment mechanism in the Agreement. Plaintiff attempted to support those claims by noting that the general partner, while under prior leadership, made distributions without accounting for prior overpayments and that the signatory to the original Agreement verified that plaintiff's complaint was true and correct. The court was unpersuaded. It noted that plaintiff did not explain what error was made in drafting or what the correct language in the Agreement should have been. Further, the court stated that the prepayment mechanism was clear on its face and was included in three other distribution provisions in the Agreement, none of which plaintiff addressed. Therefore, the court dismissed plaintiff's claim for reformation of the Agreement based on an alleged scrivener's error. The court also addressed plaintiff's alternative claim that defendants breached the implied covenant, noting that the Agreement spoke directly with respect to the prepayment mechanism and plaintiff offered no evidence or explanation of how defendants acted unreasonably to frustrate the fruits of the bargain evidenced by the terms of the Agreement.

The court also dismissed plaintiff's claim that the general partner breached the Agreement by failing to receive unanimous limited partner approval of the amendment. The Agreement required unanimous approval for any amendment that would change the liability of or reduce the interests of the partners in Partnership capital, profits or losses. The amendment provided that gain from the proposed refinancing transaction would be allocated to the general partner in accordance with existing provisions of the Agreement. Because the allocations would be made in accordance with the Agreement's existing terms, the court held that the amendment did not change the allocation of gains under the Agreement.

The court also dismissed plaintiff's claim that the general partner breached the agreement by advancing legal fees to defendants. The Agreement provided that attorneys' fees "may be paid as incurred" which, under Delaware case law, permits advancement of attorneys' fees.

Finally, the court dismissed plaintiff's breach of fiduciary duty claim. Plaintiffs alleged that the owners and directors of the general partner acted in bad faith, violating the duty of loyalty, by causing the general partner to disclose that the general partner would incur tax liability as a result of the refinancing transaction when the liability was to the owners of the general partner. The court noted that a general partner generally owes fiduciary duties to limited partners, but liability for breach may be restricted or eliminated in the limited partnership agreement. The Agreement here provided that the owners and directors were liable for actions constituting fraud, bad faith, willful misconduct or gross negligence. Plaintiff alleged bad faith of the owners and directors. The court noted that the general partner initially disclosed that the refinancing likely would not be viable in the absence of the amendment because the general partner would incur a tax liability that it would be unable to pay. The general partner subsequently clarified that the owners of the general partner were the ones that would incur the liability. The court noted that plaintiff pled no facts to support its allegation of bad faith, and therefore, the court dismissed the claim.

8. *Aloha Power Co., LLC v. Regenesis Power, LLC*, C.A. No. 12697-VCMR (Del. Ch. Dec. 22, 2017) (V.C. Montgomery-Reeves)

Plaintiff, Aloha Power Company, LLC, brought an action to compel inspection or production of certain books and records against defendant, Regenesis Power, LLC (the "Company"), under the Company's operating agreement (the "Operating Agreement") and Section 18-305 of the Delaware LLC Act. Plaintiff sought the following books and records: (i) copies of the Company's balance sheet, income statement, and statement of changes in financial position from 2011 to 2017; (ii) information that was necessary for plaintiff to complete its federal and state income tax or information returns, and a copy of the Company's federal, state, and local income tax or information returns from 2011 to 2017; (iii) minutes of all meetings of the members; (iv) copies of any powers of attorney pursuant to which the Operating Agreement or any amendments thereto were executed; (v) copies of the operating statements and general ledgers of the Company, if any, for the six most recent fiscal years; (vi) a current list of the full name and last known business or residence address of each member and economic interest owner set forth in alphabetical order, together with the capital contributions, capital account, number of units and percentage interest of each member and economic interest owner; and (vii) the Company's books and records as they related to the internal affairs of the Company for at least the current and past four fiscal years. The court divided the books and records into two different categories—books and records that the Operating Agreement required the Company to produce without the need for demand, and books and records that required members to show a proper purpose for inspection.

Books and records that the Company was required to produce without demand included copies of the Company's balance sheet, income statement, and statement of changes in financial position from 2011 to 2017, information necessary for plaintiff to complete its federal and state income tax or information returns, the Company's income tax or information returns, minutes of all meetings of the members, and copies of any powers of attorney pursuant to which the Operating Agreement or any amendments thereto were executed. The Operating Agreement explicitly stated that the governing members were required to, or were required to cause the Company to, prepare and distribute these four categories of books and records and did not contain a requirement for demand from the members. The court, therefore, held that plaintiff was entitled to inspect the Company's books and records described in clauses (i)-(iv) in the preceding paragraph.

Plaintiff requested the remaining books and records under the section of the Operating Agreement which, similar to Section 18-305, granted plaintiff access for purposes reasonably related to its interest as a member of the Company. Plaintiff argued that it required the books and records to value its membership interest, to understand the dilution of its membership interest and to investigate mismanagement. Defendant, on the other hand, claimed that the reasons given by plaintiff did not represent plaintiff's actual purpose, which defendant claimed was to harass the Company because of a 2009 lawsuit between the parties in which defendant prevailed. The court stated that defendant did not show that harassment was the sole purpose for the request and, therefore, plaintiff was not barred from inspecting the books and records if plaintiff proved it had any proper purpose for the inspection.

Plaintiff noted that it requested operating statements and general ledgers for the six most recent fiscal years in order to assess the value of plaintiff's membership interests in the Company. Even though assessing the value of one's membership interest is a proper purpose, the court stated that plaintiff must establish proof that the category of books and records requested was essential and sufficient for that purpose. The court found that plaintiff did not attempt to explain why the books and records that plaintiff was already entitled to were not sufficient for assessing the value of the membership interest or why the operating statements and ledgers were necessary. Therefore, the court denied plaintiff access to the operating statements and ledgers.

For purposes of understanding the dilution of its membership interest, plaintiff requested a current list of the full name and last known business or residence address of each member and economic interest owner set forth in alphabetical order, together with the capital contributions, capital account, number of units and percentage interest of each member and economic interest owner. Defendant argued that because the dilution of plaintiff's interest was the subject of the 2009 lawsuit, plaintiff was barred from arguing dilution as a proper purpose for requesting inspection of books and records. Defendant, however, did not provide a reason why the 2009 lawsuit, which was resolved in 2011, would bar inspections for documents related to events after the resolution. The court, therefore, held that plaintiff was entitled to books and records relating to the members and their capital contributions and ownership in order to understand the dilution of its membership interest after 2011.

Finally, plaintiff requested books and records related to the Company's internal affairs for at least four years. Plaintiff did not explicitly state a reason that it needed these books and records, but the court speculated that it was most likely to allege mismanagement or wrongdoing. Citing *Seinfeld v. Verizon Commc'ns, Inc.*, the court stated that a general purpose to investigate possible mismanagement was not enough to warrant inspection of books and records; instead, plaintiff must present a reasonable basis for the court to infer that mismanagement or waste occurred. Plaintiff did not present a reasonable basis to infer mismanagement or waste, and the court held that plaintiff was not entitled to books and records related to internal affairs.

In addition to inspection of the Company's books and records, plaintiff requested attorneys' fees for this action. Even though the American Rule (i.e., that each party must pay their own attorneys' fees) is usually applied by the Delaware courts, if an LLC's operating agreement provides for a different allocation of the fees, Delaware courts depart from the general rule to respect the parties' wishes. In this case, the Operating Agreement stated that the prevailing party in litigation or arbitration in a dispute between the Company and the members "shall be entitled to recover from the other party all reasonable actual fees, costs and expenses of enforcing any right of the prevailing party, including without limitation, reasonable actual attorneys' fees and expenses." Unless an agreement explicitly states otherwise, attorneys' fees are awarded on an all-or-nothing basis. As a result, plaintiff was entitled to attorneys' fees because it was the prevailing party in this action.

9. *Perry v. Neupert*, C.A. No. 2017-0290-VCL (Del. Ch. Dec. 6, 2017) (V.C. Laster)

The parties to this action disputed who owned the equity of Cote D'Azur Estate Corporation ("Cote D'Azur"), a Delaware corporation that was converted from a Delaware LLC by defendant Dieter Walter Neupert ("Neupert") after the death of the original equity owner of Cote D'Azur, Israel Igo Perry ("Perry"). Plaintiff, Perry's widow, contended that her late husband owned all of the equity of Cote D'Azur at all times prior to his death, that the equity became part of his estate upon his death and passed to her, and that Neupert lacked authority to convert Cote D'Azur from a Delaware LLC to a Delaware corporation after Perry's death. In contrast, Neupert and Cote D'Azur claimed that before Perry died, he transferred all of the equity of Cote D'Azur pursuant to a Deed of Assignment to a private Liechtenstein foundation (the "Foundation"), which in turn executed an unlimited power of attorney in favor of Neupert, which power of attorney provided him the authority to file the certificate of conversion converting Cote D'Azur from an LLC to a corporation. This decision addressed plaintiff's motion to join the Foundation as an involuntary counterclaim plaintiff pursuant to Court of Chancery Rule 19. The court held that the Foundation should be joined "for a just resolution of the dispute" and that the Foundation was subject to service of process, as required by Rule 19, pursuant to the Delaware Long-Arm Statute by applying the elements of the *Istituto Bancario* conspiracy theory of jurisdiction, which it stated largely overlapped with (and therefore satisfied) the two-prong jurisdiction test that must be satisfied for the Delaware Long-Arm Statute to apply.

The court began by reciting a rather lengthy set of facts, the crux of which showed that Neupert only recently took the position that Perry transferred all of the equity in Cote D'Azur to the Foundation prior to his death pursuant to the Deed of Assignment, in contrast to emails and documents sent or drafted by Neupert both before and after Perry's death in which Neupert took the opposite position, noting that the Deed of Assignment was never executed, the transfer of the equity never occurred and the equity remained an asset of Perry's estate.

In examining plaintiff's request to add the Foundation as an involuntary counterclaim plaintiff, the court noted that Cote D'Azur asserted a counterclaim seeking a declaration that the Deed of Assignment validly transferred the equity in Cote D'Azur from Perry to the Foundation and that Neupert and Cote D'Azur asserted the same in their defense of plaintiff's claims. Therefore, if the court were to grant Cote D'Azur's requested relief or uphold defendants' defenses, the court would have to hold that the Foundation was the owner of the equity in Cote D'Azur. Similarly, if the court were to grant plaintiff's requested relief, the Deed of Assignment would be called into question in order to determine who owned the equity in Cote D'Azur. The court found a substantial risk that complete relief could not be afforded in the Foundation's absence and, therefore, the Foundation should be joined as a party if feasible.

Court of Chancery Rule 19 limits persons joined to an action to persons who are "subject to service of process." The court noted plaintiff proposed to serve the Foundation under the Delaware Long-Arm Statute, 10 *Del. C.* § 3104. The application of the long-arm statute requires a two-prong analysis—first, plaintiff must satisfy the statutory requirements of the Long-Arm Statute and, second, the exercise of personal jurisdiction must comply with the Due Process Clause of the United States Constitution (i.e., by virtue of a non-resident having sufficient "minimum contacts" with the forum state). The court noted that the Delaware Supreme Court has adopted the conspiracy theory of jurisdiction, which is rooted in the principal that one conspirator's acts may be attributed to co-conspirators. The five prongs of this theory are enumerated in *Istituto Bancario Italiano SpA v. Hunter Engineering Company*, 449 A.2d 210, 225 (Del. 1982), which provides:

> [A] conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if the plaintiff can make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

The court noted that Delaware court decisions "have not explained consistently how the conspiracy theory corresponds to the two-prong jurisdictional test" but, in the court's view, which was bolstered by its analysis of various Delaware cases, the five elements of the *Istituto Bancario* test "functionally encompass" both prongs—the first three elements encompass the statutory prong, while the fourth and fifth elements encompass the constitutional prong.

Ultimately, the court found that the factual record provided adequate support for plaintiff's claim that the Foundation was part of a conspiracy with Neupert to deprive plaintiff of her right to the equity in Cote D'Azur. Further, the court found that acts occurred in the forum state to further the conspiracy—specifically, Neupert filed in Delaware the certificate of conversion, which converted Cote D'Azur from an LLC to a corporation and purported to install Neupert as President of Cote D'Azur, and the certificate of incorporation, which authorized the issuance of stock, and used the alleged authority conveyed by these instruments to hold a meeting of Cote D'Azur where all of the stock of Cote D'Azur was issued to the Foundation. Finally, the court found it "readily inferable" that the Foundation either knew or should have known of those forum-related acts, particularly because the Foundation, as the purported sole equity owner of Cote D'Azur, granted an unlimited power of attorney in favor of Neupert to perform all legal acts on behalf of Cote D'Azur. Therefore, the court held that the Foundation should be joined as a party.

10. *Glick v. KF Pecksland LLC*, C.A. No. 12624-CB (Del. Ch. Nov. 17, 2017) (Chancellor Bouchard)

Plaintiffs Tim and Renee Glick invested their life savings in KF Pecksland LLC (the "Company"), a shell limited liability company holding shares in The Bleachers Corporation ("Bleachers"), a failed and now defunct media streaming company owned by defendant Samuel Klein. Plaintiffs claimed they invested based on (i) fraudulent misrepresentations made by defendant regarding Bleacher's success and future growth potential and (ii) promises made by defendant to repay any lost investment principal. Defendant took advantage of plaintiffs' trust and lack of investing experience to convince them to buy interests in the Company and subsequently used plaintiffs' invested money to pay for personal expenses rather than to attempt to grow the investment. The court found that plaintiffs' primary claim was for fraudulent inducement, and on this claim the court held for the plaintiffs awarding them the full amount they invested in the Company. Since the court decided this claim under Wyoming law, it is not addressed further. In addition to the fraudulent inducement claim, plaintiffs sought damages for breach of fiduciary duty owed by defendant (as manager of the Company) directly to plaintiffs (as members of the Company).

The default fiduciary duties of loyalty and care were not modified or eliminated pursuant to the Company's limited liability company agreement and therefore were owed by defendant (in his capacity as manager) to members of the Company. To sustain a claim for breach of fiduciary duty, plaintiffs needed to prove by a preponderance of the evidence that defendant breached a duty owed to them as members of the Company and that they suffered concrete damages as a result of such breach. Plaintiffs contended that defendant breached his fiduciary duties in four ways: (1) failing to maintain appropriate books and records; (2) using Company funds as his personal checking account; (3) usurping corporate opportunities; and (4) engaging in a self-interested transaction.

According to the court, defendant's first alleged breach of fiduciary duty, failure to maintain adequate books and records, was "egregious" and suggestive of the level of gross negligence that would sustain a breach of duty of care (and potentially a breach of good faith) claim. However, the court noted that plaintiffs were not directly harmed by defendant's failure to maintain records and therefore could not proffer evidence regarding damages suffered directly in relation to such failure.

The court acknowledged that defendant's second alleged breach of fiduciary duty, use of Company funds for personal gain, may have harmed the Company. However, the court reiterated that no evidence of direct harm to plaintiffs was proffered in connection with such misuse of funds.

Plaintiffs' third alleged breach of fiduciary duty, that defendant usurped a corporate opportunity from the Company, was premised upon the fact that defendant sold his own personal interests in the Company to third party investors rather than selling actual Bleachers shares held by the Company, which would have resulted in the Company (instead of defendant) receiving consideration for the value of those shares. However, plaintiffs could not prove that any opportunity to make such sales actually existed and, in any event, plaintiffs again did not suffer direct damages as a result of such conduct.

Defendant's fourth alleged breach of fiduciary duty, that defendant engaged in a self-interested transaction by obligating the Company to pay $6 million dollars to another entity owned by defendant, "ha[d] all the indicia of being unfair to [the Company]." Such indicia included the fact that defendant testified the transaction was being unwound. Despite this unfairness, plaintiffs did not submit any evidence quantifying any amount of direct harm suffered by them in relation to the sham transaction.

In sum, the court noted that although the "fiduciary duty claim rais[ed] many troubling issues concerning defendant's conduct as a fiduciary" of the Company, no evidence was submitted that plaintiffs were directly harmed by such conduct. Likely due to cost considerations, plaintiffs did not seek to litigate derivative claims on behalf of the Company.

The court also disposed of ancillary negligent misrepresentation and constructive fraud claims because plaintiffs had already fully recovered under the theory of fraudulent inducement.

11. *Apogee Investments, Inc. v. Summit Equities LLC*, Civil Action No. 12897-MZ (Del. Ch. Sept. 22, 2017) (Master Zurn)

Plaintiff, Apogee Investments, Inc., was a member of defendant Summit Equities, LLC, a Delaware limited liability company. The only other member in defendant was Evan Seiden ("Seiden"), who was also the managing member of defendant. The LLC agreement of defendant permitted defendant to make a significant loan to Seiden. Approximately five years after plaintiff made its investment in defendant, it was notified that defendant had no assets and would be dissolved. Plaintiff served a demand on defendant requesting documents from defendant for the purpose of evaluating the loan to

Seiden and investigating any wrongdoing or mismanagement by Seiden and filed a complaint after defendant failed to provide the requested documents. Plaintiff later made another demand and amended its complaint to reflect the additional demand. Plaintiff then made a third demand and filed a motion to amend its complaint again. Defendant opposed the motion, arguing that amendment would be futile because plaintiff failed to plead mismanagement and the documents plaintiff sought were nonessential to its stated purpose.

The court granted the motion to amend. Court of Chancery Rule 15(a) dictates that (1) leave to amend should be freely given when justice requires, (2) a defendant alleging the proper purpose of mismanagement faces the lowest possible burden and (3) in evaluating those allegations, the court is required to take well-plead facts as true and draw all reasonable inferences in favor of the moving party. A motion to amend may be denied, however, if the amendment would be futile, meaning it appears with reasonable certainty that the plaintiff would not be entitled to relief sought under any reasonable set of facts property supported by the complaint. The court held that plaintiff's allegations were sufficient to grant the motion to amend, noting that (i) plaintiff and Seiden were the only members in defendant, (ii) defendant was authorized to extend a loan to Seiden, (iii) plaintiff was advised with little notice or explanation that defendant had no assets and would dissolve and (iv) that plaintiff filed numerous demands for documents that were never provided. The court went on to find that the exculpation provision in defendant's limited liability company agreement did not render the amendment futile, as defendant contended, because the parties could argue at trial whether or not the alleged mismanagement was exculpated. Finally, the court rejected defendant's claim that the documents being requested were nonessential, making the amendment futile, because that would require the court to make factual determinations that were not appropriate in considering a motion to amend.

12. *LVI Group Invs., LLC v. NCM Group Holdings, LLC*, C.A. No. 12067-VCG (Del. Ch. Sept. 7, 2017) (V.C. Glasscock)

This case arose from the combination of two demolition firms ("LVI" and "NCM"), each a Delaware limited liability company. LVI sued NCM and accused NCM of fraud in the inducement. NCM countersued with mirror allegations and also attempted to state a claim of fraud against Paul Cutrone, the former Chief Financial Officer of LVI ("Cutrone"). Cutrone, who is not a Delaware resident, moved to dismiss the action against him citing lack of personal jurisdiction, and the court granted his motion.

The court began its analysis by determining whether there was a statutory basis to assert personal jurisdiction over Cutrone. The court looked to the assertions of NCM, the party who bore the burden of establishing the statutory basis for personal jurisdiction, which advanced Section 18-109 of the LLC Act, the conspiracy theory and Delaware's long-arm statute in support of its argument that the court had personal jurisdiction over Cutrone.

NCM first argued that Section 18-109 of the LLC Act provided a basis for establishing jurisdiction because Cutrone allegedly was a manager of LVI and violated his fiduciary duties. However, in a previous decision, the court decided against NCM on the breach of fiduciary duty claim and, therefore, found that Section 18-109 did not establish personal jurisdiction over Cutrone.

NCM then argued that Cutrone conspired with members of LVI's board and with LVI to commit fraud. Again, the court was unpersuaded. The court, relying on its prior decision in *Amaysing Techs. Corp. v. Cyberair Commnc'ns, Inc.*, 2005 WL 578972, (Del. Ch. Mar. 3, 2005), held that NCM's argument failed because a "corporation cannot conspire with itself." The court quoted *Amaysing* further, noting that "a corporation generally cannot be deemed to have conspired with its officers and agents for purposes of establishing jurisdiction under the conspiracy theory." NCM then argued that the "personal reasons" exception to that rule espoused by the Third Circuit in *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971), applied because Cutrone acted for his personal benefit—he was to become CFO of the new entity with substantial compensation. The court was not swayed, noting that courts generally apply that exception narrowly in instances where the individual is motivated by "personal animus and/or desire for financial benefit other than one's corporate salary" (emphasis in original).

Finally, NCM argued that statutory jurisdiction was conferred on Cutrone by the Delaware long-arm statute, 10 *Del. C.* § 3104. In its counterclaim, NCM cited to subsection (c)(3) of the long-arm statute, alleging that Cutrone cause tortious injury in Delaware. The court noted that Cutrone committed no act or omission in Delaware and, therefore, subsection (c)(3) did not provide a basis for jurisdiction. In briefing, NCM changed its theory under the long-arm statute and relied on subsection (c)(1), which provides jurisdiction over a non-resident who "[t]ransacts any business or performs any character of work or service in the State." Specifically, NCM pointed to Cutrone's actions of executing and causing to be filed a certificate of merger with the Delaware Secretary of Statute for a merger that facilitated the subsequent merger between NCM and LVI and argued that the execution and filing of the certificate of merger constituted transacting business under subsection (c)(1). The court noted that the Delaware Supreme Court encourages broad construction of Section 3104(c) but that a plaintiff must still demonstrate that (1) the nonresident transacted some sort of business in the state and (2) the claim asserted arose out of that transaction. Based on its review of the record, the court began its analysis of subsection (c)(1)'s application by stating that Cutrone's transaction of business relevant to the statute consisted of the execution and filing of a certificate of merger. However, that certificate did not cause the merger between LVI and NCM. Rather, that certificate related to a preceding merger to which NCM was not a party but that was an antecedent to the merger that was the subject of the litigation at hand. The court ultimately held that the execution of that certificate did not have a sufficiently tight nexus to the cause of action so as to form a source of the claim. Therefore, the court refused to assert personal jurisdiction over Cutrone under subsection (c)(1) of the long-arm statute.

13. *Eagle Force Holdings, LLC v. Campbell*, No. CV 10803-VCMR (Del. Ch. Sept. 1, 2017) (V.C. Montgomery-Reeves)

After a protracted negotiation that spanned nearly a year, Stanley Campbell, who was the defendant in this action, and Richard Kay signed a contribution agreement and LLC agreement with respect to Eagle Force Holdings, LLC at the end of a long negotiation session. However, these documents contained several terms that had not yet been agreed upon by the parties, including terms relating to the consideration to be exchanged, and multiple schedules to the documents intended to set forth important information were still blank. Plaintiffs were relying on the forum selection clauses in these documents which provided for consent by the parties to the jurisdiction of the Court of Chancery. Campbell argued that the court cannot assert personal jurisdiction over him because these documents did not form binding contracts. The court agreed with Campbell that the parties did not form binding contracts because essential terms of the documents were missing and thus held that the forum selection clauses were not binding on Campbell. The court did not find another basis to assert personal jurisdiction over Campbell and consequently dismissed plaintiffs' complaint.

14. *In re GR BURGR, LLC*, C.A. No. 12825-VCS (Del. Ch. Aug. 25, 2017) (V.C. Slights)

Petitioner GR US Licensing, LP ("GRUS") and Respondent Rowen Seibel formed GR BURGR, LLC ("GRB") to develop and operate upscale burger-themed restaurants affiliated with celebrity chef Gordon Ramsey. Membership equity was split 50/50 between GRUS and Seibel. Since GRB's formation in 2012, its only business venture was with an affiliate of Caesars Entertainment Corporation ("Caesars") pursuant to which GRB licensed certain trademarks and intellectual property for use in Caesar's Planet Hollywood Resort in Las Vegas.

In 2016, Seibel was convicted of a felony tax offense. That conviction prompted Caesars to notify GRB that it had determined that Seibel was an "Unsuitable Person," defined in the licensing agreement as someone whose affiliation with Caesars could result in the loss of gaming and alcohol licenses under Nevada gambling regulations, and therefore would exercise its termination right under the agreement unless Seibel disassociated with GRB. In response to the Caesars notification, GRUS attempted to comply with the request and asked Seibel to disassociate with GRB. After Seibel refused to do so, Caesars terminated the licensing agreement and GRUS petitioned for judicial dissolution of GRB on the grounds that deadlock between the parties had rendered it no longer reasonably practicable for GRB to operate in accordance with its limited liability company agreement.

The court began its analysis with the statutory grounds for judicial dissolution of a limited liability company under 6 *Del. C.* § 18-802, which provides that upon "application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." The "not reasonably practicable" standard is somewhat subjective, though the court pointed to several case law factors that support an inference that the standard is satisfied: (i) that there is voting deadlock; (ii) that the operating agreement provides no path around the deadlock; and (iii) that there is effectively no company business to operate because of the company's finances. No factor is individually dispositive, nor must they all exist simultaneously. The court further stated that although judicial dissolution is not meant to serve as a remedy for failing businesses or market turbulence, the "not reasonably practicable" standard is also not such an extreme bar as to require actual or near impossibility of the company to carry on its business.

In applying those principles to GRB, the court noted that GRUS and Seibel, as 50/50 owners of a company that required unanimity in decision-making, were clearly deadlocked. The actions taken by the parties leading up to the judicial dissolution petition provided concrete evidence of extreme dysfunction. Caesar's categorization of Seibel as an "Unsuitable Person" under the GRB licensing agreement sparked GRUS's insistence that he withdraw from GRB so as not to tarnish its reputation. Seibel's response was to suggest that his membership interest be assigned to a family trust. This suggestion was rejected by Caesars because it determined that the proposed assignees' relationships with Mr. Seibel made them Unsuitable Persons under the licensing agreement as well. When Seibel failed to disassociate with GRB after GRUS's renewed demand that he do so, Caesar's terminated the licensing agreement. Shortly thereafter, GRUS petitioned for judicial dissolution of GRB and Seibel filed a counterclaim, alleging among other things that GRUS had colluded with Caesars to usurp corporate opportunities of GRB and oust Seibel from the company. Seibel then filed a separate derivative action in Nevada on behalf of GRB seeking specific performance of the licensing agreement.

Given the above actions, the court concluded that it was "difficult to imagine how GRB could be any more dysfunctional or deadlocked" than it currently was. In fact, the parties no longer even spoke to one another at all. The court noted that the notion that the deadlock could potentially be broken in the future was unreasonable because GRUS would never want to be associated with Seibel due to the felony conviction. Since (i) the deadlock would continue, (ii) the Caesars licensing agreement was essentially the company's only business and (iii) the operating agreement provided no means of escape, the court concluded that it was not reasonably practicable for GRB to carry on its business of upscale burger-themed restaurant development and operation in conformity with the operating agreement.

Seibel argued that even if it was not reasonably practicable to carry on the business of GRB, principles of equity should discourage the court from ordering judicial dissolution at the pleadings stage of the case. Seibel pointed to the permissive phrase "may decree dissolution" in 6 *Del. C.* § 18-802 to support his allegation that since, in his opinion, the dissolution was sought in bad faith by GRUS in order to take the business of GRB for itself, equity required the court to exercise discretion and refuse to grant the dissolution petition. The court disagreed, noting that the circumstances surrounding the petition had arisen from Seibel's own bad actions and that there was no evidence that GRUS sought to dissolve GRB prior to Seibel's felony conviction for any other reasons. Furthermore, no future business opportunity had been identified by Seibel as one that GRUS was attempting to exploit through the judicial dissolution petition.

Finally, Seibel did not allege any facts to support a claim that he would be unable to recover fully any damages potentially owed to him if dissolution was granted. Therefore, the court rejected Seibel's argument that equitable principles supported the exercise of court discretion in denying the petition and ordered dissolution of GRB because it was no longer reasonably practicable to carry on the company business.

15. *Terramar Retail Centers, LLC v. Marion #2-Seaport Trust U/A/D June 21, 2002,* 2017-12875-VCL (Del Ch. Aug. 18, 2017) (V.C. Laster)

This case addressed whether a Delaware court could exercise personal jurisdiction over a member of a Delaware limited liability company that played a meaningful role in the formation of the LLC and negotiation of the operating agreement, but had no management role in the LLC. Plaintiff Terramar Retail Centers, LLC ("Terramar") originally received a 50% membership interest in Seaport Village Operating Company, LLC, a Delaware limited liability company (the "Company"), and non-party Michael Cohen, through defendant Marion #2-Seaport Trust U/A/D June 21, 2002 (the "Trust"), held a 25% membership interest in the Company. The operating agreement named Terramar as the sole manager of the Company and did not grant the Trust any power to act on behalf of the Company. Under the operating agreement, Terramar received a right to request that the other members buy out its member interest at fair market value any time after a certain date (the "Put Right"). In addition to the Put Right, Terramar had the right to dissolve the Company if the members did not purchase Terramar's interest within six months of the exercise of the Put Right at the contractually determined purchase price for Terramar's interest (the "Terramar Purchase Price").

After several disputes among the members of the Company, Terramar exercised the Put Right on December 18, 2015. Terramar did not receive the Terramar Purchase Price within the six-month period and subsequently brought suit against the Trust in the Court of Chancery seeking a declaration that it possessed the right to dissolve the Company and to sell its property and assets pursuant to the operating agreement. The Trust moved to dismiss the complaint for a lack of personal jurisdiction.

The court began its inquiry by setting forth the two-step analysis for determining whether a Delaware court has jurisdiction over a non-resident defendant: (i) the court must determine whether the plaintiff has identified a legally cognizable basis for asserting jurisdiction and (ii) the court must determine whether exercising personal jurisdiction over the defendant passes muster under the Due Process Clause of the United States Constitution. Terramar contended that the first step was met pursuant to Delaware's long-arm statute. The court initially noted that it has been consistently held that forming a Delaware entity constitutes the transaction of business within Delaware that is sufficient to establish specific personal jurisdiction under 10 *Del. C.* § 3104(c)(1). However, the court cautioned that there must be a nexus between the formation of the Delaware entity and the cause of action asserted in the lawsuit. The court stated that the principal factor in determining whether there is a sufficient nexus is the extent of the factual relationship between the formation of the Delaware entity and the cause of action, while the second factor is the degree of involvement that the defendant had in the formation of the entity.

The court initially noted that Delaware courts have traditionally interpreted the nexus factor broadly when the underlying claims involve the internal affairs of a Delaware entity. The court held that a sufficient nexus existed between the formation of the Company and Terramar's claims to enforce the operating agreement to permit the court to exercise specific personal jurisdiction over the Trust as Terramar's claims under the operating agreement implicated core issues discussed by the parties when negotiating the underlying transaction that gave rise to the Company's formation. The court reasoned that forming the Company was the act that resulted in the operating agreement being a legally viable contract and that the business deal Terramar sought to enforce was embodied in the operating agreement and implemented through the creation of the Company.

Turning to the second factor, the court held that the record supported a reasonable inference that the Trust played a meaningful role in forming the Company and negotiating the operating agreement. The court stated that "as a defendant's involvement in the underlying transaction and the formation of the Delaware entity becomes more attenuated, it becomes more difficult to hold that the defendant transacted business in the state." However, the court noted that Cohen had brokered the deal contained in the operating agreement, had an ongoing professional relationship with the other members of the Company and had bargained for a unique economic benefit in the form of an exclusive right to broker future financing for the related real estate property.

The court also held that exercising personal jurisdiction over the Trust comported with due process. The court looked to whether the Trust had engaged in sufficient minimum contacts with Delaware to require it to defend itself in Delaware courts consistent with the traditional notions of fair play and justice. Under this traditional due process analysis, the court held that because the Trust had participated in negotiating the deal that resulted in the formation of the Company and participated in negotiating the operating agreement itself, the Trust had purposefully availed itself to the benefits and protections of the laws of the State of Delaware and therefore exercising personal jurisdiction over the Trust comported with due process.

16. *In re Energy Transfer Equity L.P. Unitholder Litigation*, 2017-12197–VCG (Del. Ch. Feb. 28, 2017) (V.C. Glasscock); *In re Energy Transfer Equity L.P. Unitholder Litigation*, 2017-12197–VCG (Del. Ch. July 31, 2017) (V.C. Glasscock)

This case involved cross-motions for partial summary judgment in a dispute over the issuance of partnership units of defendant Energy Transfer Equity, L.P. ("ETE"). The litigation arose from the issuance of convertible units to some, but not all, unitholders in ETE, in return for which the unitholders gave up their common units (the "Issuance"). The Issuance was initially planned as a public offering to all unitholders to finance a proposed merger with The Williams Companies, Inc. ("Williams") and to strengthen ETE's credit profile; however, Williams refused to consent to the public offering. After Williams withheld consent of the proposed public offering, ETE sought to conduct a private placement of the convertible units by offering such units to certain accredited investors rather than all common unitholders, which would not require Williams' cooperation. The substantive terms of the private placement did not materially differ from the terms of the unsuccessful initial public plan.

The Issuance was subject to the approval of a Conflicts Committee (the "Conflicts Committee") of the board of LE GP, LLC, the general partner of ETE (the "General Partner"). The Conflicts Committee as initially established by the General Partner consisted of three members, but two of those members were on boards of the General Partner's affiliates and therefore unable to serve on the Conflicts Committee under the terms of the limited partnership agreement of ETE (the "LPA"). Two days after the original members of the Conflicts Committee had been designated, the board of the General Partner adopted a resolution indicating that the Conflicts Committee consisted of the only unaffiliated member. The Conflicts Committee engaged legal and financial advisors and after meeting multiple times and receiving presentations from the financial advisor, which indicated that the Issuance would lower ETE's leverage ratio closer to what rating agencies expect in order to provide a "neutral rating," the Conflicts Committee voted to grant special approval. Shortly thereafter the Issuance was consummated. Pursuant to the Issuance, the director defendants together with two other unitholders named as defendants in this action acquired the overwhelming majority of the convertible units.

Following the consummation of the Issuance, the plaintiffs commenced this action alleging among other things, (i) breach of the LPA related to a purportedly non-pro rata distribution, (ii) breach of the LPA related to entering into a conflicted transaction without complying with the relevant terms of the LPA, (iii) breach of the implied covenant in connection with approvals made under the LPA and (iv) breach of the LPA related to the adoption of an amendment to the LPA that was entered into to establish the convertible units. The plaintiffs moved for partial summary judgment that (A) the issuance of the convertible units was invalid because they were non-pro rata distributions of securities to some of the limited partners in their capacity as partners and (B) the defendants breached the LPA because the General Partner failed to properly constitute the Conflicts Committee, which resulted in the failure to establish "special approval" as defined in the LPA. The defendants moved for partial summary judgment for, among other things, a judgment that (i) as a matter of law the failure to obtain special approval cannot provide a claim for breach of the LPA and (ii) the plaintiffs' breach of LPA claim regarding a non pro rata distribution fails as matter of law because the Issuance was an issuance of equity securities not a distribution. The court reasoned that the dispute primarily involved two issues: first, whether the Issuance (and the corresponding Conflicts Committee process) failed the contractual safe harbor provided by the LPA; and second, whether the Issuance (and the offering of such convertible units via receipt of the PPM) constituted a contractual "distribution." The court denied the defendants' motion for summary judgment on both issues, noting that both issues would benefit from further development of the factual record.

The court first considered the parties' partial summary judgment requests related to Special Approval. The court noted that although the LPA provided the General Partner with broad authority to issue securities, the authority is not unlimited and was subject to the relevant appropriate contractual standard set forth in the LPA. The LPA provided that issuances that arose out of interested situations were subject to a higher level of scrutiny. Section 7.9(a) provided a safe harbor for the General Partner or its affiliates to resolve a conflict, which included obtaining "Special Approval." Special Approval was defined to include, among other things, approval by a majority of the members of the Conflicts Committee. The Conflicts Committee was initially comprised of three members, but two of those members were on boards of the General Partner's affiliates and therefore unable to serve under the terms of Section 7.9(a). Two days after the original members of the Conflicts Committee had been designated, the board of the General Partner adopted a resolution indicating that the Conflicts Committee consisted only of the unaffiliated member. However, a resolution indicating the resignation of the two affiliated members was never adopted. Therefore, the plaintiffs argued that the approval by one member did not constitute a majority of the 3-member committee.

The court denied the motion for summary judgment because it was unclear based on the record before it whether the Conflicts Committee consisted of one member or three at the time of the Conflicts Committee's finding. The court found that the Conflicts Committee's approval would have met the Special Approval safe harbor of Section 7.9(a) if the committee had been comprised of the one unaffiliated director at the time of its finding, but a "gap in the record" warranted further development of this issue to determine if the Special Approval safe harbor had been met.

Plaintiffs also argued that even if defendant had complied with the Special Approval safe harbor, the Issuance constituted an impermissible distribution under the LPA. Under the terms of the LPA, all distributions were required to be pro-rata and the Issuance was only offered to some, but not all partners. Defendants also moved for summary judgment on this issue and argued that the Issuance was a permitted issuance of securities under Section 5.8 of the LPA, and not a distribution. The court first noted that the term "distribution" was not defined anywhere in the LPA or in the Delaware Revised Uniform Limited Partnership Act, *6 Del. C.* §§ 17-101 *et seq.* ("DRULPA") and that the default under DRULPA provides for pro rata distributions.

Defendants argued that a transaction could only be characterized as a distribution under the LPA where a transfer was made to a partner that lacked consideration and disbursed the wealth of the partnership to its partners. Defendants therefore characterized the transactions contemplated by the Issuance as an issuance of securities to certain partners in return for the surrender of other securities, which, according to defendants, would constitute a transfer of value and thus not a distribution. Plaintiffs defined a distribution as any transfer to partners in their capacity as partners, and disputed defendants' argument that there is a requirement that the transfer must be for no consideration. Plaintiffs also argued that, to the extent there was any ambiguity in the LPA it should be construed against defendants.

To interpret the term "distribution," the court looked to Black's Law Dictionary for the plain meaning of the term, which defined partnership distribution as "[a] partnership's payment of cash or property to a partner out of earnings or as an advance against future earnings, or a payment of the partners' capital in partial or complete liquidation of the partner's interest." The court found that the usage of the terms "issuance" and "distribution" in the LPA were consistent with the Black's Law Dictionary definition, but declined to find as a matter of law what the term "distribution" means in the context of the issuance of convertible units in return for common units because the record was incomplete or in dispute. In particular, the court noted that further factual development as to whether the Issuance was truly an exchange for value would be helpful to its analysis and therefore the court's analysis would benefit from further factual development. Thus, the cross-motions for summary judgment were denied.

In its July 2017 order, the court addressed two issues that the parties identified as outstanding following the court's February 28, 2017 opinion. First, Defendants sought summary judgment on the issue of whether failure to receive Special Approval would in and of itself constitute a breach of the LPA, noting that, generally, those types of safe harbor provisions are optional and not mandatory. Therefore, defendants argued that failing to pursue Special Approval would not be a breach of the LPA. The court denied defendants' motion on the basis that certain provisions of the LPA cross-referenced and potentially triggered an obligation to conform to the LPA's safe harbor provisions. Moreover, defendants asserted that they complied with the safe harbor provisions of the LPA and, therefore, the declaration they sought from the court would be advisory in nature only. The court held that the effect of failure to receive Special Approval would be best decided on a full factual record that would be developed at trial, which was set to commence in the near future. Second, defendants requested that the unitholder defendants be dismissed from the case because they were not parties to the LPA. Defendants argued that the plaintiffs' case is based on claims of contractual breach and, because the unitholder defendants are not bound by the LPA, they should be dismissed from the case. The court noted that plaintiffs alleged that the unitholder defendants were not merely passive recipients but were active participants in the Issuance, and plaintiffs pointed to language in the LPA under which contractual liability would allegedly attach to such defendants and requested rescissory damages and other equitable relief. Because those defendants received the majority of the allegedly improper Issuance, the court denied defendants' request in order to develop a full record at trial and aid the court's ability to grant full relief.

17. *McKenna v. Singer*, C.A. No. 11371-VCMR (Del. Ch. July 21, 2017) (VC Montgomery-Reeves)

This case arose from the soured business relationship between Thomas and Garrett McKenna (the "McKennas") and David and Daniel Singer (the "Singers"). The Singers owned an energy distribution business that sold natural gas, heating oil and electricity to buildings in the New York City metropolitan area. Robison Energy, LLC ("Robison Energy"), a company owned by the Singers, was in the business of converting heating systems from oil to natural gas. The McKennas and the Singers began negotiations to develop a business that would provide customers with financing to pay for the heating system conversions performed by Robison Energy. In pitching the business to the Singers, the McKennas misrepresented their experience in loan financing and underwriting. The Singers did not have any experience with loan financing and therefore relied on the McKennas for their alleged expertise. The McKennas and the Singers formed a Delaware limited liability company named Robison Energy Fund LLC ("REF") to pursue this business and seek outside investment. An operating agreement was signed for REF which provided that REF was equally owned by the McKennas and the Singers. REF was able to secure a term sheet to finance the oil-to gas-conversion for fourteen properties owned by Mount Hope Housing Company, Inc. ("Mount Hope"), and the McKennas and Singers hoped to use this to test the viability of the conversion financing business.

The REF fundraising effort was unsuccessful, and the McKennas and Singers pursued a different fundraising model through a new entity, Green Energy Companies LLC ("GEC"). No operating agreement was executed for GEC, but the private placement memorandum relating to this new investment structure provided that 20% of GEC would be owned equally by the McKennas and the Singers and 80% would be owned by an investment fund that the McKennas and the Singers would indirectly control. The Singers and the McKennas were only able to garner investment interest from one investment fund, Westport Capital Partners, LLC ("Westport"), but only on terms dictated by Westport, which terms did not align with the investment structure anticipated by the McKennas and Singers.

Westport's interest in the business was contingent upon the Singers contributing Robison Energy to the new business and upon the contribution of the GEC name. The investment structure provided that members who made a capital contribution, i.e., Westport and the Singers, would receive a preferred return. The McKennas would only receive a carried interest because they would not be making a capital contribution and would therefore primarily be compensated as employees or consultants. After months of negotiations, it became apparent to the Singers and Westport that the McKennas did not have the loan financing and underwriting expertise required for the Mount Hope transaction. The relationship between the parties deteriorated to such a point that the Singers and Westport decided to form a new investment vehicle in which Westport and the Singers would contribute their respective capital and assets and pursue the conversion financing business without the McKennas.

The McKennas sued the Singers for allegedly breaching their fiduciary duties to the McKennas by misappropriating the opportunity to receive an investment from Westport that belonged to REF or GEC. After trial, the court held that although the managers of REF and GEC owed fiduciary duties to the McKennas, the claim for breach of fiduciary duty failed for two reasons. First, the McKennas came to the court with unclean hands as a result of their misrepresentations to the Singers, which misrepresentations had an immediate and necessary relationship to the formation of REF and GEC. Accordingly, they were barred from bringing fiduciary duty claims that were related to those misrepresentations. Second, neither REF nor GEC had any interest or expectancy in the investment made by Westport. The court reasoned that (i) the fundraising for REF had never received investment interest from Westport and (ii) Westport was only interested in GEC for its name and for the contribution of Robison Energy to be made by the Singers. When the Singers and Westport ultimately decided to pursue the business without the contribution of the GEC name, the Singers did not take any asset or opportunity in which GEC or REF had an interest or expectancy, so there was no corporate opportunity to misappropriate.

18. *The Renco Group, Inc. v. MacAndrews AMG Holdings LLC*, C.A. No 7668-VCN (Del. Ch. May 17, 2017 and July 18, 2017) (V.C. Slights)

In another decision in a series of related cases, the court addressed the parties' cross-motions for partial summary judgement on The Renco Group, Inc.'s ("Renco") breach of contract and declaratory judgment claims. Renco's claims related to distributions made by MacAndrews AMG Holdings LLC ("AMG") to itself, by AM General Holdings LLC ("Holdco"). Reno and AMG were members of Holdco. AMG was the managing member of Holdco. The Holdco LLC Agreement (the "Holdco Agreement") sets forth a complex scheme by which the profits and losses of the Company should be allocated and distributions made to each Member. As the result of a recent valuation of Holdco, the parties' capital accounts became distorted, and Renco asserted that provisions in the Holdco Agreement entitled Renco to receive distributions to conform its capital account to the provisions in the Holdco Agreement.

In beginning its analysis, the court stated that summary judgment would be granted if the relevant terms of the Holdco Agreement were clear and unambiguous. Additionally, the court noted that a contract is ambiguous if the language is "reasonably or fairly susceptible of different interpretations."

Renco argued that, pursuant to Section 8.3 of the Holdco Agreement, it had the option to elect to reallocate profits and losses, or cause a distribution to be made to itself in order to keep its capital account balance below the contractually mandated cap. Further, Renco argued that AMG was prohibited from receiving distributions under Section 9.4(c) of the Holdco Agreement, if it would cause its capital account to be less than 20%. The court held that Renco's reading was reasonable because Section 9.4(c) of the Holdco Agreement seemed to prevent AMG from receiving distributions when its capital account balance was below 20% if it violated the Renco 80% Capital Account Cap described in Section 8.3(b) of the Holdco Agreement, and Section 8.3 of the Holdco Agreement could reasonably be read to allow Renco to elect to receive distributions to bring the RCA balances to the contractually-mandated levels.

AMG argued that the allocations described in Section 8.3(a) of the Holdco Agreement were mandatory, and such allocations must be made prior to making any distributions to Renco to prevent any capital account balance issues. Additionally, AMG argued that Section 9.4(c) of the Holdco Agreement allowed AMG to prevent distributions that would cause its capital account from dropping below 20%. The court stated that AMG's construction was reasonable because "even if Section 9.4(a) applies, it is not clear whether Renco has the immediate right to elect to receive a distribution under Section 8.3(b) prior to the managing member applying the allocation limitations in Section 8.3(a)."

The court held that both parties' interpretations of the relevant provisions were reasonable and thus denied the cross motions for summary judgment, stating that the court's construction of the Holdco Agreement would have to await the presentation of extrinsic evidence that hopefully will provide the court with insight regarding the parties' intent.

In a subsequent opinion, the court denied Renco's request to reargue its motion for partial summary judgement.

19. *Beach to Bay Real Estate Ctr. LLC v. Beach to Bay Realtors Inc.*, No. CV 10007-VCG (Del. Ch. July 10, 2017, *as corrected on* July 11, 2017 (V.C. Glasscock)

Plaintiffs, Beach to Bay Real Estate Center, LLC, ("Center"), AJ Realty, LLC ("AJ") and Anthony Kulp, filed this complaint after a dispute with defendants, Beach to Bay Realtors, Inc. ("Realtors") and Andy Staton, arising from the winding down of Center. Plaintiffs alleged that Staton had wrongfully refused to pay amounts he had agreed to pay when Center dissolved, that Staton stole confidential client information from Center for his own benefit in breach of his fiduciary duties and that he had converted trade secrets and breached the implied contract. Plaintiffs also brought claims based on estoppel and constructive trust as well as piercing the corporate veil and conversion, misappropriation and restitution of Center's funds. In response, defendants' sought the dismissal of three of the counts in the complaint: the breach of fiduciary duties claim, breach of implied contract/estoppel claim and the constructive trust claim.

With respect to the breach of fiduciary duties claim, the court granted defendants' motion because it held that minority members of an LLC do not owe fiduciary duties by default. The court noted that minority membership on its own is insufficient as a matter of law to create a fiduciary relationship. Plaintiffs argued that defendants owed a duty because defendants had access to confidential information and wrongfully stole that confidential information. In response, the court stated that stealing confidential information does not create a fiduciary relationship; plaintiffs must claim that there is an agreement supplying a duty or special relationship. The court noted the access to confidential information could in certain circumstances create a fiduciary relationship, but plaintiffs' complaint did not support the creation of such a relationship. In regard to the breach of implied contract and estoppel claims, the court held that there was an absence of facts in the complaint to support a claim for the breach of an implied contract. However, the court denied defendants' motion with respect to the promissory estoppel claim because the complaint alleged that Staton had promised to pay Kulp back for contributions and loans after Center dissolved, that the promise by Staton encouraged Kulp to procure loans and Kulp obtained additional loans after the alleged promise. Finally, the court granted defendants' motion to dismiss the constructive trust claim finding that plaintiffs had waived this claim.

20. *Morris v. Spectra Energy Partners (DE) GP, LP*, C.A. No. 12110-VCG (Del. Ch. June 27, 2017) (V.C. Glasscock)

In this case an investor in Spectra Energy Partners, LP (the "MLP"), a Delaware limited partnership, challenged a reverse dropdown transaction entered into by the MLP with Spectra Energy Corp. (the "Sponsor"), a Delaware corporation and the parent of the MLP's general partner. The Sponsor proposed a transaction whereby it would obtain a one-third interest in two pipeline companies from the MLP in exchange for a combination of a redemption of interests held by Sponsor and a waiver of its Incentive Distribution Rights. Prior to making the proposal to the MLP, Sponsor publicly promised to contribute the pipeline interests to a joint venture it owned with a third party at an implied value of approximately $1.5 billion. The Sponsor proposed the transaction to Spectra Energy Partners (DE) GP, LP, a Delaware limited partnership and the general partner of the MLP (the "GP"). The GP established a conflicts committee to evaluate the Sponsor's proposed transaction. The conflicts committee's financial advisor initially prepared a financial presentation that indicated that the value of the total consideration proposed by Sponsor was $1.46 billion, which was essentially on par with the implied value of $1.5 billion. The financial advisor's initial presentation ascribed a value of $575 million to the value of reduced distributions to be made to the GP as a result of the transfer of profitable assets to the Sponsor. The financial advisor's subsequent reports did not include the reduced GP distributions as part of the consideration to be received by limited partners and the final terms of the transaction allegedly provided the limited partners with consideration valued at approximately $946 million. The GP's conflicts committee approved the transaction in reliance on a fairness opinion issued by its financial advisor.

Plaintiff, an MLP unitholder, pled six counts challenging the transaction, two of which were relevant. The first relevant count asserted breach of the limited partnership agreement of the MLP (the "MLP Agreement") against the GP. Plaintiff alleged that the GP breached its contractual obligation to act in good faith by approving a "patently unfair and unreasonable" transaction. The Plaintiff argued further that the GP "improperly constrain[ed] the Conflicts Committee's authority" in the written consent establishing the conflicts committee. The written consent included a recital that stated that the aim of the reverse drop-down transaction would be to hold the MLP net-cash-neutral (the "Recital"). The second relevant count asserted a claim against the GP for breach of the implied covenant of good faith and fair dealing. Plaintiff alleged that this count would be relevant only if (i) the court found that the GP was not required to act in good faith or (ii) reliance on a fairness opinion altered the relevant standard of conduct for purposes of evaluating defendants' conduct in approving the transaction. Plaintiff alleged that the GP breached the implied covenant by (i) allowing the Sponsor to "engineer the Transaction on terms that are patently unfair and unreasonable to [the MLP]," (ii) constraining the conflicts committee's authority via the net-cash-neutral mandate in the Recital and (iii) relying on improper special approval and/or a flawed fairness opinion. Defendants moved to dismiss all counts for failure to state a claim. The Court of Chancery granted defendants' motion in part and denied it in part.

The Court of Chancery first analyzed whether the GP breached the MLP Agreement by violating its contractual obligation to act in good faith. The court noted that in interpreting the MLP Agreement, it would give effect to the parties' intent, interpret words according to their plain meaning (unless the parties intended a special meaning) and read the MLP Agreement as a whole in order to give effect to every provision if reasonably possible. The court also noted that to extent provisions of the MLP Agreement were ambiguous, the provisions would be interpreted against the GP and the court would give effect to the reasonable expectation of investors.

The court then considered plaintiff's argument that only the rebuttable presumption of good faith applied by operation of the special approval process or whether, as defendants argued, a conclusive presumption attached given the conflicts committee's reliance on a fairness opinion. The court found that the rebuttable presumption applied because it would be "contrary to the plain terms of the contract and the reasonable expectations of the contacting parties" to find that the "more general" provision containing the conclusive presumption was applicable. The court then addressed defendants' argument that the conclusive presumption should attach and is intended to afford additional protection to the GP when it relied on a fairness opinion, thus heightening the burden in overcoming the good faith presumption arising from special approval. The court concluded that there was no binding authority that the MLP Agreement be interpreted to require that the conclusive presumption provision be read to alter the standard under the conflicts of interest provision. The court found helpful the case of *Employees Retirement System of City of St. Louis v. TC Pipelines*, which analyzed a partnership agreement that contained a conclusive presumption within the special approval provisions, rather than in a separate provision referring generally to "other matters." The court further observed that "when sophisticated entities intend to provide a conclusive presumption in a conflicts situation, they know how to draft such a provision." In the MLP Agreement, the conclusive presumption provision was absent from the conflicts of interest provision, and to the extent any ambiguity exists regarding its application, the court reasoned that such ambiguity should be resolved in the limited partners' favor. The court further found the reasonable expectation of an investor required the attachment of the rebuttable presumption because, if the conclusive presumption were applicable, a conflicted general partner would simply hire an investment banker to render a fairness opinion to acquire a conclusive presumption rather than establish an independent conflicts committee to obtain a rebuttable presumption. The court noted that the MLP Agreement could have been drafted to include a conclusive presumption in the conflicts of interest provision, but it was not.

After finding that the rebuttable presumption attached, the court considered whether the complaint rebuts the presumption of good faith. The court noted that in order to successfully rebut the special approval presumption of good faith, plaintiff must plead facts to support an inference that the conflicts committee or the GP did not subjectively believe that the transaction was in the best interests of the MLP. The court found that plaintiff sufficiently pled facts supporting an inference of subjective bad faith with respect to the alleged consideration gulf. The court found that plaintiff sufficiently alleged that the pipeline assets were worth approximately $1.5 billion raising an inference of a gap in actual consideration of $500 million. The court then held that in authorizing a "self-dealing transaction" in which the GP acquired assets from the MLP which it knew to be worth $1.5 billion in exchange for consideration valued at less than $1 billion, it was reasonably conceivable that the GP acted in subjective bad faith. Accordingly, the court denied defendants' motion with respect to this count.

With respect to the claim for breach of the implied covenant, the court noted that plaintiff conceded at oral argument that plaintiff's claims under the implied covenant would be mooted if the rebuttable presumption applied. Thus, because the court determined that the rebuttable presumption applied, the court noted that its construction of the MLP Agreement left no gap for the implied covenant to fill. Therefore, the court dismissed plaintiff's implied covenant claim.

21. *Meyers v. Quiz-DIA LLC*, C.A. No. 9878-VCL (Del. Ch. June 6, 2017) (VC Laster)

Plaintiffs Greg MacDonald and Dennis Smythe claimed entitlement to mandatory indemnification under the operating agreements of Quiz-DIA LLC ("Quiz-DIA"), Quizmark LLC ("Quizmark") and QCE Gift Card LLC ("QCE") (collectively, the "Subs")—all subsidiaries of the primary operating entity for Quiznos sandwich shops. Plaintiffs alleged that the indemnification obligations arose from their successful defense of a lawsuit brought in Colorado federal district court in which they had been accused of fraud and federal securities violations (the "Colorado Action") related to an out-of-court restructuring of Quiznos. The indemnification claims were initially dismissed by the Court of Chancery because the federal appeals court had not yet ruled on the Colorado Action, but the claims became ripe for review after the deadline to file a writ of certiorari had passed.

To determine whether plaintiffs were entitled to indemnification, the court analyzed the provisions of the Subs' respective operating agreements. Each operating agreement granted members and officers an identical right to indemnification and advancement under certain circumstances. Since plaintiffs were not members of the Subs, they necessarily had to be officers in order to qualify for indemnification. Although plaintiffs were appointed as officers of Quizmark and QCE pursuant to the relevant operating agreement, they were not appointed as officers of Quiz-DIA.

Plaintiffs argued that they served as de facto officers because they performed the same functions for Quiz-DIA as they did for other Quiznos entities. The court disagreed, stating that officers of Quiz-DIA were subject to additional requirements that neither plaintiff satisfied, including undergoing a mandatory background check, which was required of officers of Quiz-DIA in order to comply with its Colorado airport liquor license. Consequently, the Court concluded that the plaintiffs were not officers of Quiz-DIA and had no right to indemnification under Quiz-DIA's operating agreement. Therefore, summary judgment was entered in favor of Quiz-DIA on the plaintiffs' claim for indemnification. Having settled the indemnification claim with respect to Quiz-DIA, the court then turned to Quizmark and QCE.

Given that plaintiffs were in fact properly appointed officers of Quizmark and QCE, the court analyzed the Colorado Action to determine if the litigation defense entitled plaintiffs to indemnification under the Quizmark and QCE operating agreements. The operating agreements stated that officers were entitled to indemnification "to the fullest extent permitted by law" for "any loss, damage or claim incurred . . . by reason of any act or omission performed or omitted by such Officer in good faith on behalf of the Company." Here, the Court noted that in the corporate context, the "by reason of" standard is satisfied "if there is a nexus or causal connection between any of the underlying proceedings…and one's official corporate capacity." The court noted that the Colorado Action attacked plaintiffs' activities performed on behalf of Quizmark and QCE in negotiating the out-of-court restructuring, which the Court concluded were activities "by reason of" their status as CEO and CFO of the subsidiaries. Therefore, any losses suffered in the Colorado Action were by reason of acts performed on behalf of the subsidiaries.

Having settled the causal link, the court then turned to the issue of whether plaintiffs needed to prove that their actions were taken in good faith. The Court explained that as a matter of corporate law, indemnification "to the fullest extent permitted by law" has been interpreted to mean that good faith need not be proven if an officer successfully defends an action "on the merits." That phrase, in turn, had been interpreted in the corporate context to include dismissal of a federal action without prejudice—among certain other technical defenses like the statute of limitations. Since plaintiffs' defense of the Colorado Action was successful under this broad interpretation of "on the merits," the court held that plaintiffs were not required to prove that their actions were performed in good faith under Delaware law in connection with their indemnification claim. Furthermore, plaintiffs were also entitled to indemnification for their pre-litigation expenses incurred in addition to their actual litigation costs. The court noted that in the indemnification context, the concept of "losses" generally includes pre-litigation investigation expenses incurred when an officer suspects they will be sued. Thus, the plaintiffs were entitled to be indemnified for expenses they incurred investigating claims that the defendants might bring against them.

As a final note, the court acknowledged that QCE was an Arizona entity and that Arizona law would therefore govern whether an officer would be required to prove good faith in connection with an indemnification provision that applied "to the fullest extent permitted by law." However, since neither party argued for a different result under Arizona law, the court stated that it was entitled to apply Delaware law.

22. *Dietrichson v. Knott*, C.A. No. 11965-VCMR (Del. Ch. Apr. 19, 2017)

Plaintiff Aleksander Dietrichson ("Dietrichson"), who was one member of NxGenEd, LLC, a Delaware limited liability company (the "Company"), alleged that another member breached his fiduciary duties to the Company by improperly paying himself an unauthorized salary and misappropriating the proceeds of an asset sale. Plaintiff also alleged that these actions deprived him of contractually-mandated distributions and wasted corporate assets. Defendants Martin G. Knott ("Knott") and the Company moved to dismiss the complaint on the basis that all of plaintiff's claims were derivative and that plaintiff had failed to make demand or allege demand futility.

Plaintiff and defendant had formed the Company for the purpose of marketing intellectual property. Plaintiff and defendant were each a 50% member, director and officer of the Company. Plaintiff had contributed the intellectual property to the Company while defendant's role was allegedly to gain investors and customers for the Company. Under the Company LLC Agreement (the "Operating Agreement"), Dietrichson and Knott were entitled to certain distributions as members, but no salary. The Company eventually faced a liquidity shortage and entered into an asset purchase agreement (the "Asset Purchase Agreement") with Blackboard, Inc. ("Blackboard"). Shortly after the Company entered into the Asset Purchase Agreement, Dietrichson sent a letter requesting, among other things, confirmation that Knott had not paid Company funds to himself. Counsel for the Company replied stating that although Knott had not made any distributions to himself, he had paid himself a salary.

As an initial inquiry, the court applying the *Tooley* analysis found that plaintiff's fiduciary duty and waste claims were derivative. Specifically, plaintiff had alleged that Knott breached his fiduciary duty by transferring sales proceeds from the Asset Purchase Agreement to himself as a salary without necessary approval under the Operating Agreement. Applying the two-part *Tooley* analysis, the court found that plaintiff's claims were exclusively derivative as they pled harm to the Company and requested relief for the Company. The court noted that the complaint sought to challenge the improper transfer of the Company's assets, alleged that Knott expended Company funds and that the waste claim alleged that Knott "caused the *Company* to waste valuable assets." The court also found that under the second prong of *Tooley* the complaint clearly sought recovery for the Company, as the complaint sought restitution for the Company and a constructive trust in favor of the Company.

The court also rejected plaintiff's claim that the fiduciary duty and waste claims were "dual natured" under *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*. The court acknowledged that the Supreme Court has recognized the existence of dual-natured claims in "unique circumstances" where certain claims have both direct and derivative aspects under *Brinckerhoff*. However, the court held that plaintiff's claims were not dual natured since there was no allegation of dilution of voting power in this case. After finding that these claims were solely derivative, the court dismissed them because Dietrichson had not made demand on the board or made any attempt to establish demand futility.

Dietrichson also argued that Knott had breached the Operating Agreement and the implied covenant of good faith and fair dealing by depriving him of certain guaranteed distributions. The court found that this claim was direct because the allegation was that Dietrichson had been deprived of distributions that were specifically guaranteed in the Operating Agreement, as opposed to an allegation challenging the discretion of Knott in making a distribution. The court then dismissed this contract claim as unripe. The provision of the Operating Agreement at issue provided for a "required distribution" to Dietrichson upon dissolution or liquidation of the Company. The court held that this claim was unripe because Dietrichson had made no allegation that Company was in dissolution or that a liquidation event had occurred.

23. *Sehoy Energy LP v. Haven Real Estate Group, LLC*, C.A. No. 12387-VCG (Del. Ch. Apr. 17, 2017) (VC Glasscock)

This suit was brought by certain investors in a Delaware limited partnership (the "Partnership") alleging that they were falsely induced by the general partner (the "General Partner") of the Partnership and the General Partner's managing member, Albert Adriani ("Adriani"), to become investors in the Partnership and that the General Partner and its controller prevented the investors' access to accurate partnership records and breached certain contractual and fiduciary duties. The Partnership filed for bankruptcy and plaintiffs filed a motion that, in effect, requested the court to rule that the bankruptcy stay did not apply to plaintiffs' claims against the General Partner and Adriani. Defendants argued that all claims were or should be stayed. The court noted that, to the extent plaintiffs' claims were derivative in nature and, thus, belonged to the

Partnership, the claims would be stayed. However, any direct claims against non-bankrupt defendants would not be stayed. Therefore, the court engaged in an analysis of the various claims at issue to determine whether such claims were derivative or direct.

The Partnership was formed to invest its partners' assets in publicly traded real estate securities. Investment authority was vested with the General Partner and the limited partners' interests were not freely transferable—thus, the only way for limited partners to redeem or liquidate their interests was to withdraw from the Partnership in accordance with the terms of its limited partnership agreement (the "Partnership Agreement"). The Partnership Agreement gave limited partners the right to inspect and copy books and records upon prior written notice and required the General Partner to distribute audited financials to each partner after the end of each fiscal year. Plaintiffs invested as limited partners in the Partnership after discussions with Adriani and review of a "pitch book" provided by Adriani. After their investment, Adriani provided periodic investment and performance updates to plaintiffs that made it seem that the Partnership's investments were performing quite well. However, upon plaintiffs' receipt of their K-1s in 2013, plaintiffs became suspicious that Adriani's disclosures to them were not entirely accurate. Plaintiffs continued to receive updated disclosures from Adriani that showed a steady net gain. Then, in 2015, Adriani sent plaintiffs a letter admitting that a significant asset of the Partnership had become substantially impaired due to the Partnership's loaning a certain person and his business entities (the "defaulting borrower") over $4.4 million. Those loans were never repaid. Adriani promised plaintiffs that he would waive his management fees going forward and not receive any return on his investment until the limited partners were repaid their basis in full. Plaintiffs then demanded the investor list and other books and records of the Partnership, as well as audited financials from 2013 to 2015. Adriani never responded. Further, plaintiffs learned that the only major asset available to collect against the defaulting borrower was being sold in one month's time and that Adriani had a $1 million security interest in that asset in favor of his personal investment vehicle. Plaintiffs then sued Adriani, the General Partner and the Partnership (which was only a nominal defendant in this action), asserting breach of contract, breach of fiduciary duty, fraud and veil piercing claims. Subsequently, the Partnership and Adriani's personal investment vehicle filed for bankruptcy, requiring the court in this opinion to engage in an analysis of the claims to determine whether such claims were derivative (and thus, stayed by virtue of the bankruptcy) or direct.

Applying the Delaware Supreme Court's decision in *El Paso Pipeline GP Co. LLC v. Brinckerhoff* (stating that any contract claim does not necessarily have to be a direct claim), the court found the *Tooley* analysis applicable to the breach of contract claims. The court permitted certain of the breach of contract claims to go forward to develop the factual record regarding whether the court should apply the rationale set forth in *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.* (which stands for the proposition that direct claims exist when the entity at issue is a mere pass-through entity and the benefits flow directly back to the investors). The court also categorized certain other breach of contract claims -- specifically, those surrounding a failure to disclosure required information -- as direct because plaintiffs alleged that the nondisclosure resulted in their failure to timely withdraw, which the court categorized as a claim running to the individual investors, not the entity.

The court also categorized the fiduciary duty claims, which alleged a breach of the duty of loyalty due to "dissemination of false and misleading disclosures" regarding the Partnership's performance, as direct because "such a disclosure violation involves injury to the limited partners individually and not to the Partnership, and is thus properly treated as a direct claim. The source of the duty, whether contractual . . . or equitable/statutory . . . is not material to the *Tooley* analysis."

Finally, the court categorized the fraud claims, which related to defendants' alleged misrepresentations, as direct as well, noting that plaintiffs, not the Partnership, relied on the misrepresentations, and plaintiffs alleged harm was the inability to exercise their right to withdraw from the Partnership which, as noted above, the court categorized as a claim running to the individual investors, not the entity.

The court found that plaintiffs could proceed with the claims that it categorized as direct and that the other claims were stayed by the bankruptcy.

24. *Trusa v. Nepo*, C.A. No. 12071-VCMR (Del. Ch. Apr. 13, 2017) (V.C. Montgomery-Reeves)

Plaintiff was a creditor of XION Management LLC, a Delaware limited liability company (the "Company"), which was in the business of borrowing funding from investors and using the proceeds to provide debt financing to other companies. Plaintiff alleged that defendants, as managing members of the Company, made representations to plaintiff relating to the Company's investment strategy in order to entice him into investing in the Company. Plaintiff then entered into a loan agreement with the Company (the "Loan Agreement"), which contained a power of attorney provision that granted plaintiff the right to "take any action and execute any instrument which [plaintiff] may deem reasonably necessary or advisable in pursuing [his] remedies set forth herein." When plaintiff's loan matured and the Company defaulted, plaintiff learned through various communications with defendants that the representations allegedly made by defendants prior to the execution of the Loan Agreement were false or misleading. Plaintiff then filed a complaint in the Court of Chancery and asserted derivative claims for breach of fiduciary duty against the defendants, as well as claims of fraud. Plaintiff also sought dissolution of the Company. Upon the filing of a motion to dismiss and oral argument on the motion, the court issued a memorandum opinion dismissing Plaintiff's complaint in its entirety.

The court first addressed whether plaintiff, as a creditor, had standing to bring derivative claims for breach of fiduciary duty against defendants on behalf of the Company. Plaintiff argued that he could pursue such claims (i) as a creditor of the Company and (ii) through the power of attorney granted to him by the Loan Agreement. As to plaintiff's first argument, the court cited its decision in *CML V, LLC v. Bax* and the Delaware Supreme Court's affirmance thereof for the proposition that only members or assignees of a limited liability company, and not its creditors, have standing to bring derivative claims on behalf of the company. Thus, given that plaintiff was merely a creditor and not a member or assignee of a limited liability company interest, the court found that plaintiff lacked standing to bring derivative claims on behalf of the Company despite being a creditor of the Company.

The court then addressed plaintiff's argument that the Loan Agreement's power of attorney provision contractually granted him the authority to assert such derivative claims. The court first found that the language of the power of attorney provision limited plaintiff's authority to pursuing the remedies expressly provided in the Loan Agreement. The court then found that nothing in the Loan Agreement suggested that the parties intended to grant plaintiff the authority to bring derivative claims on behalf of the Company. Thus, the court held that plaintiff lacked standing to bring such claims. In a footnote, the court noted that because the language of the power of attorney provision did not give plaintiff the authority to bring derivative suits on behalf of the Company, it need not address the issue of whether the parties could contractually bestow derivative standing upon plaintiff in contravention of Section 18-1002 of the Delaware Limited Liability Company Act (the "Act").

Next, the court analyzed whether plaintiff was entitled to dissolution of the Company. Plaintiff argued that he was entitled to dissolution either (i) under the provisions of the Act or (ii) through the court's equitable powers. The court first held that plaintiff was not entitled to judicial dissolution under the plain language of Section 18-802 of the Act because he was not a member or manager of the Company. The court then examined whether plaintiff, as a creditor, could seek the appointment of a receiver under Section 18-805 of the Act. Plaintiff argued that his rights as a creditor to appoint a receiver under Section 18-805 were triggered upon any event of cancellation pursuant to Section 18-203(a) of the Act. However, the court reasoned that a creditor's rights under Section 18-805 were triggered only upon the filing of a certificate of cancellation. The court also reasoned that under Section 18-203(a) of the Act, a certificate of cancellation may be filed only upon the dissolution and winding up of the company. Thus, because plaintiff failed to allege that the Company was dissolved, had begun winding up or had filed a certificate of cancellation, the court held that plaintiff could not seek the appointment of a receiver under Section 18-805 of the Act.

With regard to plaintiff's request that the court exercise its equitable jurisdiction to dissolve the Company, the court noted that equitable dissolution is extreme in nature and is sparingly granted. Plaintiff argued that defendants had abandoned the Company and had led the Company into insolvency. However, the court found that plaintiff's allegations were conclusory and contrary to allegations contained in his complaint. Specifically, the court noted that according to plaintiff's complaint, several defendants were actively trying to resolve creditor claims and had communicated with plaintiff about the same. The court found that plaintiff's complaint showed "active engagement" by defendants and that plaintiff merely disagreed with their actions. The court held those facts alone were not grounds for equitable dissolution. The court also found that plaintiff's assertion that the Company was insolvent was not supported by non-conclusory allegations. The court held that bare assertions were insufficient to allege insolvency, abandonment or managerial dysfunction. Accordingly, the court held that no basis for equitable dissolution existed. After addressing plaintiff's remaining claims of fraud, material omission, fraudulent transfer, conspiracy to commit fraud and aiding and abetting fraud and holding such claims must be dismissed for failure to state a claim, the court dismissed plaintiff's complaint in its entirety.

25. *Brinckerhoff v. Enbridge Energy Company, Inc.*, No. 273, 2016 (Del. Mar. 20, 2017, *as corrected on* Mar. 28, 2017) (*en banc*)

On appeal to the Supreme Court, plaintiff, a unitholder of Enbridge Energy Partners L.P., a master limited partnership (the "MLP"), challenged the reasonableness of the Court of Chancery's interpretation of the MLP's limited partnership agreement (the "Partnership Agreement"). Plaintiff also argued that the Supreme Court's prior decision in *Brinckerhoff v. Enbridge Energy Co., Inc. ("Brinckerhoff III")*, 67 A.3d 369 (Del. 2013) improperly defined what was needed to plead bad faith.

The plaintiff's action challenged a conflicted dropdown transaction in which the parent ("Enbridge") of the MLP's general partner (the "GP") sold to the MLP Enbridge's interest in a pipeline join venture, which Enbridge had acquired six years earlier from the MLP at a lower price, on the grounds that the transaction was not "fair and reasonable" to the MLP, which was the standard articulated in the MLP's limited partnership agreement (the "Partnership Agreement"). The Court of Chancery granted defendants' motion to dismiss based on precedent that set aside a governing document's specific requirements and focused instead on its good faith standards. Further, because the plaintiff failed to satisfy the rigorous pleading standard for bad faith, the Court of Chancery determined that the defendants were exculpated from any liability and dismissed the complaint. On appeal, the Supreme Court reasoned that a gating issue was whether the Court of Chancery reasonably interpreted the Partnership Agreement to permit the GP to breach any of the Partnership's specific requirements if the GP acts in good faith.

As it relates to this gating issue, the Supreme Court noted that the Partnership Agreement provided that the GP was authorized to approve a conflicted transaction if it determined that the transaction was fair and reasonable to the MLP. Other provisions of the Partnership Agreement replaced traditional default fiduciary duties with a general "good faith" contractual standard of care that the GP "reasonably believe that its action is in the best interest of, or not inconsistent with, the best interests of the MLP." The Supreme Court held that the Court of Chancery erred when it held that the "good faith" provisions of the Partnership Agreement modified the specific requirement that conflicted transactions be fair and reasonable to the MLP. The Supreme Court reasoned that the contractual standards of good faith provided in the Partnership Agreement provided a standard of care that operated in spaces of the Partnership Agreement without express standards, but it did not displace specific requirements. The Supreme Court stated that the Court of Chancery's interpretation of the Partnership Agreement "leads to an unreasonable result no public investor would have considered possible when reviewing the LPA-that [the GP] is free to violate any specific LPA requirement so long as the breach is in good faith." Consequently, the Supreme Court found that the Court of Chancery erred when it determined that the general standards of care modified the obligation applicable to interested transactions, and therefore the "fair and reasonable" requirement would govern the disputed transaction.

The Supreme Court then considered the viability of plaintiff's breach of Partnership Agreement claims. With respect to plaintiff's claim that the transaction breached the fair and reasonable provision, the Supreme Court held that plaintiff had pled sufficient facts leading to an inference that the challenged transaction was not fair and reasonable to the MLP because the transaction was less favorable to the MLP than those available from unrelated third parties.

The Supreme Court upheld the Court of Chancery's decision that the special tax allocation and the corresponding amendment did not breach the provisions of the Partnership Agreement governing new unit issuance and tax allocations. The Partnership Agreement provided that the GP could not adopt amendments which would "enlarge the obligations" of any limited partner without such limited partner's consent. Plaintiff argued that the special tax obligation "enlarges the obligations" of the unitholders because of its potential to generate significant taxable income to the unitholders. The Supreme Court noted that the term "obligations" did not have a specific definition in the Partnership Agreement, but its usage in other provisions of the Partnership Agreement indicated that it was intended to refer to the responsibilities or lack of responsibilities to the MLP not obligations to third parties or the government. Consequently, the Supreme Court held that the GP did not breach the Partnership Agreement by adopting the amendment related to the special tax allocation because the special tax allocation did not enlarge the limited partners' obligations to the MLP.

Having determined that the plaintiff pled a viable claim for breach of the "fair and reasonable" provision, the court considered potential remedies in light of the exculpation provisions. Under the terms of the Partnership Agreement the GP would be exculpated from monetary damages if it acted in good faith. Although recognizing that its prior decision, *Brinckerhoff III*, indicated that to plead bad faith, the plaintiff had to show that the challenged transaction essentially amounted to "waste" or was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith," the Supreme Court changed course. The Supreme Court instead held that to plead a claim that the GP did not act in good faith, plaintiff must plead facts supporting an inference that the GP did not reasonably believe that the challenged transaction was in the best interests of the MLP. The court also noted that prior cases had established that the use of the qualifier "reasonably" imposes an objective standard of good faith. Applying the newly articulated pleading standard, the Supreme Court found the following sufficient to support an inference that the GP did not reasonably believe the transaction was fair and reasonable to the MLP: (a) the GP did not consider the prior transaction, despite express direction in the Partnership Agreement to do so, (b) Enbridge changed its valuation methodology from that used in the prior transaction, (c) failed to consider that the EBITDA for the following year was 20% lower than it was in 2009 although valued 25% higher in 2009; (d) failed to negotiate the purchase price despite the negative oil pricing environment; (e) failed to value the special tax allocation benefits to Enbridge, and the financial detriment to the unaffiliated unitholders, (f) failed to consider the lack of expansion rights sold in 2009 and (g) relied upon a purportedly flawed financial opinion. Consequently, the Supreme Court concluded that the GP could not rely upon Section 6.8(a) of the Partnership Agreement to exculpate it from damages.

Finally, the Supreme Court held that the GP was not entitled to the Partnership Agreement's conclusive presumption of good faith that applies to decisions made in reliance on an advisor. This provision of the Partnership Agreement required that the GP reasonably believe that an advisor was professionally equipped to opine on the fairness and reasonableness of a transaction. The Supreme Court found that in this case, whether the GP could have reasonably believed that an investment banker was an appropriate advisor would depend on the factual record developed through discovery. Provided, further, the Supreme Court found that the conclusive presumption provision was a more comfortable fit when the advisor assists with setting the sale price as opposed to coming in when the financial terms are financially baked by the time the financial advisor appears on the scene to render a fairness opinion.

26. *The Marilyn Abrams Living Trust v. Pope Investments LLC*, C.A. No. 2017-12829-VCL (Del. Ch. Mar. 21, 2017) (V.C. Laster) (ORDER)

Plaintiff Marilyn Abrams Living Trust (the "Trust") had invested in each of China Alarm Holdings Acquisition, LLC (the "China Alarm Fund"), Pope Investments LLC ("Pope I"), and Pope Investments II, LLC ("Pope II" and together with the China Alarm Fund and Pope I, the "Companies"), each a Delaware limited liability company. Plaintiff made a demand to inspect the books and records of the Companies pursuant to Section 18-305 of the Delaware Limited Liability Company Act (the "LLC Act"). Each of the Companies was managed by Pope Asset Management, LLC (the "Manager"). The Manager argued that it was entitled to deny the Trust's initial requests to examine the books and records of Pope I and Pope II on the basis that the operating agreements for Pope I and Pope II gave the Manager the right to "keep confidential information that it reasonably believes the disclosure of which is not in the best interests of the Company or could damage the Company." Plaintiff subsequently made a second demand to inspect the books and records of the Companies, which second demand focused on the categories of documents to which a member is explicitly entitled under Section 18-305 of the LLC Act. After this request was also denied by the Manager, plaintiff sent a final demand to inspect the books and records of the Companies, which demand was also refused by the Manager. Plaintiff then filed a complaint with the Court of Chancery seeking to enforce the requests for documents it had previously requested from the Manager.

The court first evaluated whether plaintiff sought to inspect the Companies' books and records for a proper purpose under Section 18-305(a) of the LLC Act. The court found plaintiff's stated purpose of valuing its interests to be proper due to the significant reported losses of the Companies, the belated release of the audited financial statements of the Companies and the fact that outside auditors offered only a qualified opinion of the accuracy of Pope II's financial statements. Additionally, the court found that plaintiff's stated purpose of contacting other members to discuss their investments was proper because the operating agreement authorized one-third of the members to call a special meeting, no annual or special meetings have ever been called and another investor in the Companies has sought to communicate about the investments. The court also found that plaintiff offered a credible basis for the court to infer that there was possible mismanagement and therefore investigating potential mismanagement was a proper purpose for asserting a books and records request.

The court also rejected the argument that plaintiff could not inspect the membership lists of the Companies because the Manager designated such information confidential. The Companies argued that Section 3.01(c) of the operating agreements gave the Manager unlimited authority to designate information confidential. Section 3.01(c) gave the Manager "the right to keep confidential from the Members…any information which the Manager reasonably believes *to be in the nature of trade secrets or other information* the disclosure of which the Manager believes is not in the best interests of the Company or could damage the Company's business." However, the court noted that Section 18-305(a)(3) of the LLC Act specifically contemplates that a member can access the names and addresses of other members and that if an operating agreement was to limit this right it would need to do so explicitly. The court emphasized that rather than explicitly limiting this right, Section 3.01(b) of the operating agreements broadly stated that the books and records "shall be…open to the examination of all or any of the Members or their representatives designated in writing." The court rejected the Manager's interpretation of Section 3.01(c) and found that it was not plausible that the Manager's rights under that provision could be so broad as to render meaningless the members' rights under Section 3.01(b).

Finally, the court held that the Companies litigated in bad faith and awarded plaintiff its costs and expenses, including attorneys' fees. The court found that the Companies litigated in bad faith because plaintiff had a clearly defined and established right to inspect the Companies' books and records yet the Companies refused to cooperate with her requests for inspection. The court specifically noted that plaintiff was a member who "articulated numerous facially valid purposes for her inspection" and that, except for the member lists, the Companies were unable to explain what documents they regarded as confidential or any basis for such determination and that the Manager previously shared some of the purportedly confidential documents with other members.

27. *Ensing v. Ensing*, C.A. No. 12591-VCS (Del. Ch. Mar. 6, 2017) (VC Slights)

The suit was brought by Sara Ensing, a member and the sole manager of two Delaware limited liability companies, International Wine Capital Partners, LLC ("IWCP") and Loggio Finance LLC ("Loggio" and together with IWCP, the "Companies"), against her ex-husband, Hans Ensing ("Hans"), and the Companies. When married, plaintiff and Hans formed the Companies to act as holding companies of an Italian company ("S.A. Villa Loggio"), which owned and operated a vineyard, winery and hotel in Italy. The members of IWCP were plaintiff and her two minor children. IWCP was the sole member of Loggio. Hans was neither a member nor manager of the Companies.

After his separation from plaintiff, Hans began to interfere with the day-to-day operations of S.A. Villa Loggio. Plaintiff sought to convene a special meeting of S.A. Villa Loggio's shareholders (the Companies) in order to change the composition of S.A. Villa Loggio's board of directors to prevent further interference by Hans. In response, Hans advised plaintiff that he was activating a pledge agreement between Loggio and an entity he controlled that purported to permit Hans to appoint Loggio's manager. Hans also executed, on behalf of himself and as guardian of the couple's minor children, a written consent of the members of IWCP that purported to appoint him as manager of IWCP pursuant to a trust agreement produced by Hans that was allegedly executed by Hans and plaintiff and granted Hans the power to appoint the manager of IWCP. At the special meeting of shareholders of S.A. Villa Loggio, plaintiff appointed herself as the sole director of the S.A. Villa Loggio.

Acting as the purported manager of the Companies, Hans engaged in a series of transactions intended to remove plaintiff from the Companies as manager, and vested control of the Companies in himself and another entity he controlled. At this point plaintiff filed suit in the Court of Chancery seeking a declaration under Section 18-110 of the Delaware Limited Liability Company Act that she was rightful manager of the Companies.

After trial, the court concluded that Hans had engaged in deceitful, bad faith and possibly fraudulent conduct by presenting falsified documents and unreliable testimony. The court found that the documents initially relied upon by Hans to support his allegation of control over the Companies were of dubious credibility and that ultimately the plain, unambiguous terms of the limited liability company agreement of IWCP (the "IWCP Agreement") contradicted Hans' position. First, the IWCP Agreement indicated that plaintiff alone was authorized to act on behalf of her minor children and therefore Hans was not authorized to execute on their behalf the written consent of members of IWCP that appointed him as manager of IWCP. That action was voided by the court as a matter of law. Second, Hans failed to give plaintiff proper notice of her purported removal from IWCP, as was required by the IWCP Agreement. Thus, even if Hans was authorized to execute the consent, it was nonetheless void as a matter of law for failure to give proper notice. Finally, Hans' attempt to issue to himself, and then transfer, membership interests in IWCP was deemed by the court to be void because the IWCP Agreement required transferees to enter into a joinder agreement to the IWCP Agreement to become a member and provided that the failure to do so would cause the transfer to be null and void. No such joinder agreement was ever executed. The court also found that the IWCP Agreement did not authorize the manager of IWCP, which Hans claimed he was, to issue membership interest in the first place; therefore, such issuance was void as a matter of law.

The court concluded that Hans' actions to remove and replace plaintiff as a member and manager of the Companies were void as a matter of law based on the plain terms of the IWCP Agreement.

28. *Glazer v. Alliance Beverage Distributing Co., LLC*, No. CV 12647-VCMR (Del. Ch. Mar. 2, 2017) (V.C. Montgomery-Reeves)

Plaintiffs requested advancement of legal fees and expenses from defendant, Alliance Beverage Distributing Co., LLC, a Delaware limited liability company ("Alliance"), pursuant to Section 5.5 of the limited liability company agreement of Alliance (the "Company Agreement") and Section 18-101 of the Delaware Limited Liability Company Act. The two members of Alliance, Arizona Beverage Distributing Co., LLC, a subsidiary of Breakthru Beverage Group ("Breakthru"), and Cactus Beverage Distributing Company, a subsidiary of Glazer's, Inc. ("Glazer's"), were in a dispute over

Glazer allegedly depriving Alliance of the opportunity to distribute Bacardi, Inc. brands. In response to plaintiffs' request for advancement in connection with that dispute, defendant moved to dismiss the case for lack of subject matter jurisdiction because the Company Agreement contained an agreement to submit disputes to arbitration. In the alternative, defendant moved to stay the case pending the resolution of the matter through arbitration.

The court first noted that the threshold issue was whether it had jurisdiction to determine whether the dispute was subject to arbitration (i.e., substantive arbitrability). The court applied the standard established in *James & Jackson, LLC v. Willie Gary*, 906 A.2d 76 (Del. 2006), which presumes that the question of arbitrability is one for the court to decide, not arbitrators, unless there is "clear and unmistakable" evidence that the parties agreed to arbitrate. Clear and unmistakable evidence that the parties intended to arbitrate arbitrability exists if the arbitration clause: (1) generally refers all disputes to arbitration and (2) references a set of arbitration rules that empowers arbitrators to decide arbitrability. Additionally, in *McLaughlin v. McCann*, 942 A.2d 616, 627 (Del. Ch. 2008), the court further held that to realize the efficiency goals of the *Willie Gary* rules "absent a clear showing that the party desiring arbitration has essentially no nonfrivolous argument about substantive arbitrability to make before the arbitrator, the court should require the signatory to address its arguments against arbitrability to the arbitrator."

Here, the Company Agreement provided generally for arbitration of any controversy or claim, satisfying the first prong of *Willie Gary*. The second prong of *Willie Gary* was also satisfied because the Company Agreement required that arbitration proceedings be "administered by the American Arbitration Association under its Commercial Arbitration Rules and Supplemental Procedures for Large, Complex Disputes." The American Arbitration Association rules provide that the arbitrator has the power to rule on her or his own jurisdiction. Finally, the court held that defendant had more than a non-frivolous argument that the arbitrator should decide substantive arbitrability because the broad arbitration clause in the Company Agreement included no exceptions and plaintiffs did not argue that their claim did not fall within the broad arbitration clause or was not related to the Company Agreement. Therefore, the court held that it lacked subject matter jurisdiction to decide substantive arbitrability and stayed the case pending the arbitrator's decision on arbitrability.

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